NORTH CAROLINA COURT OF APPEALS REPORTS

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1989

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

NANCY SILVERS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF STUART MARTIN WILLIAMS, DECEASED v. HORACE MANN INSURANCE COMPANY, ROGER MATTHEWS, AS AGENT, AND INDIVIDUALLY, JAMES RICHARD BELL, AND ROBERT EARL BELL

No. 8711SC317

(Filed 3 May 1988)

1. **Insurance § 69— underinsured motorist coverage—settlement with tortfeasors no bar to recovery**

Where the terms of an insurance policy providing underinsured motorist coverage stated that the insurer would pay damages which a covered person was "legally entitled to recover" from an underinsured motorist, and the policy also provided that the insurer would pay only after the limits of liability had been exhausted by payment of judgments or settlements, plaintiff was not barred from recovery under the underinsured liability provision because she had entered into a consent judgment with the tortfeasors and had been paid the maximum amount under their liability policy, since to deny recovery would contravene the purposes behind underinsured motorist coverage, and since it was reasonable for plaintiff to believe that she was required to settle or obtain a judgment against the tortfeasors and their liability insurer before seeking payment from her own liability carrier. N.C.G.S. § 20-279.21(b)(4) (1983).

2. **Insurance § 69— underinsured motorist coverage—failure to obtain insurer's consent before settling with tortfeasors—action not barred**

Plaintiff's action to recover underinsurance benefits was not barred by her failure to obtain defendant insurance company's consent before entering into a consent judgment with the tortfeasors, since defendant did not have a right to subrogation under the terms of its policy and the consent to settle provision of the policy served no valid purpose.

3. Insurance § 69— underinsured motorist coverage—failure to serve complaint in action against tortfeasors or insurer—action not barred

There was no merit to defendant insurer's contention that plaintiff's recovery of underinsured motorist benefits was precluded because plaintiff failed to serve copies of the summons or complaint in her action against the tortfeasors on defendant, since defendant did not plead failure to give notice of the accident as a defense to coverage in its answer. Furthermore, insured does not lose his action against the insurer when he fails to serve suit papers on the insurer; rather, the insurer is not "bound" by the judgment, a claim which plaintiff never made in this action. N.C.G.S. § 20-279.21(b)(3).

APPEAL by plaintiff from *Barnette (Henry V.), Judge.* Judgments entered 8 September 1986 and 28 October 1986 in Superior Court, HARNETT County. Heard in the Court of Appeals 20 October 1987.

Anderson, Broadfoot, Johnson & Pittman, by Henry L. Anderson, Jr. and Clay A. Collier, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Grady S. Patterson, Jr. and Theodore B. Smyth, for defendant-appellees Horace Mann Insurance Company and Roger Matthews.

Downing, David & Maxwell, by Edward J. David, for defendant-appellees James Richard Bell and Robert Earl Bell.

GREENE, Judge.

This is an action to collect underinsurance benefits and damages arising out of an automobile accident. Plaintiff appeals from the entry of summary judgment against her.

The plaintiff, Nancy Silvers (hereinafter "Silvers"), brought this suit individually and in her capacity as administratrix of the estate of her deceased son against defendants James Richard Bell, Robert Earl Bell (hereinafter the "Bells"), Horace Mann Insurance Company (hereinafter "Horace Mann") and its agent, Roger Matthews (hereinafter "Matthews"). Plaintiff seeks payment pursuant to an insurance policy issued by Horace Mann for underinsured motorist (hereinafter "UIM") benefits as well as damages for breach of contract, negligence, fraud, bad faith and unfair and deceptive trade practices. This appeal concerns plaintiff's right to underinsurance benefits from Horace Mann.

On 14 March 1984, plaintiff's son was involved in a one-car automobile accident in which James Richard Bell was driving a

car owned by his father, Robert Earl Bell. On 20 March 1984, plaintiff's son died from the injuries he received in the accident. Plaintiff, as the administratrix of her son's estate, then sued the Bells for the wrongful death of her son on 4 May 1984. On 14 May 1984, plaintiff, the Bells, and the liability insurance carrier for the Bells, Indiana Lumbermans Mutual Insurance Company, entered into a consent judgment granting plaintiff recovery of $25,000 against the Bells and Indiana Lumbermans. The consent judgment provided:

> THIS CAUSE, coming on to be heard and being heard before the undersigned Judge upon statement of counsel for Plaintiff and Defendants that this cause has been settled and adjusted between the parties by agreement under the terms of which the Plaintiff shall have and recover judgment in the amount of Twenty-Five Thousand Dollars ($25,000.00); AND IT FURTHER APPEARING TO THE COURT from the face of the Complaint that this is an action for recovery for wrongful death of Plaintiff's intestate for which damages far exceed the liability coverage of the Defendants' insurance carrier, Indiana Lumbermans Mutual Insurance Co; AND IT FURTHER APPEARING TO THE COURT, upon statement of counsel, that the liability of Indiana Lumbermans Mutual Insurance Company, which is the insurance carrier for the Defendant, is limited to Twenty-Five Thousand Dollars ($25,000.00) per person for bodily injury; AND IT FURTHER APPEARING TO THE COURT that the primary carrier, Indiana Lumbermans Mutual Insurance Co., wishes to pay the policy limits in order to avoid unnecessary litigation costs as liability on the part of the Defendants is clear and the damages of the Plaintiff's intestate far exceed the policy limits covered by the primary liability carrier, Indiana Lumbermans Mutual;
>
> AND IT FURTHER APPEARING TO THE COURT that the Plaintiff's intestate was covered by underinsured motorist coverage through The Horace Mann Company and that *this consent judgment is not to be construed in any way to adversely affect the rights of Plaintiff or her intestate concerning any such underinsured coverage;*
>
> NOW, THEREFORE, IT IS BY CONSENT ORDERED AND ADJUDGED that the Plaintiff's intestate have and recover of and

> from the Defendants, by and through their primary liability insurance carrier, Indiana Lumbermans Mutual Insurance Company, the sum of Twenty-Five Thousand Dollars ($25,000.00) and that the same *shall be a full and final release of Indiana Lumbermans Mutual Insurance Company and the Defendants. It is hereby further ordered that this consent judgment shall not release nor relinquish any rights that the Plaintiff's intestate has or might have against Horace Mann Company under any underinsured liability coverage.*

(Emphasis supplied.)

On 27 March 1985, plaintiff instituted this action against the Bells and Horace Mann for recovery of UIM benefits under the automobile insurance policy issued by Horace Mann to plaintiff. In addition, plaintiff sued Horace Mann and Matthews for breach of contract, negligence, fraud, bad faith and unfair and deceptive trade practices. Defendants Horace Mann and Matthews moved to dismiss the action under N.C.G.S. Sec. 1A-1, Rule 12(b)(6) (1983), asserting various violations of the policy as a bar to plaintiff's recovery.

Defendants Bell moved to dismiss based on the previous consent judgment. The court considered matters outside the pleadings and treated the motion as one for summary judgment under N.C.G.S. Sec. 1A-1, Rule 56. The trial judge granted defendants' motions for summary judgment. Plaintiff appeals the grant of these motions.

This appeal presents the following issues: (I) Whether plaintiff is barred from recovery from Horace Mann because she is not legally entitled to recover additional damages from the tortfeasors; and (II) whether plaintiff's failure to obtain Horace Mann's consent before settling with the tortfeasors bars her recovery from Horace Mann.

Summary judgment is proper where pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Cutchin v. Pledger*, 71 N.C. App. 279, 281, 321 S.E. 2d 462, 464 (1984).

At the outset, we note the statute in effect at the time the policy was issued and at the time of the accident, N.C.G.S. Sec. 20-279.21 (1983), was the version of the statute amended in 1983. Effective 1 October 1985, the statute was again significantly amended to provide for different procedures in claims for underinsurance benefits. Therefore, our discussion of the applicable statutory provisions concerns only the 1983 version.

I

[1] Under the terms of N.C.G.S. Sec. 20-279.21(b)(4) and the policy in question, an underinsured motor vehicle is included within the definition of an uninsured motor vehicle (hereinafter "UM"). The statutory definition of an underinsured motor vehicle, which is similar to the definition given in the policy, provides:

> An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's policy.

N.C.G.S. Sec. 20-279.21(b)(4). This definition evinces a public policy to place the insured in the position that would have existed if the tortfeasor had carried liability insurance limits equal to the liability coverage carried by the insured. *See* 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* Secs. 32.2 at 13 and 35.2 at 44 (2d ed. 1987) (provision requiring insurers to make available UIM coverage limits in an amount equal to amounts selected by insured for his liability coverage clearly manifests public policy of assuring indemnification to insured). UIM coverage is required unless a named insured in the policy rejects the coverage. *See* N.C.G.S. Sec. 20-279.21(b)(4). The statute is remedial in nature and is to be liberally construed to effectuate its purpose of providing coverage for damages to injured parties caused by insured motorists with liability coverage not sufficient to provide complete compensation for the damages. *See American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 346, 338 S.E. 2d 92, 96 (1986) (avowed purpose of Financial Responsibility Act, of which Section 279.21 is a part, is to compensate innocent victims of financially

irresponsible motorists); *Hendricks v. U.S. Fidelity and Guaranty Co.*, 5 N.C. App. 181, 184, 167 S.E. 2d 876, 877 (1969).

Subdivision (4) also states that "[t]he [UM coverage] provisions of subdivision (3) shall apply to the coverage required by this subdivision." N.C.G.S. Sec. 20-279.21(b)(4); *see also Crowder v. North Carolina Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 556, 340 S.E. 2d 127, 130-31, *disc. rev. denied*, 316 N.C. 731, 345 S.E. 2d 387 (1986). Subdivision (3) requires automobile liability policies issued in North Carolina to contain coverage "for the protection of persons insured thereunder who are *legally entitled to recover* damages from owners or operators of uninsured motor vehicles . . . because of bodily injury, . . . including death, resulting therefrom . . . ." N.C.G.S. Sec. 20-279.21(3).

The policy also includes underinsured motorists within the definition of uninsured motorists and provides:

> We will pay damages which a covered person is *legally entitled to recover* from the owner or operator of an uninsured motor vehicle because of:
>
> 1. Bodily injury sustained by a covered person and caused by an accident; and
>
> 2. Property damage caused by an accident.

Horace Mann argues that because plaintiff entered into the consent judgment, she is no longer "legally entitled to recover damages" from the Bells so that she may not recover UIM benefits from Horace Mann.

The clear language of the consent judgment was that it was to be a "full and final release" of the Bells and their liability insurer. Therefore, plaintiff is barred from recovering further damages from the Bells. However, plaintiff reserved her right of action against Horace Mann for UIM benefits. Accordingly, we do not decide whether plaintiff could proceed with this action had she given a general release to the Bells without reserving her action against Horace Mann. Instead, we must determine the effect of the consent judgment on plaintiff's right to recover from Horace Mann under the terms of the policy.

The policy contains an exhaustion clause which appears only in the section of the policy applicable to UIM coverage. This pro-

vision states: "We will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements." A similar statutory provision provides:

> The insurer shall not be obligated to make any payment because of bodily injury to which underinsured motorist insurance coverage applies and that arises out of the ownership, maintenance, or use of an underinsured highway vehicle until after the limits of liability under all bodily injury liability bonds or insurance polices applicable at the time of the accident have been exhausted by payment of judgments or settlements. . . .

N.C.G.S. Sec. 20-279.21(b)(4).

Plaintiff argues that in an effort to exhaust the applicable liability policy held by the Bells, she entered into the consent judgment with the Bells and Indiana Lumbermans. The judgment states the liability of Indiana Lumbermans is $25,000 and in order to avoid unnecessary litigation costs, it paid its policy limits since the damages exceeded that amount. Plaintiff argues that by entering into the consent judgment with the Bells, she was seeking to exhaust the applicable liability insurance coverage limits in compliance with the statutory and policy provisions and therefore her recovery against Horace Mann is not barred.

Our Supreme Court has stated: "The terms of an insurance contract are not bargained for in the traditional sense. Insurance policies are offered on a take-it-or-leave-it basis and, frequently, the only term over which the insured has any say is the amount of coverage." *Great American Ins. Co. v. Tate Const. Co.*, 303 N.C. 387, 395, 279 S.E. 2d 769, 774 (1981). Furthermore, in interpreting the terms of an insurance contract, our Supreme Court has stated:

> The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.

Woods v. Nationwide Mutual Ins. Co., 295 N.C. 500, 506, 246 S.E. 2d 773, 777 (1978). In addition, an insurance contract should be given the construction a reasonable person in the position of the insured understands it to mean. *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E. 2d 894, 897 (1978).

The exhaustion clause of the policy and the similar wording of Section 20-279.21(b)(4) obligate the insurer to pay *only after* the applicable liability bonds or policies have been exhausted by payment of a judgment or settlement. In entering the consent judgment with the Bells and their insurer, plaintiff established her legal entitlement to damages as to those parties. However, once the applicable liability policy was exhausted in compliance with the provision, plaintiff was no longer legally entitled to recover additional damages from the tortfeasors. To read the "legally entitled to recover damages" provision as Horace Mann argues creates a conflict with the exhaustion provision in Section 20-279.21(b)(4) which urges settlement or judgment *before* obligating the insurer to pay UIM benefits. Given the remedial purposes of underinsurance coverage, we do not believe the General Assembly in creating UIM coverage intended this reading of the statute.

A remedial statute should be construed liberally in the light of the evils sought to be remedied and the objectives to be obtained. *Wade v. Wade*, 72 N.C. App. 372, 379, 325 S.E. 2d 260, 268, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). The evil sought to be remedied by underinsurance coverage is compensation for injuries caused by tortfeasors with liability insurance insufficient to adequately compensate the injured party. In the context of a situation where the tortfeasor's policy is the only applicable liability policy, the objective is to provide the injured insured protection against injuries in the amount of the difference between the insured's own liability coverage and the tortfeasor's liability coverage. *See* N.C.G.S. Sec. 20-279.21(b)(4). Given the fact that plaintiff settled for the maximum amount available under the tortfeasor's liability policy, it would contravene the purposes behind UIM coverage to read the "legally entitled to recover damages" as a bar to plaintiff's recovery. In addition, given the language of the exhaustion clause which urges settlement or judgment before obligating the UIM carrier, we hold that it was reasonable for plaintiff to believe that she was required to settle

or obtain a judgment against the tortfeasors and their liability insurer before seeking payment from Horace Mann. *Cf. Progressive Casualty Ins. Co. v. Kraayenbrink*, 370 N.W. 2d 455, 460 (Minn. App. 1985) (court held that similar exhaustion clause would lead a reasonable person to believe that settlement without prior notice was permissible even though it destroyed insurer's subrogation rights).

Defendant cites *Brown v. Lumbermens Mut. Casualty Co.*, 285 N.C. 313, 204 S.E. 2d 829 (1974) and *Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E. 2d 175 (1986), *disc. rev. denied*, 319 N.C. 224, 353 S.E. 2d 406 (1987), for the proposition that because plaintiff settled with the Bells, plaintiff may not recover from Horace Mann as she is no longer legally entitled to recover further damages from the tortfeasors. In *Brown*, our Supreme Court held an insured could not recover against its UM carrier where the statute of limitations had run against the tort of the uninsured motorist since the insured was no longer "legally entitled to recover" from the uninsured motorist. The court held the insured's action against his UM carrier was derivative and conditional on his action against the uninsured motorist. Therefore, since the insured's action against the uninsured motorist was barred, it could not collect on its claim against its UM carrier. *Brown*, 285 N.C. at 319-20, 204 S.E. 2d at 834. Similarly, in *Buchanan*, this court held that a release of two tortfeasors after payment from the tortfeasors' insurance carrier discharged the carrier because its liability was derivative in nature.

However, UIM coverage was not available until 1 October 1979, some four years after the *Brown* decision. 1979 N.C. Sess. Laws ch. 675. Furthermore, *Brown* dealt only with *un*insured motorist benefits, while the exhaustion clause here applies only to *under*insured motorist benefits by the terms of the policy and because in the uninsured motorist context, there are no applicable insurance policies which must be first exhausted. The existence of other insurance policies in the underinsured motorist context creates distinctive problems which do not arise in uninsured motorist coverage. *See Widiss*, Sec. 31.6 at 9; Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C. L. Rev. 1408, 1410-11 (1986) (tortfeasor's insurer seeks to fulfill its duty to defend and indemnify by paying policy limits and obtaining release for its insured while UIM carrier

desires to protect its subrogation rights which would be destroyed by a release). *Cf. Haas v. Freeman*, 236 Kan. 677, 682, 693 P. 2d 1199, 1203 (1985) (underinsured motorist claims sufficiently distinguishable from uninsured claims to require different procedures at trial). Therefore, courts should exercise care in applying the judicial precedents of uninsured motorist cases to underinsured motorist cases. *See Widiss*, Sec. 31.6 at 9.

Neither *Brown* nor *Buchanan* addressed the exact issue now before this court. Neither addressed the effect of an exhaustion clause which requires settlement or judgment against the tortfeasor's insurer before obligating the underinsurance carrier to pay. Where an insurance policy contains contradictory language, doubts as to the effect of the various provisions will be resolved against the insurer and in favor of the policyholder. *See Woods*, 295 N.C. at 506, 246 S.E. 2d at 777. Therefore, we reject Horace Mann's proposition that because plaintiff is no longer "legally entitled to recover" additional damages from the underinsured tortfeasor, she may not recover UIM benefits from Horace Mann.

II

[2] Horace Mann also argues plaintiff violated the consent to settle provision of the policy and therefore may not recover against it. This provision states:

> A. We do not provide Uninsured Motorist Coverage for property damage or bodily injury sustained by any person:
>
> . . . .
>
> 2. If that person or the legal representative *settles* the bodily injury or property damage claim *without our written consent.*

This provision is not included in Section 20-279.21(b)(3) or (b)(4) and appears only in the policy.

Consent to settle clauses are exclusionary provisions which limit the liability of insurers and therefore are not favored. *See Holcomb v. U.S. Fire Ins. Co.*, 52 N.C. App. 474, 482-83, 279 S.E. 2d 50, 56 (1981). Exclusion clauses are to be strictly construed against the insurer. *Id.* In the context of a condition precedent to an insured collecting insurance benefits, our Supreme Court has

stated: "the scope of the condition precedent which will relieve an insurer of its obligations under an insurance contract, is only as broad as its purpose . . . ." *Great American I,* 303 N.C. at 396, 279 S.E. 2d at 774-75. We hold that the consent to settlement clause in this case should likewise be construed in light of its purpose.

Cases upholding consent to settle clauses do so based on protecting an insurer's right to subrogation. *See, e.g., March v. Mountain States Mut. Casualty Co.*, 101 N.M. 689, 692, 687 P. 2d 1040, 1043 (1984) (purpose of consent to settle clause is to protect insurer's subrogation rights); *Rister v. State Farm Mut. Auto Ins. Co.*, 668 S.W. 2d 132, 136 (Mo. App. 1984) (same); *see also Porter v. MFA Mut. Ins. Co.*, 643 P. 2d 302 (Okla. 1982) (consent to settle clause is against public policy but release of tortfeasor destroyed subrogation rights of insurer and was defense to insurer's obligation to pay under the policy); Note, 64 N.C. L. Rev. at 1411; Thomas, *No-Consent-to-Settlement Clauses and Uninsured Motorist Coverage,* 35 Fed'n Ins. Couns. Q. 71, 74 (1984) (most frequently stated rationale for upholding clause is to protect insurer's right to subrogation); *cf. Galinko v. Aetna Casualty and Surety Co.*, 432 So. 2d 179 (Fla. 1st Dist. Ct. App. 1983) (Florida court applying North Carolina law held that violation of consent to settle clause did not excuse insurer from paying benefits when insurer was not prejudiced by an unconsented to release of the uninsured tortfeasor since no recovery by way of subrogation was realistically available because of financial status of tortfeasor).

Horace Mann argues that because plaintiff violated the consent to settle provision she destroyed its right to be subrogated once it made payment to plaintiff for her loss. *See Milwaukee Ins. Co. v. McLean Trucking Co.*, 256 N.C. 721, 726, 125 S.E. 2d 25, 29 (1962) ("The general rule is that upon payment of a loss, pursuant to the terms of its contract of insurance, the insurer . . . [is] entitled to be subrogated pro tanto to any right of action which the insured may have against a third party whose negligence or wrongful act caused the loss."). The right of an insurer to be subrogated may come about by contract, equity or statute. *See id.* Horace Mann maintains that it had a right of subrogation pursuant to N.C.G.S. Sec. 20-279.21(b)(3) which provides:

> In the event of payment to any person under the coverage required by this section *and subject to the terms*

> *and conditions of such coverage,* the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement [or] judgment resulting from the exercise of any limits of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

(Emphasis supplied.) Other jurisdictions interpreting similarly worded statutes are split on whether this provision gives an insurer a right to subrogation in the UM and UIM context. *Compare Niemann v. Travelers Ins. Co.*, 368 So. 2d 1003, 1007 (La. 1979) (statute provides only for reimbursement from proceeds of judgment against underinsured tortfeasor) *and Reese v. Preferred Risk Mut. Ins. Co.*, 457 S.W. 2d 205, 209-10 (Mo. App. 1970) (both statute and similarly worded provision in policy provide only for right of reimbursement from proceeds of any settlement or judgment insured obtains from uninsured motorist) *with Frey v. Independence Fire and Casualty Co.*, 698 P. 2d 17-21 (Okla. 1985) (statute provides right of subrogation to insurer).

Horace Mann also argues that under the policy and equitable principles, it had a right to subrogation upon payment of the loss to plaintiff. We note the above-quoted section of the statute specifically states that its provisions are subject to the "terms and conditions of [the uninsured motorist] coverage." The policy provides:

> A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:
>
> 1. Whatever is necessary to enable us to exercise our rights; and
>
> 2. Nothing after loss to prejudice them.
>
> However, *our rights in this paragraph do not apply under:*
>
> 1) *Parts B and C* . . . .

(Emphasis supplied.)

Part C of the policy is the section providing for UM and UIM coverage. From this language, it is clear that Horace Mann does

not have a right to subrogation under the terms of its policy. Furthermore, assuming Horace Mann had a right of subrogation in equity or by statute, we hold it waived the right under this section of the policy. *See* 16 M. Rhodes, *Couch on Insurance 2d* Sec. 61.15 at 89 (1983) (since right of subrogation arises for benefit of insurer, it may waive right by contract); 44 Am. Jur. 2d *Insurance* Sec. 1799 at 791 (1982) (insurance company may waive any right it has to subrogation by contract).

Therefore, since Horace Mann has waived its right to subrogation, the clause serves no valid purpose. *See* Hentemann, *Underinsured Motorist Coverage; A New Coverage with New Problems*, 1983 Ins. Couns. J. 365, 368-69 (existence of exhaustion clause and consent to settle clause gives insurer power to frustrate application of UIM coverage by forcing injured party into a full trial). We hold that plaintiff's failure to obtain Horace Mann's consent before entering into the consent judgment does not bar its recovery against Horace Mann as a matter of law. *See Branch v. Travelers Indemnity Co.*, No. 8726SC861 (filed 3 May 1988) (insurer not prejudiced by violation of consent to settle clause where insurer has no right to subrogation).

III

[3] Horace Mann also argues that plaintiff violated certain provisions of Section 20-279.21(b)(3)(a) and that this precludes plaintiff's recovery of UIM benefits. Specifically, it argues plaintiff's failure to serve copies of the summons or complaint in its action against the Bells bars plaintiff's recovery. Horace Mann apparently relies on the following provisions as a defense:

> [T]he insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist . . . . The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name.

N.C.G.S. Sec. 20-279.21(b)(3)(a). Likewise, the policy provides that "[a]ny judgment for damages arising out of a suit is not binding

on us unless we have been served with a copy of the summons, complaint or other process against the uninsured motorist."

However, Horace Mann pled neither the statute nor any other provision relating to notice of the accident as a defense to coverage in its answer and nothing in the record indicates this was a basis of summary judgment below. However, subdivision (b)(3)(a) does provide a guide for the posture of this case on remand. Assuming the General Assembly meant to include a consent judgment within a "final judgment" as it is used above, these provisions do not provide that the insured loses his action against the insurer where he fails to serve suit papers on the insurer, but rather state that the insurer is not "bound" by the judgment. *See Hendricks v. U.S. Fidelity and Guaranty Co.*, 5 N.C. App. 181, 183-84, 167 S.E. 2d 876, 878 (1969) (insurer shall be bound by a final judgment against the uninsured motorist in certain situations). The provisions contemplate a situation where an insured has taken a final judgment against an uninsured or underinsured motorist, but has not lost his right to claim coverage under the UIM or UM policy provisions. *See Rampy v. State Farm Mut. Auto Ins. Co.*, 278 So. 2d 428, 435 (Miss. 1973) (failure to send copy of process of suit against uninsured motorist to insurer does not forfeit right to sue insurer for benefits unless judgment obtained against uninsured motorist used as basis of suit against insurer). Therefore, when the insured fails to comply with Section 20-279.21(b)(3), it may not use the previous judgment against the underinsured motorist as *res judicata* on the issue of liability or damages in a later action against its underinsurance carrier.

In any event, plaintiff does not seek to use the previous judgment against the Bells as *res judicata* on the issue of liability or damages in its action against Horace Mann and therefore does not contend that Horace Mann is "bound" by the previous judgment. Therefore, in its action against Horace Mann on remand, plaintiff must prove the liability of the tortfeasor as well as the amount of damages. *Cf. Brown*, 285 N.C. at 319, 204 S.E. 2d at 834 (action against uninsured motorist carrier is "actually one for the tort allegedly committed by the uninsured motorist"). In plaintiff's action against Horace Mann, Horace Mann may raise any defenses originally available to the tortfeasor in order to show the insured was not legally entitled to recover damages from the tortfeasor.

IV

For the reasons above, the trial court's entry of summary judgment is reversed as to defendants Horace Mann and Matthews and this case is remanded for proceedings on plaintiff's claims for underinsurance benefits, negligence, bad faith, fraud, and unfair and deceptive trade practices. The summary judgment for the Bells is affirmed.

Affirmed in part, reversed in part and remanded.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JERRY WAYNE ALLEN

No. 8718SC1004

(Filed 3 May 1988)

1. Narcotics § 3.1— evidence whispered to reporter—no prejudicial error

There was no prejudicial error during a suppression hearing in a prosecution for narcotics offenses and for being a habitual felon where the court allowed a detective to answer a question as to whether defendant's name appeared on the passenger manifest of a flight only by whispering to the reporter. The detective had already testified that he did not check the manifest until after defendant was arrested and taken into custody; evidence of what the detective learned subsequent to the arrest was outside the scope of the *voir dire*.

2. Arrest and Bail § 3.1— officer's opinion of authority to stop—not admissible

The trial court did not err during a suppression hearing in a prosecution for narcotics offenses by sustaining the State's objection to questions concerning a detective's opinion of his authority to ask defendant to halt. The detective's opinion of the basis of authority for his request was not relevant, given the objective standard used to determine authority for a brief investigatory stop; the question amounted to little more than a request for a legal conclusion as to reasonable suspicion; and there was no prejudice from the court's method of preserving the answer for the record.

3. Narcotics § 3.1; Criminal Law § 88— suppression hearing—cross-examination of arresting detective—answers originally excluded—ultimately considered—no prejudice

There was no prejudice in an action for narcotics offenses where the trial court reversed its earlier rulings on a *voir dire* on defendant's suppression motion and considered "for what they are worth" a detective's whispered answers. The answers could properly be excluded as irrelevant and outside the

scope of the *voir dire*, defendant failed to show that the answers influenced the court's findings and conclusions, and the rules of evidence are relaxed in hearings before a judge without a jury on pretrial motions.

4. Criminal Law § 99.2— court's remarks and questions during trial—no error

There was no reversible error in the conduct of the trial judge in a *voir dire* suppression hearing in a prosecution for narcotics offenses where the judge made a preliminary statement that "the burden of showing admissibility is on us, uh, on the State, I mean," and defendant also contended that the court assumed the role of the prosecutor by explaining the State's objections and by suggesting or raising objections to defense counsel's questions. The trial court has authority to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. N.C.G.S. § 8C-1, Rule 611(a).

5. Narcotics § 3.2— airport stop—fleeing defendant—evidence of narcotics admissible

The trial court did not err by denying defendant's motion to suppress evidence of narcotics possession where two detectives, who were observing passengers deplane from a flight from Newark, New Jersey, observed defendant disembarking from the flight; the flight originated from a source city for heroin; defendant was the last passenger to disembark; defendant nervously scanned the crowd, made eye contact with one of the detectives, then turned abruptly and walked quickly down the concourse to the exit; defendant passed the luggage pickup area without stopping; when a detective shouted "halt, police," defendant pushed his way between an elderly woman and the wall, turned and made eye contact with the detective, and bolted down an escalator, knocking three people out of his way; at the foot of the escalator, defendant broke into an "all-out run" through the airport exit doors; the detective and an agent did not actually approach and question defendant until they found him walking in a parking area at the North end of a pedestrian tunnel; defendant then voluntarily stopped; defendant had no airline ticket but presented a driver's license; the detective recognized the name as being the name of a narcotics courier which had previously been supplied by an informant; defendant denied that he had any narcotics on him and asked if the officers wished to search him; the detective began to search defendant, at which time defendant grabbed the detective's wrists and pushed the detective backwards violently; defendant was placed under arrest for assault on a law enforcement officer; and a construction foreman subsequently approached the officers with packets of a white powder, later found to be cocaine, which he had seen defendant drop.

6. Searches and Seizures § 2— discarded narcotics seized by private party during chase—no improper seizure

Narcotics which were dropped by a defendant as he fled from officers and retrieved by a construction foreman were not improperly seized where the court could properly conclude that defendant voluntarily discarded and abandoned the evidence along with any expectation of privacy in that evidence; moreover, the Fourth Amendment only proscribes unreasonable searches and seizures by government action.

APPEAL by defendant from *Hairston (Peter W.), Judge.* Order entered 12 June 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 March 1988.

Attorney General Lacy H. Thornburg, by Associate Attorney General Teresa L. White, for the State.

McNairy, Clifford and Clendenin, by Locke T. Clifford, for defendant-appellant.

PARKER, Judge.

On appeal, defendant contends that he was denied his due process rights and his right to effectively present his case by the trial court in the *voir dire* and that the trial court erred in denying defendant's motion to suppress because the evidence obtained by Detective West and Agent Porter on 3 September 1986 was the fruit of an illegal seizure not based on reasonable suspicion. We find these contentions to be without merit and affirm the order of the trial court.

Defendant was charged by information with the offense of habitual felon following his arrest on 3 September 1986 for the felonies of possession of heroin and possession of heroin with intent to sell and deliver. On 21 May 1987, defendant filed a motion to suppress evidence and statements made by him. A hearing on the motion was held on 9 June 1987.

At the close of all the evidence, the trial court made the following findings of fact, which are binding on appeal because not excepted to by defendant:

> 1) That Detectives Grady Bryant and Tim Parker, between August 4, 1986 and August 29, 1986 obtained information in reference to Jerry Wayne Allen from an informant;
>
> 2) That Detective Parker had obtained information from this informant on prior occasions and that Detective Parker had verified the information by corroborating details given by the informant with other law enforcement agents. That the information given by the informant in the past had lead [sic] to the arrest and conviction of one other person, Betty Quick;

3) That Detective Parker considered informant to be reliable based upon the information he had previously received and was able to verify;

4) That the information was that Jerry W. Allen traveled to New York by airplane for purpose [sic] of bringing controlled substances (heroin and cocaine) back to the High Point area, and that he used both the Raleigh/Durham Airport and the Regional Airport;

5) That on at least two occasions, August 4, 1986 and subsequent to August 29, 1986, but before September 3, 1986, Detectives Bryant and Parker relayed information provided by the informant to Detective West of the Guilford County Sheriff's Department who was then assigned to the Narcotics Interdiction at Regional Airport;

6) That Deputy West received this information, obtained a photograph of Jerry Wayne Allen and kept the information and photograph for future reference;

7) That on September 3, 1986, Detective West and Agent Porter were observing the passengers of People [sic] Express Flight 352 deplane at Gate 21 of the Regional Airport. That Flight 352 originated from Newark, and served New York City, which West knew to be a "source city" for heroin;

8) That Jerry W. Allen deplaned from Flight 352, and was the last person to deplane;

9) That Deputy West recognized Mr. Allen's face as being familar [sic] but did not recognize him as Jerry Wayne Allen;

10) That upon deplaning, Jerry W. Allen began to scan the area by looking at the various persons nearby;

11) That Jerry W. Allen made eye contact with Agent Porter and Deputy West, who were standing side by side and then, quickly looked down. That he then re-established eye contact, looked away again and began to walk quickly down the concourse;

12) That Deputy West has been trained in airport interdiction procedures by representatives of the State Bureau of

Investigation and the Drug Enforcement Agency and had more than two years experience as an interdiction officer at the Regional Airport. That during those two years Deputy West has participated in more than twenty-five arrests for narcotics violations;

13) That based upon his training and experience, Deputy West characterized the demeanor of Jerry W. Allen as being very nervous and noted that he was walking very fast and pushed between an older lady in the concourse and the wall;

14) That Jerry W. Allen was wearing casual clothes, a white shirt with pink stripes, a pink belt and shoes. That he was carrying a black leather jacket, a paper bag and no other baggage;

15) That after Jerry W. Allen and Deputy West made eye contact, Deputy West stated to Agent Porter that Mr. Allen appeared familar [sic] to him, and that Agent Porter and Deputy West then began to follow Jerry W. Allen and continue observing him;

16) That Agent Porter and Deputy West followed Jerry Wayne Allen at a very brisk pace to the escalator area, at which time Jerry Wayne Allen looked back, made eye contact again and ran to the down elevator [sic];

17) That Jerry W. Allen ran down the escalator, striking and knocking three individuals out of his way as he ran;

18) That Jerry W. Allen reached the bottom of the escalator, turned to the right and ran in an all-out run toward the exterior doors which lead to the lower parking area;

19) That Deputy West and Agent Porter continued to follow Jerry W. Allen by running after him;

20) That Jerry W. Allen passed the luggage claim area without stopping;

21) That Jerry W. Allen exited the exterior doors of the lower level of the airport and continued to run across the parking lot;

22) That as Jerry W. Allen ran, he discarded the paper bag he was carrying, which contained magazines, and the leather jacket he was carrying;

23) That Deputy West followed at a distance and yelled, "Halt, police;"

24) That Jerry W. Allen did not respond by halting or otherwise;

25) That Deputy West continued to follow Jerry W. Allen and observed him run into a construction area and jump off the top of a wall which was approximately six feet in height;

26) That as he jumped, Jerry W. Allen used his hand to assist himself and place [sic] his hand on the top of the wall, catching his hand on a reinforcing bar;

27) That Jerry W. Allen continued to run through the tunnel he had jumped down and under the road and into another parking area;

28) That Deputy West did not follow Jerry W. Allen, through the tunnel, but went over the top of the road, losing sight of Jerry W. Allen for some fifteen seconds;

29) That after crossing the road, Deputy West observed Jerry W. Allen walking in the parking area;

30) That Deputy West approached Jerry W. Allen, who voluntarily stopped and spoke to Deputy West;

31) That Deputy West identified himself as a law enforcement officer and in response to West's question, Jerry W. Allen stated he had no airline ticket but presented a driver's license in the name of Jerry W. Allen;

32) That Deputy West then recognized the name and recalled the information he had previously been provided by Detectives Bryant and Parker;

33) That Deputy West asked Jerry W. Allen if he had any narcotics on him and Jerry W. Allen replied, "No, do you want to search me?"

34) That Deputy West began to search Jerry W. Allen, at which time Jerry Wayne Allen grabbed his wrists and pushed Deputy West backwards violently, stating, at the same time, "Wait a minute, don't plant anything on me;"

35) That West then placed Jerry W. Allen under arrest for assault on a law enforcement officer;

36) That prior to the consent search, Jerry W. Allen was not detained in any way;

37) That prior to the consent to search neither Deputy West nor Agent Porter had touched Jerry W. Allen;

38) That Agent Porter and Deputy Allen [sic] never displayed a firearm or any other weapon;

39) That Deputy West and Agent Porter did not make any effort to detain Jerry W. Allen other than shouting, "Halt, police," and later approaching him on a consensual basis;

40) That subsequent to the arrest for assault, Donald Powell, Senior, a civilian construction foreman on the site, approached the officers with thirty (30) packets of white powder which he had seen Jerry W. Allen drop at the bottom of the wall as he jumped from the wall, and which he retrieved and turned over to Deputy West;

41) That subsequent to the arrest, Donald Powell, Senior, located ten (10) more packets of white powder and scraps of brown wrapping paper on top of wall [sic], near the reinforcing bar and turned them over to Deputy West;

42) That subsequent to the arrest Donald Powell, Senior, located more packets containing white powder wrapped in brown paper in the bushes, near the scene of Jerry W. Allen's arrest, brought them to the attention of Deputy West who photographed and collected one-hundred-three (103) packets from the bushes;

43) That the packets with white powder were field tested and Jerry W. Allen was charged with Possession of Heroin;

44) That Jerry W. Allen was advised of his constitutional rights between 3:20 p.m. and 3:28 P.M., executed a standard advice of rights form, and stated that the heroin was for Rudy Steele. Thereafter, he denied possession of the heroin and that it was for Rudy Steele;

45) That subsequent, and incidental to his arrest, Deputy West and Agent Porter seized a black leather jacket which was dropped as Jerry W. Allen ran across the parking lot, six papers with writing on them from the wallet of Jerry W. Allen, two papers with writing on them from the person of Jerry W. Allen;

46) That on September 10, 1986, a search warrant, proper in form and based upon probable cause, was issued by the Honorable Mary M. Pope, Superior Court Judge Presiding, ordering the subsequent seizure of the black leather jacket which had been placed in the personal property of Jerry W. Allen in the Guilford County Jail.

Based on the foregoing findings of fact, the court concluded as a matter of law that Detective West and Agent Porter had an articulable reasonable suspicion based on the "Drug Courier Profile" which justified a brief detention of defendant after he deplaned; that the officers had the right to pursue defendant in order to observe him and to attempt to approach him; that Detective West's conduct in shouting " 'Halt, police' " did not amount to a seizure, and even if it was a seizure, it was a constitutionally permissible brief stop based upon an articulable reasonable suspicion; that Detective West's conduct in approaching defendant and asking for his airline ticket and identification was consensual, constituted a constitutionally permissible investigative stop based on an articulable reasonable suspicion, and was not a seizure within the meaning of the fourth amendment; that defendant consented to a search, and Detective West properly attempted to search defendant; that defendant assaulted Detective West, giving the officer probable cause to arrest defendant and to conduct a search incident to that arrest; that the 143 packets of heroin, scraps of paper, and fibers were discarded or otherwise not in defendant's possession or in a place where defendant had a reasonable expectation of privacy and were collected by a private citizen and lawfully turned over to Detective West; that the items were not discarded as the result of illegal police activity; that defendant's jacket was seized incident to arrest, subsequently returned to defendant, and later seized pursuant to a valid search warrant; that any statements made by defendant were made while he was in lawful custody based on probable cause that he had assaulted

an officer and was in possession of controlled substances; and that defendant was properly advised of his constitutional rights.

Defendant pled guilty to the charges against him, reserving the right to appeal the court's denial of his motion to suppress.

I.

Defendant first argues that he was denied a full and fair hearing in the *voir dire* on 9 June 1987. Specifically, defendant claims that the trial court erred in not allowing defense counsel to effectively cross-examine the State's witnesses, in not allowing defense counsel to hear the witnesses' answers to certain questions, in interrupting defense counsel during cross-examination and while defense counsel was addressing the court, and in "confusing the roles of the court and the prosecutor."

At the outset, we note that the initial question presented in defendant's brief combines four separate assignments of error and directs this Court to fifty-three exceptions to the proceedings of the trial court. While we have reviewed each of these exceptions, we will confine our discussion here to those exceptions that are specifically discussed in the brief.

Although cross-examination of an adverse witness is a matter of right, the scope of cross-examination is subject to appropriate control by the trial court. *State v. Hosey*, 318 N.C. 330, 334, 348 S.E. 2d 805, 808 (1986). General Statute 8C-1, Rule 611(a), provides that the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Further, the rule is well established that in a hearing before a judge on a preliminary motion, the ordinary rules as to the competency of evidence that apply in a trial before a jury are relaxed because the judge, being knowledgeable in the law, is able to eliminate immaterial and incompetent testimony and to consider only that evidence properly tending to prove the facts to be found. *State v. Thomas*, 34 N.C. App. 534, 538, 239 S.E. 2d 281, 284 (1977), *disc. rev. denied*, 294 N.C. 444, 241 S.E. 2d 846 (1978). Therefore, in a *voir dire* on a motion to suppress, there is a presumption that the trial judge disregarded incompetent evi-

dence. *State v. Fox*, 58 N.C. App. 692, 694, 294 S.E. 2d 410, 412 (1982), *aff'd per curiam*, 307 N.C. 460, 298 S.E. 2d 388 (1983).

[1] The first group of exceptions addressed in defendant's brief involves the trial court's refusal to permit counsel for the defense to ask Detective West whether defendant's name appeared on the passenger manifest for the People's Express Flight 352 from Newark on 3 September 1986. The State objected to the question because it exceeded the scope of the *voir dire*. Detective West had already stated that he did not check the manifest until after defendant was arrested and taken into custody. On the insistence of counsel for defendant, Detective West was made to answer the question for the record. So that the defense could not utilize the suppression hearing for discovery purposes, the witness was asked to whisper his answer to the court reporter out of the hearing of the judge and defense counsel.

We agree that the question was outside the scope of the *voir dire*. The basis of defendant's motion to suppress was that defendant's stop at the airport on 3 September 1986 was not based on an articulable reasonable suspicion. The requisite reasonable and articulable suspicion that the person was engaged in criminal activity must be based on facts known to the officer *at the time of the stop*. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E. 2d 776, 779, *cert. denied*, 444 U.S. 907, 100 S.Ct. 220, 62 L. Ed. 2d 143 (1979); *State v. Sugg*, 61 N.C. App. 106, 109, 300 S.E. 2d 248, 250, *disc. rev. denied*, 308 N.C. 390, 302 S.E. 2d 257 (1983). Although the trial judge did not permit defense counsel to hear the witness's answer, there was no resulting prejudicial error. Evidence of what Detective West learned subsequent to defendant's arrest when he first looked at the manifest was irrelevant to and outside the scope of the *voir dire*.

[2] Defendant's next group of exceptions involves defense counsel's questions to Detective West concerning the officer's authority and purpose in telling defendant to "halt." The court once sustained the State's objection to the question. When counsel for the defense asked the question a second time, defense counsel was informed that the court had already ruled on the issue and was warned not to repeat questions that had been ruled on. The court stated that this would be especially important when trial began and a jury was present in the courtroom. Again, at

defense counsel's insistence, the witness's answers were noted in the record outside the hearing of both the trial judge and counsel for the defense.

We again find that the trial court's ruling excluding Detective West's opinion or belief as to his authority or purpose in asking defendant to halt was correct. A brief investigative stop of an individual must be based on specific and articulable facts as well as inferences from those facts, viewing the circumstances surrounding the seizure through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training. *State v. Thompson*, 296 N.C. at 706, 252 S.E. 2d at 779; *State v. Harrell*, 67 N.C. App. 57, 61, 312 S.E. 2d 230, 234 (1984). Given this objective standard, Detective West's opinion as to the basis or authority for his request that defendant halt is not relevant to the court's inquiry and could be properly excluded. We also note that in North Carolina, an expert witness is not permitted to testify that a particular legal standard has or has not been met. *See State v. Smith*, 315 N.C. 76, 100, 337 S.E. 2d 833, 849 (1985). To ask Detective West his opinion as to whether he had authority to seize or stop defendant amounts to little more than a request for a legal conclusion as to reasonable suspicion. *See State v. Fox, supra.* The court properly sustained the State's objection, and we find no prejudice to defendant in the method used by the court in preserving the witness's answer for the record.

[3] Defendant also asserts as error the court's decision at the close of all evidence to reverse its earlier rulings and to consider, "for whatever they were worth," Detective West's whispered answers to cross-examination that had been previously excluded. Considering that the answers could be properly excluded as irrelevant and outside the scope of *voir dire*; that defendant has failed to show that the answers to the questions influenced the trial court's findings and conclusions, *see State v. Rogers*, 43 N.C. App. 475, 259 S.E. 2d 572 (1979); and that the rules of evidence are relaxed in hearings before a judge without a jury on pretrial motions, *see State v. Thomas, supra*, we conclude that there was no reversible error in this ruling by the court below.

[4] Finally, defendant contends that "at various points in the *voir dire* proceeding, the court appeared to take over the role as prosecutor." Specifically, defendant points to the court's prelimi-

nary statement, "The burden of showing admissibility is on us, uh, on the State, I mean." Defendant also contends that the court assumed the role of prosecutor by explaining the State's objections and by suggesting or raising objections to defense counsel's questions. There is no merit to these contentions.

As noted earlier, the trial court has authority to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence pursuant to G.S. 8C-1, Rule 611(a). Moreover, a trial judge is not precluded from questioning witnesses during a *voir dire* on a preliminary motion. *State v. Thomas, supra; State v. Berry,* 24 N.C. App. 312, 210 S.E. 2d 494 (1974). Therefore, we conclude that there was no reversible error in the conduct of the trial judge.

II.

[5] The second issue raised by defendant's appeal is whether the trial court erred in denying defendant's motion to suppress because the evidence was seized by Detective West and Agent Porter as the result of the officers' illegal conduct in chasing defendant and in ordering him to halt. There is no merit to this contention.

The facts of the present case are not unlike those of many airport interdiction cases previously considered by the United States Supreme Court and by this Court. *See, e.g., Florida v. Rodriguez,* 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed. 2d 165 (1984); *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed. 2d 229 (1983); *Reid v. Georgia,* 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed. 2d 890 (1980); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497 (1980); *State v. Thomas,* 81 N.C. App. 200, 343 S.E. 2d 588, *disc. rev. denied,* 318 N.C. 287, 347 S.E. 2d 469 (1986); *State v. Perkerol,* 77 N.C. App. 292, 335 S.E. 2d 60 (1985), *disc. rev. denied,* 315 N.C. 595, 341 S.E. 2d 36 (1986); *State v. Sugg, supra; State v. Casey,* 59 N.C. App. 99, 296 S.E. 2d 473 (1982); *State v. Grimmett,* 54 N.C. App. 494, 284 S.E. 2d 144 (1981), *disc. rev. denied and appeal dismissed,* 305 N.C. 304, 290 S.E. 2d 706 (1982); *State v. Cooke,* 54 N.C. App. 33, 282 S.E. 2d 800 (1981), *aff'd,* 306 N.C. 132, 291 S.E. 2d 618 (1982). Out of these cases have emerged the following levels of analysis:

"1. Communications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment;

2. Brief seizures must be supported by reasonable suspicion; and

3. Full-scale arrests must be supported by probable cause."

State v. Thomas, 81 N.C. App. at 205, 343 S.E. 2d at 591 (quoting *State v. Perkerol*, 77 N.C. App. at 298, 335 S.E. 2d at 64). *See also State v. Sugg, supra.* The facts in this case involve an ongoing and unfolding situation; therefore, the facts must be analyzed in light of the extent of the intrusion caused by the officers' actions and the facts and circumstances known by the officers to warrant the intrusion as the situation developed.

" 'There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets' "; however, " 'the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.' " *State v. Grimmett*, 54 N.C. App. at 498, 284 S.E. 2d at 148 (quoting *Terry v. Ohio*, 392 U.S. 1, 34, 88 S.Ct. 1868, 1886, 20 L.Ed. 2d 889, 913 (1968) (White, J., concurring)). A defendant's fourth amendment rights are not implicated where police officers approach him and ask to see his airline ticket and other identification. *See State v. Thomas*, 81 N.C. App. 200, 343 S.E. 2d 588; *State v. Grimmett, supra; United States v. Mendenhall, supra* (opinion of Stewart, J.). The fact that an officer identifies himself as a police officer does not, without more, convert the encounter into a seizure requiring some level of objective justification. *Florida v. Royer*, 460 U.S. at 497, 103 S.Ct. at 1324, 75 L.Ed. 2d at 236. *See also United States v. Mendenhall, supra* (opinion of Stewart, J.). On the other hand, a person is seized within the meaning of the fourth amendment, " 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he or she was not free to leave.' " *State v. White*, 77 N.C. App. 45, 49, 334 S.E. 2d 786, 790, *cert. denied*, 315 N.C. 189, 337 S.E. 2d 864 (1985) (quoting *United States v. Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877, 64 L.Ed. 2d at 509 (opinion of Stewart, J.)). *See also State v. Grimmett, supra.*

Applying these general principles to the facts of the case before us, we agree with the trial court that the actions of Detective West and Agent Porter in following and observing defendant as he hurried through the terminal and Detective West's conduct in shouting, "Halt, police," did not constitute a seizure. West's attempt to make defendant stop for questioning and his identification of himself as a police officer did not convert the situation into a "seizure" wherein a reasonable person would believe he or she was not free to leave. Defendant did not stop, and, in fact, was not in direct contact with the officers until they approached him at the north end of the tunnel.

Even if we were to accept defendant's argument that Detective West's words did amount to a "stop" or "seizure" of defendant, at that point, the officer did have a reasonable and articulable suspicion that defendant was engaged in criminal activity. The trial court found as fact that when Detective West first saw defendant deplane, he recognized his face, although he could not specifically identify him. The court also found that West had received information concerning defendant's involvement in drug trafficking at the Regional Airport and had obtained a photograph of defendant in reference to this information. The court found that Detective West was trained in airport interdiction procedures and had participated in numerous drug-related arrests. The court also found as fact that West and Porter were aware that defendant's flight originated from a "source city," or a city which is a major supply center for heroin; that defendant was the last passenger to disembark from the plane; that defendant nervously scanned the crowd and made direct eye contact with Detective West; that defendant then turned abruptly and walked quickly down the concourse toward the exit; and that defendant passed the luggage pick-up area without stopping. The court found that at the time when Detective West shouted, "Halt, police," defendant had pushed his way between an elderly woman and the wall; turned and again made eye contact with Detective West; bolted down an escalator, knocking three people out of his way; and, at the foot of the escalator, had broken into an "all-out run" through the airport exit doors. Based on these objective and articulable facts and circumstances, we must conclude that Detective West had, at the time he shouted, "Halt, police," a reasonable and articulable suspicion that defendant was engaged in criminal

activity justifying a temporary investigative stop of defendant for questioning.

Moreover, as the trial court found, Detective West and Agent Porter did not actually approach and question defendant until they found him walking in a parking area at the north end of the pedestrian tunnel. At that point, Detective West approached defendant, who voluntarily stopped and spoke with the officer. West identified himself and asked defendant for an airline ticket or other identification. This form of non-coercive communication between a police officer and a citizen has been held not to implicate any fourth amendment rights. *See State v. Thomas*, 81 N.C. App. 200, 343 S.E. 2d 588; *State v. Grimmett, supra. See also Florida v. Rodriguez, supra; United States v. Mendenhall, supra* (opinion of Stewart, J.). Defendant was not actually "seized" in any sense of the word until after his assault on Detective West, when defendant was formally arrested. Because Detective West and Agent Porter's conduct did not violate defendant's fourth amendment rights, the trial court properly denied defendant's motion to suppress evidence seized and statements he made subsequent to his arrest.

[6] Finally, because the officers' actions were constitutionally permissible, there is no merit to defendant's contention that the evidence he disposed of in the course of his flight was improperly seized. The trial court correctly concluded that the evidence was discarded by defendant or was otherwise in a place where defendant had no reasonable expectation of privacy. The evidence was dropped in a public place, and defendant continued to flee the area. The court could, therefore, properly conclude that defendant voluntarily discarded and abandoned the evidence along with any expectation of privacy in that evidence. *See State v. Williams*, 71 N.C. App. 136, 137-38, 321 S.E. 2d 561, 562-63 (1984).

Moreover, the United States Supreme Court has consistently construed fourth amendment rights against unreasonable searches and seizures as proscribing only governmental action, not action by a private citizen, such as the tunnel construction foreman in this case, who was not acting as an agent of the government or with government participation or knowledge. *See United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed. 2d 85 (1984); *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048

(1921). *Accord, State v. Keadle*, 51 N.C. App. 660, 277 S.E. 2d 456 (1981); *State v. Morris*, 41 N.C. App. 164, 254 S.E. 2d 241, *appeal dismissed and cert. denied*, 297 N.C. 616, 267 S.E. 2d 657 (1979).

Therefore, for the foregoing reasons, the order of the trial court denying defendant's motion to suppress is

Affirmed.

Judges WELLS and ORR concur.

NORTH CAROLINA DEPARTMENT OF JUSTICE v. JAY EAKER

No. 8710SC857

(Filed 3 May 1988)

1. **State § 12— retention of employees in abolished positions—authority of State Personnel Commission to issue policy**

Because retention of employees in abolished positions is clearly a personnel matter affecting the "separation" of employees, pursuant to N.C.G.S. § 126-4(7a), the State Personnel Commission had authority to issue a policy concerning such action and to require respondent to follow it.

2. **State § 12— policy of State Personnel Commission—failure of respondent to follow—sufficiency of evidence**

The trial court erred in determining that there was insufficient evidence to support the State Personnel Commission's finding that respondent failed to follow the Commission's policy regarding retention of employees whose positions are abolished as part of a reduction in force, but the Commission erred in placing upon respondent the burden of proving that appropriate reduction in force procedures were utilized.

3. **State § 12— failure of employer to follow policy of State Personnel Commission —no showing of prejudice required of dismissed employee**

Petitioner did not have to show prejudice once he carried his burden of showing that respondent failed to follow the State Personnel Commission's policies concerning retention of employees whose positions are abolished as part of a reduction in force.

4. **State § 12— reinstatement of dismissed employee—authority of State Personnel Commission**

There was no merit to respondent's contention that the State Personnel Commission had authority to issue binding orders for reinstatement of dismissed employees only in disciplinary and discrimination cases, since N.C.G.S. § 126-37(a) allows the Commission to order reinstatement of an employee and

direct other suitable relief whenever it deems it necessary to correct the failure of a department or agency to follow policies or rules promulgated pursuant to N.C.G.S. § 126-4.

APPEAL by petitioner from *Farmer, Judge.* Order entered 2 June 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 9 February 1988.

The facts of this case are essentially undisputed. Petitioner began working for respondent, the North Carolina Department of Justice, in 1976. Prior to December 1984, petitioner was an Information and Communications Specialist III (Press Secretary) for then Attorney General Rufus Edmisten. In November, after the election of the new Attorney General, Lacy H. Thornburg, petitioner accepted a demotional transfer to a position as a Criminal Justice Research Associate in the Department's Sheriffs' Standards Division. Petitioner's job there consisted of reviewing information to determine whether sheriffs' deputies qualified for "certification" and, if so, to complete the necessary paper work and issue the certification.

When Attorney General Thornburg took office in January 1985, he decided to "streamline" the Department. Although he retained ultimate authority, Attorney General Thornburg delegated much of the responsibility for managing the Department's non-attorney personnel to Administrative Deputy Attorney General Lester Roark. Mr. Roark reviewed a number of positions, examining the position titles and job descriptions as well as the position's productivity and cost effectiveness. After his review, Mr. Roark recommended that eight positions within the Department be abolished, one of which was petitioner's position. Attorney General Thornburg accepted the recommendation and petitioner's position was abolished and petitioner was terminated as a State employee effective 13 May 1985. The following month, plaintiff was offered a different position within the Department which paid a substantially lower salary. Petitioner turned down the offer.

Petitioner appealed his termination to the State Personnel Commission, alleging that it was the result of his political association with former Attorney General Edmisten and that the Department failed to comply with its own policies or those of the State Personnel Commission regarding "reductions in force." The Hearing Officer rejected petitioner's political discrimination claim, but

concluded that the Department had failed to follow the Commission's policies for reductions in force. The Hearing Officer recommended that petitioner be reinstated to his former position or a comparable position and that he be awarded back pay and reasonable attorney's fees. The full Commission adopted the Hearing Officer's findings of fact and conclusions of law and ordered petitioner's reinstatement with back pay and reasonable attorney's fees.

Pursuant to then G.S. 150A-43 (now G.S. 150B-43), the Department appealed to superior court. However, petitioner did not appeal the Commission's decision even though the Commission rejected certain of his claims. After a hearing the superior court reversed the Commission's decision on several grounds: (1) that the Commission had no authority to order reinstatement of an employee whose position has been improperly abolished; (2) that the Department had followed all mandatory policies for reductions in force; (3) that even if the policies were not followed, petitioner had failed to show a substantial chance of a different result; and (4) that even if petitioner had showed the policies were not followed and that he was prejudiced thereby, the only remedy available to petitioner was for the Commission to remand the case to the Department to follow those policies. Consequently, the court remanded the case to the Commission with directions to dismiss petitioner's appeal. From the superior court order, petitioner appeals.

Attorney General Thornburg, by Senior Deputy Attorney General Jean A. Benoy and Special Deputy Attorney General James Peeler Smith, for the respondent-appellee.

Marc W. Sokol, for the petitioner-appellant.

EAGLES, Judge.

Judicial review of State Personnel Commission decisions is governed by Chapter 150B, the Administrative Procedure Act. G.S. 150A-1(c) (now G.S. 150B-1(c)); *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) (decided under former G.S. 126-43). Petitioner argues that in reversing the Commission's decision, the superior court erred when it concluded that: (1) the Commission lacked jurisdiction to reinstate him, (2) the Commission's findings

that the Department failed to follow the applicable policies for accomplishing a reduction in force were unsupported by substantial evidence, (3) petitioner was not entitled to any remedy because he failed to show prejudice, and (4) any remedy available to petitioner before the Commission should have been limited to the Commission remanding the case to the Department for reconsideration. We review each of these issues in order.

I.

[1] G.S. 126-4(7a) gives the State Personnel Commission the power, subject to the approval of the Governor, to establish policies and rules governing "[t]he separation of employees." G.S. 126-4 (7a). The Department contends that a reduction in force is not a "separation" within the meaning of G.S. 126-4(7a), but is a "management" decision reserved solely to department heads under G.S. 143B-10(c). The Department concedes that the Commission has authority under G.S. 126-36 and G.S. 126-35 to reinstate employees whose positions have been abolished improperly as a result of unlawful discrimination or for a disciplinary motive. Otherwise, the Department argues, the Commission has no statutory authority to order reinstatement of an employee whose position has been abolished. In contrast, petitioner argues that a reduction in force is a "separation," and that under G.S. 126-4(7a) the Commission has authority to reinstate employees whose positions were abolished in violation of its policies and rules. We believe that both parties have failed to make the distinction between the management decision to abolish a position and personnel matters which may necessarily be a consequence of that management decision.

The purpose of Chapter 126 is "to establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry." G.S. 126-1. In addition to the power to promulgate policies and rules regarding the "separation" of employees, the Commission has the same policy and rule making power over "[t]he appointment, promotion, transfer, demotion, and suspension" of employees under G.S. 126-4(6) and "programs and procedures as may be necessary to promote efficiency of administration and provide for a fair and reasonable system of personnel administration"

under G.S. 126-4(10). Chapter 126 clearly gives the State Personnel Commission the power to establish rules and policies governing personnel matters.

We need not fully delineate the extent of the Commission's powers; nor do we need to decide whether it has the power to issue rules and policies which attempt to affect when a reduction in force should occur. The only policies of the Commission which purport to do that were found in a portion of the State's Personnel Manual entitled "Suggested Guidelines for Reductions in Force." Those "guidelines" provide, among other things, that a reduction in force should occur only after "a thorough evaluation of the accomplishments of specific programs" and "measures such as a hiring freeze on vacant positions, limits on purchasing and travel, retirement options and job sharing and work schedule alternatives have proven insufficient." The superior court, however, correctly concluded that these guidelines were not mandatory and that the Department was not obligated to comply with them. Since, at the time petitioner's position was abolished, the Commission had not attempted to exercise any authority over the Department's decision to make a reduction in force, we need not decide whether the Commission has the authority to do so.

The only mandatory policy regarding reductions in force dealt with the retention of employees whose positions have already been abolished. It provided, in pertinent part, as follows:

> Retention of employees in classes affected shall be based on systematic consideration of type of appointment, length of service, and relative efficiency; the relative weight of each of these factors is to be determined by management in making reduction-in-force decisions.

25 N.C.A.C. 1D.0504. It is immaterial whether the required "systematic consideration" of the listed factors is accomplished after the position is abolished or occurs as a means of deciding which position, among those similarly classified, should be abolished. In either case, the policy governs a personnel matter which does not interfere with "management" determinations such as whether a position is necessary, cost-effective, or consistent with the department's mission, or whether the department's limited resources could best be used elsewhere. Because retention of employees in abolished positions is clearly a personnel matter affecting the

"separation" of employees, under G.S. 126-4(7a) the Commission has authority to issue the policy and to require the Department to follow it.

II.

[2] In a conclusion of law, which would more appropriately be labeled a finding of fact, the Commission found that the Department had failed to follow the policy regarding retention of employees. It stated that:

> 14. [T]he retention of the other Research Associate in the Sheriff Standards Division and similar employees throughout the Department was not based on a systematic consideration of type of appointment, length of service and relative efficiency. Petitioner's skills, knowledge, and productivity were not compared to the skills, knowledge, and productivity of employees in similar positions who were retained in employment by Respondent. Mr. Roark, in fact, admitted that the people in the affected positions and their job performances were not evaluated as part of his own reduction in force process. Petitioner was dismissed even though he may have possessed more skills and knowledge and been capable of greater productivity than employees in similar positions who were retained.

The superior court concluded that this finding was not supported by the record and that Mr. Roark's procedures were sufficiently systematic to insure that the decision to abolish petitioner's position was neither arbitrary nor capricious.

Whether the Department's decision to abolish the position was arbitrary or capricious is not germane to the question of whether the Commission's personnel policies were followed. Court review of an agency's findings of fact is limited to determining, from an examination of the whole record, whether there is evidence to support the finding. *Goodwin v. Goldsboro Board of Education*, 67 N.C. App. 243, 312 S.E. 2d 892, *disc. rev. denied*, 311 N.C. 304, 317 S.E. 2d 680 (1984). If, after considering all of the evidence, including that which contradicts as well as that which supports the finding, the court finds competent, material, and substantial evidence in support of the finding, the finding is deemed conclusive on appeal. *Boehm v. Board of Podiatry Examiners*, 41

N.C. App. 567, 255 S.E. 2d 328, *cert. denied*, 298 N.C. 294, 259 S.E. 2d 298 (1979). We find, from the whole record, that the trial court erred and that there is substantial evidence to support the Commission's finding that the Department failed to follow the policy regarding retention of employees whose positions are abolished as part of a reduction in force.

Although there is substantial evidence to support the Commission's finding that the Department failed to follow the policy, and, as a result, the Department is not entitled to prevail on those grounds; nevertheless, we must remand this case to the Commission. In one of the Commission's conclusions of law complained of by the Department, the Commission stated that "[r]espondent has not satisfied its burden of proving that appropriate reduction in force procedures were utilized." We agree with the Department that the Commission improperly placed that burden on the Department.

Generally, the burden of proof is on the party attempting to show the existence of a claim or cause of action and, if proof of his claim includes proof of negative allegations, it is incumbent on him to do so. *See Johnson v. Johnson*, 229 N.C. 541, 50 S.E. 2d 569 (1948). Neither Chapter 126 nor the Administrative Procedure Act indicate that the burden is shifted to the department or agency to show that it followed the Personnel Commission's rules, policies, or procedures. Moreover, we do not believe that the facts tending to show whether the policy was followed are so peculiarly within the knowledge of the Department that the burden should be on the Department to show the policy was followed. *Cf., Joyce v. Sell*, 233 N.C. 585, 64 S.E. 2d 837 (1951).

Because the Commission acted under a misapprehension of the law, this case must be remanded. *See Insurance Co. v. Chantos*, 298 N.C. 246, 258 S.E. 2d 334 (1979). The rule fixing the burden of proof constitutes a substantial right of the party upon whose adversary the burden rests and must be rigidly enforced. *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163 (1954). The law relating to the burden of proof is equally applicable to proceedings which are not conducted before a jury. *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 182 S.E. 2d 553 (1971). We cannot say, as a matter of law, that the Commission's finding was not affected by its misapprehension of the law. *Cf., Bowles Distributing*

Co. v. Pabst Brewing Co., 69 N.C. App. 341, 317 S.E. 2d 684 (1984). Therefore, we vacate the findings and conclusions and remand this case to the Commission for reconsideration of the evidence in additional proceedings in which petitioner has the burden of proof.

Although we remand this case to the Commission, we must address the Department's remaining arguments, since, if meritorious, they would require that we reverse the Commission's decision and uphold the trial court's order.

III.

[3] The Department contends, and the superior court agreed, that even if the Department failed to follow the Commission's policies, petitioner is without a remedy unless he shows a substantial chance that a different result would have followed. The Department cites *Farlow v. Bd. of Chiropractic Examiners*, 76 N.C. App. 202, 332 S.E. 2d 696, *disc. rev. denied*, 314 N.C. 664, 336 S.E. 2d 621 (1985) and *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 342 S.E. 2d 914, *cert. denied*, 318 N.C. 507, 349 S.E. 2d 862 (1986) in support of its contention. We believe *Farlow* and *Leiphart* are distinguishable and we hold that petitioner does not have to show prejudice once he carries his burden of showing the Department failed to follow the Commission's policies.

In *Farlow, supra*, the Board of Chiropractic Examiners, in violation of the Board's own rules, failed to render its decision within 90 days after the hearing. This court held that an administrative agency's failure to follow its own rules requires reversal only where "its failure to do so would result in a substantial chance that there would be a different result from what the result would be if the rule were followed." *Id.* at 208, 332 S.E. 2d at 700. In *Leiphart, supra*, we applied the same holding to a petitioner's argument that the School of the Arts failed to follow its own internal grievance procedures. Since *Farlow* and *Leiphart* involved only an agency's failure to follow its own procedural rules, they are inapposite.

The policy at issue here was promulgated pursuant to the Commission's statutory authority under G.S. 126-4. The Legislature has delegated, to the extent of the Commission's statutory powers, its own legislative powers over the State's personnel sys-

tem. Therefore, rules and policies made pursuant to the Commission's statutory authority have the effect of law. *See Westmoreland v. Laird*, 364 F. Supp. 948 (E.D.N.C. 1973), *aff'd*, 485 F. 2d 1237 (4th Cir. 1973); *American Federation of Labor v. Donovan*, 757 F. 2d 330 (D.C. Cir. 1985); 2 Am. Jur. 2d, "Administrative Law," sections 292, 295 (1962). Pursuant to its statutory authority, the Commission promulgated a policy requiring the State's departments and agencies to systematically consider certain factors in determining which employees should be retained once a department or agency has decided to implement a reduction in its force. Consequently, that policy has the force of law and must be strictly followed and enforced. *See Parrish v. Real Estate Licensing Board*, 41 N.C. App. 102, 254 S.E. 2d 268 (1979); *In re Trulove*, 54 N.C. App. 218, 282 S.E. 2d 544 (1981), *disc. rev. denied*, 304 N.C. 727, 288 S.E. 2d 808 (1982). Petitioner was not required to show prejudice resulting from the Department's failure to follow the Commission's policy.

If petitioner were required to show prejudice, it would be nearly impossible for him to do so. The policy requires only that the Department have systematically considered certain factors, leaving the weight to be accorded each factor up to the Department. At the hearing before the Commission, petitioner presented some evidence of his own qualifications and work record. To show prejudice from failure to follow the policy, petitioner would have to show, not only how he stood in relation to other employees in the same class as to type of appointment, length of service, and work performance, but he would have to show the weight which the Department would attribute to each of those factors. The Commission and the reviewing court would be relegated to speculating how the Department would weigh each factor.

IV.

[4] Finally, we address the Department's argument that the Commission has authority to issue binding orders for reinstatement only in disciplinary and discrimination cases.

G.S. 126-37(a) states, in pertinent part, that:

> [t]he State Personnel Director or any other person or persons designated by the Commission shall investigate the disciplinary action or alleged discrimination which is appealed to the

> Commission. Appeals involving a disciplinary action, alleged discrimination *and any other contested case arising under this Chapter* shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B; provided that no grievance may be appealed unless the employee has complied with G.S. 126-34. . . . The State Personnel Commission is hereby authorized to *reinstate any employee to the position from which he has been removed,* to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied *or to direct other suitable action to correct the abuse* which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action of the appointing authority. [Emphasis added.]

G.S. 126-37(a). The State Personnel Commission's jurisdiction is not limited to disciplinary actions under G.S. 126-35 or discriminatory actions under G.S. 126-36; jurisdiction may also arise, under G.S. 126-34, for any "grievance arising out of or due to his employment." G.S. 126-34. *See Poret v. State Personnel Comm.*, 74 N.C. App. 536, 328 S.E. 2d 880, *disc. rev. denied,* 314 N.C. 117, 332 S.E. 2d 491 (1985). Moreover, G.S. 126-4(9) provides the Commission with policy and rule-making authority regarding:

> [t]he investigation of complaints and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge, and reinstatement in all cases as the Commission shall find justified.

G.S. 126-4(9). Although G.S. 126-37(a) makes more frequent reference to the Commission's remedial powers over disciplinary and discriminatory action, the statute also refers to "grievance[s]" under G.S. 126-34 and "any other contested case arising under this Chapter." It has been recognized that, to serve the purpose of Chapter 126, rules and policies made pursuant to G.S. 126-4 must be enforced. *Bean v. Taylor,* 408 F. Supp. 614 (M.D.N.C. 1976) *aff'd,* 534 F. 2d 328 (4th Cir. 1976). We believe G.S. 126-37(a) allows the Commission to order reinstatement of an employee and direct other suitable relief, whenever it deems it necessary to correct the failure of a department or agency to follow policies or rules promulgated pursuant to G.S. 126-4. To hold that the Commis-

sion's opinion in those cases is merely advisory would give the Commission the power to establish policies and rules but no power to enforce them. That construction of G.S. 126-37 reaches a result which is contrary to the Chapter's stated policy.

Accordingly, this case is reversed and remanded to the Superior Court for remand to the Personnel Commission for reconsideration in additional proceedings consistent with this opinion.

Reversed and remanded.

Judges BECTON and GREENE concur.

DANIEL R. SMITH AND ALICE SMITH v. BUTLER MOUNTAIN ESTATES PROPERTY OWNERS ASSOCIATION, INC.

No. 8728SC476

(Filed 3 May 1988)

1. **Deeds § 20.4— restrictive covenants—construction of geodesic dome prohibited**

In an action for a declaratory judgment and alternatively for injunctive relief to have defendant's restrictive covenants which prevented plaintiffs from constructing a geodesic dome house on their property declared void, there was competent evidence to support the trial court's findings of fact and conclusions of law that plaintiffs failed to meet the 1100 minimum square footage on the main level requirement and that defendant's architectural review committee rejected plaintiffs' plans on that basis.

2. **Deeds § 20.4— restrictive covenants—construction of geodesic dome prohibited—sufficiency of findings**

In an action for a declaratory judgment and alternatively for injunctive relief to have defendant's restrictive covenants which prevented plaintiffs from constructing a geodesic dome house on their property declared void, evidence was sufficient to support the trial court's findings that defendants had developed an architectural style as construction took place, that the existing housing was of a common, similar, or like design, and that plaintiffs' set of plans was a marked departure from existing homes in the development and did not meet the roofline designs of homes in the area.

3. **Deeds § 20.4— restrictive covenants—submission of house plans and prior consent before construction required—validity of covenants**

Restrictive covenants requiring submission of house plans and prior consent before construction, even if they vest the approving authority with broad discretionary power, are valid and enforceable so long as the authority to con-

sent is exercised reasonably and in good faith; therefore, rejection of plaintiffs' house plans was not arbitrary or capricious because the record clearly showed that plaintiffs' plans for their geodesic home was not of the same or similar design as homes already constructed in the subdivision; plaintiffs' dome shaped roofline, which was built out of a series of triangles and pentagons, was a radical departure from the other houses' rooflines; and the main level of plaintiffs' proposed house did not contain 1100 square feet of habitable floor space.

Judge COZORT dissenting.

APPEAL by plaintiffs from *Burroughs, Judge.* Order entered 17 December 1986 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 November 1987.

This is a civil action for a declaratory judgment and, alternatively, for injunctive relief to have defendant's restrictive covenants which prevented plaintiffs from constructing a geodesic dome house on their property declared void.

Brock & Drye, P.A., by Michael W. Drye, for plaintiff-appellants.

Adams, Hendon, Carson, Crow & Saenger, P.A., by Martin K. Reidinger, for defendant-appellee.

JOHNSON, Judge.

Plaintiffs are the owners of a lot in Butler Mountain Estates. Butler Mountain Estates is a residential development containing forty-eight lots, and at the time of this action, consisted of twelve lots upon which houses have been constructed and three lots upon which houses are under construction. The lots in Butler Mountain Estates are subject to restrictive covenants set forth in a restrictive agreement. The restrictive covenants provide that the lots are to be used for single family residential houses and specify that any dwelling erected thereon is to have a habitable floor space on the main level of at least 1100 square feet. Furthermore, the restrictive covenants provide that:

> all building plans . . . shall require the approval of the developer and/or Property Owners Association. . . . No structure of any kind, the plan, elevations, and specifications which have not received the written approval of the developer and/or Property Owners Association and which does not

> comply fully with such approved plans and specifications, shall be erected, constructed, placed or maintained upon any lot . . .

In the beginning, prior to the formation of an architectural review board, proposed plans were submitted to each existing homeowner and approved or disapproved by the individual homeowners based on square footage and on the design.

On 29 February 1984, Elbert S. Brown and Dorothy S. Brown, the developers of Butler Mountain Estates, signed a Grant of Architectural Review, by the terms of which they granted to Butler Mountain Estates Property Owners Association Corporation, all rights of review and approval reserved by the developer under the above quoted restrictive covenant regarding building plans. In January of 1985, an architectural review board was formed to review all proposed building plans for each dwelling unit to be constructed. The architectural review board consists of the Board of Directors and the existing homeowners in Butler Mountain Estates.

In October 1985, plaintiffs submitted a set of plans for a proposed dwelling unit to the architectural review committee for approval. Plaintiffs' plans, which were not for a geodesic dome house, were rejected solely because they failed to meet the restrictive covenant's square footage requirement.

In December 1985, plaintiffs submitted a second set of plans for a proposed dwelling unit, a geodesic dome house, to the architectural review committee for approval. The architectural review committee rejected these plans because of the roofline and the geodesic design of the house. It was also determined that the plans did not meet the minimum square footage requirement, but the architectural review committee did not express that failure as a prime consideration for rejecting plaintiffs' plans. On 23 January 1986, the president of the Property Owners Association mailed plaintiffs a letter indicating that the "proposed structure reflects a marked departure from home-building styles prevailing throughout the area" and that plaintiffs "might consider a design closer to the home-building styles that exist on Butler Mountain Estates."

The primary manner in which this plan was such a radical departure from the existing homes was in its roofline. Plaintiffs' home would have an irregular domed roofline, which is built out of a series of triangles and pentagons, whereas the existing houses have conventional horizontal rooflines.

The architectural review committee did not have written standards as to design acceptability of plans but did establish among themselves a format to review plans submitted by owners. The committee believed that the homes should "conform and blend together." (See Illustrations on page 44.)

On 11 April 1986, plaintiffs filed their complaint seeking a declaratory judgment and alternatively injunctive relief. Defendant filed its answer on 13 June 1986. On 18 September 1986, plaintiffs filed a motion for summary judgment which was denied by order of the court on 5 November 1986. On 17 December 1986, a trial without jury was conducted before Judge Robert M. Burroughs, Sr. On 18 December 1986, after making findings of fact and conclusions of law, an order was filed granting defendant's motion for involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. Plaintiffs appeal.

Plaintiffs bring forth sixteen assignments of error grouped into three arguments for this Court's review. For the following reasons, we find no error and affirm the order of the trial court.

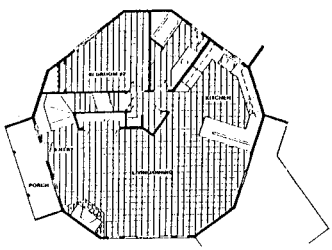
[1] First, plaintiffs contend that the trial court erred in finding as fact and concluding as a matter of law that plaintiffs' second set of plans did not meet the restrictive covenant square footage requirement and that the plans were rejected on this basis. We disagree.

The court's findings of fact are conclusive on appeal if supported by any competent evidence, and a judgment supported by such findings will be affirmed, notwithstanding the fact that evidence to the contrary may have been offered. *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E. 2d 417 (1971).

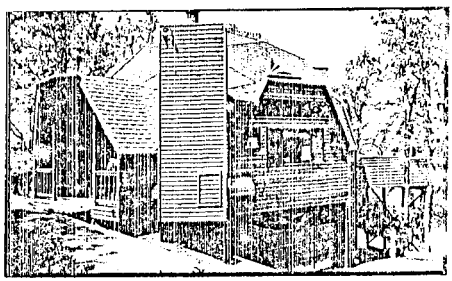
In the case *sub judice*, there was sufficient competent evidence to support the court's findings of fact and conclusions of law. The restriction in question states in part that:

Smith v. Butler Mtn. Estates Property Owners Assoc.

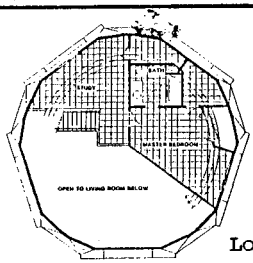
Illustration of existing houses in
Butler Mountain Estates



(CR: EC) 39' WILLETT ST-39-15-102 **MAIN FLOOR**



Willett 39' diameter dome on a 5' riser wall with full basement.



Loft

Illustration of

Plaintiffs' geodesic house pla

> No structure or building shall be erected, altered, placed, or permitted to remain on any property or tract of land conveyed in Butler Mountain Estates other than one detached single family dwelling, permanent in nature, *the habitable floor space of which, exclusive of basements, porches, garages, is less than 1,100 square feet on the main level of said residence.* (Emphasis added.)

Evidence was also admitted in response to questions tendered by plaintiffs, that the habitable living space on the main level of the house proposed by plaintiffs was thirty to fifty feet short of the required square footage. Thus, there was competent evidence to support the court's findings of fact and conclusions of law that plaintiffs failed to meet the 1100 minimum square footage requirement and that the architectural review committee "rejected [the plans] invariably" on that basis.

[2] Next, plaintiffs contend the trial court erred in finding as fact that (a) defendants had developed an architectural style as construction took place; (b) that the existing housing was of a common, similar or like design; and (c) that the plaintiffs' second set of plans was a marked departure from existing homes in the development and did not meet the roofline designs of homes in the area. Again, we disagree.

We have thoroughly examined the record and find that there is sufficient evidence in the record to support the trial court's findings of fact. The photographs of the twelve houses that exist in the development establish that they are of common, similar or like design, though they are not all exactly alike. The plans submitted by the plaintiffs revealed that the roofline of plaintiffs' house was not of the same or similar design of the other houses. The remaining houses had flat roofs, or pitched roofs with flat planes, and plaintiffs' geodesic home roofline was dome shaped. Furthermore, each house as it was built maintained the same or similar design as each house previously built, thereby establishing the architectural style of the community. Therefore, plaintiffs' assignments of error on these findings of fact are overruled.

[3] Finally, plaintiffs contend that the trial court erred in entering its judgment against them for the reason that the evidence showed that the restrictive covenants are void and unenforceable

as applied because (1) they contain no standards by which proposed plans are to be judged; (2) they are not connected to any general plan or scheme of development; (3) they are ambiguous and (4) they were applied in an arbitrary and unreasonable manner and in bad faith. Again, we disagree.

"In North Carolina restrictive covenants are strictly construed against limitations upon the beneficial use of property, but such construction must be reasonable and not applied in such a way as to defeat the plain and obvious purposes of a restriction." *Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. App. 191, 195, 218 S.E. 2d 476, 478 (1975). In *Boiling Springs*, a restrictive covenant required building plans to be submitted to and approved by the grantor prior to construction. This Court laid out the following rules governing approval of building plans by a grantor.

> The exercise of the authority to approve the house plans cannot be arbitrary. There must be some standards. Where these standards are not within the restrictive covenant itself, they must be in other covenants stated or designated, or they must be otherwise clearly established in connection with some general plan or scheme of development. (Citations omitted.) . . . [A] restrictive covenant requiring approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith. (Citations omitted.)

Id. at 195-96, 218 S.E. 2d at 478-79.

In support of this rule, this Court relied upon decisions in other jurisdictions. *See Syrian Antiochian Orthodox Archdiocese v. Palisades Associates*, 110 N.J. Super. 34, 264 A. 2d 257 (1970); *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 449 P. 2d 361 (1969).

In *Syrian*, the court held that a covenant which prohibited the creation of structures or improvements unless plans and specifications in a grading plan of a plot to be built upon were approved by the grantor, who could refuse to approve any such plans which were not suitable in his opinion, was valid and enforceable, though no objective standards were set forth within the covenant to guide the grantor. The court stated:

> [t]he purpose of such a provision is to afford mutual protection to the property owners living in the development against injury, whether taking the form of diminished property val-

> ues or otherwise, that would result from the construction of a residence or other improvement that was unsightly, in singularly bad taste, *discordantly at variance with neighboring homes in architectural appearance*, or otherwise offensive to the proposed or developed standards of the neighborhood.

Syrian at 40, 264 A. 2d at 261. (Emphasis added.)

Similarly, in *Rhue*, that court was called upon to consider a covenant which required plans for construction of houses to be submitted to an architectural committee for approval. In *Rhue*, an owner of property in whose chain of title the covenant appeared, wished to move to the site a thirty-year-old Spanish style home with a stucco exterior and a red tile roof. The development in which the house was to be located was 80% improved with modern ranch style and split level homes. The grantor refused approval upon the ground that the proposed improvement, if allowed, would diminish the value of other properties in the neighborhood and would be an unsightly variation from the architectural pattern that had been established. In sustaining the disapproval the court observed:

> [i]t is no secret that housing today is developed by subdividers who, through the use of restrictive covenants, guarantee to the purchaser that his house will be protected against adjacent construction which will impair its value, and that a general plan of construction will be followed. Modern legal authority recognizes this reality and recognizes also that the approval of plans by an architectural control committee is one method by which guarantees of value and general plan of construction can be accomplished and maintained.

Rhue at 8, 449 P. 2d at 362.

In the case *sub judice*, the restrictive covenant at issue requires building plans to be submitted to and approved by the Property Owners Association which in turn formed an architectural review committee to serve the same function. The record establishes that this architectural review committee rejected plaintiffs' second set of plans because (1) the design of the house reflected a marked departure from the home building styles in the area and (2) the plans did not meet the general roofline design of the houses in the area. In addition, plaintiffs' plans did not

meet the square footage requirement but the architectural review committee did not rely solely on this failure as the primary basis for rejection of the plans.

As shown earlier in the opinion, the plans of the main level of a proposed home had to contain 1100 square feet of habitable floor space. Thus, the architectural review committee could have justifiably rejected plaintiffs' second set of plans on this basis alone. Nevertheless, assuming arguendo, that plaintiffs had met the minimum square footage requirement, the record reveals that the twelve houses constructed were conventional type homes of the same or similar design, and had similar flat roof designs. Plaintiffs' second set of plans for their geodesic home was not of the same or similar design, and their dome shaped roofline, which is built out of a series of triangles and pentagons, was a radical departure from the other houses' rooflines.

Despite the architectural review committee's failure to put in writing the specific architectural style of the houses to be erected, all legitimate considerations which an architectural review committee may assess when determining the aesthetic value in approving house plans which fit into a general plan or development scheme of the neighborhood were attempted in the case *sub judice*. Without such consideration, there would have been no reasonable or good faith determination for approval or disapproval of house plans.

The majority view, which this Court has adopted, with respect to covenants requiring submission of plans and prior consent to construction, is that such clauses, even if vesting the approving authority with broad discretionary power, are valid and enforceable so long as the authority to consent is exercised reasonably and in good faith. Therefore, applying the test of reasonableness and good faith to the case *sub judice*, we find that the rejection of plaintiffs' house plans was not arbitrary or capricious because the record clearly shows that plaintiffs' proposed house plans did not fit into the present and existing general plan or development scheme of the homes in the area.

Accordingly, for all the aforementioned reasons, the judgment is

Affirmed.

Judge WELLS concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

The trial court's order in favor of defendant is confusing, at best. The defendant's president testified that the plans were *not* rejected because of the square footage requirement, even though they "could have been rejected for that reason" because the plans "missed it by about 30 to 50 square feet." He further testified that two houses built by the developer in the early stages of the development were also deficient on square footage, but no action was taken. The only reason given to plaintiffs in the letter rejecting their plans is: "The proposed structure reflects a marked departure from home-building styles prevailing throughout the area." This evidence was uncontradicted.

In its findings of fact, the trial court found:

> 9. The plaintiffs' . . . plans did not meet the restrictive covenant square footage requirement . . . .
>
> 10. The plaintiffs' . . . plans did not meet the general roofline design of the houses in the area . . . .
>
> * * * *
>
> 14. The rejection of the Plaintiffs' . . . plans is upheld based upon their failure to meet the square footage requirement of the restrictive covenants; no finding is made as to the facade or geodesic design.

In its conclusions of law the trial court stated:

> 6. The rejection of the Plaintiffs' . . . plans due to square footage requirements was a valid exercise of authority under the restrictive covenants . . . .

Plaintiffs excepted to the findings of fact and conclusion of law quoted above.

I do not believe we can affirm the trial court's holding for defendant apparently on the issue of square footage. There is simply

no evidence to support a finding that the plans were rejected on that basis. Furthermore, I do not believe the evidence would support a finding or conclusion that it was proper for defendant to reject the plans because of the geodesic dome design. The pictures of the existing houses in the development, which were tendered as exhibits, demonstrate that almost all of the houses are of a contemporary design, including A-frames and designs which feature roofs of varying heights and slopes. I simply do not find any evidentiary support for the conclusion that the plaintiffs' proposed design is a "marked departure from the home building styles" in the area or that the plans "did not meet the general roofline design of the houses in the area," as stated in the majority opinion. I do not believe there was justification for defendant's rejection of plaintiffs' plans on that basis.

I vote to reverse the trial court and to remand the cause for entry of judgment for plaintiffs.

STATE OF NORTH CAROLINA v. SAM COLVIN

No. 8713SC971

(Filed 3 May 1988)

1. **Criminal Law § 91— speedy trial—time between filing change of venue motion and disposition—time properly excluded**

When a motion for change of venue is heard within a reasonable time after it is filed and the State does not delay the hearing for the purpose of thwarting the speedy trial statute, the time between the filing of the motion and its disposition is properly excluded in computing the time within which a trial must begin, and the time required to transfer records between counties is a part of the disposition of the motion. N.C.G.S. § 15A-701(b)(1)d.

2. **Criminal Law § 79.1— co-conspirator's testimony as to willingness to participate in crime—admissibility before conspiracy established**

In a prosecution of defendant for conspiracy to commit robbery with a dangerous weapon and robbery with a dangerous weapon, the trial court did not err in allowing a co-conspirator to testify about a conversation concerning his own willingness to participate in the robbery, since the acts and declarations of a co-conspirator are admissible before the *prima facie* case of conspiracy is sufficiently established, but the prosecution must properly prove the existence of the *prima facie* case of conspiracy before the close of the State's evidence in order to have the benefit of the acts and declarations; and the State in this case sufficiently established the elements of a conspiracy and de-

fendant's involvement in it where the evidence tended to show that defendant was present when two others discussed robbing a bank, agreed to help, and engaged in elaborate preparations to rob the bank.

3. **Criminal Law § 79— co-conspirator's testimony as to what defendant meant—admissibility**

In a prosecution for conspiracy to commit robbery with a dangerous weapon, a co-conspirator could properly testify that defendant meant he was going to rob a bank when he said he was going to "do it," since the statement was admissible as a lay opinion pursuant to N.C.G.S. § 8C-1, Rule 701.

4. **Criminal Law § 86.8— co-conspirator's plea arrangement—admissibility of evidence**

The trial court did not err in allowing the introduction of a letter concerning a co-conspirator's plea arrangement with the State. N.C.G.S. § 15A-1055(a).

5. **Conspiracy § 6— conspiracy to commit robbery—sufficiency of evidence**

In a prosecution for conspiracy to commit robbery with a dangerous weapon, evidence was sufficient to be submitted to the jury where a co-conspirator testified that defendant stated he was going to "do it"; the co-conspirator stated that defendant meant he was going to rob the bank; defendant accepted from his brother a jumpsuit, mask, gloves, and sawed-off shotgun for use in the robbery; defendant rode with his brother and a co-conspirator to town where he and the co-conspirator got out and broke into a house behind the bank; and while in the house they changed into clothes provided by the brother and waited there for a signal from him before entering the bank.

6. **Criminal Law § 138.34— limited mental capacity—failure to find as mitigating factor**

The trial court did not err in failing to find defendant's limited mental capacity as a mitigating factor where the reports submitted by defendant established his borderline intelligence, but there was no evidence that defendant was unable to understand the consequences of his behavior so as to significantly reduce his culpability for the offense. N.C.G.S. § 15A-1340.4(a)(2).

APPEAL by defendant from *Beaty, Judge*. Judgment entered 30 April 1987 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 8 March 1988.

Attorney General Lacy H. Thornburg by Assistant Attorney General William F. Briley for the State.

William E. Wood for defendant appellant.

COZORT, Judge.

Defendant was charged and convicted of conspiracy to commit robbery with a dangerous weapon and robbery with a dangerous weapon. From a judgment sentencing him to twenty years for

the robbery, and three years consecutive for the conspiracy, defendant appeals. We hold that defendant received a fair trial, free of prejudicial error.

The State's evidence consists primarily of the testimony of John Earl Carthens, a co-conspirator and participant in the robbery, who testified under a plea arrangement with the State. Carthens testified that on Sunday, 23 February 1986, he and Greg Colvin, defendant's brother, went to the Colvin home in Bladen County. While there, Greg initiated a conversation about robbing the bank in Tarheel, North Carolina. Carthens stated that, "I told him I'd help him out," and that defendant said, "he was gonna do it, help his brother out."

The next day, 24 February 1986, Greg Colvin brought Carthens and defendant a jumpsuit, army pants, gloves, masks, and two sawed-off shotguns. The three men then rode together to Tarheel where Greg let Carthens and defendant out, and they broke into a house behind the bank. There they changed into the clothes provided by Greg and waited for a signal from him to enter the bank. Upon receiving the signal, the two entered the bank with the shotguns and told the bank tellers that it was a stickup. After stuffing a bag and pillowcase with money, they fled the bank on foot and ran into the woods throwing off their disguises as they went.

On cross-examination there was some discrepancy in Carthens' testimony as to whether defendant was present during the conversation about robbing the bank or if he even heard the conversation.

When defendant took the stand, he testified that he did not recall talking with Carthens on 23 February 1986, and that he never participated in a discussion about robbing a bank. He also testified as to his activities during the day of 24 February 1986, and stated that he did not participate in or have any knowledge of a bank robbery.

The jury found defendant guilty of both conspiracy to commit robbery with a dangerous weapon and of robbery with a dangerous weapon. He was then sentenced to a twenty-year term for the robbery and a three-year term for the conspiracy, which terms were to run consecutively. From this judgment, defendant appeals.

[1] Defendant argues that the trial court erred in denying his motion to dismiss for failure to comply with the requirements of the Speedy Trial Act. We disagree.

N.C. Gen. Stat. § 15A-701(a1) provides in part:

> The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:
>
> (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last; . . .

N.C. Gen. Stat. § 15A-701(b) provides that in computing this 120-day period, the following periods are excluded:

> (1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from:
>
> . . . .
>
> d. Hearings on any pretrial motions or the granting or denial of such motions.
>
> The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved; . . .

In the case below, defendant filed a motion for change of venue on 23 April 1986. Although the motion to transfer the case from Bladen to Columbus County was granted on 7 August 1986, the order was not filed until 20 August 1986, and defendant's files did not reach the Clerk of Superior Court of Columbus County until 25 August 1986. The trial judge found that the time from defendant's filing of the motion until 25 August 1986 was excluded from the time requirements of the Speedy Trial Act. Defendant contends that the case was disposed of on 7 August 1986, when the motion was granted, and that the time between 7 August and 25 August 1986 should not be excluded from the time limits of the Speedy Trial Act. If this time is not excluded, then the 120-day time limit is exceeded.

When the motion for change of venue is heard within a reasonable time after it is filed and the State does not delay the hearing for the purpose of thwarting the speedy trial statute, the time between the filing of the motion and its disposition is properly excluded in computing the time within which a trial must begin. *State v. Overton*, 60 N.C. App. 1, 298 S.E. 2d 695 (1982), *disc. rev. denied and appeal dismissed*, 307 N.C. 580, 299 S.E. 2d 652 (1983). We hold that this motion was not fully disposed of until 25 August 1986 when defendant's records reached Columbus County. When a motion for change of venue is granted, the transfer of records between counties is a part of the disposition of the motion, and some delay is impossible to avoid. Therefore, we find no error in the denial of defendant's motion to dismiss.

[2] Defendant next assigns as error three instances where Carthens was allowed to testify, over objection, as to Carthens' own willingness to participate in the robbery. Defense counsel objected three times to Carthens' testimony concerning Carthens' conversation with Greg Colvin about robbing the bank. Defendant contends that these statements were inadmissible in his trial because they did not establish a conspiracy between Carthens and defendant, but only between Carthens and Greg Colvin. Defendant also argues that there is no evidence that the statements about robbing the bank were directed to defendant or were stated in his presence. We find no merit in defendant's argument.

The State may "offer the acts or declarations of a conspirator before the *prima facie* case of conspiracy is sufficiently established. Of course, the prosecution must properly prove the existence of the *prima facie* case of conspiracy before the close of the State's evidence in order to have the benefit of these declarations and acts." *State v. Polk*, 309 N.C. 559, 566, 308 S.E. 2d 296, 299 (1983). The State in this case sufficiently established the elements of a conspiracy and defendant's involvement in it subsequent to Carthens' testimony. The evidence presented by the State taken in the light most favorable to the State, showed that defendant was present when Carthens and Greg Colvin discussed robbing the bank, that he agreed to help, and that he engaged in elaborate preparations to rob the bank. Therefore, there was no error in allowing Carthens' testimony.

[3] Next, defendant argues that the trial court erred in allowing Carthens to testify concerning defendant's agreement to participate in the robbery. As to defendant's agreement to participate, Carthens testified as follows:

> Q. Did you have a conversation with Sam there at the house?
>
> A. Well, he ain't said that much, but he said he was gonna do it.
>
> Q. What did Sam say?
>
> A. He said he was gonna do it, help his brother out.
>
> . . . .
>
> Q. What, if anything, was your understanding as to what was to be done when Sam said that he would "do it"?
>
> Mr. Wood: Objection.
>
> The Court: Overruled.
>
> The Witness: Go to Tarheel Bank and rob it.

Defendant argues that Carthens' testimony concerning defendant's intent when he said he was going to "do it" was inadmissible as an improper conclusion by Carthens. We find this argument meritless.

N.C. Gen. Stat. § 8C-1, Rule 701, allows opinions by lay witnesses which are "(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." We hold that Carthens' statement meets the requirements of Rule 701 and there was no error in allowing this statement. Furthermore, if there was any error, it was not prejudicial because there was ample other evidence to prove defendant's involvement in the conspiracy.

[4] Defendant next argues that the trial court erred in overruling defense counsel's objection to the introduction of a letter concerning Carthens' plea arrangement with the State. Defendant argues that the letter was self-serving, misleading, and contained conclusory statements. We find no error.

N.C. Gen. Stat. § 15A-1055(a) provides that "any party may examine a witness testifying under . . . an arrangement under G.S. 15A-1054 [charge reductions or sentence concessions in consideration of truthful testimony] with respect to that . . . arrangement. A party may also introduce evidence . . . in corroboration or contradiction of testimony or evidence previously elicited . . . concerning the . . . arrangement." This section is "aimed at ensuring that the jury be made aware that the witness is testifying under a grant of immunity or some other arrangement." *State v. Morgan*, 60 N.C. App. 614, 617, 299 S.E. 2d 823, 826 (1983).

In the case below, it was defense counsel who initially introduced evidence of Carthens' plea arrangement with the State. In addition, the contents of the letter were relevant to defendant's case and in no way prejudiced him. The letter merely informed the jury of Carthens' plea arrangement with the State and his interest in testifying against defendant. We find no error in the admission of this letter.

[5] Defendant next argues that the trial court erred in denying his motion to dismiss the conspiracy charge for insufficiency of the evidence. We find no error.

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

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975). To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. . . . The existence of a conspiracy may be established by direct or circumstantial evidence. "Direct proof of the charge [conspiracy] is not essential, for such is rarely ob-

> tainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. . . ." *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933).

State v. Abernathy, 295 N.C. 147, 164-65, 244 S.E. 2d 373, 384 (1978).

In this case, there was ample evidence of defendant's involvement in the conspiracy to withstand the motion to dismiss. The only direct evidence of defendant's guilt is Carthens' testimony that defendant said "he was gonna do it, help his brother out," which defendant contends is inadmissible. We have found that evidence to be admissible. In addition, there is enough circumstantial evidence to create an inference of defendant's guilt sufficient to withstand his motion to dismiss. The evidence shows that defendant accepted from his brother a jumpsuit, mask, gloves, and sawed-off shotgun for use in the robbery. He also rode with his brother and Carthens to Tarheel, where he and Carthens got out and broke into a house behind the bank. While in the house he and Carthens changed into the clothes provided by Greg Colvin and waited there for a signal from him before entering the bank. Defendant's participation in these elaborate preparations for the robbery are sufficient alone to prove defendant's guilt. Therefore, we find no error in the trial court's denial of the motion to dismiss.

[6] Finally, defendant argues that the trial court erred in not finding defendant's limited mental capacity as a mitigating factor. We find no error.

Defendant submitted a psychiatric history/evaluation from Dorothea Dix Hospital which stated that defendant was "in the low borderline range of intellectual functioning" and a letter from a psychiatrist which stated that defendant "is functioning in the Borderline range of intellectual ability." On the basis of this evidence, defendant requested that the trial judge find his limited mental capacity as a mitigating factor under N.C. Gen. Stat. § 15A-1340.4(a)(2), which states:

> (2) Mitigating factors:
>
> * * * *

e. The defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense.

To find a defendant's limited mental capacity as a mitigating factor, the statute requires that it significantly reduce the culpability for the offense. Although the reports submitted by defendant did establish his borderline intelligence, there was no evidence that defendant was unable to understand the consequences of his behavior so as to significantly reduce his culpability for the offense. Therefore, we find no error in the trial court's failure to find defendant's limited mental capacity as a mitigating factor.

Based on the foregoing, we hold that defendant received a fair trial, free of prejudicial error.

No error.

Judges EAGLES and SMITH concur.

WARD DAVID BEIGHTOL v. KATHRYN LEE BEIGHTOL

No. 8712DC645

(Filed 3 May 1988)

1. **Divorce and Alimony § 30— equitable distribution—findings as to marital interest in separately titled property**

The trial court did not err in finding that defendant had a marital interest in plaintiff's separately titled property where marital funds were used to make mortgage payments and pay for other improvements, defendant made the monthly mortgage and utility payments as the financial manager for the couple, and defendant thoroughly cleaned the condominium every other year and, on occasion, painted and made other improvements; moreover, there was no merit to plaintiff's contention that defendant was not entitled to have the appreciation in the property's value classified as marital property merely because her contributions consisted of those functions which a homemaker performs and they were therefore valueless.

2. **Divorce and Alimony § 30— equitable distribution—valuation of family auto and debts proper**

In a proceeding for equitable distribution of marital assets, the trial court did not err in its valuation of the family automobile and debts incurred immediately after the parties' separation for the purpose of purchasing necessities for defendant and the children.

3. Divorce and Alimony § 30— equitable distribution—unequal division of property proper

The trial court did not commit reversible error in making an unequal division of the marital property where the court listed six of the twelve factors stated in N.C.G.S. § 50-20(c) as considerations which it used to support its finding that an unequal division of the marital property was equitable.

APPEAL by plaintiff from *Keever, A. Elizabeth, Judge.* Order entered 23 February 1987 in District Court, CUMBERLAND County. Heard in the Court of Appeals 10 December 1987.

Reid, Lewis & Deese, by Renny W. Deese, for plaintiff-appellant.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, for defendant-appellee.

JOHNSON, Judge.

Plaintiff-appellant, Ward David Beightol, and defendant-appellee, Kathryn Lee Beightol, were married on 28 December 1976, separated on 1 July 1985, and were divorced on 30 September 1986. Two children were born of this union.

In his action for absolute divorce based upon one year's separation, plaintiff requested equitable distribution of the parties' real and personal property. The equitable distribution claim was severed from the divorce hearing at plaintiff's request. On 5 February 1987, the equitable distribution claim came on for hearing, and the order from which plaintiff now appeals was entered on 23 February 1987.

The substance of this appeal concerns the finding that defendant had a marital interest in plaintiff's separately-titled property, the valuation attached to the parties' marital property, and the unequal division of the parties' marital property.

[1] Plaintiff first contends that the trial court erred in finding that defendant had a marital interest in plaintiff's separately-titled property, because such a finding was not supported by competent evidence. We cannot agree. The two separately-titled properties to which plaintiff refers are a Florida condominium and unimproved Texas ranch land which shall be discussed in turn.

The distribution of marital property is vested in the discretion of the trial courts and the exercise of that discretion will not be upset absent clear abuse. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). In order to reverse the trial court's decision for abuse of discretion, we must find that the decision was unsupported by reason and could not have been the result of a competent inquiry. *Id.* at 777, 324 S.E. 2d at 833. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record. *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984).

Applying these principles to the case *sub judice*, we find that evidence was adduced at the hearing to the effect that in 1972, approximately four years prior to the marriage, plaintiff purchased a condominium at New Smyrna Beach, Florida, for $28,000.00. The condominium was used as rental property and had a fair market value of $70,000.00 and an outstanding mortgage of $14,000.00 at the time when the couple separated.

Further evidence was introduced in the form of testimony by defendant, who testified that she handled all communications with the manager of the condominium complex, made the monthly mortgage payments on the unit, as well as the monthly utility bills, and helped to maintain the unit by conducting a thorough "spring cleaning" on it at least once every two years. Defendant further stated that on at least one occasion, she put up mirror tiles, painted a part of the interior, and dyed the carpeting. She also testified that furnishings and appliances which were placed into the unit as they were needed, were purchased with marital funds, and that the monthly utility bills and mortgage payments noted above, were also paid with marital funds.

Similarly, plaintiff has conceded in his brief that defendant's "personal efforts" with respect to the condominium including writing checks for the mortgage payments, as she was the financial manager for the couple, providing redecoration ideas and advice, cleaning the condominium, and on one occasion, painting a part of the interior and visiting the property once every two years. He refers to her investment as a "de minimus" homemaker contribution which a "dutiful spouse would have done anyway."

We agree with the trial court's ruling that defendant's contributions were much more substantial than plaintiff suggests,

and find no rule of law which even intimates that a non-titled spouse should be penalized and not allowed a return on his or her investment because the efforts expended were characteristic of those which a caring and loving spouse would have performed in any event.

Our Courts have consistently recognized the interest acquired by a non-titled spouse in separately-owned property which increases in value due to the personal efforts of the non-titled spouse. *See, e.g., Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985) (which states that the phrase of G.S. 50-20(b)(2) that "[t]he increase in value of separate property shall be considered separate property" applies only to increased values attributable to external economic influences such as inflation, namely, passive appreciation).

Plaintiff, by this appeal, does not contest these rules but instead contends that defendant is not entitled to have the appreciation in the properties' values classified as marital property merely because her contributions consisted of those functions which a homemaker performs and are therefore valueless. We see no difference between the contributions made by the defendant in the case *sub judice*, and those made by the non-titled spouse in *Lawrence v. Lawrence*, 75 N.C. App. 592, 331 S.E. 2d 186, *disc. rev. denied*, 314 N.C. 541, 335 S.E. 2d 18 (1985), where plaintiff, husband, expended physical labor in making various repairs, alterations and additions to the separately-owned property and thus enhanced its value. The Court stated that "[i]t is clear the marital estate invested substantial labor and funds in improving the real property, therefore the marital estate is entitled to a proportionate return of its investment." *Id.* at 595, 331 S.E. 2d at 188. Quite similarly in *Lawing v. Lawing*, 81 N.C. App. 159, 176, 344 S.E. 2d 100, 112 (1986), this Court again recognized the marital characteristic of appreciation which results from "funds, talent or labor that [are] contributed by the marital community, ..."

In reaching its decision, that the condominium's increase in value attributable to the marital estate, or active appreciation, was $20,000, the trial court considered the following factors:

(a) The overall increase in value during the fifteen years of ownership.

(b) The increase in value during the nine years of marriage.

(c) The mortgage and other payments made with marital funds.

(d) The improvements made to the marital property with marital funds.

(e) The efforts of both parties in the improvement of the property.

(f) The nature of the increase, whether active or passive.

We find no abuse of discretion by the trial court, and hold that the evidence of record supports both the finding that defendant had a marital interest in the separately-titled property, as well as the valuation accorded the interest.

The court applied essentially the same factors as those noted above in evaluating the interest which defendant acquired in the separately-titled Texas ranch land, and included as a factor, the profit realized as stated on the 1985 tax return. The court found as a fact the following:

> [t]hat in January of 1976, and prior to the marriage, Plaintiff, with his brother and father, purchased unimproved ranch land near Thorndale, Texas, his one-third share of the purchase price being $22,000.00 with the Plaintiff making a down payment of $10,000.00; that during the marriage the Plaintiff used marital funds to pay his share of the mortgage payments of $750.00 each year; that Plaintiff, along with his brother and father, sold the property in 1985 after the parties had separated, and earned a tax profit of $6,247.00; that during the marriage the parties paid $6,750.00 toward the mortgage; that Defendant primarily took care of the financial aspects of paying the mortgage indebtedness; that the Court finds that the active increase in value of the property attributable to the marital efforts was $6,000.00; . . . .

Again, we find and so hold, that these findings of fact are supported by competent evidence from the record.

[2] Plaintiff next contends that the trial court failed to consider substantial evidence in valuing the parties' marital property. We find no error.

First, we reiterate the standard of review with which we are bound; to affirm the trial court's decision absent an abuse of discretion, *see White, supra,* and apply it to plaintiff's objections. In addition to argument on the valuation of defendant's acquired interest in the separately-titled properties, which we have heretofore decided, plaintiff objects to the valuation of the family automobile, debts incurred immediately after the separation for the purpose of purchasing necessities for defendant and the children, and a loan obligation which he personally assumed to establish defendant in business.

A trial judge is required to conduct a three-step analysis when making an equitable distribution of the marital assets. These steps are: (1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner. *Cable v. Cable*, 76 N.C. App. 134, 331 S.E. 2d 765, *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 856 (1985). An equal division of the marital property is mandatory, unless the court determines in the exercise of its discretion that such a distribution is inequitable. G.S. 50-20(c); *White, supra* at 776, 324 S.E. 2d at 832; *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E. 2d 658 (1985).

In part one of this second Assignment of Error plaintiff argues that the trial court ignored the uncontroverted evidence that he invested $3,500.00 of his separate estate toward the purchase of an automobile shortly after the marriage. What plaintiff fails to note here is that the parties entered a stipulation prior to the hearing that the automobile, a 1982 J-2000 Pontiac, was marital property having a net value of $2,477.00. The court considered this stipulation in making its distribution and we therefore find any arguments to the contrary meritless.

In part two of the assignment of error, plaintiff alleges that the trial court improperly considered a child support obligation, in attributing his payment of a $3,000.00 debt accumulated by defendant and the minor children for necessities after the date of separation, to his continuing obligation to support his minor children. We agree that G.S. 50-20(f) prohibits consideration of child support in an equitable distribution hearing, but find that such an improper factor was not considered in this case. In *Bradley, supra*

at 153, 336 S.E. 2d at 660 (1985), the Court stated that "[t]his provision indicates that amounts paid or received by a party as support for the children of the parties are not to be considered in determining an equitable distribution." The trial court did not improperly use the child support to inflate the income of either party, but rather determined that the debt was incurred to purchase necessities after the parties' separation.

The remaining components of this assignment of error do not merit discussion and neither does plaintiff's third assignment of error, in light of the previous discussion designated part two of assignment of error number two. We further acknowledge plaintiff's decision to abandon his fifth assignment of error. He states: "[i]n light of the trial court's great discretionary latitude and the absence of any definitive finding that the excepted to evidence implicated the final judgment of the court, [a]ppellant abandons this assignment of error."

[3] Finally, plaintiff contends that the trial court committed reversible error in making an unequal division of the marital property as such a division was unsupported by competent evidence. We disagree.

We are guided by the principle which plaintiff enunciates, that an equal division of property is mandatory absent a determination that an equal division would not be equitable. *White, supra.* In G.S. 50-20(c), twelve factors are listed which the court may consider in making an equitable division. The weight which is assigned to any factor rests in the trial court's discretion. *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E. 2d 809, *disc. rev. denied*, 316 N.C. 730, 345 S.E. 2d 385 (1986).

In the judgment of property distribution, the trial court listed six of the twelve factors stated in G.S. 50-20(c) as considerations which it used to support its finding that an unequal division of the marital property was equitable. Several of the factors considered were: (1) the disparity in the parties' earning abilities, (2) plaintiff's expectation of an unvested pension fund and defendant's lack thereof, and (3) the tax consequences to each party. We find no abuse of discretion.

It is for the foregoing reasons that we affirm the trial court's order in all respects.

Affirmed.

Judges ARNOLD and ORR concur.

BUTLER & SIDBURY, INC., PLAINTIFF v. GREEN STREET BAPTIST CHURCH AND ITS TRUSTEES, DEFENDANT

No. 8726SC1023

(Filed 3 May 1988)

1. **Architects § 3; Contracts § 28— contractor who complies with building specifications—responsibility for defects—instructions**

The trial court was not required to instruct the jury that a contractor who complies with the plans and specifications prepared by the owner or the owner's architect is not liable for the consequences of defects in the plans or specifications, since the jury found that both the roof and the brickwork on defendant's building were defective, but plaintiff failed to show that the specifications were defective or that they proximately caused the defects in the finished work.

2. **Evidence § 48— chloride added to mortar—expert testimony based on testimony of another witness—admissibility**

The trial court did not err in permitting an expert to testify that calcium chloride was deliberately added to the mortar used in the building constructed by plaintiff for defendant where the expert based his testimony on the testimony of another witness who was tendered as an expert in material analysis; this witness was clearly better qualified than the jury to draw appropriate inferences from the facts; and the uncontradicted evidence as to the high level of chlorides in the mortar was a sufficient factual basis from which the experts could infer that the chlorides were deliberately added.

3. **Damages § 17— faulty construction—measure of damages—instructions proper**

Where a construction contract contains a guarantee against faulty materials or workmanship such as appeared in this contract, the measure of damages is controlled by the contract, and the proper measure is the cost of repairs; however, plaintiff could not complain of the trial court's instructions on measure of damages where there was no indication in the record that plaintiff either requested an instruction or objected to the trial court's instructions regarding damages even though the trial judge specifically asked counsel for objections, corrections, or additions to the charge.

APPEAL by plaintiff from *Sitton (Claude S.), Judge.* Judgment entered 3 June 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 March 1988.

Plaintiff, a general contractor, entered into a contract with defendant to construct a church building in High Point, North Carolina. The total contract price for the construction of the building was $3,560,099. The building was completed and occupied by defendant in July 1984. Defendant was not satisfied with various aspects of the construction, however, and withheld the balance due on the contract in the amount of $106,986.56.

Plaintiff filed a complaint on 16 September 1985 seeking to enforce a lien on the church property and to recover the balance due on the contract. Defendant's answer alleged that the work had not been completed and asserted a counterclaim for damages arising out of defects in the construction of the building. The case proceeded to trial, and the jury returned a verdict finding that the roof and the brickwork supplied by plaintiff breached the construction contract and the warranties contained therein. The jury awarded defendant $293,000 in damages for the brickwork, and $50,000 in damages for the roof. The trial court entered judgment cancelling plaintiff's lien and ordering plaintiff to pay defendant damages in the amount of $343,000 plus interest and costs. Plaintiff appeals.

Miller, Johnston, Taylor and Allison, by John B. Taylor and Greg C. Ahlum; and Henderson & Shuford, by William A. Shuford, for plaintiff-appellant.

Haworth, Riggs, Kuhn, Haworth and Miller, by John Haworth and Susan H. Thomas, for defendant-appellee.

PARKER, Judge.

Plaintiff brings forward four assignments of error: that the trial court erred (i) in failing to instruct the jury regarding the owner's implied warranty of plans and specifications; (ii) in admitting a portion of defendant's expert testimony; (iii) in instructing the jury on the method to determine defendant's damages; and (iv) in failing to apply the balance due on the contract to offset the jury's damage award.

[1] In support of its first assignment of error, plaintiff contends that the trial court was required to instruct the jury that a contractor who complies with the plans and specifications prepared by the owner or the owner's architect is not liable for the conse-

quences of defects in the plans or specifications. *See Bd. of Education v. Construction Corp.*, 50 N.C. App. 238, 241, 273 S.E. 2d 504, 506-07, *disc. rev. allowed*, 302 N.C. 396, 279 S.E. 2d 350, *disc. rev. improvidently granted*, 304 N.C. 187, 282 S.E. 2d 778 (1981). The rationale for the rule is that there is an implied warranty by the owner that the plans and specifications are free of defects and that the contractor's compliance with them will ensure a correct result. *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 362-63, 328 S.E. 2d 849, 857, *disc. rev. denied*, 314 N.C. 329, 333 S.E. 2d 485 (1985).

In the present case, the jury found that both the roof and the brickwork on the church building were defective. Each defect must be considered separately to determine whether the implied warranty of plans and specifications could operate to shield plaintiff from liability. In order to establish a breach of the implied warranty, the contractor has the burden to prove (i) that the plans and specifications were complied with, (ii) that the plans and specifications were defective, and (iii) that the defects in the plans and specifications proximately caused the defects in the completed work. *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. at 363, 328 S.E. 2d at 857.

With regard to the brickwork, defendant's evidence showed that the mortar in the brickwork contained unusually high amounts of calcium chloride. Defendant's experts testified that the chlorides in the mortar caused two problems. First, the chloride levels were high enough to corrode the metal ties that anchored the brickwork to an interior wall of concrete blocks. Second, the movement of water through the brickwork brought the chlorides to the surface where they caused discoloration known as efflorescence. The experts also testified that, due to poor workmanship, large amounts of water were able to penetrate the brickwork, which also contributed to the efflorescence.

Plaintiff contends that the presence of chlorides in the mortar could be attributed to defendant's plans and specifications. The specifications called for mortar made up of a prepared mortar mix, sand, and water. Plaintiff argues that, if the chlorides were present in the sand or water, then the specifications were defective. This argument has no merit.

Even if the sand or water were the source of the chlorides, and there is no evidence to show that they were, the presence of the chlorides could not be attributed to the specifications. The specifications did not designate the particular sand and water to be used, nor did they call for calcium chloride in the mortar. Plaintiff did not offer any evidence to show that the specifications were defective or that they proximately caused the defect in the finished work. A trial court cannot instruct the jury on a legal theory that is not supported by the evidence. *Veach v. American Corp.*, 266 N.C. 542, 549-50, 146 S.E. 2d 793, 798-99 (1966). Thus, the trial court did not err in failing to instruct the jury on the implied warranty of plans and specifications with regard to the brickwork.

With regard to the roof, defendant's evidence showed that many of the roofing shingles faded in color. The manufacturer of the shingles, which provided a warranty against non-uniform color fading, attempted to correct the problem by painting or coating the roof, but the result was still not acceptable to defendant. The specifications provided that "color blend shall be uniform over entire roof," and the shingles that were used were approved by defendant's architect.

Plaintiff offered evidence to show that the type of shingle used on the roof, known as a mineral fiber shingle, normally fades in spots. The president of the company that sold the shingles testified that the shingles normally fade in varying degrees over time to achieve a mottled appearance similar to natural slate. Plaintiff contends that the specifications, which called for mineral fiber shingles, are responsible for the unsatisfactory appearance of the roof. Plaintiff argues that the specifications were contradictory and defective because the specified type of shingle could not produce a uniform color blend.

Plaintiff's argument is not supported by the evidence in this case. Both plaintiff's own president and the president of the shingle supplier testified that some fading of the shingles was consistent with the requirement of a "uniform color blend" and that the church roof complied with that requirement before it was painted. This evidence tends to show that the specifications were complied with, but it does not show that the specifications were defective. To the contrary, plaintiff's own evidence tends to show

that the specifications were not contradictory because mineral fiber shingles normally provide a "uniform color blend" as that term is understood in the roofing industry.

The record contains ample evidence to show that the shingles themselves were defective. Plaintiff's contract contained the following guarantee against faulty materials:

> [T]he Contractor shall guarantee his materials and workmanship against defect due to faulty materials or faulty workmanship or negligences for a period of twelve (12) months following final acceptance of the work. . . . The Contractor shall make good such defective materials, equipment, or workmanship within the stipulated guarantee period without cost to the Owner.

The implied warranty of plans and specifications was of no significance where the defect in the completed work was caused by defective materials as opposed to the owner's choice of materials. The assignment of error is overruled.

[2] Plaintiff next assigns error to the trial court's admission of a portion of defendant's expert testimony concerning the chlorides in the mortar. Specifically, plaintiff contends that the trial court erred in permitting the expert to testify that calcium chloride was deliberately added to the mortar. Plaintiff argues that the expert was not qualified to give such an opinion and that the opinion lacked a proper foundation.

The expert in question is Ian Chin, who was tendered by defendant as an expert in the field of structural engineering and architecture. Mr. Chin is employed by a firm that specializes in investigation and repair of distressed buildings, and his firm investigated the brickwork on the church building. Mr. Chin testified that his firm conducted tests which revealed that there were high levels of calcium chloride in the mortar. He further testified that, although small amounts of chlorides may have been present in the sand or water used to make the mortar, the high levels indicated by the tests could only have resulted from a deliberate addition of calcium chloride. This testimony was admitted over plaintiff's objection.

Defendant argues that plaintiff lost the benefit of its objection because nearly identical testimony from another expert, Ber-

nard Erlin, was subsequently admitted without objection. *See, e.g., State v. Wilson*, 313 N.C. 516, 532, 330 S.E. 2d 450, 461 (1985). Rule 46(a)(1) of the N.C. Rules of Civil Procedure provides that "when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning." In order to obtain the benefit of Rule 46(a)(1), however, either the objecting party must precisely define the objectionable line of questioning, or the line of questioning objected to must be apparent to the court and the parties. *Power Co. v. Winebarger*, 300 N.C. 57, 68, 265 S.E. 2d 227, 233-34 (1980).

The transcript in this case shows that the trial court initially sustained plaintiff's objection and conducted a *voir dire*. On *voir dire*, the court inquired into Mr. Chin's qualifications to testify as to the usual levels of calcium chloride in sand and water. The transcript of the *voir dire* shows that Mr. Chin's testimony in this regard was substantially based on information obtained from Mr. Erlin, who is with the same firm. Mr. Erlin was tendered as an expert in material analysis, and he also testified that the levels of calcium chloride in the mortar were too high to be attributed to sand or water and could only be explained by a deliberate addition.

An expert witness may base his opinion upon testimony of another witness given in the same trial. *Board of Education v. Construction Corp.*, 64 N.C. App. 158, 160, 306 S.E. 2d 557, 559 (1983), *disc. rev. denied*, 310 N.C. 152, 311 S.E. 2d 290 (1984). In this case, Mr. Chin's testimony was based on the testimony of Mr. Erlin, who had different qualifications. Thus, the objection to Mr. Chin's testimony on the ground that he was not qualified did not invoke the benefit of Rule 46(a)(1) with regard to Mr. Erlin's testimony. In any event, Mr. Erlin's qualifications were adequate because he was clearly better qualified than the jury to draw appropriate inferences from the facts. *See State v. Young*, 312 N.C. 669, 679, 325 S.E. 2d 181, 187 (1985).

Similarly, we find no merit in plaintiff's contention that the opinion lacked a proper foundation. Plaintiff argues that there was no factual basis to support Mr. Chin's opinion that the chlorides were deliberately added to the mortar. Although there was

no direct evidence of a deliberate act, both Mr. Chin and Mr. Erlin testified that there was no other possible explanation for the amount of chlorides they found in the mortar. Both experts also testified that calcium chloride is sometimes added to mortar to make it harden more rapidly and speed up construction, but that chlorides should never be added when there are metal ties in the masonry. Plaintiff made no objection to Mr. Erlin's testimony, and never specifically challenged the factual basis of Mr. Chin's testimony. Aside from the *voir dire* concerning his qualifications, Mr. Chin's testimony was challenged only by a general objection. A general objection will not enable a party to take advantage of Rule 46(a)(1). *Power Co. v. Winebarger, supra.* Even if plaintiff had made the proper objections, we would not find error in the trial court's admission of the testimony because the high level of chlorides in the mortar is a sufficient factual basis from which the experts could infer that the chlorides were deliberately added.

[3] Plaintiff next contends that the trial court erred in its instructions to the jury concerning the method of measuring damages. The jury was instructed to assess damages based on the cost of repairing or correcting the defects in the roof and brickwork. Plaintiff contends that the jury should have been instructed that, if it found that the defects could not be corrected without undoing a substantial part of the completed work, then damages must be based on the diminution in value caused by the defects. *See Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666-67, 111 S.E. 2d 884, 887 (1960).

There is no indication in the record that plaintiff either requested such an instruction or objected to the trial court's instructions regarding damages even though the trial judge specifically asked counsel for objections, corrections, or additions to the charge. Therefore, plaintiff did not properly preserve this issue for appellate review. Rule 10(b)(2), N.C. Rules App. Proc.; *Hanna v. Brady*, 73 N.C. App. 521, 529-30, 327 S.E. 2d 22, 27, *disc. rev. denied*, 313 N.C. 600, 332 S.E. 2d 179 (1985).

In any case, the trial court correctly instructed the jury as to the measure of damages. Where a construction contract contains a guarantee against faulty materials or workmanship such as appeared in this contract, the measure of damages is controlled by the contract and the proper measure is the cost of repairs. *Leg-*

gette v. Pittman, 268 N.C. 292, 150 S.E. 2d 420 (1966); *Hayworth v. Brooks Lumber Co.*, 65 N.C. App. 555, 558, 309 S.E. 2d 572, 574 (1983).

Plaintiff's final assignment of error is that the trial court failed to offset the balance due on the contract against the jury's damage award. The record shows that the jury was instructed that defendant could recover only those damages that exceeded the retained amount of the contract price. Defendant presented evidence of damages well in excess of those awarded by the jury. Thus, there is no reason to believe that the jury did not follow the trial court's instruction, and the assignment of error is overruled.

No error.

Judges WELLS and ORR concur.

ROBERT K. MISHLER v. DOROTHY H. MISHLER

No. 8726DC1045

(Filed 3 May 1988)

1. **Divorce and Alimony § 30— *equitable distribution*—parties' *intent* to keep finances separate—insufficient evidence**

The trial court in an equitable distribution proceeding did not err in failing to find that the parties intended to keep their finances separate during the course of their marriage where the parties had their own individual checking accounts, but defendant used her savings to make mortgage payments on real property which plaintiff had purchased prior to the marriage, and defendant herself contended that no such financial arrangement existed.

2. **Divorce and Alimony § 30— equitable distribution—debts not properly considered**

In a proceeding for equitable distribution, it was questionable whether the trial court gave proper consideration to the issue of debts where the court on direct examination refused to allow plaintiff to list his debts, and the court improperly set an arbitrary limit on the time allowed for cross-examination of plaintiff and told defendant that any time taken in cross-examination would be deducted from the time allotted for legal argument.

3. **Divorce and Alimony § 30— equitable distribution—formula to determine separate and marital interests proper**

The trial court's formula for determining the amount of marital interest and separate interest in certain properties was appropriate.

4. **Divorce and Alimony § 30— equitable distribution—post-separation appreciation of marital property—failure to consider**

The trial court erred in failing to consider evidence of post-separation appreciation of marital property in determining the equitable shares of distribution under N.C.G.S. § 50-20(c).

5. **Divorce and Alimony § 30— equitable distribution—lump sum pension payment—marital property**

In an equitable distribution proceeding, the trial court properly classified defendant's lump sum pension payment as marital property and properly valued the pension at the net lump sum value, that is, at the amount of the lump sum after payment of taxes by defendant.

APPEAL by plaintiff from *Brown (L. Stanley), Judge.* Judgment entered 27 May 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 12 April 1988.

Plaintiff and defendant were married on 9 March 1979. After five years of marriage, the parties separated on 7 November 1984 and were divorced on 12 May 1986. Each party submitted an equitable distribution affidavit to the court, and on 27 May 1987 a judgment for equitable distribution was entered where it was determined that the parties would receive equal shares of the marital property. From this judgment plaintiff appeals and defendant sets out cross-assignments of error.

Casstevens, Hanner, Gunter & Gordon, by Robert P. Hanner II, for plaintiff appellant.

DeLaney and Sellers, by Timothy G. Sellers, for defendant appellee.

ARNOLD, Judge.

[1] Plaintiff first contends that the trial court erred in not allowing additional evidence and in failing to make findings of fact concerning the parties' intent to keep their finances separate during the course of their marriage. We disagree.

Despite the fact that the parties had their own individual checking accounts, the record is replete with evidence that no

such informal agreement by the parties ever existed. Defendant used her savings to make mortgage payments on real property that plaintiff had purchased prior to the marriage. Defendant, herself, contends that no such financial arrangement existed. What is obvious from the record is that the trial court simply did not believe plaintiff's argument. Plaintiff's contention is totally without merit.

Plaintiff next contends that the trial court erred in classifying certain property as marital and in its valuation of that property. We disagree.

For the most part, plaintiff's contentions concerning certain small items of personal property are frivolous and we decline to discuss each one separately. The fact that these items were acquired during the marriage and the fact that defendant listed them as marital in her equitable distribution affidavit is sufficient evidence that these items were marital.

Concerning the value of these items, plaintiff's basic argument is that the trial court did not accept his estimated value but valued most of the assets at or near defendant's estimated value. This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures. Counsel is cautioned that such arguments are a waste of this Court's time.

There is one item in plaintiff's list which seems to have been incorrectly classified as wholly marital in nature while there is only evidence to support a finding that it is part separate and part marital at best. This error, however, in view of the total value of the marital property, is of such limited significance as not to require a recomputation of the respective awards to the parties. *See Harris v. Harris*, 84 N.C. App. 353, 352 S.E. 2d 869 (1987); *see also Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E. 2d 519 (1987). We reemphasize that in the complex litigation of equitable distribution, this Court will not remand a judgment for obviously insignificant errors.

Plaintiff next contends that the court erred in classifying a $20,000 loan and a $3,000 loan as marital. We disagree. The loans were made during the marriage and the trial court simply did not believe plaintiff's testimony that the loans were made only to him.

[2] Plaintiff also contends that the trial court erred "by failing to consider the debts of the parties when determining what constitutes an equitable distribution of the marital property, by failing to make necessary findings of fact regarding the identification of those debts which comprised marital debts, and by failing to make proper conclusions of law to support its order."

In a case involving equitable distribution, a trial court is required to consider the liabilities of each party whether the debts are joint or individual. *Geer v. Geer*, 84 N.C. App. 471, 353 S.E. 2d 427 (1987); G.S. 50-20(c)(1). In the present case, during plaintiff's testimony concerning these matters, the following transpired on direct examination:

Q. What is your present debt situation, Mr. Mishler?

A. Oh, about $50,000.00.

Q. Can you list that for us right quick?

THE COURT: SUSTAINED. The Affidavit includes that, and if it doesn't, so be it.

In addition, the court improperly restricted defendant's cross-examination of plaintiff by setting an arbitrary limit on the time that the court would allow for cross-examination. The court told defendant that any time taken in cross-examination would be deducted from the time allotted for legal argument. The trial court was incorrect in taking such action. Defendant argues in a cross-assignment of error that this prevented her from, among other things, inquiring about plaintiff's expenses.

The two incidences above make it questionable whether the trial court gave proper consideration to the issue of debts and this case must be remanded to allow the parties sufficient opportunity to present and refute evidence on this matter.

Both plaintiff and defendant contend that the trial court erred in its classification, valuation and distribution of certain real property. Before dealing with these contentions, an explanation of the facts involving this property is needed.

On 6 July 1977, prior to the parties' marriage, plaintiff purchased two lots in Sunset Beach for a price of $10,700. His down payment and his contribution towards the principal before mar-

riage amounted to $4,880. The balance of the principal, $5,820, was paid during the marriage. The combined fair market value of the two lots at the date of marriage was $14,000. The fair market value at the date the parties separated was $40,000. The trial court determined that the lots were part separate and part marital in nature. In determining the separate and the marital interest in the property, the trial court used the following formulas:

$$\$40{,}000 \times \frac{\$\ 5{,}820}{\$14{,}000} = \$16{,}629 \text{ of marital interest}$$

$$\$40{,}000 \times \frac{\$\ 8{,}180}{\$14{,}000} = \$23{,}371 \text{ of separate interest}$$

The $14,000 figure, which represents the total contribution to the acquisition of the property, consisted of the actual payments both separate and marital, and the $3,330 increase in the fair market value from the date of purchase to the date of marriage.

Twelve mobile home lots in Holden Beach, North Carolina were also purchased by plaintiff before the marriage. As with the two lots above, marital funds were used to pay off the remainder of the principal after marriage. The same formula was used to determine the separate and marital interest in the Holden Beach property, with the court adding to plaintiff's separate contribution the appreciation of the property between the date of purchase and the date of marriage. Other real property, including the marital residence in Huntersville, North Carolina, was also classified, valued and distributed. In its division of marital property, the trial court distributed the Holden Beach lots, the Sunset Beach lots and the Huntersville property to plaintiff. Between the time of the parties' separation and the date of the equitable distribution hearing, the value of these properties had increased substantially.

Plaintiff's first contention concerning these properties is that the court erred in classifying them as part separate and part marital because of the parties' informal marital agreement to keep their finances separate. Having already determined that there was ample evidence to refute plaintiff's claim, and that the trial court did not err in finding against plaintiff on the issue of this informal agreement, we turn to plaintiff's next contention.

[3] Plaintiff argues that the trial court erred in determining the separate and marital interest in the Sunset Beach and Holden

Beach properties by adding to the separate contribution figure the appreciation of the properties between the date of purchase and the date of marriage. Plaintiff specifically contends that he simply should have been credited with the passive appreciation that accrued to those properties prior to the parties' marriage.

Concerning the trial court's formula, defendant cross-assigns as error the fact that the trial court included the appreciation in the formula. She contends that plaintiff's separate interest should be comprised only of his actual payments.

We first emphasize that equitable distribution cases regularly involve unique circumstances. "Spouses do not conduct their economic lives to fit distributional theories." Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. Rev. 195, 218 (1987). Inequitable results could be produced by rigid reliance on any one formula. *Id.* at 219. Such rigid reliance would be inconsistent with the partnership ideal and the general equitable goals of our equitable distribution statute. *Id.* After careful review, we have determined that in this particular case, the trial court did not err by using the formula in question.

[4] Concerning the Sunset Beach, Holden Beach and Huntersville properties, defendant cross-assigns as error the fact that when the marital property was distributed, these properties were awarded to plaintiff without considering any adjustment based on the fact that these properties had increased substantially in value between the date of separation (valuation date) and the date of distribution. We agree.

Marital property is to be valued as of the date of the parties' separation. G.S. 50-21(b). This valuation date is used to determine the equitable distributive share of each party. However, where there is evidence of active or passive appreciation of the marital assets after that date, the court must consider such appreciation as a factor under G.S. 50-20(c)(11a) or (12), respectively. *Truesdale v. Truesdale*, No. 8712DC249, slip op. at 8 (N.C. App. 5 April 1988). There are no findings indicating that the court considered the evidence of post-separation appreciation in determining the equitable shares of distribution under G.S. 50-20(c). Accordingly, the court on remand must consider whether subsequent post-separation appreciation of the parties' marital property requires a

new equitable distribution and, if needed, the award of adjustive credits to effect new distribution shares.

[5] Both parties also contend that the trial court erred in its handling of defendant's pension plan. The following facts are necessary by way of explanation.

While the parties were married, defendant was employed by Home Health Care of Mecklenburg County. As part of her employment, defendant participated in a contribution pension plan which was to vest in 1990. Home Health Care dissolved its business in 1983 and in December of 1984, a plan was adopted, terminating the pension plan effective as of 24 June 1984. This amendment was authorized by the Pension Benefit Guarantee Corporation in January of 1985. In February of that year, defendant received a lump sum in the amount of $17,053.18 of which $16,203.18 was left after taxes.

At the hearing for equitable distribution, the trial court classified this pension as marital property and divided it equally between the parties. The trial court valued the pension at $16,203.18, the net lump sum value.

G.S. 50-20(b)(1) states that "(m)arital property includes all vested pension, retirement, and other deferred compensation rights. . . ." The vested accrued benefit is calculated as of the date of separation. G.S. 50-20(b)(3)(d).

At the date of distribution the trial court was dealing with an amended pension plan which listed the vesting date prior to the date of separation. The trial court was correct to classify the benefits as marital property. The trial court was also correct to value the pension by subtracting from the lump sum award, the taxes which defendant paid upon receiving the benefits before the hearing was held. It would not have been equitable for defendant to have paid all of the taxes on the benefits while plaintiff received half of the proceeds. G.S. 50-20(c) states "(t)here shall be an equal division by using net value of marital property. . . ." The trial court did not err in classifying the pension benefit as marital. The court was also correct in valuing the pension at its net value.

We have examined plaintiff's remaining contentions and the remainder of defendant's cross-assignments of error and have

determined them to have been answered in this opinion or to be without merit. This case is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges ORR and GREENE concur.

GERALD P. BIGLEY AND BARBARA M. BIGLEY v. JAMES LOMBARDO

No. 875SC1029

(Filed 3 May 1988)

Mortgages and Deeds of Trust § 32.1— loan to buy out business partners—security agreement not purchase money deed of trust—anti-deficiency statute inapplicable

The trial court properly determined that the anti-deficiency statute, N.C.G.S. § 45-21.38, did not apply where defendant executed two separate and distinct notes; plaintiffs cancelled the first note and asserted their rights under the second; the conveyed property secured the first note; a security agreement granting a security interest in an automobile secured the second note; defendant did not execute the second note at the same time he and his partners bought the property, but only when he wanted to buy out his partners a year later; the security agreement secured a loan of money from plaintiffs to defendant made so defendant could buy out his business partners; and the second note was therefore not a purchase money deed of trust.

APPEAL by defendant from *Griffin (William C.), Judge.* Judgment entered *nunc pro tunc* 2 June 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 March 1988.

Plaintiffs sued defendant for a deficiency judgment of $18,842.88 for his failure to pay a promissory note when due. Defendant interposed the anti-deficiency statute, G.S. 45-21.38, as a defense. The trial court ruled that the statute did not apply under the facts of this case. Defendant appeals.

Larrick and Mason, by Billy H. Mason, for plaintiff-appellees.

Yow, Yow, Culbreth & Fox, by Ralph S. Pennington, for defendant-appellant.

EAGLES, Judge.

The sole issue here is whether the trial court erred in holding that the anti-deficiency statute does not apply to this case. Defendant argues that the trial court's ruling implicitly allows a buyer of real property to waive the broad protections afforded him under G.S. 45-21.38. We disagree and affirm the trial court's judgment.

At the outset we note that defendant has expressly abandoned his exceptions to the trial court's findings of fact. There is competent evidence to support the court's findings and, therefore, those findings are binding in our review of the case. *Worthington v. Worthington*, 27 N.C. App. 340, 219 S.E. 2d 260 (1975), *disc. rev. denied*, 289 N.C. 142, 220 S.E. 2d 801 (1976). The facts show the following.

On 24 March 1983 plaintiffs sold their business, known as Snoopy's Pizza Parlor, to defendant and wife, Nancy Jane Lombardo, and William Keith Bell and wife, Marilyn Amey Bell. Plaintiffs conveyed the real property upon which the business is located by general warranty deed to defendant and wife, Nancy Jane Lombardo, and William Keith Bell and wife, Marilyn Amey Bell. As part of the purchase price all four buyers executed a purchase money promissory note in favor of plaintiffs for $80,000. A deed of trust from the four buyers to David E. Huffine, trustee for plaintiffs, secured the note.

Sometime in December 1984, upon defendant's request, plaintiffs agreed to cancel the purchase money promissory note and deed of trust. The trial court specifically found that this was done so that defendant could borrow money on the business and real property and "buy out" the interests of his wife and the Bells. In return defendant agreed to pay plaintiffs a sum certain and execute another promissory note in plaintiffs' favor. On 12 December 1984 defendant alone executed a new promissory note to plaintiffs for $20,000 with interest at twelve percent per year. The note was payable one year from execution and was secured by a security agreement which granted plaintiffs a security interest in a 1983 Mazda automobile. As agreed, plaintiffs marked the first note and deed of trust "paid in full and satisfied." The deed of trust was canceled of record on 6 March 1985.

On 12 December 1985 defendant did not make the payment required by the second note. Plaintiffs declared defendant to be in default and demanded payment but defendant refused to pay. In accordance with the security agreement securing the second note, plaintiffs recovered the 1983 Mazda through claim and delivery and sold the car at public auction. After the sale of the Mazda and application of the proceeds, the balance remaining on the note was $18,842.88.

Generally, upon default a secured creditor has two remedies against the debtor: *in personam* for the debt and *in rem* to subject the property to the debt. *Underwood v. Otwell*, 269 N.C. 571, 153 S.E. 2d 40 (1967). G.S. 45-21.38 restricts this right and provides in pertinent part the following:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, *to secure to the seller the payment of the balance of the purchase price of real property*, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate. [Emphasis added.]

Our courts will not apply this statute unless the deed of trust, on its face, indicates that the deed of trust is for purchase money for the sale of real property. *Real Estate Trust v. Debnam*, 299 N.C. 510, 263 S.E. 2d 595 (1980); *Gambill v. Bare*, 32 N.C. App. 597, 232 S.E. 2d 870, *disc. rev. denied*, 292 N.C. 640, 235 S.E. 2d 61 (1977).

Plaintiffs first argue that the anti-deficiency statute does not apply in this case. Alternatively, plaintiffs contend that if G.S. 45-21.38 applies, a novation has occurred which changes the rights and duties of the parties. Defendant contends that the second note and security agreement were substituted for the original promissory note and deed of trust to which G.S. 45-21.38 does apply and, therefore, the anti-deficiency statute applies to the second note and deed of trust as well.

In addressing whether or not G.S. 45-21.38 applies to this case, we first review the development of the case law. In *Ross Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), the Supreme Court first stated that G.S. 45-21.38 was to be read broadly in order to give effect to its legislative intent and to prevent evasions of the statute. In *Ross Realty* the vendee had first attempted to sue on the note rather than accept the deed tendered by defendant or foreclose on the real property. The Court of Appeals' opinion had allowed the vendee this election of remedies. The Supreme Court reversed stating that allowing an election of remedies "would circumvent the spirit and purpose of the statute." *Id.* at 372-373, 250 S.E. 2d at 275. The court ruled that the only remedy available to the creditor was to foreclose the conveyed property or accept a tendered deed to the subject property. *Id.*

Next, this Court in *Chemical Bank v. Belk*, 41 N.C. App. 356, 255 S.E. 2d 421, *disc. rev. denied*, 298 N.C. 293, 259 S.E. 2d 911 (1979), ruled that, if applicable, the anti-deficiency statute could not be waived nor its protection precluded by the doctrine of estoppel. Noting that broad construction of the statute was dictated by *Ross Realty*, the court reasoned that it could not "allow by indirection that which was directly forbidden." *Id.* at 367, 255 S.E. 2d at 428. The only remedy available to the creditor was to foreclose the property. *Id.* at 363, 255 S.E. 2d at 426.

The *Ross Realty* and *Chemical Bank* analysis, however, conflicted with the rationale of an earlier Supreme Court decision, *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940). In *Brown* the Supreme Court had applied a narrower and more literal construction of the statute. The Supreme Court allowed plaintiff, a second mortgagee, to recover a deficiency judgment when foreclosure proceeds were sufficient to satisfy only the first deed of trust. The court held that

> this statute does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien. The statute applies only to the holders of notes "secured by such deed of trust," that is the deed of trust under which the security was foreclosed and the land sold. It refers to the

> "obligation secured by the same." The holder of the note secured by the first deed of trust upon foreclosure, presumably, will receive satisfaction of his note from the sale, or he can protect himself by purchase of the land. But the holder of the note secured by the second deed of trust, who receives nothing, or an insufficient amount, from the sale, finds himself without security. In this situation the Court will not extend by judicial interpretation the provisions of the statute, and deny him the right to judgment for a valid debt.

Id. at 487-488, 8 S.E. 2d at 602.

In *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E. 2d 600 (1985), the Supreme Court resolved this inconsistency in favor of a broad construction of the statute. There the Supreme Court reversed the Court of Appeals' ruling and held that G.S. 45-21.38 was applicable. The mortgagee had released the conveyed property from the deed of trust in accordance with an agreement reached with the mortgagor. Upon default the mortgagor sued to restrain the mortgagee from foreclosing on the property. The mortgagee, citing *Brown*, counterclaimed for a deficiency judgment. The Supreme Court expressly rejected the *Brown* rationale. Holding that the Court of Appeals' approach was "too mechanically literal and restrictive" the Supreme Court reaffirmed the broad construction principles laid out in *Ross Realty. Id.* at 568, 330 S.E. 2d at 602. The court stated that "[t]he teaching of [*Ross Realty*] is that our anti-deficiency statute 'bars any suit *on the note* whether before or after foreclosure.' " [Citation omitted.] [Emphasis added.] *Id.* at 571, 330 S.E. 2d at 603. The court *"expressly reject[ed] the reasoning of Brown"*; however, it noted that the result in *Brown* might be correct since the deed of trust "was not a 'purchase-money deed of trust under G.S. 45-21.38.' *Childers v. Parker's, Inc.*, 274 N.C. 256, 261, 162 S.E. 2d 481, 484 (1968)." *Barnaby*, 313 N.C. at 570 n. 2, 330 S.E. 2d at 603 n. 2.

The *Childers* court had defined a purchase money deed of trust as a deed of trust which "is made as a part of the same transaction in which the debtor purchases the land, embraces the land so purchased, and secures all or part of its purchase price." [Citation omitted.] *Childers*, 274 N.C. at 261, 162 S.E. 2d at 484.

This Court in *Burnette Industries, Inc. v. Danbar of Winston-Salem, Inc.*, 80 N.C. App. 318, 341 S.E. 2d 754, *disc. rev. denied,*

317 N.C. 701, 347 S.E. 2d 37 (1986), however, declined to follow the *Childers* analysis. The issue in *Burnette Industries* was whether G.S. 45-21.38 prohibited the seller of real property from collecting interest on a purchase money note after default and subsequent reconveyance of the property as payment of the principal owed. The *Burnette Industries* court, citing *Barnaby* and *Ross Realty*, construed G.S. 45-21.38 to conclude that the interest owed was "part of the debt secured by the purchase money deed of trust" and, therefore, judgment for a deficiency of interest was precluded by the statute. *Id.* at 320, 341 S.E. 2d at 755. In answer to a request for an admission, the buyer admitted that the deed of trust was for purchase money; accordingly, G.S. 45-21.38 applied. The court then noted that "so long as the debt of the purchaser of property is *secured by a deed of trust on the property or part of it* given by the purchaser to secure payment of the purchase price the deed of trust is a purchase money deed of trust." [Emphasis added.] *Id.* at 321, 341 S.E. 2d at 756.

Here defendant executed two separate and distinct notes. Plaintiffs canceled the first note and assert their rights under the second. The conveyed property secured the first note. A security agreement granting a security interest in a 1983 Mazda automobile secured the second note, not "a deed of trust on the property or part of it." Defendant did not execute the second note at the same time he and his partners bought the property, but only when he wanted to buy out his partners a year later. The security agreement did not secure any portion of the original purchase of real property; it secured a loan of money from plaintiffs to defendant made so that defendant could "buy out" his business partners. Plaintiffs canceled the purchase money deed of trust. Though we agree that G.S. 45-21.38 is to be liberally construed, we conclude that the second note on which plaintiffs bring this suit is not a purchase money deed of trust. Accordingly, the protection afforded under G.S. 45-21.38 is not available here.

Affirmed.

Judges COZORT and SMITH concur.

FIRST UNION NATIONAL BANK v. DONALD ROLFE AND JOSEPHINE ROLFE

No. 8730SC797

(Filed 3 May 1988)

1. **Judgments § 48— personal property exemptions—defendant not resident of North Carolina—time for making determination**

In an action to execute a judgment where plaintiff sought to determine whether defendant was a resident entitled to any personal property exemptions, the trial court did not err in determining defendant's residency as of the time of a 1987 hearing rather than upon the evidence at a 1985 hearing on plaintiff's original motion to determine residency, since neither Art. X, § 1 of the N.C. Constitution nor N.C.G.S. § 1C-1601(a) confers any property exemptions on past residents of this state.

2. **Judgments § 48— personal property exemption—defendant not resident of North Carolina—sufficiency of findings**

Though defendant stated that she "hoped" to return to North Carolina as soon as her sister's estate in Ireland was settled, the trial court nevertheless did not err in concluding that defendant was no longer a resident of this state given the undisputed evidence that defendant had moved to Ireland, her place of citizenship, at least one year previously, had no dwelling place in this state, and offered no definite plan to return.

APPEAL by defendant Josephine Rolfe from *Ferrell (Forrest A.), Judge.* Order entered 8 April 1987 in Superior Court, MACON County. Heard in the Court of Appeals 7 January 1988.

Jones, Key, Melvin & Patton, P.A., by Joseph D. Johnson and Chester Marvin Jones, for plaintiff-appellee.

Western North Carolina Legal Services, Inc., by Lawrence Nestler, for defendant-appellant.

GREENE, Judge.

This appeal arises from plaintiff's second attempt to execute a judgment against defendant Josephine Rolfe (hereinafter, "defendant"). In an earlier appeal arising from plaintiff's first attempt at execution, this court held plaintiff had failed to give defendant proper notice of its motion to determine whether defendant was a resident entitled to any personal property exemptions under Article X, Section 1 of our constitution or under N.C.G.S. Sec. 1C-1601(a) (1987). *Compare* N.C. Const. art. X, sec. 1

(exemptions apply to "personal property of any resident of this state") *with* Sec. 1C-1601(a) (each "resident of this State" entitled to exemptions). As plaintiff failed to notify defendant it was challenging her residency, we vacated the order determining she was not a resident entitled to such exemptions. *First Union Nat'l Bank v. Rolfe*, 83 N.C. App. 625, 351 S.E. 2d 117 (1986).

On remand, plaintiff again moved to determine defendant's residence for exemption purposes. Defendant stipulated she was properly notified of this second motion. At the 1987 hearing on plaintiff's second motion, the trial court again concluded defendant was not a resident of North Carolina. This conclusion was based in part upon findings summarized as follows:

1. Plaintiff mailed a copy of its motion and notice of motion by first class mail to Josephine Rolfe to her address at 14 Tower Court, Sandy Mount, St. Johns Road, Dublin 4, Ireland and at an address at 44 West Main Street, Franklin, North Carolina; the latter mailing was returned to plaintiff's attorney with the notation, "Moved to Ireland, certified mail not forwardable overseas";

2. The Sheriff of Macon County, North Carolina attempted to personally serve defendant at 44 West Main Street, Franklin, North Carolina but could not locate her within Macon County, North Carolina and indicated that he had received information she had moved to Ireland;

3. Although defendant was not present at the hearing, her attorney stipulated she had been adequately served with notice of plaintiff's motion and notice of motion filed on 30 January 1987;

4. Defendant advised an assistant district attorney during the Fall of 1984 that she was moving from North Carolina to Ireland as a result of her recent divorce and also as a result of an illness or death in her family; she further advised the assistant district attorney that she would testify at a rape trial in which she was the alleged victim only if the State paid for her transportation to and from Ireland. Defendant did not testify in those criminal proceedings at the time of their disposition in early 1985;

5. Plaintiff's agent went to 44 Main Street, Franklin, North Carolina on 7 April 1987 but could not locate defendant at that address;

6. The address in Franklin, North Carolina is the address of a tourist home or boarding house which defendant no longer occupied;

7. Defendant moved from her residence in Franklin, North Carolina prior to April 1986 and presented no evidence she had returned to North Carolina since that time nor any evidence she had any other domicile or place of residence anywhere but Ireland since that date.

Based upon these findings, the court concluded defendant was not a resident of North Carolina as of 30 January 1987 and had not been a resident at any time since April 1986. The trial court accordingly ordered that execution issue against defendant's property within the state without the protection of any exemptions. Defendant appeals.

Defendant raises two issues: I) whether the trial court properly determined defendant's resident status as of the 1987 hearing rather than as of November 1985 when plaintiff first challenged defendant's residency; and II) whether the trial court properly concluded under these facts that defendant was not a resident of this state entitled to any personal property exemptions under Article X, Section 1 of our constitution or under N.C.G.S. Sec. 1C-1601(a) (1987).

I

[1] Defendant first contends her residency should have been determined as of the November 1985 hearing on the original motion to determine her residency. We note the trial court also concluded at that hearing that defendant was not a resident of this state. Irrespective of defendant's assertion that insufficient evidence supported the court's conclusion she was not a resident in 1985, neither Article X, Section 1 nor Section 1C-1601(a) confers any property exemptions on *past* residents of this state. Indeed, the constitutional and statutory provisions both contemplate the possibility that changes in the debtor's residency or other changing circumstances may warrant subsequent modification of the

debtor's right to constitutional or statutory exemptions. *Compare Wierse v. Thomas*, 145 N.C. 261, 268, 59 S.E. 58, 60 (1907) (where evidence in record that debtor left state after creditor's suit commenced, Court stated subsequent non-residency, if proved on remand, would preclude constitutional exemptions) *with* Sec. 1C-1603(g) (upon motion by debtor or any interested person, debtor's exemptions may be modified based on changed circumstances); *cf.* Sec. 1C-1602 (debtor must elect either constitutional or statutory exemptions; statutory procedure governs election of either). Thus, irrespective of her resident status in 1985, the trial court here correctly determined defendant's residency based upon the evidence at the 1987 hearing.

II

[2] The trial court's findings of fact are conclusive on appeal if there is evidence to support them even though there may be evidence to the contrary. N.C.G.S. Sec. 1A-1, Rule 52(a)(1) (1983); *see Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975). Our review of the record and transcript reveals ample evidence supported the court's findings noted earlier. The only evidence supporting defendant's contention of residency was her statement that she "hoped" to return to this state as soon as her sister's estate was settled. This general declaration does not itself defeat the trial court's findings in light of the other facts of this case. *See Carden v. Carden*, 107 N.C. 214, 216-17, 12 S.E. 197, 198 (1890) (non-residency means actual cessation of dwelling in state without definite time of return "although a general intention to return may exist"); *Lee v. Moseley*, 101 N.C. 311, 316, 7 S.E. 874, 876 (1888) (legal effect of changing residence not defeated by general declaration of contrary intent); *In re Dinglehoef*, 109 F. 866, 868 (1901) (declared intention to return insufficient to show residency where defendant had merely stayed at boarding house).

In *Jones v. Alsbrook*, 115 N.C. 46, 52, 20 S.E. 170, 171 (1894), the court stated:

> It will not be necessary to trouble ourselves with the distinction, sometimes very plain and at others most shadowy, if, indeed, there be any, between residence and domicile. It is well understood that a domicile is in its strict legal sense one's true, fixed and permanent home, to which, whenever he is absent, he has the intention of returning. . . . [a]nd

> the word 'residence,' while often a word of not so restricted a meaning, in some instances in no respect differs from domicile. There may be an actual and a constructive residence. . . . [T]he word 'resident,' as employed in Art. X, sec. 2, of the Constitution, is restricted to the former class, and simply means one who has his permanent home in this State.

(Citations omitted.)

Especially given the undisputed evidence that defendant had moved to Ireland (her place of citizenship) at least one year previously, had no dwelling in this state, and offered no definite plan to return, we conclude the trial court's findings properly warranted its conclusion that defendant was no longer a resident of this state. *See S. D. Scott & Co. v. Jones*, 230 N.C. 74, 79-80, 52 S.E. 2d 219, 222 (1949) (presumption of continuing residence rebutted where defendant did not personally appear at hearing, could not be found in county, and evidence that defendant had "removed" to Virginia); *Carden*, 107 N.C. at 216, 12 S.E. at 98 (declaration of general intent to return insufficient); *Munds v. Cassidey*, 98 N.C. 558, 565-66, 4 S.E. 355, 356 (1887) (residence for exemption purposes must be actual, not constructive); W. Aycock, *Homestead Exemptions in North Carolina*, 29 N.C. L. Rev. 145, 146-47 (1951) (noting residence for constitutional exemptions terminates upon "removal" from state).

We accordingly affirm the trial court's 1987 order determining defendant was not a resident of this state entitled to any property exemptions and hold that plaintiff may proceed with execution as otherwise permitted by law.

Affirmed.

Judges ARNOLD and PARKER concur.

EDITH C. GOINS, WIDOW OF GURNEY L. GOINS, DECEASED, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LUMBERMEN'S MUTUAL CASUALTY COMPANY, CARRIER, DEFENDANTS

No. 8710IC1100

(Filed 3 May 1988)

Judgments § 36; Master and Servant § 93— workers' compensation—lifetime benefits awarded to husband—wife not collaterally estopped from pursuing death benefits claim

In an action for death benefits pursuant to N.C.G.S. § 97-38, plaintiff wife was not collaterally estopped to prove that her husband was totally disabled at the time of his death by a finding in an award of lifetime benefits to her husband for temporary total disability that the husband had reached the end of the healing period before his death, although plaintiff continued to pursue the husband's claim for lifetime benefits after his death and withdrew an appeal from that claim, since plaintiff was not a party to or in privity with a party to the earlier action and did not present evidence or control the litigation in the earlier action.

APPEAL by plaintiff from Opinion and Award of the Industrial Commission entered 20 May 1987. Heard in the Court of Appeals 12 April 1988.

Plaintiff's late husband, Gurney L. Goins, was posthumously awarded compensation for temporary total disability from 9 September 1978 to 13 February 1979 and for permanent loss of important internal organs, the lungs. After Mr. Goins' death, the Industrial Commission denied plaintiff's claim for death benefits under G.S. 97-38. Plaintiff appeals.

Turner, Enochs, Sparrow, Boone & Falk, P.A., by Peter F. Chastain and Laurie S. Truesdell, for plaintiff-appellant.

Smith Helms Mulliss & Moore, by J. Donald Cowan, Jr., and Caroline H. Wyatt, for defendants-appellees.

SMITH, Judge.

For approximately thirty years, Mr. Goins was employed by defendant Cone Mills Corporation at its White Oak plant in Greensboro in various capacities in the weave room. On 18 March 1980, Mr. Goins filed a claim seeking compensation for disability resulting from an occupational disease caused by exposure to cotton dust. A hearing was held on 12 March 1981. Before the opin-

ion was entered, Mr. Goins died on 12 December 1981. Plaintiff informed the Deputy Commissioner that she would continue to pursue Mr. Goins' claim and also filed a claim for death benefits under G.S. 97-38. At the Deputy Commissioner's request, the parties agreed to allow the Commissioner to decide only the claim for lifetime benefits. The request was granted with the understanding, evidenced by a letter from plaintiff's counsel to Commissioner Roney and a statement to that effect in Commissioner Roney's opinion, that the death benefits claim would not be prejudiced by his determination of Mr. Goins' lifetime benefits claim. On 13 December 1982, Deputy Commissioner Roney filed an Opinion and Award finding Mr. Goins reached the end of the healing period on 13 February 1979. Mr. Goins' personal representative was awarded a lump sum payment of $3,451.76 for temporary total disability from 9 September 1978 to 13 February 1979, $11,000.00 compensation for permanent loss of important internal organs (the lungs), medical expenses and counsel fees. Plaintiff gave notice of appeal to the Full Commission but later withdrew the appeal.

On 7 February 1985, Deputy Commissioner Bryant entered an award granting plaintiff compensation pursuant to G.S. 97-38 from 14 February 1979 until her death or remarriage as well as attorney's fees and Mr. Goins' medical and burial expenses. Defendants appealed to the Full Commission.

On 20 May 1987, the Full Commission entered an Opinion and Award denying plaintiff's claim for death benefits under G.S. 97-38. The Commission concluded it was bound by Commissioner Roney's finding that Mr. Goins was temporarily totally disabled and determined that plaintiff was estopped to prove that Mr. Goins was permanently totally disabled.

Plaintiff sought compensation under G.S. 97-38 for death proximately resulting from an occupational disease. A dependent may recover under the statute as it was written at the time of Mr. Goins' death "[i]f death results proximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident, or while total disability still continues and within two years of the final determination of total disability, whichever is later." G.S. 97-38. An "accident" in an occupational disease case occurs on the date the disability occurs. *Booker v. Medical Center*, 297 N.C. 458, 256 S.E.

2d 189 (1979). We note that the statute has been amended for death claims arising on or after 5 August 1987, to change the time limits and to provide recovery for death proximately resulting from accident or occupational disease. 1987 N.C. Sess. Laws, c. 729, s. 9. G.S. 97-38 (Supp. 1987). Plaintiff may recover under the statute existing at Mr. Goins' death if she can prove that she was Mr. Goins' dependent, that his death proximately resulted from the accident (the disability from occupational disease), and that his death occurred within the time limits set forth.

The Commission concluded plaintiff was not entitled to compensation under G.S. 97-38. The Commission determined that "plaintiff was . . . barred and collaterally estopped from relitigating those issues which had previously been litigated and decided by . . . [C]ommissioner Roney, whose Opinion and Award, unappealed from, [was] final, conclusive, and binding." Accordingly, the Commission found that although Mr. Goins was totally disabled from chronic obstructive pulmonary disease when he quit work on 8 September 1978, he reached the end of the healing period for treatment of the disease on 13 February 1979. Thus, Mr. Goins' death was not within the time limits set by former G.S. 97-38. His death occurred over three years after the disability arose, and although he died within six years of the onset of the disability, he was not totally disabled at his death. Therefore, the Commission concluded that plaintiff was not entitled to compensation under the statute.

Plaintiff contends the Commission was not bound by Commissioner Roney's determination of temporary total disability ending on 13 February 1979 and assigns error to this conclusion and to the Commission's failure to find Mr. Goins was totally disabled at the time of his death. We hold the Industrial Commission erred in concluding plaintiff was collaterally estopped by Commissioner Roney's determination in his Opinion on the lifetime benefits claim. Accordingly, we reverse and remand the case for a determination of whether plaintiff is entitled to benefits under G.S. 97-38.

Under the principle of collateral estoppel, "parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior deter-

mination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973). A companion doctrine to *res judicata*, which bars every ground of recovery or defense which was actually presented or which could have been presented in the previous action, collateral estoppel bars only those issues actually decided which were necessary to the prior finding or verdict. *Id.* Like *res judicata*, collateral estoppel only applies if the prior action involved the same parties or those in privity with the parties and the same issues. *Id.* In the context of collateral estoppel and *res judicata*, the term privity indicates a mutual or successive relationship to the same property rights. *Moore v. Young*, 260 N.C. 654, 133 S.E. 2d 510 (1963). An exception to the general requirement of privity exists where one not actually a party to the previous action controlled the prior litigation and had a proprietary interest in the judgment or in the determination of a question of law or facts on the same subject matter. In such a case, the one who was not a party to the prior action is bound by the previously litigated matters as if he had been a party to that action. *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E. 2d 492 (1957).

In *Thompson*, the plaintiff was his son's guardian *ad litem* in a previous case against the son and the present defendant. In the first suit, the son and the present defendant were found negligent in causing a third party's injuries in an automobile accident. In plaintiff's action for damages to his car and for expenses of his son's injuries arising out of the same accident, the court found plaintiff was estopped to relitigate the issue of his son's negligence. *Id.* The relationship of father and son was that of principal and agent, giving rise to liability under the doctrine of *respondeat superior. Id.* The father, in complete control of defending the previous action, was protecting his own interests as well as his son's. "The mere fact that he was his son's guardian *ad litem* did not remove the factual existence of the relationship of principal and agent that existed between the father and son with respect to the very matter in litigation." *Id.* at 40, 97 S.E. 2d at 497.

In this case, plaintiff is not collaterally estopped to litigate the issue of total permanent disability. She was not a party to the claim for her husband's lifetime benefits nor was she in privity with a party to that claim. She does not have a mutual interest in the same property rights as contemplated by *Moore v. Young, supra.* Mr. Goins' claim was for lifetime benefits. Plaintiff's claim,

which did not arise until Mr. Goins' death, was for benefits under G.S. 97-38. It is true that plaintiff continued to pursue Mr. Goins' claim for lifetime benefits and that she withdrew the appeal of that claim. However, she was not in control of the prosecution of the claim as contemplated by *Thompson v. Lassiter, supra.* She did not have complete control of the prior action; at the hearing on Mr. Goins' claim, he was the only witness and controlled the litigation. Plaintiff had no opportunity to present evidence or direct the course of the litigation. "It is elementary and fundamental that every person is entitled to his day in court to assert his own rights or to defend against their infringement." *Shaw v. Eaves,* 262 N.C. 656, 662, 138 S.E. 2d 520, 526 (1964). Plaintiff is not bound by Commissioner Roney's determination that Mr. Goins reached the end of the healing period before his death. The Commission may consider additional evidence and make its own determination of whether Mr. Goins was totally disabled at his death and thus whether plaintiff is entitled to benefits under G.S. 97-38.

In view of our decision, it is not necessary to consider the other issues raised by the parties in their briefs. The case is reversed and remanded to the Industrial Commission for proceedings consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

JEANNINE B. MORRIS, PLAINTIFF v. DON B. MORRIS, DEFENDANT, AND DON B. MORRIS, PLAINTIFF v. JEANNINE B. MORRIS, DEFENDANT

No. 8722DC1188

(Filed 3 May 1988)

1. Divorce and Alimony § 30— equal division of marital assets equitable—sufficiency of findings to support conclusion

The trial court's conclusion that an equal division of the marital assets was equitable was supported by its findings that appellant was a high school graduate and sole shareholder of his own corporation; appellee was a high school graduate with business college training and was employed as a medical secretary; and the parties owned several properties together and each maintained a separate IRA account in identical amounts.

2. **Divorce and Alimony § 30— equitable distribution—treatment of mortgage payments and debts as alimony pendente lite**

In making an equitable distribution of marital assets, the trial court did not err in not allowing appellant credit for mortgage payments he made on the marital home after the parties separated, in not equally dividing the marital debts existing at separation, and in not considering appellee's alleged depletion of the marital assets by obtaining foodstuffs, gasoline, and other supplies from appellant's store, since these items were ordered as part of the award of alimony *pendente lite*, and giving appellant credit for any of these items would defeat the purpose of alimony *pendente lite* by penalizing the dependent spouse in the final distribution of the marital assets.

3. **Divorce and Alimony § 16.6— alimony award—parties' accustomed standard of living—sufficiency of findings**

The trial court's findings were sufficient to support an alimony award of $400 per month where the trial court made specific findings with regard to the parties' ages, educational backgrounds, job status, earnings, and properties. Moreover, the court's failure to make a specific finding with regard to the couple's accustomed standard of living did not constitute reversible error where the court's findings did establish that appellee's monthly expenses exceeded her gross pay which resulted in a reduction in her standard of living; prior to separation appellant owned and operated his own business for years; appellant's annual salary exceeded his expenses; the parties owned various properties including a vacation timeshare; and these findings allowed the court to determine the couple's accustomed standard of living.

4. **Divorce and Alimony § 20.3— divorce and equitable distribution—findings insufficient to support award of attorney's fees**

In an action for divorce and equitable distribution, a recital in the judgment that appellee's attorney rendered valuable services was insufficient to support the court's conclusion that appellee was entitled to recover $2,500 in attorney's fees.

APPEAL by appellant, Don Morris, from *Johnson (Robert W.), Judge*. Judgment entered 20 July 1987 in District Court, DAVIDSON County. Heard in the Court of Appeals 14 April 1988.

The parties were married on 10 February 1957. During their marriage they adopted two children. On 16 April 1985, appellant announced to appellee that he wanted a divorce. Despite appellee's requests that appellant remain in the marital relationship, he moved out of the marital home on 19 April 1985. On 24 October 1985, appellee filed an action requesting, among other things, permanent alimony, alimony *pendente lite*, equitable distribution of the marital property and attorney's fees. On 5 December 1985, the trial court entered an order granting appellee's request for alimony *pendente lite* but denied without prejudice her request

for attorney's fees. Subsequently, on 19 December 1986 appellant filed a petition for absolute divorce based on one year's separation. The two actions were consolidated for judgment. Appellant was granted an absolute divorce on 6 July 1987. Judgment granting equitable distribution and alimony was entered on 20 July 1987. In this judgment, the court ordered an equal division of the marital property and further awarded appellee $400.00 per month in permanent alimony and $2,500.00 in attorney's fees.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by G. Thompson Miller, for plaintiff-appellee.

Hedrick, Harp and Michael, by Robert C. Hedrick and Laura Lu Hedrick, for defendant-appellant.

SMITH, Judge.

Appellant brings forth as his sole assignment of error the trial court's entry of judgment distributing the marital property and ordering him to pay alimony and attorney's fees. He asserts that the evidence, findings of fact, and conclusions of law do not support the trial court's judgment. Appellant contends in his brief that the trial court's distribution of the marital property was not equitable and specifically says that the court, in its findings and conclusions: 1) failed to give credit in the distribution of property for amounts he paid in mortgage principal for the marital home after appellant and appellee separated; 2) failed to consider all marital debts of the parties and distribute them equally; 3) failed to consider, pursuant to G.S. 50-20(c)(11a), acts of appellant to maintain the marital property and the devaluation of other property due to appellant's efforts to support appellee; and 4) failed to correctly valuate certain marital property. Appellant also contends that the evidence and findings regarding the parties' estates, earnings, earning capacity and standard of living fail to support the court's conclusion as to alimony. Finally, appellant argues that the court failed to make adequate findings or meet the statutory requirements for awarding attorney's fees and that the evidence was insufficient to support such a finding had it properly been made.

Appellant's only exception and assignment of error is to the trial court's entry of judgment. He has not excepted to any of the

court's findings of fact or conclusions of law. When no exceptions have been taken to specific findings of fact then those findings are considered to be supported by competent evidence and are binding on appeal. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 292 S.E. 2d 159 (1982); *Jarman v. Jarman*, 14 N.C. App. 531, 188 S.E. 2d 647, *cert. denied*, 281 N.C. 622, 190 S.E. 2d 465 (1972); *Jackson v. Collins*, 9 N.C. App. 548, 176 S.E. 2d 878 (1970). We therefore do not address any of appellant's contentions regarding the insufficiency of the evidence to support the court's findings of fact. We must only determine whether the findings of fact support the conclusions of law and the judgment entered thereon. *Jarman, supra.*

[1] We first consider whether the trial court's conclusion that "an equal division . . . is equitable" is supported by the findings of fact. Appellant contends in his brief that the court's division was not equitable because certain marital property and liabilities of the parties were not equitably distributed. We disagree. G.S. 50-20(c) provides that "[t]here shall be an equal division . . . unless the court determines that an equal division is not equitable." An equal division is mandatory unless the court finds such division is not equitable. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). If evidence of inequity is presented, then the trial court is given discretion in weighing the facts before it to determine a proper distribution of marital assets. *Id.*

> It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion . . . . A ruling committed to a trial court's discretion . . . will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

Id. at 777, 324 S.E. 2d at 833. In other words, an equitable distribution order should not be disturbed unless "the appellate court, upon consideration of the cold record, can determine that the division ordered . . . has resulted in an obvious miscarriage of justice." *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E. 2d 772, 776 (1984). In the case *sub judice*, the findings of fact indicate that appellant is a high school graduate and sole shareholder of his own corporation. Appellee is also a high school

graduate with business college training and is employed as a medical secretary. Further, the findings are that the parties own several properties together and each maintains a separate IRA account in identical amounts. There is nothing in the record to indicate any abuse of discretion on the part of the trial court in concluding that "an equal division . . . is equitable."

[2] Appellant has set forth in his brief several statutory and non-statutory factors which he alleges the court did not properly consider in its judgment thus resulting in an inequitable distribution. These factors are: 1) defendant's post-separation mortgage payments on the marital residence; 2) evidence that marital property in Florida awarded to appellant, valued by the court at $14,000.00 (purchase price), was worth only $4,500.00 (tax value); 3) marital debts and 4) acts of appellant during the separation to maintain the marital property contrasted with appellee's alleged depletion of marital property. The only specific findings of fact relating to these factors are a finding concerning the value of the Florida property and a finding that a second mortgage on the marital residence is actually appellant's business debt. Appellant did not except to these findings of fact; therefore, they are binding on appeal. *Jarman, supra.* As to the remaining factors, our Court has held that where a trial court determines that equal distribution is equitable, the judge need not make findings on statutory or non-statutory factors. *Armstrong v. Armstrong*, 85 N.C. App. 93, 354 S.E. 2d 350, *rev. allowed*, 320 N.C. 511, 358 S.E. 2d 515 (1987); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). Therefore, absent a showing that an equal division is inequitable and arbitrary, such a division is mandatory and specific findings of statutory factors under G.S. 50-20(c) and non-statutory factors are not necessary to sustain the judgment. Based on the foregoing and the court's findings as to the parties' background and estates, we are unable to say that the court abused its discretion in ordering an equal division of marital assets. The order for an equal division of property is supported by the findings and conclusions and is affirmed. We further note appellant's contentions that the trial court erred: (1) in not allowing him credit for mortgage payments he made on the marital home after the parties separated; (2) in not equally dividing the marital debts existing at separation; and (3) in not properly considering appellee's alleged depletion of the marital assets

are without merit for other reasons. In support of his first contention regarding mortgage payments, appellant relies on *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E. 2d 519 (1987). The case now before this Court is factually distinguishable. In *Hunt*, the mortgage payments were not made as a part of alimony *pendente lite* payments. The appellant in the case at bar was ordered to make the mortgage payments as a part of the alimony *pendente lite* award to appellee. With regard to appellant's second contention concerning the failure of the trial court to equally divide the marital debts, appellant relies on G.S. 50-20(c)(11a). We hold that this statute is not controlling because the payment of the marital debts in question was also ordered as a part of the award of alimony *pendente lite*. Lastly, appellant's contention that appellee depleted marital assets by obtaining certain foodstuffs, gasoline and other supplies from appellant's store must fail for the same reason. The purpose of alimony *pendente lite* is to give a dependent spouse immediate support and allow her to maintain her action. *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964). Giving appellant credit for any of these items would defeat the purpose of alimony *pendente lite* by penalizing the dependent spouse in the final distribution of the marital assets. Further, this rationale is supported by G.S. 50-20(b)(3) and (f) which prohibit the court from considering alimony awards in distributing marital property. *Accord In re Foreclosure of Cooper*, 81 N.C. App. 27, 344 S.E. 2d 27 (1986). For these reasons, this Court is of the opinion that appellant's contentions are without merit. We also point out that appellant herein did not except or assign error to any portion of the order awarding alimony *pendente lite*.

[3] We next consider whether the court's findings support an alimony award of $400.00 per month to appellee. Appellant contends that the court's findings as to the estates, earnings and standard of living of the parties were insufficient. We disagree. The trial court is required to take into account each party's estate, earnings, earning capacity, accustomed standard of living and other facts unique to the case. G.S. 50-16.5. The court is also required to make detailed findings concerning these factors. *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E. 2d 636 (1984). In the case at bar, the court's findings specifically set forth the parties' ages, educational backgrounds, job status, earnings, and properties. The court, however, did not make any detailed findings as to

the couple's accustomed standard of living. A lack of such a finding may constitute reversible error. *Perkins v. Perkins*, 85 N.C. App. 660, 355 S.E. 2d 848, *disc. rev. denied*, 320 N.C. 633, 360 S.E. 2d 92 (1987). That is not the case here. The trial court's findings established that 1) appellee's monthly expenses exceeded her gross pay which resulted in a reduction in her standard of living; 2) prior to separation, appellant owned and operated his own business for years; 3) appellant's annual salary exceeded his expenses, and 4) the parties owned various properties including a vacation timeshare. These findings allowed the court to determine the couple's accustomed standard of living. A specific finding regarding the standard of living was not necessary. *See Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E. 2d 129 (1985) (court's findings that defendant's income inadequate to meet expenses for years prior to separation and plaintiff's income outpaced his expenses allowed court to determine standard of living so that specific finding of fact not necessary).

[4] Finally, we consider whether the court's findings of fact and conclusions of law support its award of $2,500.00 in attorney's fees to appellee. We conclude that the findings of fact are insufficient to support this award.

> An award of attorney's fees . . . cannot be upheld where the court failed to make findings of fact upon which a determination of the reasonableness of the fees can be based, such as the nature and scope of the legal services rendered, and skill and time required (citation omitted). The conclusory finding that plaintiff's attorney had rendered 'valuable' legal services fails to qualify as a finding upon which a determination of the reasonableness of the . . . fee can be based.

Brown v. Brown, 47 N.C. App. 323, 327-328, 267 S.E. 2d 345, 348-349 (1980). The court's finding of fact here fails to set forth any of the required factors necessary to determine the reasonableness of the award. The judgment merely contains a finding that appellee's attorney rendered valuable services. This recital is not sufficient to support the court's conclusion that appellee is entitled to recover $2,500.00 in attorney's fees. Therefore, the case must be remanded to the trial court for such findings regarding attorney's fees as are consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DALE VERNON COMPTON

No. 8728SC975

(Filed 3 May 1988)

False Pretense § 3— personal property in exchange for real property—real property not conveyed—insufficiency of evidence of intent to defraud

Evidence was insufficient to support defendant's conviction of obtaining property by false pretenses where it tended to show that defendant promised to convey five acres of property to a third person in exchange for money and various items of personal property; defendant took the personal property to his home in New York but never conveyed the five acres, though the buyer was ready, willing, and able to close; defendant gave his correct phone number and address to the purchaser before he returned to New York, as well as the name, address, and phone number of a local attorney who defendant testified he had hired to represent him and whose name appeared as trustee on the deed of trust securing the tract; although defendant did not return to the area until several months after he entered into the contract, defendant called the purchaser several times and obtained his help in selling additional lots within the tract; the purchaser himself testified that defendant did nothing which caused him to believe the closing would not occur; defendant, before indictment, returned what he had remaining in his possession of the purchaser's personal property; and this evidence was insufficient to allow an inference that defendant's promise was made without the present intention to comply with it.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Burroughs, Judge*. Judgment entered 16 June 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 28 March 1988.

Defendant was indicted on one count of obtaining property by false pretenses. The evidence at trial showed that in 1983 defendant and his wife purchased approximately 500 acres of land in Buncombe County. Although the property was subject to a deed of trust, certain property within the tract could be released upon payment to the seller of $1,000 per acre. On 11 April 1984, defendant and his wife agreed to sell 5 acres of the tract to Mr. Raymond Wheeler for $30,000. The contract provided that Mr.

Wheeler would pay $300 in earnest money and $4,700 on the date of closing, which was to be "approx[imately] May 15." The remaining $25,000 was "to be paid in trade" out of Mr. Wheeler's collection of guns, knives, coins, rings, and various items made of ivory. The parties also orally agreed that, before closing, defendant would repair the road leading to the property and supply Mr. Wheeler with a list of the restrictive covenants applicable to the property.

On the same day the contract was signed, defendant and his wife went to Mr. Wheeler's home and picked out the items they wanted to take in trade. Mr. Wheeler wrote up receipts, listing each item separately and the value they had agreed to place on each one. The following day, defendant and his wife took most of the items to their residence in New York. On 14 May 1984, Mr. Wheeler obtained a cashier's check made out to defendant and his wife in the amount of $4,700. Shortly thereafter, he notified defendant that he had the money and was ready to close. Defendant responded that he would be in North Carolina soon and they could close then.

Although he spoke with Mr. Wheeler several times by telephone in the ensuing months, defendant did not return to the area until October. When he did return, defendant directed his efforts at selling more lots in the tract and, in fact, entered into several other contracts, including another one with Mr. Wheeler for the sale of two additional lots. In attempting to sell other lots, defendant enlisted the help of Mr. Wheeler, who showed the property to prospective buyers on five separate occasions during October and November.

Defendant failed to make timely payments on his promissory note and on 7 May 1985 foreclosure proceedings were instituted. When Mr. Wheeler found out about the proceedings, he contacted defendant, who told him that he believed he could make the payments and that the foreclosure would not occur. Defendant did not make the payment and the entire tract was foreclosed on without defendant having conveyed the 5 acres to Mr. Wheeler. Prior to his indictment, defendant returned about $3,000 worth of the property he had taken from Mr. Wheeler in the trade. The remainder of it had apparently been distributed to other individuals through defendant's involvement with a national barter organization.

At the close of the State's evidence, and again at the close of all the evidence, defendant moved to dismiss the charge. The trial court denied the motions and the jury returned a verdict finding defendant guilty. Defendant appeals.

Attorney General Thornburg, by Assistant Attorney General K. D. Sturgis, for the State.

Herbert L. Hyde for the defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the trial court's failure to grant his motion to dismiss at the close of all the evidence, arguing that the evidence is insufficient to support the conviction.

Obtaining property by false pretenses is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person. *State v. Cronin*, 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980); G.S. 14-100(a). A key element of the offense is that the representation be intentionally false and deceptive. *State v. Kelly*, 75 N.C. App. 461, 331 S.E. 2d 227, *disc. rev. denied*, 315 N.C. 187, 339 S.E. 2d 409 (1985). Prior to the 1975 amendment to G.S. 14-100(a), criminal liability could not be imposed on someone for misrepresenting their intention to do something in the future since their "state of mind" was not considered a subsisting fact. *See State v. Hargett*, 259 N.C. 496, 130 S.E. 2d 865 (1963). *Cf., United States v. O'Boyle*, 680 F. 2d 34 (6th Cir. 1982); *People v. Ashley*, 42 Cal. 2d 246, 267 P. 2d 271, *cert. denied*, 348 U.S. 900, 99 L.Ed. 707, 75 S.Ct. 222 (1954). The statute's amendment, however, broadened the scope of proscribed activity, *State v. Cronin, supra*, to include, within the definition of "false pretense," cases where someone misrepresents his present intention to perform a promise.

Defendant argues that the evidence is insufficient to enable the jury to find that he did not intend to comply with the contract and convey the property to Mr. Wheeler. In reviewing whether the evidence is sufficient to go to the jury, the trial court must view the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences which can be drawn

therefrom. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 58 L.Ed. 2d 124, 99 S.Ct. 107 (1978). At this point defendant's evidence may be considered only to the extent that it clarifies, explains, or is not inconsistent with the State's evidence. *State v. Bennett*, 84 N.C. App. 689, 353 S.E. 2d 690 (1987). If the record reveals substantial evidence of the essential elements of offense, the defendant's motion to dismiss should be denied. *State v. Bates*, 313 N.C. 580, 330 S.E. 2d 200 (1985).

Applying those principles here, we find the evidence is insufficient to enable a reasonable mind to infer that defendant falsely represented his intention to convey the property to Mr. Wheeler. A person's intent is seldom provable by direct evidence, and must usually be shown through circumstantial evidence. *State v. Bennett, supra.* The State argues that the evidence shows that defendant's failure to convey the property was inexcusable, and that it, together with evidence of defendant's failure, after several requests, to repair the road or supply Mr. Wheeler with a list of the restrictive covenants, is sufficient circumstantial evidence to show that defendant's promise was false.

We agree that the record does not articulate a good reason for defendant's failure to set a closing date and convey the 5 acres to Mr. Wheeler. G.S. 14-100(b), however, recognizes the danger that juries may improperly infer criminal intent merely from a defendant's failure to carry out his promise, and provides that evidence of the nonfulfillment of a contractual obligation, standing alone, is not sufficient to show an intent to defraud. G.S. 14-100(b). *Cf.* MODEL PENAL CODE, section 223.3(1) (American Law Institute 1962) (failure to meet contractual obligation does not, by itself, support an inference that the promise was false). Evidence of conduct which shows merely that the defendant was inept or that he failed to diligently pursue the accomplishment of his promise, is insufficient to allow an inference that the promise was made without the present intention to comply with it.

Here, the record discloses no other incriminating evidence. The evidence showed that defendant gave his correct telephone number and address to Mr. Wheeler before he returned to New York, as well as the name, address, and telephone number of a local attorney who defendant testified he had hired to represent him and whose name appears as trustee on the deed of trust se-

curing the tract. Although defendant did not return to the area until several months after he entered into the contract, defendant called Mr. Wheeler several times and obtained his help in selling additional lots within the tract. Significantly, Mr. Wheeler himself testified that defendant did nothing which caused him to believe the closing would not occur. In addition, evidence that defendant, before indictment, returned what he had remaining in his possession of Mr. Wheeler's personal property is some evidence that he did not intend to defraud Mr. Wheeler. *See State v. Johnson*, 195 N.C. 506, 142 S.E. 775 (1928) (evidence that defendant confessed and satisfied judgment in favor of prosecuting witness before criminal proceedings were instituted is relevant to show absence of intent to defraud).

The evidence here is insufficient to allow a reasonable mind to conclude that defendant made a false representation with intent to defraud. Consequently, the trial court erred in denying defendant's motion to dismiss.

Reversed.

Chief Judge HEDRICK concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the evidence supports defendant's conviction.

FLORIDA NATIONAL BANK, F/K/A ROYAL TRUST BANK, N.A. v. G. HOWARD SATTERFIELD, JR.

No. 873SC1049

(Filed 3 May 1988)

1. Judgments § 27.1— action to enforce foreign judgment—intrinsic fraud not a defense

Whether plaintiff's commercial loan officer made misrepresentations to defendant which were imputable to plaintiff and whether defendant's attorney in Florida litigation had conflicts of interest and inadequately represented defendant were claims of intrinsic fraud, which should have been raised in the

Florida courts, rather than claims of extrinsic fraud, which would be a defense to plaintiff's action to recover on the Florida judgment.

2. **Rules of Civil Procedure §§ 15, 56— motion to amend and motion for summary judgment granted at same time—no error**

There was no merit to defendant's contention that the trial court erred in granting his motion to amend while at the same time granting plaintiff's motion for summary judgment, since defendant's motion to amend did not create any new issues; plaintiff did not move for summary judgment until almost 14 months after the complaint was filed, and the court did not rule on the motion until two months after it was made; there were no discovery proceedings outstanding; defendant did in fact make investigation in Florida; and defendant at no time requested a continuance to permit additional discovery pursuant to N.C.G.S. § 1A-1, Rule 56(f).

APPEAL by defendant from *Phillips, Judge*. Order entered 30 July 1987 in Superior Court, PITT County. Heard in the Court of Appeals 10 March 1988.

Plaintiff filed this action on 18 March 1986 seeking to enforce a judgment of the Circuit Court of Florida for Palm Beach County. That judgment was based on a 3 August 1983 guaranty agreement between plaintiff and defendant. The agreement provided that plaintiff would loan $35,000 to Leisure Development, Inc. of Greenville, of which defendant was a major shareholder, if defendant and the corporation's only other shareholder would guarantee repayment of the loan. The loan apparently fell into default and, in May 1984, plaintiff sued the corporation, as maker, and defendant, as guarantor. On 9 October 1985, the Florida court entered a final judgment against both defendants. Within two weeks, the corporation was placed into bankruptcy.

Plaintiff's complaint in this action included a copy of the Florida judgment and alleged that the judgment was entitled to full faith and credit in North Carolina. Defendant answered, denying that the judgment was entitled to full faith and credit, and alleged that it was rendered without the State of Florida having personal jurisdiction over him. Subsequently, plaintiff was allowed to amend his complaint to include a claim for an additional award obtained in Florida for costs and attorneys fees, bringing the total amount sought from defendant to over $70,000.

On 4 May 1987, plaintiff moved for summary judgment. In opposition, defendant submitted his own affidavit and the affidavit of Stephen L. Beaman, the Trustee in Bankruptcy for Leisure De-

velopment, Inc. of Greenville. Defendant also moved to amend his answer to plead, as an affirmative defense, the existence of "extrinsic fraud." By order entered 30 July 1987, the trial court granted defendant's motion to amend "to the extent that the answer is deemed amended to conform" to defendant's affidavits, and granted plaintiff's motion for summary judgment. Defendant appeals.

Smith, Debnam, Hibbert & Pahl, by Cindy G. Oliver and Bettie K. Sousa, for the plaintiff-appellee.

Connor, Bunn, Rogerson & Woodard, by David M. Connor and I. Joe Ivey, for the defendant-appellant.

EAGLES, Judge.

[1] The Full Faith and Credit Clause of the United States Constitution requires North Carolina to enforce a judgment rendered in another state, if the judgment is valid under the laws of that state. *Boyles v. Boyles*, 308 N.C. 488, 302 S.E. 2d 790 (1983); U.S. Const. Art. IV, section 1. A foreign judgment may be collaterally attacked only on the grounds that it was obtained without jurisdiction; that fraud was involved in the judgment's procurement; or that its enforcement would be against public policy. *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 280 S.E. 2d 787 (1981). Defendant's attack on the validity of the Florida judgment is based solely on the grounds of fraud. He contends that the materials before the trial court show that there is a genuine issue of material fact regarding whether the judgment was procured by fraud. We disagree.

Although extrinsic fraud is a defense to an action to recover on a foreign judgment, intrinsic fraud is not. *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E. 2d 2 (1979). "Extrinsic fraud" is fraud which occurs in the procurement of the judgment; intrinsic fraud arises in the proceeding itself and concerns some matter necessarily under the consideration of the foreign court in deciding the merits. *Scott v. Cooperative Exchange*, 274 N.C. 179, 161 S.E. 2d 473 (1968); *J.I.C. Electric, Inc. v. Murphy*, 81 N.C. App. 658, 344 S.E. 2d 835 (1986); *Truitt v. Truitt* (Fla. 5th Dist. Ct. App.), 383 So. 2d 276 (1980). Where a party has had proper notice of the foreign action and the alleged fraud did not prevent his full

participation in the action, any fraud is intrinsic. *Stokley v. Stokley*, 30 N.C. App. 351, 227 S.E. 2d 131 (1976).

The only questions of fact which defendant's affidavits arguably raise concern intrinsic fraud. Those affidavits tend to show that the other shareholder of Leisure Development, Inc. of Greenville, Mr. James D. Carter, obtained the loan from plaintiff through Mr. Joseph Cimilluca, one of plaintiff's commercial loan officers. The affidavits also claim that Cimilluca did not disburse the loan's proceeds to the corporation's account, and, instead, deposited the money in the account of a Colorado corporation named Leisure Development, Inc. When defendant received notice of the action in Florida, he contacted Carter, who told him that the loan had been paid and that he (Carter) had hired an attorney, Timothy H. Kenney, to represent the corporation and defendant. The affidavits also show that a transfer of over $17,000 was made from the corporation's account in another bank to a trust account belonging to Mr. Kenney. A disbursement of the same amount from that account was made to the law firm representing plaintiff in the Florida action, apparently in partial settlement of certain other claims of plaintiff against Carter. Carter had several other outstanding loans with plaintiff in his individual name.

Defendant contends that the materials submitted to the trial court create a genuine issue of material fact regarding whether Cimilluca, acting as an agent for plaintiff, fraudulently procured the guaranty of the loan and otherwise acted to defraud defendant. Defendant argues that Kenney was also representing Carter's interests in the Florida action and that Kenney had a conflict of interest which deprived defendant of a full opportunity to present the merits of his case. Even assuming, however, that the record establishes an issue of fact regarding those contentions, none of them involve extrinsic fraud.

Whether Cimilluca made misrepresentations to defendant, which are imputable to plaintiff, is a question which defendant was required to have raised in the Florida courts. Similarly, questions regarding Kenney's alleged conflicts of interest and the adequacy of his representation may not be used now to collaterally attack the judgment. Allegations that the defendant's attorney in the foreign state had a conflict of interest and failed to protect his interests are claims of intrinsic fraud and must be directly at-

tacked in that state. *See J.I.C. Electric, Inc. v. Murphy, supra*; G.S. 1A-1, Rule 60(b)(3); Fla. Stat. Ann., R.C.P. Rule 1.540(b)(3) (West 1985). Plaintiff presented our trial court with a copy of a final judgment issued in the State of Florida. Defendant failed to present a forecast of evidence establishing a genuine issue of material fact regarding the judgment's validity. Accordingly, the trial court properly granted plaintiff's motion for summary judgment.

[2] Defendant's last arguments relate to the trial court's granting his motion to amend while, at the same time, granting plaintiff's motion for summary judgment. Defendant contends that granting his motion to amend created a new issue by raising an affirmative defense of extrinsic fraud. He argues that the trial court should have denied the motion for summary judgment or ordered a continuance to allow him time to investigate facts surrounding the disposition of the case in Florida. We disagree.

As noted, the affidavits submitted by defendant contained no factual allegations related to extrinsic fraud. When the trial court granted defendant's motion to amend, however, it did so only "to the extent that the answer is deemed amended to conform" to those affidavits. The trial court's granting defendant's motion to amend did not, therefore, inject a new issue for which additional discovery might have been appropriate.

Defendant also cites Rule 56(f) of the North Carolina Rules of Civil Procedure in arguing the trial court should have deferred ruling on plaintiff's motion for summary judgment. Rule 56(f) allows the trial court to deny a motion for summary judgment or order a continuance to permit additional discovery, if the party opposing the motion cannot present facts essential to justify his opposition. G.S. 1A-1, Rule 56(f). Although the Rule should be liberally applied to allow sufficient time to complete discovery, *see Ipock v. Gilmore*, 73 N.C. App. 182, 326 S.E. 2d 271, *disc. rev. denied*, 314 N.C. 116, 332 S.E. 2d 481 (1985), the decision to grant a continuance rests in the trial court's discretion. *Glynn v. Stoneville Furniture Co., Inc.*, 85 N.C. App. 166, 354 S.E. 2d 552, *disc. rev. denied*, 320 N.C. 512, 358 S.E. 2d 518 (1987). We find no abuse of discretion.

Plaintiff did not move for summary judgment until almost 14 months after the complaint was filed, and the trial court did not

rule on the motion until two months after it was made. Nothing in the record indicates there were any discovery proceedings outstanding. In addition, the record contains the affidavit of Mr. Beaman, in which he states that he went to Florida in late February and early March of 1987 and interviewed the attorney who represented defendant, the attorney who represented plaintiff and several of plaintiff's employees, among others. That affidavit belies defendant's claim that he did not have sufficient time to investigate the case. Moreover, the record here shows no request for the court to invoke Rule 56(f). Further, there is no affidavit from defendant, as Rule 56(f) requires, setting out the facts or reasons why he could not justify his opposition to the motion for summary judgment. *See Glynn v. Stoneville Furniture Co., Inc., supra.* Even if defendant had properly moved for relief under Rule 56(f), on this record the trial court, in the exercise of its discretion, would have been justified in concluding that defendant had had ample opportunity to conduct discovery and that further delay in the disposition of plaintiff's motion was unwarranted.

Affirmed.

Judges COZORT and SMITH concur.

MARY HARRIS v. DAVID T. FLAHERTY

No. 8718SC1093

(Filed 3 May 1988)

Social Security and Public Welfare § 1— day-care benefits for nephew—nephew not part of aunt's family for eligibility purposes—criteria proper

The Department of Human Resources' denial of petitioner's request for day-care benefits for her nephew because he could not be considered a member of her family unit for eligibility purposes did not violate Title XX of the Social Security Act or the equal protection clauses of the U.S. and N.C. Constitutions, since the DSS eligibility criteria to which petitioner objected provided that children living under the care of individuals not legally or financially responsible for their care should be considered one-person families; these criteria promote and preserve family unity and also prevent abuse by those who have not assumed legal responsibility for children residing with them; and the criteria are intended to foster a fair meting out of the state and federal funds to promote the objectives of the social services programs, and as such are rationally related to the State's legitimate objectives.

APPEAL by petitioner from *Seay, Thomas W., Jr., Judge.* Order entered 17 August 1987 in GUILFORD County Superior Court. Heard in the Court of Appeals 5 April 1988.

This appeal arises out of the Guilford County Division of Social Services' (DSS) denial of petitioner's request for full reduced fee day-care services for her minor nephew. Petitioner appealed the initial decision to Zelda Epley, Chief Hearing Officer of DSS, who affirmed the denial by Order dated 10 March 1987. Ms. Epley's decision constituted the respondent's final decision in this case as respondent had delegated his decision-making authority respecting DSS review of requests for day-care benefits to Ms. Epley. On 13 April 1987, petitioner filed a Petition for Judicial Review in Guilford County Superior Court. By Order dated 17 August 1987, Judge Seay affirmed the decision of the Department of Human Resources, stating in part:

> The Court finds that the definition of the term "related by blood" utilized by the North Carolina Department of Human Resources in the Title II programs, as set out in Section 8100 of the Family Services Manual, is not so arbitrary as to violate any of the rights of the parties to this matter. The agency's findings of fact are supported by the evidence received at the hearing.

The evidence at the initial hearing tended to show that petitioner lived with her 5-year-old daughter and 7-year-old nephew. She earned approximately $821.00 per month and received Aid to Families with Dependent Children (AFDC) benefits of $172.00 per month for her nephew. Although her nephew had lived with her since his infancy, petitioner had never adopted him nor had she become, or made any attempts to become, his legal guardian.

At the time of the hearing, petitioner had already obtained full-time day-care assistance for her daughter which required a payment by petitioner of $68.00 per month. The amount of the payment was determined under DSS eligibility guidelines by which petitioner and her daughter qualified as a "two-person family." Upon application for the same day-care benefits for her nephew, DSS refused to consider the nephew as part of petitioner's family unit and qualified him as a "one-person family." Petitioner was therefore required to pay an additional $3.40 per month for her nephew. Her day-care expenses totalled $71.40

per month instead of $16.80 per month, which would have been required had her nephew been considered a part of her family unit comprising a "three-person" household. The trial court having affirmed the DSS decision, petitioner appealed.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Henry T. Rosser, for respondent-appellee.

WELLS, Judge.

Our review of administrative agency decisions is pursuant to N.C. Gen. Stat. § 150B-51(b) (1987) and the review standards there set forth.

By her two assignments of error, petitioner contends that the trial court erred in affirming the Department of Human Resources' denial of petitioner's request for day-care benefits because her nephew could not be considered a member of her family unit for eligibility purposes. The denial, she argues, violated (1) Title XX of the Social Security Act (Title XX), and (2) the equal protection clauses under the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution. We disagree with petitioner and affirm the trial court's decision.

The heart of petitioner's appeal lies in her contention that the eligibility guidelines established by the N.C. Department of Human Resources, as administered by DSS, contravene the objectives of Title XX. As part of her argument, petitioner cites to a portion of the enabling federal statute, codified at 42 U.S.C. § 1397 (1982), which provides, in part:

> For the purposes of consolidating Federal assistance to States for social services into a single grant, increasing State flexibility in using social service grants, . . .
>
> (1) achieving or maintaining economic self-support to prevent, reduce or eliminate dependency;
>
> (2) achieving or maintaining self-sufficiency, including reduction or prevention of dependency;

(3) preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating, or reuniting families; . . . .

The eligibility guidelines, of which petitioner complains, are set out at 10 N.C. Administrative Code 35E .0103(c) and provide, in part:

For purposes of determining income eligibility, an individual's family size and income must be determined.

(1) For purposes of determining family size, family means the basic family unit consisting of one or more adults and children, if any, related by blood, marriage, or adoption and residing in the same household. Where related adults, other than spouses, or unrelated adults reside together, each is considered a separate family. *Children living with non-legally responsible relatives,* emancipated minors, and children living under the care of unrelated persons are also considered to be one-person families. (Emphasis added.)

Consistently, the DSS "Family Services Manual," Vol. VI, Ch. II limits children in the family unit to those who are family or legally related.

Conditions of Eligibility: Title XX

(3) Definition of Family

For purposes of determining family size, *"family" means the basic family unit consisting of one or more adults and children, if any, related by blood, marriage, or doption, and residing in the same household.*

. . . .

(b) Children living with non-legally responsible relatives, emancipated minors, and *children living under the care of unrelated persons are also considered to be one-person families.*

The foregoing regulations substantially track the previous federal guidelines set out at 45 CFR 1396.1 (1980) where the term "family" for the purposes of Title XX day-care benefits programs was defined, in part: ". . . Emancipated minors and children liv-

ing under the care of individuals *not legally responsible* for that care *may be considered one-person families by the State.*" (Emphasis added.)

Petitioner argues that part of Congressional intent of Title XX was to provide day-care services for AFDC recipients which would allow parents receiving public assistance the opportunity to work and become self-sufficient thereby removing some financial burdens from the AFDC program. She further contends that the denial of benefits to her nephew inhibits her ability to be self-sufficient by forcing her to pay $54.60 per month more than she would have had to pay if she were considered part of a "three-person" family under the program. As such, she complains, the DSS interpretation of 10 N.C.A.C. 35E .0103, which limits her right to claim her nephew for benefits, contravenes Title XX.

A plain reading of 42 U.S.C. § 1397 reveals Congress' intent to afford the states substantial flexibility in administering state assistance programs. As such, the state is allowed to design eligibility criteria which aid in an efficient administration of the social services programs. The DSS eligibility criteria, by their plain terms, limit benefits to families where the adults are legally and financially responsible for the children. The criteria serve not only to promote and preserve family unity but also to prevent abuse by those who have not assumed legal responsibility for children residing with them.

Given the amount of discretionary flexibility afforded the states by Congress under Title XX and that the eligibility guidelines as interpreted by DSS do promote the objectives of Title XX, it follows that 10 N.C.A.C. 35E .0103(c) does not contravene the federal statute. The DSS definition of "family" or "related by blood" which excludes those minors for whom adult family members are not legally responsible follows the statutory test to determine eligibility. We therefore hold that respondent's determination that petitioner's nephew constituted "one family" under the eligibility guidelines, did not violate or contravene the objectives of Title XX.

Petitioner likewise argues that the DSS definition of "family" violates the equal protection clauses of the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution. Under the equal protection clauses,

a state statute or regulation, which has the effect of creating separate classifications preferring one group over another, must be rationally related to legitimate state interest(s). *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972). We believe respondent's construction of 10 N.C.A.C. 35E .0103(c) meets this test.

Petitioner complains that respondent's definition creates two classes of people (*i.e.*, those who have been legally adopted or otherwise by the "related adult" and those for whom the adult is not legally responsible), and that the classification is not rationally related to a legitimate state interest. Again, we disagree.

The State (DSS/Department of Human Resources) has several legitimate interests in distinguishing among those eligible to receive day-care benefits as prescribed under 10 N.C.A.C. 35 E. Those interests include ensuring the distribution of funds to the most needy children/families; preventing abuse of the system and an unwarranted depletion of State funds and resources. As the respondent points out in his brief, the ultimate criterion of eligibility is "whether there is some type of legally mandated financial interdependence among those living together." We believe the DSS definition of "family" and the relevant eligibility criterion are intended to foster a fair meting out of the State and Federal funds to promote the objectives of the social services programs and as such are rationally related to the State's legitimate objectives.

For the reasons stated, petitioner's assignments of error are overruled, and the Order of the trial court is

Affirmed.

Judges PARKER and ORR concur.

DAVID E. BRANCH, ADMINISTRATOR OF THE ESTATE OF CHERYL LYNN BRANCH v. THE TRAVELERS INDEMNITY COMPANY AND UNIGARD MUTUAL INSURANCE COMPANY

No. 8726SC861

(Filed 3 May 1988)

Insurance § 69— underinsured motorist coverage—failure to comply with condition precedent—insurer not prejudiced—renunciation of subrogation right by insurer

While plaintiff's failure to obtain the written consent of defendant insurer before settling a tort claim against an underinsured motorist violated a provision expressly denominated by the policy as a condition precedent to underinsured motorist coverage, defendant was not prejudiced by this non-compliance in view of its renunciation of all right to be subrogated against an underinsured motorist.

APPEAL by plaintiff from *Snepp, Frank W., Jr., Judge.* Judgment entered 9 June 1987 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 4 February 1988.

Plaintiff filed this civil action on 9 December 1985 seeking payment of sums claimed owing under the underinsured motorist coverage provisions of two policies—one issued to plaintiff's decedent by defendant The Travelers Indemnity Company (Travelers) and the other to decedent's parents by defendant Unigard Mutual Insurance Company (Unigard). Both defendants filed answers admitting execution of the policies, and both defendants moved for summary judgment. Discovery was engaged in and affidavits were filed. The motion for summary judgment by defendant Travelers came on for hearing on 8 June 1987. Travelers supported its motion for summary judgment with an affidavit from its claim supervisor, Dorothy Becker, which stated that plaintiff had settled its tort claim against the underinsured motorist without first having obtained Travelers' consent to the settlement. On 9 June the trial court signed and entered summary judgment dismissing plaintiff's action against Travelers. Unigard's motion for summary judgment was continued at its request. The trial court further determined in the judgment that there was no just reason for delay, and on 10 June, plaintiff gave notice of appeal.

Tucker, Hicks, Moon, Hodge and Cranford, P.A., by John E. Hodge, Jr. and Michael F. Schultze, for plaintiff-appellant.

Wade and Carmichael, by J. J. Wade, Jr., for defendant-appellee.

WELLS, Judge.

The question is whether insured's failure to comply with a provision of an insurance policy requiring him to obtain written consent from the insurer before settling the tort claim against the underinsured motorist relieves the insurer of any obligation to pay on the underinsurance coverage.

The facts are not in dispute. Plaintiff is the administrator of the estate of his daughter, who on 10 December 1983 was fatally injured in an accident while riding as a passenger in an automobile owned and operated by Linda Ann Munao, who was also killed. Plaintiff alleges in his complaint that Ms. Munao's negligent driving caused the accident from which his daughter died, and that the damages for personal injuries to his daughter, her medical care, funeral expenses, and her wrongful death were not less than $650,000.

On the day of the accident there was in effect a policy of motor vehicle liability insurance, issued by Royal Insurance Company of America (Royal) to Ms. Munao, providing coverage for the liability of Ms. Munao with a liability limit for bodily injury of $50,000. There was also in effect on the day of the collision a policy of automobile liability insurance, issued by defendant Travelers, providing underinsurance coverage for plaintiff's decedent with a liability limit of $100,000, subject to certain exclusions. Under the latter policy's rubric Exclusions the following term appears:

> A. We do not provide Uninsured Motorists Coverage for property damage or bodily injury sustained by any person:
>
> . . .
>
> 2. If that person or the legal representative settles the bodily injury or property damage claim without our written consent.

The above exclusion clearly applies not only to uninsured coverage but to underinsured coverage as well, because the policy manifestly includes the latter as a subcategory of the former.

On 14 August 1984 counsel for plaintiff wrote a letter to defendant Travelers requesting its written consent for plaintiff to settle its claim against the estate of the tortfeasor. By letter dated 24 September 1984 Travelers replied as follows: "We are not in a position to do that at this time and we will advise you when we have come to a conclusion in that regard." Travelers did not further advise, and on 29 November 1985 plaintiff entered into a Settlement Agreement and Release with Royal, the liability insurance carrier of the tortfeasor, under which agreement plaintiff recovered the entire liability coverage of $50,000 from Royal. In return plaintiff released Royal from all claims and covenanted not to sue the estate of the tortfeasor.

The gravamen of Travelers' defense is that by settling with the tortfeasor's estate plaintiff-insured destroyed any right Travelers may have had under the terms of the liability policy and under N.C. Gen. Stat. § 20-279.21(b)(3)b. to be subrogated to plaintiff's rights against the underinsured tortfeasor. As a result, Travelers is barred from recovering from the tortfeasor's estate any underinsurance sums that it pays to plaintiff, its insured.

The plaintiff concedes that the policy with Travelers expressly requires the written consent of the insurer as a precondition to settlement. However, plaintiff contends (1) that such exclusionary provision violates N.C. Gen. Stat. § 20-279.21, (2) that Travelers is estopped to assert the exclusion or has waived it, (3) that Travelers was not materially prejudiced by plaintiff's failure to obtain written consent to settle, and (4) that the underinsured provisions are ambiguous and should be construed against Travelers. We find it necessary to reach only one aspect of plaintiff's arguments inasmuch as Travelers expressly renounces in the disputed policy all right to be subrogated against an underinsured motorist. In the General Provisions section, the policy provides as follows:

Our Right to Recover Payment

A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover

damages from another we shall be subrogated to that right.

That person shall do:

1. Whatever is necessary to enable us to exercise our rights; and

2. Nothing after loss to prejudice them.

However, our rights in this paragraph do not apply under:

1. Coverage C, D, D1 and D2; and

2. Coverage G or H, against any person using *your covered auto* with a reasonable belief that that person is entitled to do so.

Sections D, D1, and D2 set forth the terms of the policy's uninsured/underinsured motorist coverage.

While it is true that plaintiff's failure to obtain the written consent of Travelers violated a provision expressly denominated by the policy as a condition precedent to coverage, defendant Travelers was not prejudiced by this noncompliance in view of its renunciation of all subrogation right in an underinsurance context. In *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981), our Supreme Court held that an unexcused delay by the insured in giving notice of an accident to an insurer does not relieve the insurer of its duties under the policy unless the delay materially prejudices the insurer's ability to defend. By analogy, we hold in the present case that Travelers is not relieved of its obligation to pay underinsurance coverage on account of insured's failure to comply with the policy's consent to settle clause because such noncompliance prejudiced no right reserved by Travelers under the policy.

For the reasons stated, we reverse the entry of summary judgment for defendant Travelers.

Reversed and remanded.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. MARCEL WILLIAMS

No. 8716SC1003

(Filed 3 May 1988)

Automobiles and Other Vehicles § 132— passing stopped school bus—identity of driver of car—sufficiency of evidence

In a prosecution for passing a stopped school bus, evidence of the identity of the driver of the car which passed the bus was sufficient to be submitted to the jury where it tended to show that defendant had admitted that she was the only driver of the car; the car was registered to defendant; a State's witness testified that she had seen a black woman driving a blue car which matched the description of both defendant and her car; and N.C.G.S. § 20-217(f), which was in effect both at the time of the violation and the trial, provided that proof that a particular motor vehicle violated the statute constituted *prima facie* evidence that the motor vehicle was driven at the time by the car's registered owner.

APPEAL by defendant from *Smith, Donald L., Judge.* Judgment entered on the verdict 14 July 1987 in ROBESON County Superior Court. Heard in the Court of Appeals 29 March 1988.

Defendant appeals her conviction for passing a stopped school bus in violation of N.C. Gen. Stat. § 20-217(a) (1983). The matter came on for trial before a jury on 13 July 1983. Defendant moved to dismiss at the close of the State's evidence and at the close of all the evidence. Defendant also moved to set aside the verdict as being contrary to the greater weight of the evidence. The trial court denied each of these motions.

The State's evidence tended to show that on 6 January 1987 around 3:55 p.m., a Robeson County school bus, travelling west on Highway 72, stopped to discharge some school children. The State's witness, Ms. Virginia Emanuel, testified that she was following the bus in her car some 300 feet behind the school bus at that time. She stated that the bus had discharged approximately ten children and had extended its mechanical stop signal when she observed, in the oncoming lane, a blue Plymouth or Dodge automobile pass the bus. Ms. Emanuel then testified that the driver of the blue car appeared to be a black female of medium complexion wearing a bonnet and a coat. Ms. Emanuel also testified that immediately after the blue car passed the bus, she watched the car from her rearview mirror and noted its license plate number (BTS-161) on a scratch piece of paper. The evidence further tend-

ed to show that the day was clear and Ms. Emanuel's view of the road was unobstructed. The highway was comprised of three lanes, one of which was a turning lane.

The second of the State's witnesses, Highway Patrol Trooper John Flynn, testified that he contacted Ms. Emanuel regarding the incident on 9 January 1987. She described the car as a two-tone blue Plymouth or Dodge and stated that "it was not a new model." She also gave him the license plate number.

The trooper instituted a license plate check through which he located defendant. Flynn then contacted defendant at her home and found a blue two-tone 1972 Plymouth on her property. Trooper Flynn explained to defendant that he was investigating the school bus incident and asked defendant if she was the only driver of the 1972 Plymouth. Defendant replied affirmatively although she stated that she had not driven the car on 6 January 1987.

Defendant's evidence tended to show that she drove the car to John McRae's in Lumberton on the day in question, to have the brake shoes replaced. Both defendant and McRae testified that she was at his shop until 4:15 p.m. or later that day. Defendant testified that she drove directly home from McRae's.

On the jury's guilty verdict finding defendant in violation of G.S. § 20-217(a), the trial court imposed a sentence of 90 days' imprisonment suspended for a two-year probationary period with a 24-hour active period. From the trial court's denial of defendant's motions to dismiss and motion to set aside the verdict, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Meg Scott Phipps, for the State.

Britt & Britt, P.A., by Evander M. Britt, III, for defendant-appellant.

WELLS, Judge.

By two of her assignments of error, defendant contends that the trial court erred in denying her motions to dismiss and to set aside the verdict. Her argument in the main is that the State's evidence regarding the identity of the driver of the blue car was

insufficient as a matter of law for the case to have been submitted to the jury or to have supported the jury verdict. We disagree.

To prevail against a motion to dismiss, the State must introduce substantial evidence of each element of the offense. *State v. Childress*, 321 N.C. 226, 362 S.E. 2d 263 (1987). On appeal of a motion to dismiss, the State is entitled to every reasonable inference that may be drawn from its evidence. *State v. Byrd*, 309 N.C. 132, 305 S.E. 2d 724 (1983). Where the State bases a portion of its case on circumstantial evidence, the sufficiency of the State's evidence may be determined by drawing inferences from inferences. *State v. Childress, supra.* Further, where there exists a rational relationship between the facts proven and inferences drawn, the reasonable doubt burden of proof required of the State will be met. *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977); *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

In the case at bar, the State presented evidence that defendant had admitted that she was the only driver of the car and that the car was registered to her. Moreover, the State's eyewitness, Ms. Emanuel, testified that she had seen a black woman driving a blue car which matched the description of both the defendant and her car. Such facts rationally give rise to the inference that defendant was the driver of the car which passed the stopped school bus. *Batdorf, supra; Williams, supra.*

Additionally, G.S. § 20-217(f), which was in effect both at the time of the violation and the trial, provided that proof that a particular motor vehicle violated the statute constituted *prima facie* evidence that the motor vehicle was driven at the time by the car's registered owner. [G.S. § 20-217(f) expired 1 October 1987.] Although defendant told Flynn that she had not driven the car on 6 January 1987, such inconsistencies being for the jury to resolve, would not prevent submission of the case to the jury. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976); *In re Adoption of Searle*, 82 N.C. App. 273, 346 S.E. 2d 511 (1986). Furthermore, defendant's evidence that her car was at John McRae's at the time of the offense, being in direct conflict with the State's evidence, would not have justified taking the case from the jury. *Id.*

Defendant's argument that the State could not rely on N.C. Gen. Stat. § 20-71.1 (1983) is likewise unpersuasive. The statute provides for the presumption that the registered owner of the car is the party responsible for any mishaps caused by the car, but its admissibility is limited to civil cases. *State v. Cotten*, 2 N.C. App. 305, 163 S.E. 2d 100 (1968). As has already been pointed out, the pertinent statute, G.S. § 20-217(f) sets out a similar evidentiary presumption. The State, therefore, did not need to bring the evidence of ownership registration in under G.S. § 20-71.1. More importantly, even if the evidence of the registration had not been admissible, defendant's having stated that she was the only driver of the car coupled with Ms. Emanuel's description of the car and driver was sufficient evidence of defendant's identity to go to the jury. *See State v. Childress, supra.* We hold that the trial court properly allowed the case to the jury and defendant's third assignment of error is thus overruled.

Defendant, by her second argument and fourth assignment of error, contends that the trial court erred in denying her motion to set aside the verdict as being contrary to the greater weight of the evidence. Again, we disagree.

Ruling on a motion to set aside the verdict is addressed to the sound discretion of the trial court. *State v. Powell*, 74 N.C. App. 584, 328 S.E. 2d 613 (1985) and will not be reviewed on appeal in the absence of abuse of that discretion. *Id.; State v. Puckett*, 46 N.C. App. 719, 266 S.E. 2d 48 (1980).

In the present case, we believe there existed sufficient evidence from which the jury could infer that defendant was the driver of the blue car. Moreover, the jury was entitled to make such an inference under *State v. Childress, supra.*

Finding no abuse of discretion, we hold that the trial court's denial of defendant's motion to set aside the verdict did not constitute error.

No error.

Judges PARKER and ORR concur.

SKY CITY STORES, INC. v. UNITED OVERTON CORPORATION

No. 8728SC557

(Filed 3 May 1988)

1. **Judgments § 35— indemnification contract—indemnitor's agency not determined in first action—second action not precluded**

An indemnitee is not collaterally estopped from bringing an action to recover under an indemnification contract when the issue of the indemnitor's agency, or lack thereof, was not decided in the first action.

2. **Indemnity § 3.2— failure to inform indemnitor of lawsuit—summary judgment for indemnitor proper**

In an action to recover the cost of litigation for a previous action under an indemnification contract with defendant, the trial court properly entered summary judgment for defendant where the prior action was filed against plaintiff by a third party within days of the expiration of the statute of limitations; the statute of limitations had run against any negligence claim by the third party against defendant before plaintiff filed its answer in the first action, thus making a recovery from this defendant unlikely; plaintiff did not notify defendant of the claim until one year and four months after suit was filed; and this neglect or default was fatal to its claim for indemnity.

APPEAL by plaintiff from *James U. Downs, Judge.* Order entered out of session 30 January 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 2 December 1987.

Van Winkle, Buck, Wall, Starnes, and Davis, P.A., by Allan R. Tarleton and Michelle Rippon, for plaintiff-appellant.

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

BECTON, Judge.

This appeal arises from an action by plaintiff, Sky City Stores, Inc. (Sky City), to recover the cost of litigation for a previous action under an indemnification contract with defendant, United Overton Corporation (United Overton). The trial judge granted United Overton's motion for summary judgment on the ground that the doctrine of collateral estoppel precluded Sky City from maintaining an action based on United Overton's negligence since that issue was decided in the earlier action in which Sky City was found negligent. Sky City appeals. We affirm.

I

The facts are not in dispute. In May of 1980, Betty Foster was injured on the premises of Sky City's discount center in Brevard, North Carolina. She was struck by a box that fell from a cart pushed by Brad Scott. Foster filed a negligence action against Sky City in May 1983 on the theory that Sky City was vicariously liable for the negligence of its employee, Scott. Sky City, in its Answer, admitted that Brad Scott was a Sky City employee. However, shortly before trial and after the statute of limitations had run, Sky City filed a motion to amend its Answer in order to deny that Brad Scott was its employee, having discovered that Scott was actually employed by Sky City licensee, United Overton. Sky City also filed a motion to join United Overton as a third-party defendant. The motions to amend and to join United Overton were denied. Scott's negligence was found to have caused Foster's injury, and Sky City was ordered to pay $35,000 in damages. Sky City also paid $8,809.32 in interest, costs, and attorney's fees for a total of $43,809.32.

Sky City brought this action seeking reimbursement of the entire $43,809.32 from United Overton pursuant to an indemnification provision in its license agreement. The agreement, executed by Sky City (the licensor) and United Overton (the licensee) and in force at the time of Foster's injury, contained the following clause:

> (b) Licensee hereby assumes all responsibility for injury to persons or property of customers, employees and others arising in the Department conducted by it, or out of transactions, acts or omissions therein or connected therewith, and agrees and covenants to hold Licensor and Sky City free and harmless from any claim of customers, employees, or others for damages arising out of injuries to anyone or transactions with anyone, whether employee or otherwise, in said Department, or arising through or from the business of said Department, or for violation of agreements made with customers, employees or others by said Licensee, or from any claim made by third parties arising out of dealings with said Department, provided the same is not due to negligence of Licensor. The Licensee shall indemnify the Licensor for any loss sustained or expenses incurred on account of any act or claims set forth herein.

Sky City assigns error to (1) the trial judge's grant of United Overton's motion for summary judgment, and (2) the trial judge's denial of Sky City's motion for summary judgment.

II

[1] The trial judge granted United Overton's motion for summary judgment based on application of the doctrine of collateral estoppel. Collateral estoppel precludes relitigation by parties or their privies of facts or issues *actually determined* in a previous action although based upon a different claim or cause of action. In addition, our Supreme Court abolished the mutuality requirement so that the doctrine may be invoked *as a defense* against a party or privy in the first action by one not a party to, or in privity with a party to, the first action. *See Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E. 2d 552 (1986). The following requirements must be met in order to apply collateral estoppel:

> (1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment. *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E. 2d 799, 806 (1973).

Collateral estoppel does not apply in the instant case because the issues in the two actions are different. Although the same instance of employee negligence is involved, in the first claim the dispositive issue was *Sky City's* vicarious liability in tort; the instant action is to establish *United Overton's* liability to Sky City under an indemnity contract. Moreover, the second requirement —that the issue must have been raised and *actually litigated*—is not satisfied. In the instant case, Sky City was estopped from raising the issue of United Overton's agency in the first action. Sky City's motion to join United Overton was denied, as well as its motion to amend its Answer to deny its own agency. The fact that Sky City *could have* joined United Overton in the first action under the provisions of N.C. Gen. Stat. Sec. 1A-1, Rule 14 (1969) does not alter the fact that United Overton's obligation under the license agreement was not decided in the first action. Thus, we

hold that an indemnitee is not collaterally estopped from bringing an action to recover under an indemnification contract when the issue of the indemnitor's agency, or lack thereof, was not decided in the first action.

Notwithstanding our conclusion that collateral estoppel does not apply, summary judgment for United Overton was appropriate. The scope of our review when a motion for summary judgment is granted is "whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E. 2d 349, 401 (1980). United Overton contends, and we agree, that the trial judge should have granted summary judgment in its favor on other legal grounds.

[2] It was noted in *Jones v. Balsley*, 154 N.C. 61, 68, 69 S.E. 827, 831 (1910) that in order for an indemnitee to recover after defending an action for which it seeks indemnification, "[t]he judgment must not have been recovered against [the indemnitee] by reason of any neglect or default on his part." In the case *sub judice*, Sky City's negligent handling of the first action resulted in a judgment against it. The action was filed against Sky City within days of the expiration of the statute of limitations. The statute of limitations had run against any negligence claim by Foster against United Overton before Sky City filed its Answer to Foster's Complaint, thus making a recovery from United Overton unlikely. Moreover, Sky City did not notify United Overton of the claim until October of 1984, more than one year and four months after suit was filed. This neglect or default by Sky City is fatal to its appeal.

III

For the foregoing reasons, we summarily reject Sky City's contention that the trial judge erred in denying *its* motion for summary judgment.

The judgment of the trial court is

Affirmed.

Judges EAGLES and COZORT concur.

Doerner v. City of Asheville

WYAND F. DOERNER, III, BY AND THROUGH HIS GUARDIAN, DORIS PRICE v. CITY OF ASHEVILLE, OFFICER BEVERLY LEE, SERGEANT HERBERT J. WATTS, AND ROBERT OVERMAN

No. 8728SC992

(Filed 3 May 1988)

Municipal Corporations § 9.1; Public Officers § 9— police officer investigating assault—victim's refusal of medical assistance—duty of officer

The trial court properly granted summary judgment for defendants in plaintiff's action alleging that two defendants were negligent in their duties as police officers in that they failed to render first aid or cause first aid to be rendered by others where plaintiff at no time was unconscious, semiconscious, or other than coherent; one defendant approached plaintiff on the street and attempted to investigate when plaintiff told her he had been assaulted; she told plaintiff it was her opinion that he needed medical attention; in each instance plaintiff affirmatively refused help and stated that all he wanted was to go to his motel room; defendant took plaintiff to his motel room where he was found unconscious two days later; plaintiff suffered irreparable brain damage and was totally disabled; and defendant police officers could have done no more than offer assistance.

APPEAL by plaintiff from *Lewis (Robert D.), Judge.* Judgment entered 10 July 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 8 March 1988.

Plaintiff appeals the trial court's grant of summary judgment in favor of Officer Beverly Lee (Lee), Sergeant Herbert J. Watts (Watts), and the City of Asheville (City). Plaintiff's complaint specifically alleges that defendant Lee and defendant Watts were grossly negligent in their duties as police officers in that they failed to render first aid or cause first aid to be rendered by others in order to assist plaintiff and prevent him from further injury. Plaintiff sues the City under the theory of *respondeat superior.* Summary judgment was not granted in favor of defendant Overman and he is not a party to this appeal.

McLean & Dickson, by Russell L. McLean, III, for plaintiff-appellant.

Roberts, Stevens & Cogburn, by Frank P. Graham and Glenn S. Gentry, for defendant-appellees, City of Asheville, Officer Beverly Lee, and Sergeant Herbert J. Watts.

EAGLES, Judge.

The issue before us is whether the trial court erred in granting summary judgment for the defendants. After careful examination of the record, we affirm the trial court's order.

In ruling on a motion for summary judgment, the trial court must consider the evidence in the light most favorable to the non-movant. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). All inferences drawn from the evidence must be drawn in favor of the non-movant. *Id.* Only when the moving party shows that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law, may the court grant summary judgment. *Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980).

The facts here, in the light most favorable to plaintiff, show the following. On 5 January 1985 plaintiff became involved in a fight in an Asheville bar. Plaintiff left the bar. Shortly thereafter Donald Netherton observed him on Lexington Avenue. Netherton called the police and informed them that there was an injured person on Lexington Avenue who looked like his throat had been cut.

Officer Lee responded to the call. When she arrived, she observed plaintiff walking on Walnut Street, which runs perpendicular to Lexington Avenue. At that time plaintiff appeared to be fairly clean, conscious, and coherent. He was not bleeding then but there was dried blood on his face and clothing. When Lee asked plaintiff what had happened, he told her that he had been hit in the head with a stick in a bar but he could not remember just where it had happened. Lee then asked plaintiff to accompany her so that they might determine where the assault occurred. Before allowing plaintiff to get into the police car, Lee frisked him. She found only a motel room key. Lee next secured radio permission from the dispatcher to transport plaintiff.

Plaintiff got into the police car with Officer Lee. They first went to Wally's Bar on Lexington Avenue where Lee inquired and determined that the fight did not take place there. At this point Lee asked plaintiff if he wanted to "have his head checked" and if he wanted a report filed. Lee asked these questions on at least three occasions. Further, Officer Lee told plaintiff that she "felt like he needed to go have his head checked." On each occa-

sion, however, plaintiff refused treatment saying he just wanted to go back to his motel and go to bed. Officer Lee radioed Sergeant Watts and received permission to take plaintiff to his motel room. Lee drove plaintiff to his motel and watched him enter his room. Two days later plaintiff was discovered unconscious in his motel room. Plaintiff has suffered irreparable brain damage and is now totally disabled.

Plaintiff argues that Lee and Watts were negligent in dealing with plaintiff because they failed to render first aid or cause first aid to be rendered by others. To prevail on these negligence claims plaintiff must demonstrate (1) the existence of a legal duty by the defendants to the plaintiff, (2) a breach of the duty, and (3) that the negligent act or omission was the proximate cause of plaintiff's injury. *Meyer v. McCarley and Co.*, 288 N.C. 62, 215 S.E. 2d 583 (1975). Plaintiff's claim against the City depends on the negligence of Watts and Lee through the theory of *respondeat superior.*

The threshold inquiry here is what duty does an investigating police officer owe to a conscious assault victim. Plaintiff concedes in his brief that in North Carolina there is no statutory duty on the part of the police to assist a conscious victim. We note that G.S. 15A-503 imposes a duty on police who *arrest* an unconscious or semiconscious person to make a reasonable effort to provide appropriate medical care. Plaintiff further acknowledges the rule that citizens generally have no duty to come to the aid of one who is injured. Restatement (2d) Torts, Section 314. Plaintiff argues, however, that Officer Lee's conduct in dealing with plaintiff was such that she took plaintiff into her custody or charge and, therefore, was under a duty to act. Restatement (2d) Torts, Section 314A(4); *cf. Klassette v. Mecklenburg County Mental Health*, 88 N.C. App. 495, 364 S.E. 2d 179 (1988) (mental health facility supervisor's conduct precluded any other person from assisting victim of drug overdose). Plaintiff argues alternatively that a duty of reasonable care arose under Restatement (2d) Section 324 because plaintiff was helpless and Officer Lee took charge of him.

We believe the record is devoid of evidence tending to show that plaintiff was semiconscious, unconscious or helpless. We cannot say that there is no evidence from which a jury might find

that plaintiff was in Officer Lee's custody so that a duty of reasonable care was owed to him.

Assuming *arguendo* that a duty of reasonable care arose under these circumstances, looking at the evidence in the light most favorable to plaintiff, we hold as a matter of law that neither Officer Lee nor Sergeant Watts breached their duty of reasonable care. On at least three occasions Officer Lee asked plaintiff whether he wanted medical assistance. At no time was plaintiff unconscious, semiconscious or other than coherent. Lee told plaintiff that it was her opinion that he needed medical attention. In each instance plaintiff affirmatively refused help and stated that all he wanted was to go to his motel room. Given plaintiff's apparent coherence and his adamant refusal to receive medical attention, Officer Lee and Sergeant Watts could do no more. Though distinguishable in part because Louisiana by statute explicitly allows all persons to refuse medical treatment, we are supported by the logic of *Ciko v. City of New Orleans*, 427 So. 2d 80 (La. Ct. App. 1983), that defendant police officers, on these facts, could do no more than offer assistance. We decline to insist that each police officer substitute his judgment for that of an injured but conscious, coherent person who has refused offers of medical assistance. Accordingly, we affirm the judgment of the trial court.

Affirmed.

Judges COZORT and SMITH concur.

DEBRA ANNE GUNN, PLAINTIFF v. LORA L. HESS, DEFENDANT

No. 8715SC1196

(Filed 3 May 1988)

Rules of Civil Procedure § 33; Constitutional Law § 77— criminal conversation and alienation of affections—interrogatories—assertion of right against self-incrimination properly exercised

In an action for alienation of affections and criminal conversation, defendant's filing of a verified answer did not constitute a waiver of the right to assert the privilege against self-incrimination, and she could properly assert this

privilege in refusing to answer interrogatories with regard to her sexual behavior toward plaintiff's husband.

APPEAL by defendant from *Brewer, Judge.* Order entered on 17 November 1987 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 14 April 1988.

This is an action for alienation of affections and criminal conversation.

Latham, Wood, Eagles & Hawkins, by William A. Eagles, for plaintiff-appellee.

Vernon, Vernon, Wooten, Brown & Andrews, P.A., by Wiley P. Wooten and T. Randall Sandifer, for defendant-appellant.

JOHNSON, Judge.

Plaintiff instituted this action on 17 April 1987 by the filing of complaint and issuance of summons. Plaintiff alleges a cause of action for alienation of affections and criminal conversation with plaintiff's husband. Plaintiff sought both compensatory and punitive damages.

On 13 May 1987, defendant filed a verified answer to the complaint generally denying the allegations.

On 9 June 1987, plaintiff served defendant with twenty-one interrogatories. Among other things, the interrogatories contained questions addressing possible sexual activity between defendant and plaintiff's husband.

On 24 June 1987, defendant filed notice of objection to interrogatories 1, 6-15 and 19. Defendant objected to interrogatories 1, 10 and 11 on the ground of relevancy; and objected to the others on the ground that defendant's answers to them "may tend to incriminate the defendant" in violation of her rights under the Fifth Amendment to the United States Constitution.

On 6 July 1987, defendant served her answers to plaintiff's interrogatories, partially answering some and objecting to others. On 8 October 1987, plaintiff filed her motion to compel defendant to answer interrogatories.

On 17 November 1987, the trial court entered an order compelling defendant to answer interrogatories 1, 9, 10, 14 and 15. From this order, defendant appeals.

Defendant assigns as error the overruling of her objections to, and the court's requiring her to answer, plaintiff's interrogatories 14 and 15.

Interrogatories 14 and 15 read as follows respectively:

> State the date and location of the first instance of sexual intercourse between you and Robert J. Gunn, Jr.
>
> State the date and location of each instance of sexual intercourse between you and Robert J. Gunn, Jr.

Defendant argues that answers to these questions could be incriminating to defendant. Plaintiff contends that by filing a verified answer defendant waived her right to assert the privilege against self-incrimination.

Constitutional guarantees against self-incrimination apply not only to criminal actions but also to civil proceedings "wherever the answer might tend to subject to criminal responsibility him who gives it." *Johnston County Nat'l Bank and Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E. 2d 500, 502, *disc. rev. denied*, 298 N.C. 304, 259 S.E. 2d 300 (1979) (*quoting McCarth v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158, 161 (1924); *Accord, Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964)).

It is unquestionable that the right against self-incrimination may be waived.

> The waiver [of the privilege against self-incrimination] may be express or specific, that is, by word of mouth or by writing, or it may be by some act amounting to waiver; . . .

Golding v. Taylor, 19 N.C. App. 245, 248, 198 S.E. 2d 478, 480, *cert. denied*, 284 N.C. 121, 199 S.E. 2d 659 (1973) (*quoting* 98 C.J.S., Witnesses, sec. 456 (1957)).

The sole question presented by this appeal is whether the defendant waived her right to claim the privilege against self-incrimination by verifying and filing her answer of general denial. Our research discloses no North Carolina decision which is on

point. This appears to be a question of first impression for this jurisdiction. Therefore, we have looked to other jurisdictions to see if and how this specific issue has been resolved. We have found the following cases which sustain our view that there has been no waiver.

In *Schermerhorn v. Contardi*, 10 Wash. App. 736, 520 P. 2d 188 (1974), an action for alienation of affections and criminal conversation, the defendant, as in the case *sub judice*, filed a verified answer generally denying the allegations of the complaint. During pretrial discovery procedures, plaintiff requested the right to take defendant's deposition. At the deposition hearing, defendant refused to answer all questions regarding the relationship with plaintiff's wife on the ground that the answers may have tended to incriminate him. Subsequently, plaintiff made a motion to compel defendant to answer. Upon the hearing of plaintiff's motion to compel, the trial court held that defendant had waived his privilege against self-incrimination by filing an answer to the complaint and compelled defendant to answer all questions relating to his denials of allegations in the complaint. On appeal to the Court of Appeals of Washington, the Court reversed, holding that defendant's filing of answer and verification did not constitute a waiver of right to claim the privilege against self-incrimination.

In *Southbridge Finishing Co. v. Golding*, 208 Misc. 846, 143 N.Y.S. 2d 911 (1955), plaintiff sued defendant for conspiracy to cheat and defraud plaintiff, with resulting damage to plaintiff. The Court held that where defendant filed a verified answer denying the allegations of plaintiff's complaint, such filing did not constitute a waiver of defendant's privilege against self-incrimination.

In our State, fornication and adultery are general misdemeanors. G.S. 14-184. Defendant could properly claim the privilege against self-incrimination when asked in effect by pretrial interrogatories 14 and 15 whether she had committed adultery or fornication. Under our discovery rules of civil procedure, "[p]arties may obtain discovery regarding any matter *not privileged* which is relevant to the subject matter involved in the pending action," . . . (emphasis added). G.S. 1A-1, Rule 26(b)(1). Although the privilege may be waived, we find *Schermerhorn* and *Southbridge* persuasive and hold that the mere filing of a verified

answer does not operate to effectuate a waiver of the right to assert the privilege against self-incrimination. We note that in the instant case, interrogatories 14 and 15 disclose on their face reasons why an answer might be incriminating. Also, in addition to seeking compensatory damages, plaintiff seeks punitive damages. Defendant's answers to interrogatories 14 and 15 might also necessarily tend to subject her to a verdict or an award of punitive damages, and to an execution against her person. N.C.G.S. 1-410; *Edwards v. Sorrell*, 150 N.C. 712, 64 S.E. 898 (1909). Defendant, not having waived her right to the privilege against self-incrimination, could and did properly assert that right. It was therefore error for the trial court to overrule defendant's objection and to compel her to answer plaintiff's interrogatories 14 and 15.

We, therefore, reverse and vacate that part of the trial court's order compelling defendant to answer plaintiff's interrogatories 14 and 15.

Reversed and vacated.

Judges PHILLIPS and SMITH concur.

CHARLES D. FOX, III AND WIFE, FRANCES PRESTON VENABLE FOX v. GERALD A. BARRETT, JR. AND THE LITTLE CREEK COMPANY, INC.

No. 8715SC1066

(Filed 3 May 1988)

1. Process § 19— abuse of process—failure of complaint to state claim

Plaintiffs' complaint failed to state a claim for abuse of process where plaintiffs did not allege any improper act by defendant occurring subsequent to the institution of the prior lawsuit; moreover, there was no merit to plaintiffs' argument that where the issuance of a valid summons is accompanied by a "fatally defective" complaint advancing no legitimate purpose or goal, all acts and proceedings resulting from such complaint constitute a continuing perversion and misuse of process for an improper, collateral purpose.

2. Libel and Slander § 11— allegations in pleadings absolutely privileged—libel action dismissed

The trial court properly dismissed plaintiffs' complaint for libel where the allegedly libelous statements were allegations in a prior lawsuit between the

parties, since statements in pleadings filed in a judicial proceeding which are relevant to the subject matter are absolutely privileged.

3. **Rules of Civil Procedure § 12— motion to dismiss for failure to state claim—consideration of material outside the pleading—no error**

There was no merit to plaintiffs' contention that the trial court erred in going outside the pleading to consider the complaint in a prior action in deciding on defendants' Rule 12(b)(6) motion, since plaintiffs' claim for libel focused exclusively on the complaint of the prior lawsuit.

4. **Appeal and Error § 6.2— denial of summary judgment motion—denial of motion to dismiss for failure to state claim—no appeal**

A denial of a motion for summary judgment is interlocutory and nonappealable, as is a denial of a motion to dismiss for failure to state a claim.

5. **Appeal and Error § 2— denial of writ of certiorari by one panel of court—no authority of second panel to review trial court's order**

Where one panel of the Court of Appeals had denied a petition for a writ of certiorari to review an order of the trial court, a second panel of the Court of Appeals has no authority to exercise its discretion in favor of reviewing the trial court's order.

APPEAL by plaintiffs and cross-appeal by defendants from *Hobgood, Robert H., Judge.* Order entered 2 July 1987 in ORANGE County Superior Court. Heard in the Court of Appeals 30 March 1988.

Plaintiffs filed this civil action on 9 June 1986 seeking damages for abuse of process, libel, and malicious prosecution arising from the institution of a prior lawsuit to enforce a right of first refusal under a contract. Defendants answered denying all material allegations and moved to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Subsequently, both parties filed motions for summary judgment. The matter came on to be heard on 22 June 1987, and the trial court dismissed for failure to state a claim so much of plaintiffs' complaint as was founded on libel or abuse of process but denied defendants' motions to dismiss and for summary judgment as to malicious prosecution. Plaintiffs appealed, and defendants attempted to cross-appeal.

Pending this appeal defendants petitioned our Court for a Writ of Certiorari to review the trial court's denial of their motions as to malicious prosecution, which petition this Court denied 17 November 1987.

Emanuel and Emanuel, by Robert L. Emanuel, for plaintiff-appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Susan K. Burkhart, for defendant-appellees.

WELLS, Judge.

Plaintiffs' Appeal

The question is whether the trial court properly ruled on the motions before it. For the reasons to follow, we affirm the trial court's dismissal of plaintiffs' claims for abuse of process and libel; we decline to consider plaintiffs' appeal of the denial of their motion for summary judgment in their favor; and we dismiss defendants' cross-appeal.

On 18 November 1981 the plaintiffs joined with their children in the execution of a contract for the sale of some real property to defendants, such joinder being for the limited purpose of granting defendants a right of first refusal to purchase the "Louise V. Coker Property," which adjoined the property sold. Upon the death of Louise V. Coker, the University of North Carolina, as primary beneficiary of the "Louise V. Coker Property," expressed reservations to the conditions attaching to the bequest, whereupon plaintiffs gifted to the University any contingent interest they might otherwise have acquired in the property. Upon learning of this benefaction, defendant Gerald A. Barrett, Jr. (Barrett) caused suit to be filed by his corporation, defendant The Little Creek Corp., Inc. (Little Creek), against the University of North Carolina and against the individual members of the Fox family, including plaintiffs herein, accusing them of conspiring to defeat their property rights under the Will of Louise V. Coker. The Foxes and the University filed separate motions to dismiss. The cause came on for hearing in Orange County Superior Court on 30 January 1986. Argument was heard, the suit was dismissed, and no appeal was taken. Subsequently, plaintiffs filed this action.

[1] In their first assignment of error, plaintiffs contend that the trial court erred in dismissing so much of their claim as is founded on abuse of process. We disagree. Abuse of process consists of the malicious perversion or misapplication of lawfully issued process after issuance to accomplish some purpose not authorized or

commanded by the writ. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Plaintiffs' complaint in the present case does not allege any improper act by defendant occurring *subsequent to* the institution of the prior lawsuit. For that reason, the complaint fails to state a claim for abuse of process. Plaintiffs argue that where the issuance of a valid summons is accompanied by a "fatally defective" complaint advancing no legitimate goal or purpose, all acts and proceedings resulting from such complaint constitute a continuing perversion and misuse of process for an improper, collateral purpose. This argument cannot succeed. N.C. Gen. Stat. § 1A-1, Rule 3(a) provides: "A civil action is commenced by filing a complaint with the court." Where the abuse complained of occurred in a prior civil action, the plaintiff must allege some improper act or perversion taking place after the filing of the complaint that is wholly inconsistent with and collateral to the action instituted.

[2] In their second assignment, plaintiffs contend that the trial court erred in dismissing so much of their complaint as was founded in libel. We disagree again. Plaintiffs complain that defendants libeled them by alleging, in the prior suit's complaint, that they had tortiously conspired to deprive Little Creek of contractual and property rights, subjecting plaintiffs to embarrassment and humiliation.

The rule in North Carolina is that "statements in pleadings filed in a judicial proceeding which are relevant to the subject matter are absolutely privileged." *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E. 2d 682 (1985). The statements complained of by plaintiffs in the present case were contained in the complaint of the antecedent suit, and they were relevant to the subject matter of that action—namely, to Little Creek's demand for enforcement of its right of first refusal. Hence, the statements were absolutely privileged, and the trial court correctly concluded that plaintiffs failed to state a claim for libel.

[3] In their third assignment, plaintiffs argue that the trial court erred in going outside the pleading to consider the complaint in the prior action in deciding on defendants' Rule 12(b)(6) motion. This argument is meritless. Plaintiffs' claim for libel focused exclusively on the complaint of the prior lawsuit. Therefore, plaintiffs can hardly object to the trial court's reference to the instru-

ment upon which the plaintiffs were suing. *See Coley v. Bank*, 41 N.C. App. 121, 254 S.E. 2d 217 (1979). And even if the trial court's consideration of material *dehors* the complaint should have caused defendants' Rule 12(b)(6) motion to be treated as one for summary judgment, plaintiffs can show no prejudice from the error. Defendants had filed a motion for summary judgment supplemental to their motion to dismiss, and plaintiffs had had ample time to prepare materials in opposition to that motion.

By their final assignment, plaintiffs contend that the trial court erred in failing to grant summary judgment in their favor, as to liability, on all three theories of recovery (i.e. abuse of process, libel, malicious prosecution). However, it is well-settled that a denial of a motion for summary judgment is interlocutory and nonappealable. *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 325 S.E. 2d 223 (1985).

Defendants' Appeal

[4, 5] We decline to review defendants' cross-appeal which, we must point out, should have been tendered in a separate appellant brief in order to ensure that the opposing party have fair opportunity to respond. *See* N.C. R. App. P. 13(a) and 28(c); *see also Fortune v. First Union Nat. Bank*, 87 N.C. App. 1, 359 S.E. 2d 801 (1987). In their cross-appeal defendants contend the trial court erred in failing to grant their motions to dismiss and for summary judgment on the malicious prosecution claim. However, as just stated, a denial of a motion for summary judgment is interlocutory and nonappealable. *DeArmon, supra.* The same is true of a denial of a motion to dismiss for failure to state a claim. *Flaherty v. Hunt*, 82 N.C. App. 112, 345 S.E. 2d 426, *cert. denied*, 318 N.C. 505, 349 S.E. 2d 859 (1986). Defendants would, in effect, have us treat a purported appeal as a petition for Writ of Certiorari and allow the writ. However, as indicated above, defendants have already previously petitioned our Court for a Writ of Certiorari to review the selfsame lower court ruling, and we denied the petition. Our Supreme Court has held that where one panel of the Court of Appeals has denied a petition for a Writ of Certiorari to review an order of the trial court, a second panel of the Court of Appeals has no authority to exercise its discretion in favor of reviewing the trial court's order. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983).

The Order of the trial court is affirmed insofar as it dismisses the claims for abuse of process and libel; and plaintiffs' and defendants' appeals of the trial court's denials of their respective motions for summary judgment are dismissed.

Judges PARKER and ORR concur.

PELICAN WATCH, A NORTH CAROLINA PARTNERSHIP, AND DERWOOD H. GODWIN, SR., OSCAR L. NORRIS, MURRAY O. DUGGINS, KENNETH M. NORRIS, AND DEBORAH N. HOOKER, THE GENERAL PARTNERS OF PELICAN WATCH, PLAINTIFFS-APPELLANTS v. UNITED STATES FIRE INSURANCE COMPANY AND AMERICAN INTERNATIONAL CONSULTANTS, INC., DEFENDANTS-APPELLEES

No. 8712SC1106

(Filed 3 May 1988)

Appeal and Error § 6.2— appeal from order which was not final—court's finding that order affected substantial right and that there was no reason for delay improper

Defendant's appeal was from a partial summary judgment for plaintiffs on the issue of liability only which was not final within the meaning of N.C.G.S. § 1-277, and plaintiffs' appeal was from a judgment which disposed of fewer than all the claims or the rights and liabilities of fewer than all the parties and did not involve a substantial right within the meaning of N.C.G.S. § 1-277; furthermore, a finding by the trial court that its order affected a substantial right and that there was no reason for delay in obtaining appellate review was insufficient to make the judgment final, and the premature and piecemeal appeals are therefore dismissed.

APPEAL by plaintiffs and defendant United States Fire Insurance Company from *Smith, Judge.* Judgment entered 10 August 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 April 1988.

This is a civil action wherein plaintiffs seek to recover from defendants, jointly and severally, actual damages, damages for unfair or deceptive trade acts or practices, and punitive damages arising out of a contract of insurance issued by defendant United States Fire Insurance Company through defendant American International Consultants, Inc., to plaintiffs.

On 1 April 1987, defendant United States Fire Insurance Company made a motion for summary judgment. Immediately before the hearing on the motion for summary judgment, plaintiffs voluntarily dismissed "without prejudice" their claims against defendant American International Consultants, Inc. After a hearing on the motion for summary judgment, on 14 August 1987, the trial judge entered summary judgment for defendant United States Fire Insurance Company for "actual damages," and entered summary judgment for plaintiffs "against the defendant USFIC on the liability issues on plaintiffs' claim made pursuant to N.C.G.S. Chapter 75 and N.C.G.S. Sec. 58-54.4 and plaintiffs' claim under the common law for punitive damages. . . ." The trial judge further stated the order affected "substantial rights" of both parties and "that there is no reason for delay in obtaining appellate review. . . ." Plaintiffs and defendant United States Fire Insurance Company appealed.

Tuggle Duggins Meschan & Elrod, P.A., by J. Reed Johnston, Jr., for plaintiffs.

Henson Henson Bayliss & Coates, by Perry C. Henson and Jack B. Bayliss, Jr., for defendant United States Fire Insurance Company.

HEDRICK, Chief Judge.

Defendant's appeal is from a judgment that is not final within the meaning of G.S. 1-277. The appeal is from a partial summary judgment for plaintiffs on the issue of liability only, and will be dismissed. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Insurance Co. v. Dickens*, 41 N.C. App. 184, 254 S.E. 2d 197 (1979).

Plaintiffs' appeal is from a judgment that disposes of "fewer than all the claims or the rights and liabilities of fewer than all the parties," and does not involve a substantial right within the meaning of G.S. 1-277, and will be dismissed. G.S. 1A-1, Rule 54(b).

While the trial judge did find "there is no reason for delay in obtaining appellate review . . . ," as Chief Justice Exum said in *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E. 2d 443, 447 (1979), a trial judge cannot "by denominating his decree a 'final judgment' make it immediately appealable under Rule 54(b)

if it is not such a judgment." A finding that "there is no just reason for delay" under Rule 54(b) is not enough. The judgment must also be final. *Cook v. Tobacco Co.*, 47 N.C. App. 187, 266 S.E. 2d 754 (1980).

Premature and piecemeal appeals serve no purpose but to delay final judgments and thrust upon the appellate division multiple appeals. Both appeals will be dismissed, and the causes will be remanded to the superior court for further proceedings.

Appeals dismissed.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. SAM PAIGE (PAGE)

No. 873SC979

(Filed 3 May 1988)

Criminal Law § 143.12— probation revocation—consecutive sentences—no error

The trial court did not err when activating previous sentences after a probation revocation by ordering that defendant's sentence for felonious breaking or entering begin at the expiration of his sentence for possession of stolen goods. The authority for the trial court to impose consecutive prison sentences upon revocation of probation is expressly provided in N.C.G.S. § 15A-1344(d) (1983).

APPEAL by defendant from *Thomas S. Watts, Judge*. Judgment entered 18 May 1987 in Superior Court, PITT County. Heard in the Court of Appeals 11 April 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James E. Magner, Jr., for the State.

Assistant Public Defender Arthur M. McGlauflin for defendant-appellant.

BECTON, Judge.

On 18 November 1986, defendant pleaded guilty to misdemeanor possession of stolen goods. He was sentenced to one year in prison. This sentence was suspended, and defendant was placed

on probation for a period of three years. On 28 January 1987, defendant pleaded guilty to felonious breaking and entering. He was sentenced to five years imprisonment. This sentence was also suspended, and defendant was placed on probation for five years.

On 11 May 1987, a probation violation report was filed by defendant's probation officer alleging that defendant had violated the terms and conditions of his probationary judgments. After a hearing, the trial court entered an order revoking defendant's probation and activating his suspended sentences. The trial court ordered defendant's sentence for breaking and entering "to begin at [the] expiration of [his sentence for possession of stolen goods]." Defendant appealed.

Defendant contends the trial court committed reversible error in ordering his sentence for breaking and entering to run consecutively with his sentence for possession of stolen goods. We disagree.

The authority for the trial court to impose consecutive prison sentences upon revocation of probation is expressly provided in N.C. Gen. Stat. Sec. 15A-1344(d) (1983). That section provides:

> . . . A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

As we read it, this section permits the trial court to impose a consecutive sentence when a suspended sentence is activated upon revocation of a probationary judgment without regard to whether the sentence previously imposed ran concurrently or consecutively. Thus, under this section, the trial court in the present case had the authority to order defendant's sentence for felonious breaking and entering to be served consecutively to his sentence for possession of stolen goods. Accordingly, we hold that the trial court did not err in ordering that defendant's sentence for felonious breaking or entering begin at the expiration of his sentence for possession of stolen goods.

We are aware of *State v. Fields*, 11 N.C. App. 708, 182 S.E. 2d 213 (1971) and *State v. Pitts*, 25 N.C. App. 548, 214 S.E. 2d 211

(1975). In these cases, we held that the trial court, upon revocation of a probationary judgment, lacked authority to impose a consecutive sentence unless the original judgment provided that the sentence would run consecutively with a sentence imposed in another case. *Accord State v. Byrd*, 23 N.C. App. 63, 208 S.E. 2d 216 (1974). Suffice it to say, these cases were decided prior to the enactment of N.C. Gen. Stat. Sec. 15A-1344(d) and are not applicable here.

The judgment of the trial court is

Affirmed.

Judges PHILLIPS and COZORT concur.

PATTY A. WILSON v. ROBERT B. WILSON, JR.

No. 8721DC987

(Filed 3 May 1988)

Divorce and Alimony § 18.19— denial of alimony pendente lite—interlocutory order—no appeal

Plaintiff's appeal from an order denying alimony *pendente lite* is dismissed since orders and awards *pendente lite* are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal.

APPEAL by plaintiff from *Harrill, Judge*. Order entered 31 August 1987 in District Court, FORSYTH County. Heard in the Court of Appeals 3 March 1988.

Meyressa H. Schoonmaker for plaintiff appellant.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow and Clifton R. Long, Jr., for defendant appellee.

COZORT, Judge.

This appeal is from an order denying alimony *pendente lite* and attorney fees and is, therefore, subject to dismissal under this Court's ruling in *Stephenson v. Stephenson*, 55 N.C. App. 250, 252, 285 S.E. 2d 281, 282 (1981). The appeal is dismissed.

Plaintiff-wife and defendant-husband were lawfully married on 10 August 1968. They first separated in 1969, reconciled in 1969, separated again in 1970, and, that same year, executed a separation agreement mutually waiving their rights to maintenance, support, alimony, and attorney fees. After numerous reconciliations and separations, the plaintiff filed this action in 1987 requesting alimony *pendente lite*, permanent alimony, counsel fees, possession of the marital home, and the issuance of protective orders and restraining orders.

The district court heard plaintiff's motion for temporary alimony and counsel fees and denied plaintiff's motion for temporary alimony, finding that plaintiff waived her right to temporary alimony when she signed the separation agreement in 1970. Plaintiff appealed the denial of temporary alimony.

In *Stephenson*, 55 N.C. App. at 252, 285 S.E. 2d at 282, this Court held, in an opinion in which all the members of this court concurred, "that orders and awards *pendente lite* are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d)." Plaintiff's appeal from an order denying alimony *pendente lite* is

Dismissed.

Judges EAGLES and SMITH concur.

STATE OF NORTH CAROLINA v. JESSE LEWIS ADAMS, JR.

No. 8728SC1037

(Filed 3 May 1988)

Homicide § 19.1— deceased's violent crimes—evidence inadmissible

The trial court in a murder prosecution did not err in refusing to admit the record of deceased's violent crimes since defendant and his witnesses testified without contradiction or objection that deceased had the reputation of being a violent and dangerous man and had stabbed one person and shot another; furthermore, there was no merit to defendant's contention that the evidence should have been received under N.C. Evidence Rule 404(a)(2) to show that the victim had a reputation for violence in the community, since that argument was not made in the trial court and since evidence of a deceased's criminal

record cannot be received for the purpose of establishing the victim's reputation for violence.

APPEAL by defendant from *Downs, Judge.* Judgment entered 5 June 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 30 March 1988.

Attorney General Thornburg, by Assistant Attorney General Debbie K. Wright, for the State.

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

PHILLIPS, Judge.

Tried for the first degree murder of Rufus Edward Brown, Jr., defendant was convicted of voluntary manslaughter. The killing occurred in an Asheville drinking and eating place where defendant shot Brown with a pistol three times, twice in the chest and once in the abdomen. Defendant's evidence tended to show that the shooting occurred when Brown was advancing upon him in a threatening manner with a pocketknife, and his only contention here is that the trial court erred in refusing to receive evidence indicating that Brown had been convicted of the violent crimes of assault with a deadly weapon inflicting serious injury and of assaulting a female.

Even if the court erred in refusing to receive the record of the deceased's violent crimes in evidence it was clearly harmless, since defendant and his witnesses testified, without contradiction or objection, that Brown had the reputation of being a violent and dangerous man and had stabbed Lewis Lytle and shot Larry Brinkley. But the court did not err in rejecting the evidence because defendant offered it for the purpose of attacking Brown's "credibility" under G.S. 8C, Rule 806, N.C. Rules of Evidence, which it could not possibly do since Brown was dead and no statement of his was received into evidence. Defendant does not now argue otherwise. What he argues is that the evidence should have been received under N.C. Evidence Rule 404(a)(2) to show that the "victim had a reputation for violence in the community"; an argument without foundation since it was not made in the trial court, Rule 10(b)(1), N.C. Rules of Appellate Procedure, and without merit since our Supreme Court has held that evidence of a deceased's

criminal record cannot be received "for the purpose of establishing the victim's reputation for violence." *State v. Corn*, 307 N.C. 79, 85, 296 S.E. 2d 261, 266 (1982).

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 MAY 1988

ALSOP v. MELTON No. 8726DC1067	Mecklenburg (85CVD6353)	Affirmed
COLLINS v. MILLER No. 8730DC977	Swain (87CVD15)	Affirmed
EURE v. GOODWIN No. 871DC891	Gates (86CVD38)	Vacated & Remanded
GIDNEY v. AMMONS No. 8728DC1180	Buncombe (87CVD991)	Dismissed
IN RE MATTHEWS No. 874DC914	Onslow (87J62) (83CVD1560)	Dismissed
LEDBETTER v. THE SANGER CLINIC No. 8726SC1185	Mecklenburg (78CVS4670)	Appeals Dismissed
LOVETTE v. UNITED CAROLINA BANK No. 8713DC810	Columbus (84CVD765)	Affirmed
LOWE'S v. LANCASTER No. 871SC963	Pasquotank (86CVS170)	New Trial
MITCHELL v. GOLDEN No. 8721SC1062	Forsyth (87CVS3227)	Appeal Dismissed
PARSONS v. PARSONS No. 8723SC993	Wilkes (86CVS162)	No Error
QUALLS v. QUALLS No. 8718DC897	Guilford (83CVD2137)	Affirmed
ROUSE & CO. v. BURROUGHS No. 878SC1057	Wayne (87CVS737)	Appeal Dismissed
STATE v. ALLEN No. 8720SC1251	Union (87CRS001528)	No Error
STATE v. BAITY No. 8721SC782	Forsyth (86CRS42227) (86CRS42229)	No Error
STATE v. BARNES No. 8726SC1078	Mecklenburg (87CRS029986)	No Error
STATE v. DEAN No. 8714SC1082	Durham (85CRS21131)	Affirmed

STATE v. FOX No. 8727SC1178	Gaston (87CRS4780) (87CRS4782)	Affirmed
STATE v. FREEMAN No. 8718SC1042	Guilford (84CRS5369)	Affirmed
STATE v. GILMORE No. 8712SC1142	Cumberland (86CRS45431)	No Error
STATE v. HARRIS No. 8711SC972	Harnett (87CRS599)	Appeal Dismissed
STATE v. HAYES No. 8730SC967	Haywood (87CRS3052)	New Trial
STATE v. JOHNSON No. 8718SC941	Guilford (86CRS26003) (86CRS26005)	No Error
STATE v. LEAK No. 8726SC1050	Mecklenburg (86CRS35514)	Affirmed
STATE v. LIGHTSEY No. 8726SC1214	Mecklenburg (85CRS35074) (85CRS35077) (85CRS35078) (85CRS35079) (85CRS35256)	Dismissed
STATE v. MARCOM No. 8711SC1201	Harnett (87CRS991)	Remanded for amendment of the judgment, if necessary, consistent with this opinion.
STATE v. MOANEY No. 8712SC1200	Cumberland (85CRS38540) (85CRS38542) (85CRS38543)	Affirmed
STATE v. QUALLS No. 8816SC27	Robeson (87CRS4713)	No Error
STATE v. ROBERSON No. 8722SC1135	Iredell (86CRS13421)	No Error
STATE v. SHERMAN No. 8821SC5	Forsyth (87CRS14817)	No Error
STATE v. SMITH No. 8712SC969	Cumberland (86CRS40060)	No Error
STATE v. SURRETT No. 8728SC1051	Buncombe (86CRS3892)	Affirmed

STATE v. THOMAS No. 8722SC985	Davidson (86CRS7734)	Dismissed
STATE v. WARD No. 8720SC1011	Richmond (86CRS7473)	No Error
STATE v. WARD No. 8712SC1217	Cumberland (87CRS220)	Affirmed
STATE v. WATKINS No. 8730SC1038	Cherokee (86CRS3143) (86CRS3144)	New Trial
TRIVETTE, II v. SERVICE DISTRIBUTING No. 8724DC1084	Watauga (87CVD25)	Affirmed

Hedrick v. Hedrick

CATHERINE S. HEDRICK (NOW BOWLING) v. MARVIN A. HEDRICK

No. 8730DC585

(Filed 17 May 1988)

1. **Divorce and Alimony § 25.12; Parent and Child § 6.4— visitation rights of grandparents after adoption—fitness of grandparents**

In an action by paternal grandparents to gain visitation rights after the father signed a consent to adoption, the trial court's findings of fact as to the visitation that had previously occurred between the children and the grandparents established the fitness of the grandparents and that the welfare of the children was subserved.

2. **Adoption § 2— grandparents' visitation rights—motion to intervene allowed**

The trial court did not err in an adoption action by allowing the grandparents to intervene seeking visitation pursuant to N.C.G.S. § 50-13.2A where the trial judge addressed the issue of whether the grandparents had a right to intervene based on the pleadings before it without the necessity of a preliminary hearing. The right to institute an action under N.C.G.S. § 50-13.2A mandates a right to intervene on behalf of the grandparents.

3. **Rules of Civil Procedure § 19— adoption—grandparents' visitation—adoptive father not necessary party**

The trial court did not err by not joining the prospective adoptive father in an action by the paternal grandparents for visitation rights where the adoption was not finalized until one month after the entry of judgment. Whatever rights the adoptive father was to gain had not yet vested and the court could make a complete determination of the issues before it without joining the adoptive father as a necessary party.

4. **Constitutional Law § 20— adoption—visitation rights of grandparents—reasonable basis for classification**

There is a reasonable basis for the classification elicited in N.C.G.S. § 50-13.2A between grandparents whose grandchildren are adopted by two people, neither of whom is a relative or a stepparent of the children, and grandparents whose grandchildren are adopted by two people, one of whom is a relative or stepparent of the children. The classification does not violate the equal protection guarantees of either the State or Federal Constitutions. Art. I, § 19, North Carolina Constitution.

5. **Divorce and Alimony § 25.12; Adoption § 2— visitation by grandparents—substantial relationship with grandchildren—evidence sufficient**

The trial court did not abuse its discretion in an adoption action following a divorce where the grandparents sought visitation by concluding that the grandparents had established a substantial relationship with the grandchildren where, although the grandparents had not maintained contact with the children after April of 1986, April of 1986 was when respondent had prohibited the grandparents from visiting the children; the evidence established that the grandparents had maintained contact with the children since their birth

through regular visitation, both in their home and respondent's home; and the children had gone on walks with the grandparents, gone shopping, and stayed overnight with them.

6. Divorce and Alimony § 25.12— visitation rights of grandparents—substantial change of circumstances

The trial court did not err in an adoption action following a divorce by finding that it was in the best interest of the children to maintain a continuing relationship with the grandparents through visitation where there had been a substantial change of circumstances since the entry of the previous custody order in that the visitation rights of the grandparents were arbitrarily terminated by the natural mother. N.C.G.S. § 50-13.7(a); N.C.G.S. § 50-13.2A.

APPEAL by plaintiff from *Bryant, Judge.* Judgment entered 13 March 1987 in District Court, CHEROKEE County. Heard in the Court of Appeals 3 December 1987.

McKeever, Edwards, Davis & Hays, P.A., by Zeyland G. McKinney, Jr., for respondent-appellant.

Ronald Stephen Patterson, P.A., for movant-appellee.

JOHNSON, Judge.

On 24 October 1984, Catherine Hedrick (Bowling) was granted an absolute divorce from her husband, Marvin A. Hedrick, Jr. Pursuant to that order, the mother was granted custody of the two minor children, Heather and Lauren. Catherine Hedrick later married Richard Bowling. In April 1986, Marvin A. Hedrick, Jr. signed a consent to adoption giving up his right to the children. On 22 May 1986, Richard Bowling petitioned the court in a special proceeding for adoption of the two children.

On 10 December 1986, Marvin A. Hedrick, Sr. and Dorothy Hedrick (movants), paternal grandparents of Heather Hedrick and Lauren Hedrick, filed a motion to intervene and a motion in the cause to gain visitation rights with their grandchildren pursuant to G.S. sec. 50-13.2A.

In their motions, movants alleged that they were paternal grandparents of the minor children and that they had maintained a close relationship with their grandchildren until April of 1986. On 13 March 1987, the action came on for hearing before Judge Steven J. Bryant.

The evidence at the hearing established that since the birth of the two minor children, the grandparents had maintained contact with them through regular visitation, both in their home and in the home of the mother. From October of 1985 until February of 1986, they visited the grandchildren at least once per week. This visitation took place in the home of the grandparents prior to the burning of their home in October 1985 and subsequently in residences in which they lived.

Both grandchildren have gone on walks with the grandparents, have been taken shopping, and have stayed overnight with the grandparents. The grandmother has made clothes for the minor children, has taken the minor children to the doctor, and has enrolled one of the minor children into school.

The parties stipulated that Heather Hedrick is afraid for her own safety when she is around her natural grandparents, and that she has no desire to visit or see either of the grandparents. Furthermore, the grandfather did have a drinking problem, which was exhibited before the grandchildren at various times. However, Mr. Hedrick had not consumed alcohol for a period in excess of one year prior to April of 1986.

Visitation with the grandchildren had been in the mornings, on the weekends, or at various times up until April of 1986, at which time the grandparents were denied further visitation with the grandchildren by the mother, Catherine Hedrick (Bowling).

On 13 March 1987, after hearing the evidence, and after making findings of fact and conclusions of law, the trial court granted the grandparents visitation rights with their grandchildren. Judgment was filed on 17 April 1987. From the entry of judgment, respondent-appellant appealed.

Respondent-appellant brings forth thirteen assignments of error grouped into nine arguments for this Court's review. After careful consideration, we find no error and affirm the trial court's judgment.

I

[1] In her first argument, respondent contends that the trial court erred in (1) failing to make findings of fact and a conclusion of law as to the fitness of the grandparents and (2) in failing to

make findings of fact as to whether the best interests of the minor children would be served by visiting the grandparents.

"[I]t is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare." *Swicegood v. Swicegood*, 270 N.C. 278, 282, 154 S.E. 2d 324, 327 (1967). "To support an award of visitation rights[,] the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child." *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E. 2d 26, 29 (1977).

Based on the above-stated principle from *Montgomery*, respondent argues that the court made no specific finding as to the fitness of the grandparents, other than a finding as to Marvin Hedrick, Sr.'s drinking problem. Respondent's argument is without merit. The trial court specially found as facts that:

> 3. Since the birth of the minor children, Marvin and Dorothy Hedrick, Intervenors, have united regularly with their grandchildren; said visits have taken place in the home Intervenors-Hedricks, before their house burned and in the home of Catherine Bowling (formerly Hedrick) as late as February, 1986.
>
> 4. That the minor children have been taken shopping by Intervenors-Hedricks; that the minor children have been taken on walks by Intervenors-Hedricks; that Mrs. Hedrick has hand sewn clothes for her minor granddaughter, that she has taken the children to the medical doctor when it appeared necessary.

While the welfare of a child is always to be treated as the paramount consideration, the courts recognize that wide discretionary power is necessarily vested in the trial courts in reaching decisions in these particular cases. *In re Moore*, 8 N.C. App. 251, 174 S.E. 2d 135 (1970). We believe that the trial court's findings of fact established the fitness of the grandparents and that the welfare of the children is subserved. Thus, respondent's assignment of error is overruled.

II

[2] Next, respondent contends that the trial court erred in allowing the grandparents to intervene pursuant to G.S. sec. 50-13.2A, because the trial court made no findings of fact as to whether a substantial relationship existed between the grandparents and the grandchildren. This argument is without merit.

Respondent argues that in order for the trial court to decide whether the movants had a right to intervene, it was incumbent upon the trier of fact to take the pleadings submitted by the movants and hold a preliminary evidentiary hearing to determine whether a substantial relationship exists between the movants and the grandchildren pursuant to G.S. sec. 50-13.2A.

We believe that a fair reading of this statute does not belie that conclusion. G.S. sec. 50-13.2A states in part that:

> [a] biological grandparent *may institute an action or proceeding* for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparents and the child.

It is clear to this Court that the right to institute the suit mandated a right to intervene on behalf of the grandparents. Furthermore, in order for the court to grant visitation rights, it must be established that the grandparents have a substantial relationship with the grandchildren. That requirement is at least part of what the hearing is designed to establish. The trial judge addressed the issue of whether the grandparents had a right to intervene based on the pleadings before it. Without the necessity of a preliminary hearing, the record reveals that the trial court made a preliminary determination that the grandparents had a right to intervene pursuant to G.S. sec. 50-13.2A. Thus, respondent's assignment of error is overruled.

III

[3] Next, respondent contends that the trial court erred in proceeding with the merits of the case where the intervenors failed to join a necessary party. Again, we disagree.

Necessary parties must be joined in an action. A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment can-

not be rendered in the action completely and finally determining the controversy without his presence as a party. *Strickland v. Hughes*, 273 N.C. 481, 160 S.E. 2d 313 (1968). When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. *MacPherson v. The City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973).

Respondent argues that the adopting father, Richard Bowling, was a necessary party to this action. For purposes of that case, the trial court found as a fact that Richard Bowling was the adoptive father, although the adoption had not been finalized.

The best interests of the children are and have always been the polar star in determining custody actions as well as visitation rights. *See Green v. Green*, 54 N.C. App. 571, 284 S.E. 2d 171 (1981); *Mathews v. Mathews*, 24 N.C. App. 551, 211 S.E. 2d 513 (1975). Whether the grandparents had established a substantial relationship with the grandchildren and whether there was a substantial change of circumstances to warrant granting the grandparents visitation rights were also the paramount issues before the court. The adoption of the two grandchildren by Richard Bowling was not finalized until one month after the entry of the judgment in the case *sub judice*. Whatever rights Richard Bowling was to gain in becoming an adoptive parent had not vested at the time of the hearing and therefore the adjudication of the issues before the court did not require his presence in the suit. The trial court could make a complete determination of the issues before it and enter a valid judgment without the necessity of requiring the grandparents to join Richard Bowling as a necessary party. Thus, respondent's assignment of error on this issue is overruled.

IV, V, VI

We find respondent's Assignments of Error 4, 5, and 6 to be meritless and without need for discussion.

VII

[4] Next, respondent contends that G.S. sec. 50.13.2A is unconstitutional as violative of Article I, sec. 19 of the North Carolina Constitution and the equal protection clause of the

United States Constitution expressly incorporated into the North Carolina Constitution. We disagree.

"The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement that any legislative classification 'be based on differences that are reasonably related to the purposes of the Act in which it is found.' " *State v. Greenwood*, 280 N.C. 651, 656, 187 S.E. 2d 8, 11-12 (1972), *quoting, Morey v. Doud*, 354 U.S. 457, 465, 1 L.Ed. 2d 1485, 1491, 77 S.Ct. 1344, 1350 (1957).

Courts traditionally have employed a two-tiered scheme of analysis when evaluating equal protection claims. *Texfi Industries v. The City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980).

> The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. (Citations omitted). The 'strict scrutiny' standard requires that the government demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest. (Citation omitted).
>
> When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. (Citations omitted). The 'rational basis' standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity. (Citations omitted).

White v. Pate, 308 N.C. 759, 766-67, 304 S.E. 2d 199, 204 (1983).

There is no fundamental right or suspect class involved in respondent's equal protection challenge, and thus we deem that the "rational basis" test is appropriate.

Respondent contends that the statute creates two classes of persons. The first class consists of grandparents whose grand-

children are adopted by two people, neither of whom is a relative or stepparent of the child. The second class consists of grandparents whose grandchildren are adopted by two people, one of whom is a relative or stepparent of the child. Respondent argues that the first class is discriminated against because the child adopted remains a "stranger to the bloodline" of his parents, and the grandparents cannot gain visitation rights even if they have a substantial relationship with the child.

We note that in respondent's analysis of the first class concerned, she excludes the additional fact that the parental rights of both biological parents must be terminated in order to preclude any order of visitation rights for grandparents. Such is the fatal flaw in respondent's analysis. For it is that distinction which justifies the different treatment of the two classes of grandparents which respondent alleges is unconstitutional.

The overall and paramount concern that is reiterated throughout our statutes and case law is that the welfare of the child is the polar star. *See Green, supra.* For purposes of the child's welfare, if their parents' rights have been terminated, and such child or children have not been adopted by a stepparent or relative, any legal continuation of the relationship of the grandparents has been indirectly terminated because the parental rights have been terminated, and the "bloodline" of the parents is severed by persons of no relation adopting the children.

It is an entirely legitimate governmental interest for the State to make such a distinction, since the welfare and best interest of the child is primary. And if there still exists a bond between the maternal or paternal grandparents and the grandchildren, as evidenced by a stepparent or relative adopting the child, the governmental classification bears some rational relation to a conceivable legitimate governmental interest to maintain that bond. Thus, we believe that there is a reasonable basis for the classification elicited in G.S. sec. 50-13.2A. Therefore, the classification does not violate the equal protection guarantees of either our state or federal constitutions.

VIII

[5] Next, respondent contends that there was not sufficient competent evidence introduced at trial to support the trial court's

conclusion that a substantial relationship existed between the grandparents and their grandchildren. This argument is without merit.

"The findings of the trial judge, who has the opportunity to see and hear the witnesses, are binding on appellate courts if supported by competent evidence." *King v. Demo*, 40 N.C. App. 661, 668, 253 S.E. 2d 616, 621 (1979). The decision of the trial judge in the case *sub judice* should not be upset on appeal absent a clear showing of abuse of discretion. *See In re Mason*, 13 N.C. App. 334, 185 S.E. 2d 433 (1971), *cert. denied*, 280 N.C. 495, 186 S.E. 2d 513 (1972).

Respondent emphasized that the grandparents had not maintained contact with the grandchildren since April of 1986, one year prior to the hearing, and that all previous contact with the grandchildren was intermittent. It is clear from the record that April 1986 is the precise time that the respondent prohibited the grandparents from visiting her children. Furthermore, the evidence established that since the birth of the children, the grandparents maintained contact with them through regular visitation, both in their home and the home of respondent; that this visitation took place in the home of the grandparents prior to the burning of their home and that the minor children have spent time in their home, have gone on walks with the grandparents, have been shopping and stayed overnight with them. Thus, we conclude that the court did not abuse its discretion because the record is replete with competent evidence to support the trial court's conclusion that the grandparents established a substantial relationship with the grandchildren.

IX

[6] Finally, respondent argues that the movants failed to introduce sufficient competent evidence and the trial court failed to make findings of fact and a conclusion of law as to whether a substantial change of circumstances existed affecting the welfare of the children since the entry of the previous custody order. This argument is without merit.

"[T]he modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the

child, and the party moving for such modification assumes the burden of showing such change of circumstances." *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974). G.S. sec. 50-13.7(a) provides that "an order of a court of this State for custody 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." "Visitation privileges are but a lesser degree of custody [and] [t]hus . . . the word custody as used in G.S. 50-13.7 was intended to encompass visitation rights as well as general custody." *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E. 2d 129, 142 (1978).

We believe that G.S. sec. 50-13.2A must be read *in pari materia* with G.S. sec. 50-13.7(a), which therefore requires a showing of a substantial change of circumstances. The record reveals that there existed a substantial change of circumstances when the visitation rights of the grandparents were arbitrarily terminated by the natural mother when the grandparents had established a continuing substantial relationship with their grandchildren since the entry of the earlier custody order. Based upon that, the court found sufficient facts to justify its conclusion that it was in the best interest of the grandchildren to maintain a continuing relationship with the grandparents through the granting of visitation privileges. Thus, respondent's assignment of error on this issue is overruled.

Respondent has not brought forward or argued in her brief one of her assignments of error. We deem it abandoned and decline to review it. N.C.R. App. P., Rule 28(a).

Accordingly, for all the aforementioned reasons, the judgment of the trial court is affirmed.

Judges ARNOLD and ORR concur.

State v. Smith

STATE OF NORTH CAROLINA v. ROBIN STACY SMITH

No. 8714SC968

(Filed 17 May 1988)

1. **Automobiles and Other Vehicles § 110— misdemeanor death by a vehicle—criminal intent not required—constitutionality**

The misdemeanor death by a vehicle statute, N.C.G.S. § 20-141.4(a2), does not violate due process because it imposes criminal liability without requiring a finding of criminal intent. Fourteenth Amendment to the U.S. Constitution; Art. I, § 19 of the N.C. Constitution.

2. **Automobiles and Other Vehicles § 110— misdemeanor death by vehicle—ordinary negligence—constitutionality**

A conviction of misdemeanor death by vehicle under N.C.G.S. § 20-141.4(a2) may constitutionally be based upon a finding of ordinary negligence, and the statute was constitutional as applied to defendant where the jury's finding of guilt necessarily included a finding that defendant was negligent in violating N.C.G.S. § 20-150(a), the statute prohibiting the overtaking and passing of another vehicle unless the pass can be made in safety.

3. **Criminal Law § 142.4— death by vehicle—$500,000 restitution as probation condition—ability of defendant to pay**

The trial court erred in ordering defendant to pay $500,000 in restitution to the victim's next of kin as a condition of probation for misdemeanor death by vehicle where the court failed to consider defendant's ability to pay and defendant clearly cannot comply with this probation condition. N.C.G.S. § 15A-1343(d).

4. **Criminal Law § 142.4— death by vehicle—restitution as condition of probation—victim's annual salary as basis**

While the trial court properly used the wrongful death statute to compute the amount of restitution to be paid to a death by vehicle victim's parents as a condition of defendant's probation, the trial court erred in using the victim's annual salary as a base figure for the restitution since the victim's parents could only recover the amount of the victim's income that they reasonably might have received had he lived, and no evidence was presented as to such amount.

APPEAL by defendant from *Brannon (A. M.), Judge*. Judgment entered 14 May 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 March 1988.

Defendant was charged with misdemeanor death by vehicle under G.S. 20-141.4(a2) arising out of an automobile collision that resulted in the death of Donald Asbill. At the time of the accident, defendant was driving a car and Asbill was driving a motor-

cycle in the opposite direction on a two-lane road. The collision took place in Asbill's lane of travel when defendant attempted to pass a car in front of her. Defendant was found guilty of that offense in District Court and she appealed to Superior Court. Before her trial in Superior Court, defendant moved to dismiss the charge on the grounds that G.S. 20-141.4(a2) is unconstitutional. The motion was denied, and the jury found defendant guilty of death by vehicle. The trial court sentenced defendant to a two-year suspended sentence with five years' supervised probation. As a condition of her probation, defendant was ordered to pay restitution in the amount of $500,000. Defendant appeals.

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

Loflin and Loflin, by Dean A. Shangler, for defendant-appellant.

PARKER, Judge.

Defendant first assigns error to the trial court's denial of her motion to dismiss the charge of death by vehicle. Defendant's remaining assignments of error concern the requirement in the trial court's judgment that she pay restitution in the amount of $500,000 as a condition of her probation.

[1] Defendant contends that G.S. 20-141.4(a2) is invalid under both the North Carolina and United States Constitutions because it imposes criminal liability without requiring a finding of criminal intent. General Statute 20-141.4(a2) provides:

> Misdemeanor Death by Vehicle.—A person commits the offense of misdemeanor death by vehicle if he unintentionally causes 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.

Misdemeanor death by vehicle is punishable by imprisonment of not more than two years, a fine of not more than $500, or both. G.S. 20-141.4(b).

Defendant argues that G.S. 20-141.4(a2) violates the due process clause of the fourteenth amendment to the United States Constitution and the "law of the land" clause in article I, § 19 of the North Carolina Constitution. These two clauses are synonymous. *Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. 467, 474, 206 S.E. 2d 141, 146 (1974). In construing the "law of the land" clause, decisions of the United States Supreme Court concerning federal due process are highly persuasive, but not binding on the courts of this State. *Id.*

As a matter of both State and federal constitutional law, legislatures may make the doing of an act a criminal offense even in the absence of criminal intent. *See United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922); *State v. Hales*, 256 N.C. 27, 30, 122 S.E. 2d 768, 771, 90 A.L.R. 2d 804, 808 (1961); *State v. Howard*, 78 N.C. App. 262, 273, 337 S.E. 2d 598, 605 (1985), *disc. rev. denied and appeal dismissed*, 316 N.C. 198, 341 S.E. 2d 581 (1986). Defendant contends, however, that a criminal conviction without a finding of criminal intent is constitutionally permissible only when the punishment is slight and the conviction does not carry any moral stigma. In *Poultry Co. v. Thomas*, 289 N.C. 7, 220 S.E. 2d 536 (1975), our Supreme Court stated:

> Both federal and state courts have specifically held that it is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal. This is particularly so when the controlling statute does not require the act to have been done knowingly or willfully. [Citations omitted]. The bases for the inclusion of violations of motor vehicle and traffic laws within the scope of this rule are that (1) the requirement of proving intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon our roads and (2) the punishments for such violations are usually a small fine. *We would not extend the rationale of this rule beyond petty offenses involving light punishment nor would we extend its operation to any crime involving moral delinquency.*

289 N.C. at 14-15, 220 S.E. 2d at 541-42 (emphasis added); *see also Morissette v. United States*, 342 U.S. 246, 256, 72 S.Ct. 240, 246,

96 L.Ed. 288, 297 (1952) (statutes may be construed to dispense with the requirement of intent when the penalties are small and conviction does no great damage to the offender's reputation).

Defendant contends that a finding of traditional criminal intent is constitutionally required to support her conviction. Defendant relies principally on the statements of our Supreme Court in *Poultry Co. v. Thomas, supra,* and of the United States Supreme Court in *Morissette v. United States, supra,* to the effect that criminal intent must be an element of all criminal offenses except petty crimes. Even assuming for purposes of argument that a violation of G.S. 20-141.4(a2) is not a "petty offense," we are of the opinion that the cited cases do not require us to hold that G.S. 20-141.4(a2) is unconstitutional as applied to defendant.

As a basic premise, the statute is presumed to be constitutional. *In re Banks,* 295 N.C. 236, 239, 244 S.E. 2d 386, 388 (1978). Moreover, contrary to defendant's contentions, the United States Supreme Court has not decided that due process of law requires a finding of criminal intent to support a conviction of a non-petty offense. The Court in *Morissette v. United States* was not considering the constitutionality of a statute, but was determining whether a criminal statute should be construed to require criminal intent when no intent was specified in the statute. 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288; *see also United States v. United States Gypsum Co.,* 438 U.S. 422, 437-38, 98 S.Ct. 2864, 2873-74, 57 L.Ed. 2d 854, 869-70 (1978) (when statute is silent as to intent, requirement of criminal intent is presumed).

When considering the constitutional limitations on the power of state legislatures to define criminal offenses, the Court has stated: "There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." *Lambert v. California,* 355 U.S. 225, 228, 78 S.Ct. 240, 242, 2 L.Ed. 2d 228, 231 (1957). The Supreme Court has found in some instances that due process requires a finding of criminal intent, but those cases are clearly distinguishable from the present case. *Lambert v. California, supra* (state could not criminalize a mere failure to act without showing that defendant knew of duty to act); *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d

205 (1959) (criminal intent constitutionally required where freedom of speech is affected).

Similarly, our own Supreme Court's statements in *Poultry Co. v. Thomas* do not support defendant's contentions. Like the Court in *Morissette*, the Court in *Poultry Co.* was not ruling on the constitutionality of a statute. *Poultry Co.* was a negligence action in which the Court held that the plaintiff's violation of a traffic statute was negligence per se even though he was unaware of the facts constituting the violation. *Poultry Co.*, 289 N.C. at 15, 220 S.E. 2d at 542. The Court's statement to the effect that it would not extend its reasoning to more serious offenses was unnecessary to its decision and, as dictum, does not constitute binding precedent. *See In re University of North Carolina*, 300 N.C. 563, 576, 268 S.E. 2d 472, 480 (1980).

Even if we were bound by the language in *Poultry Co.*, that case is readily distinguishable. The issue in *Poultry Co.* was whether the plaintiff could be held responsible for his violation of G.S. 20-150(c), which prohibits passing at intersections in cities or towns. The constitutionality of that statute was questioned when it was applied to a motorist who neither knew nor had reason to know that he was within city limits at the time of the violation. *Poultry Co. v. Thomas*, 289 N.C. at 19, 220 S.E. 2d at 544 (Sharp, C.J., dissenting). The issue in *Poultry Co.* was essentially whether the defense of mistake of fact was applicable to the offense. *See State v. Atwood*, 290 N.C. 266, 274-75, 225 S.E. 2d 543, 547-48 (1976) (Exum, J., concurring). In the present case, defendant's conviction is not based upon facts that she had no way of knowing. To the contrary, her conviction based upon a violation of G.S. 20-150(a) shows that the jury found that she should have known that the pass could not be made in safety.

[2] We next consider whether, as defendant contends, G.S. 20-141.4(a2) is a strict liability offense that imposes criminal liability without regard to the offender's state of mind. The degree of culpability required to support a conviction for misdemeanor death by vehicle has never precisely been defined by our courts. This Court has held that "criminal responsibility for death by vehicle is not dependent upon the presence of culpable or criminal negligence." *State v. Freeman*, 31 N.C. App. 93, 97, 228 S.E. 2d 516, 519, *disc. rev. denied*, 291 N.C. 449, 230 S.E. 2d 766 (1976).

Criminal or culpable negligence is something more than ordinary negligence in the law of torts. *Id.* at 96, 228 S.E. 2d at 518. Defendant contends that G.S. 20-141.4(a2) does not require even ordinary negligence. The trial court in this case instructed the jury that the statute "imposes absolute liability without regard to negligence." Defendant does not assign error to the court's instruction, but argues that it was a correct statement of the law.

Although the jury was not required to find that defendant was negligent, the trial court did instruct it that defendant could not be convicted unless the State proved beyond a reasonable doubt that she had violated a provision of the North Carolina Motor Vehicle Code and that the violation proximately caused the victim's death. Specifically, the jury was required to find that defendant violated G.S. 20-150(a), which provides that a driver shall not overtake and pass another vehicle unless the pass can be made in safety. A violation of G.S. 20-150(a) is negligence per se. *Rouse v. Jones*, 254 N.C. 575, 579, 119 S.E. 2d 628, 632 (1961). Thus, the jury's finding of guilt necessarily included a finding that defendant was negligent.

Recognizing that the language of G.S. 20-141.4(a2) could permit a conviction to be based upon the violation of a traffic ordinance that is not negligence per se, we are limited in our review to a consideration of the constitutionality of the statute as applied to the facts of this case. *Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. at 472, 206 S.E. 2d at 145. Therefore, our decision here is limited to the question of whether a conviction under G.S. 20-141.4(a2) may be based upon a finding of ordinary negligence, and we express no opinion as to the constitutionality of the statute as applied to a non-negligent offender.

Several other jurisdictions permit convictions under vehicular homicide statutes based upon a showing of ordinary negligence. Annotation, *What Amounts to Negligence Within Meaning of Statutes Penalizing Negligent Homicide by Operation of a Motor Vehicle*, 20 A.L.R. 3d 473 (1968). Our research discloses only one case in which a state court has held that such a statute was unconstitutional because it imposed criminal liability for negligent behavior. *Commonwealth v. Heck*, 341 Pa. Super. 183, 491 A. 2d 212 (1985), *aff'd*, --- Pa. ---, 535 A. 2d 575 (1987). In affirming the

order of the Pennsylvania Superior Court, however, the Pennsylvania Supreme Court rejected the Superior Court's constitutional analysis, *Commonwealth v. Heck*, --- Pa. at ---, 535 A. 2d at 576, and rested its decision on a construction of the applicable statute which did not permit a conviction to be based upon ordinary negligence. *Id.* at ---, 535 A. 2d at 579. Other state courts that have considered the question have ruled that it is constitutionally permissible to base a vehicular homicide conviction on ordinary negligence. *State v. Russo*, 38 Conn. Supp. 426, 431-32, 450 A. 2d 857, 862 (1982); *People v. McKee*, 15 Mich. App. 382, 166 N.W. 2d 688 (1968).

We are aware that basing a serious offense on ordinary negligence may not be consistent with traditional theories of criminal justice. Regardless of the wisdom of the challenged statute, however, we cannot overturn it unless it conflicts with some provision of the State or Federal Constitutions. *State v. Brewer*, 258 N.C. 533, 545-46, 129 S.E. 2d 262, 271, 1 A.L.R. 3d 1323, 1336, *appeal dismissed*, 375 U.S. 9, 84 S.Ct. 72, 11 L.Ed. 2d 40 (1963). Accordingly, we hold that G.S. 20-141.4(a2) is not unconstitutional as applied to this defendant.

Defendant's remaining assignments of error relate to the trial court's conditioning of her probation on the payment of $500,000 as restitution. General Statute 15A-1343(d) permits the conditioning of probation on payment of restitution "to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant." In this case, the court named the victim's mother as the aggrieved party to whom restitution would be made.

[3] Defendant first contends that the trial court erred in failing to consider her ability to make the required payments. The statute in effect at the time of defendant's conviction provided in pertinent part:

> When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution . . . .

G.S. 15A-1343(d) (amended effective 1 October 1987). The transcript of the sentencing hearing shows that the trial court did not consider any evidence of defendant's financial condition. The trial judge stated that he did not know whether defendant had a job. The trial judge did know that defendant had small children and that her counsel was court appointed.

The State relies on *State v. Hunter*, 315 N.C. 371, 338 S.E. 2d 99 (1986) in which the Court upheld a restitution order under similar circumstances. The Court in *Hunter* held that G.S. 15A-1343(d) does not require the trial judge to make findings of fact as to the defendant's ability to pay. *Hunter*, 315 N.C. at 376, 338 S.E. 2d at 103. In *Hunter*, however, the amount of restitution was only $919.25. In this case, defendant would have to pay $100,000 per year to comply with her probation condition. Her probation could be extended by as much as three years to enable her to complete the program of restitution. G.S. 15A-1342(a). Even over a period of eight years, however, she would have to pay $62,500 per year.

Common sense dictates that only a person of substantial means could comply with such a requirement. General Statute 15A-1343(d) provides that "the court may order partial restitution . . . when it appears that the damage or loss caused by the offense . . . is greater than that which the defendant is able to pay." This case clearly comes within the above statutory provision, and the trial court erred in imposing a condition on defendant's probation with which she clearly cannot comply.

[4] Defendant next contends that the trial court erred in basing its restitution order on the damages recoverable for wrongful death under G.S. 28A-18-2. General Statute 15A-1343(d) defines "restitution" as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action . . . ." The victim in this case had no wife or children, thus his parents could recover damages for wrongful death. G.S. 28A-18-2(a); G.S. 29-15(3). Although the trial court properly used the wrongful death statute to compute the amount of restitution, it erred in its application of G.S. 28A-18-2.

The record shows that the trial court determined the amount of restitution by taking the victim's approximate gross annual wages of $25,000, multiplying that figure by the anticipated life span of the victim's parents (thirty years according to statutory

mortuary tables) to reach $750,000, and reducing that figure to a present worth of $500,000. The reasonably expected net income of the decedent can be recovered in a wrongful death action. G.S. 28A-18-2(b)(4). Although the trial court here used the victim's gross income, the court also had to consider other recoverable damages, such as loss of companionship, which are not susceptible to computation. *See Brown v. Moore*, 286 N.C. 664, 673, 213 S.E. 2d 342, 348-49 (1975).

The trial court properly used the lifespans of the victim's parents to compute the damages. *Bowen v. Rental Co.*, 283 N.C. 395, 420, 196 S.E. 2d 789, 806 (1973). The court erred, however, in using the victim's annual salary as a base figure. Under G.S. 28A-18-2(b)(4), only the "reasonably expected" net income of the decedent can be recovered. The victim's parents could only recover the amount of his income that they reasonably might have received had he lived. *See Bowen v. Rental Co.*, 283 N.C. at 419-20, 196 S.E. 2d at 805-06; *see also Carver v. Carver*, 310 N.C. 669, 683, 314 S.E. 2d 739, 747 (1984).

No evidence was presented at the sentencing hearing to show that either of the victim's parents reasonably expected to receive any, let alone all, of his income. Since the restitution order is not supported by the evidence, it cannot be allowed to stand. *See State v. Burkhead*, 85 N.C. App. 535, 355 S.E. 2d 175 (1987).

For the reasons stated above, we affirm defendant's conviction, but we vacate that portion of the judgment requiring defendant to pay restitution in the amount of $500,000 and remand the case to the trial court to determine an amount of restitution consistent with this opinion.

No error in the trial; judgment vacated in part and remanded.

Judges ARNOLD and BECTON concur.

Phipps v. Paley

HOWARD PHIPPS, JR. AND WIFE, MARY N. S. PHIPPS v. WARREN D. PALEY AND WIFE, CLAIRE PALEY; AND RONALD AUSTIN, JR.

No. 871SC981

(Filed 17 May 1988)

1. **Judgments § 37— judgment of nonsuit for insufficient evidence—no adjudication on the merits—plaintiff not collaterally estopped from bringing action**

Though plaintiffs' claim to the tract of land involved in the present case was based upon the same grant which plaintiffs relied on in a previous action, the present tract is part of the lands to which plaintiffs claimed title in the previous action, and judgment of nonsuit was entered against plaintiffs because they failed to locate the outer boundaries of the grant and locate the exceptions contained in the grant, plaintiffs nevertheless were not collaterally estopped from bringing this ejectment action since collateral estoppel could not apply unless the earlier action was a final judgment on the merits; judgment of nonsuit for insufficient evidence was not an adjudication on the merits and would not bar a subsequent action unless the allegations and evidence in the two actions were substantially the same; and the evidence in these two actions was not the same where plaintiffs in this action offered into evidence a new survey which purportedly located the boundaries and exceptions, thus correcting the deficiency in the evidence. However, plaintiffs' first action and cases cited in support of this decision were decided prior to enactment of the present N.C. Rules of Civil Procedure, and this decision therefore has no bearing on the *res judicata* or collateral estoppel effects of actions decided under the current rules.

2. **Adverse Possession § 25.2— color of title—possession of land other than that described in deed—insufficiency of evidence of adverse possession**

The trial court erred in entering summary judgment for defendants on their claim of adverse possession under color of title where plaintiffs' evidence raised an issue of fact as to whether a dwelling, shed, and area from which sand was taken were within the area encompassed by the description in the deed under which defendants claimed; the payment of property taxes was evidence of the adverse nature of defendants' claim but not evidence of actual possession; posts which defendants placed on the boundaries of the land were erected less than seven years before the action was commenced and thus could not be used to establish possession; and defendants' granting of permission to operate a food concession in 1984 and 1985 failed to establish possession.

APPEAL by plaintiffs from *Llewellyn (James D.), Judge.* Judgment entered 22 May 1987 in Superior Court, DARE 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 2 March 1988.

Plaintiffs instituted this action on 20 September 1985 seeking to eject defendants from a six-and-six-tenths acre tract located in Hatteras Township, Dare County. The complaint alleged that plaintiffs are fee simple owners of a one-twelfth undivided interest in the tract. By stipulation filed with the court, the non-party tenants in common of the plaintiffs agreed to be bound by the resolution of this action.

Defendants' answer raised the defenses of *res judicata*, collateral estoppel, and laches. Defendants also counterclaimed alleging that they had acquired title by adverse possession for over twenty years and by adverse possession under color of title for over seven years. Defendants then moved for summary judgment. After reviewing the pleadings, discovery, and other materials submitted by the parties, the trial court found that summary judgment based on the defense of collateral estoppel was appropriate, that partial summary judgment on defendants' claim of adverse possession under color of title was appropriate as to part of the tract, and that summary judgment on the claim of adverse possession for over twenty years and on the defense of laches was not appropriate. From the entry of summary judgment in favor of defendants, plaintiffs appeal.

Brooks, Pierce, McLendon, Humphrey and Leonard, by James T. Williams, Jr., William G. McNairy, Randall A. Underwood, and S. Leigh Rodenbough, IV, for plaintiff-appellants.

Bailey and Dixon, by John N. Fountain and E. Parker Herring, for defendant-appellees.

PARKER, Judge.

The two questions presented for review by this appeal are: (i) whether the trial court erred in entering summary judgment based on the defense of collateral estoppel and (ii) whether the trial court erred in entering partial summary judgment based on defendants' claim of adverse possession under color of title. For the reasons stated herein, we reverse the summary judgment.

I. Collateral Estoppel

[1] Defendants' plea of collateral estoppel is based upon a previous action in which the present plaintiffs claimed title to a tract of land described in a grant from the State to Mrs. Georgia

A. Gaskins dated 26 January 1910. A judgment of nonsuit was entered in that action on account of plaintiffs' failure to locate the outer boundaries of the grant and the exceptions contained in the grant. The judgment of nonsuit was affirmed by this Court in *Phipps v. Gaskins*, 8 N.C. App. 585, 174 S.E. 2d 826 (1970). It is not disputed that plaintiffs' claim to the tract involved in the present case is based upon the same grant that plaintiffs relied on in the previous action, nor is it disputed that the present tract is part of the lands to which plaintiffs claimed title in the previous action. Defendants, who were not parties to the earlier action, contend that the doctrine of collateral estoppel bars plaintiffs from bringing the present action.

Defendants argue that the issue of plaintiffs' title to the tract in question was actually litigated and decided in the previous action and that plaintiffs are barred from relitigating that issue. *See Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E. 2d 552, 557 (1986). Plaintiffs, on the other hand, contend that the judgment of nonsuit entered in the earlier action was not a final judgment on the merits and that it does not bar their claim. We agree.

Traditionally, collateral estoppel would apply if an issue in the present action is identical to an issue that was actually litigated and decided in the previous action, if the parties in the present action were the same as or in privity with those in the previous action, and if the previous action resulted in a final judgment on the merits. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. at 429, 349 S.E. 2d at 557. Our Supreme Court recently ruled, however, that the defense of collateral estoppel may be asserted in some cases where the party asserting it was not a party nor in privity with a party to the earlier action. *Id.* at 432-35, 349 S.E. 2d at 559-60.

To support their argument, plaintiffs rely in part on this Court's decision in *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 343 S.E. 2d 188, *cert. denied*, 317 N.C. 715, 347 S.E. 2d 457 (1986). In *Va. Electric*, the power company (VEPCO) had instituted a condemnation proceeding, and respondents Tillett counterclaimed to establish title in themselves. The trial court entered summary judgment quieting title in VEPCO. On appeal, VEPCO argued that, because of an earlier action between the parties'

predecessors in title, under the doctrine of *res judicata* respondents were barred from claiming title. In the earlier action, VEPCO's predecessor obtained a directed verdict when respondents' predecessor failed to present sufficient evidence to establish title. This Court held that the disposition of the earlier action did not justify summary judgment in VEPCO's favor because it merely showed that respondents' predecessor failed to prove title in himself; it did not represent an adjudication of title in favor of VEPCO's predecessor. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. at 389, 343 S.E. 2d at 193; *see also Mayberry v. Campbell*, 16 N.C. App. 375, 192 S.E. 2d 27, *cert. denied*, 282 N.C. 427, 192 S.E. 2d 840 (1972).

In the present case, plaintiffs contend that the judgment of nonsuit previously entered against them did not finally adjudicate title to the disputed property and that they, therefore, are not precluded from bringing the present action. The present case, however, is distinguishable from *Va. Electric, supra* and *Mayberry, supra*. In *Va. Electric* and *Mayberry*, this Court held that the failure of a party to prevail in a title action does not conclusively establish title in the opposing party. Defendants here are not contending that the earlier action established title in themselves, but argue that it merely bars plaintiffs from relitigating the issue. The doctrine of collateral estoppel is designed to prevent repetitious lawsuits when a party has previously had a full and fair opportunity to litigate the issue. *See Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. at 434, 349 S.E. 2d at 560.

Although defendants' argument may have some merit, collateral estoppel cannot apply unless the earlier action was a final judgment on the merits. In the earlier action, judgment of nonsuit was entered against the plaintiffs because they failed to present sufficient evidence to establish title. The case law prior to the North Carolina Rules of Civil Procedure is clear that a judgment of nonsuit for insufficient evidence is not an adjudication on the merits and will not bar a subsequent action unless the allegations and evidence in the two actions are "substantially the same." *Powell v. Cross*, 268 N.C. 134, 150 S.E. 2d 59 (1966); *Walker v. Story*, 256 N.C. 453, 124 S.E. 2d 113 (1962); *Barringer v. Weathington*, 7 N.C. App. 126, 171 S.E. 2d 233 (1969), *cert. denied*, 276 N.C. 327 (1970). A judgment of nonsuit in a title action is a judgment on the merits only when the plaintiff's evidence affirma-

tively shows that the defendant's title is superior. *See Hayes v. Ricard*, 251 N.C. 485, 494, 112 S.E. 2d 123, 129 (1960). Although the above-cited cases dealt with the doctrine of *res judicata*, the issue of whether a previous judgment was on the merits is also relevant to the application of collateral estoppel. For either doctrine to apply, the previous action must have resulted in a final judgment on the merits. *Thomas M. McInnis & Assoc., Inc., supra* at 429, 349 S.E. 2d at 557.

Defendants correctly point out in their brief that, in the present case, the trial court has had the opportunity to view plaintiffs' evidence. If the trial court correctly determined that the evidence in this case was substantially the same as the evidence in the earlier action, then the earlier action could operate to bar plaintiffs' claim. *See, e.g., Powell v. Cross, supra.* There is nothing in the record to indicate whether or not the trial court made such a determination. The record clearly shows, however, that the evidence in the two actions is not "substantially the same" as that term has been applied in similar cases.

In the first action, judgment of nonsuit was entered against plaintiffs because they failed to (i) locate the outer boundaries of the grant and (ii) locate the exceptions contained in the grant. In this action, plaintiffs have offered into evidence a new survey which purportedly locates the boundaries of the grant and the exceptions contained therein. A judgment of nonsuit will not bar a subsequent action if the plaintiff corrects the deficiency in the evidence. *Kelly v. Kelly*, 241 N.C. 146, 149-50, 84 S.E. 2d 809, 812 (1954). Plaintiffs here have offered evidence which, if true, would supply the essential elements that were lacking in the earlier action. Thus, their present claim is not barred by the doctrine of collateral estoppel.

We emphasize, however, that plaintiffs' first action and the cases cited in support of our decision were decided prior to the enactment of the present North Carolina Rules of Civil Procedure. The effect of the judgment of nonsuit entered against plaintiffs was necessarily determined in accordance with the law in force at the time it was rendered. 46 Am. Jur. 2d *Judgments* § 236 (1969). Under present law, the motion for nonsuit has been replaced by the motion for involuntary dismissal under Rule 41(b) of the N.C. Rules of Civil Procedure in civil actions tried without

a jury and by the motion for a directed verdict under Rule 50 in jury trials. *See Whitaker v. Earnhardt*, 289 N.C. 260, 264, 221 S.E. 2d 316, 319 (1976). Rule 41(b) provides that a dismissal for insufficient evidence "operates as an adjudication upon the merits" unless the trial court specifies otherwise. A judgment entered upon a directed verdict is a judgment on the merits for *res judicata* purposes. *Taylor v. Electric Membership Corp.*, 17 N.C. App. 143, 193 S.E. 2d 402 (1972). Therefore, our decision here has no bearing on the *res judicata* or collateral estoppel effects of actions decided under the current rules of procedure.

II. Adverse Possession

[2] The trial court entered partial summary judgment in favor of defendants based on adverse possession under color of title. The party asserting title by adverse possession has the burden of proof on that issue. *State v. Brooks*, 275 N.C. 175, 181, 166 S.E. 2d 70, 73 (1969). As the moving party, defendants also have the burden of establishing that no genuine issue of material fact exists. *Kidd v. Early*, 289 N.C. 343, 366, 222 S.E. 2d 392, 408 (1976). Even if plaintiffs failed to raise an issue of fact, defendants, as the party with the burden of proof, " 'must still succeed on the strength of [their] own evidence.' " *Id.* (quoting Louis, *A Survey of Decisions Under the New North Carolina Rules of Civil Procedure*, 50 N.C.L. Rev. 729, 738 (1972)).

Plaintiffs do not dispute that the deed upon which defendants' claim of adverse possession is based is sufficient to constitute color of title for the part of the tract encompassed by the judgment. In order for defendants to prevail on their claim, however, their evidence must show both actual and adverse possession for the full seven-year period prescribed in G.S. 1-38. *Morehead v. Harris*, 262 N.C. 330, 337, 137 S.E. 2d 174, 181-82 (1964). Plaintiffs contend that defendants' evidence is not sufficient to prove actual possession of the property described in their deed for the statutory period.

We first note that defendants originally claimed title to the entire tract involved in this action. Plaintiffs submitted evidence, however, which tended to show that the description in defendants' deed did not cover the entire tract. The trial court's judgment stated that defendants' claim of adverse possession under color of title was good only for that portion of the tract which

was within the deed's coverage as shown on a survey submitted by plaintiffs.

Defendants' evidence in support of their motion for summary judgment tended to show the following: On 2 February 1973, a deed was executed conveying the property in question to defendant Warren D. Paley. The property is jointly owned and managed pursuant to a partnership agreement between Paley and others. In 1973, defendants erected a "modular dwelling" and a shed on the property. From 1973 up until the present time, defendants have entered into various leases for the use of the dwelling and have collected rent for such use. Defendants have paid property taxes on the property since 1973. In early 1979, defendants placed posts along the boundaries of the property with signs that said "Property of Paley." In 1978 and 1979, defendants sold sand from the property, and filed a complaint against a third party for conversion of sand on the property. In 1984 and 1985, defendants received rents in exchange for allowing a food concession to be operated on the property during the summer. Defendants also submitted the affidavits of thirty-six individuals who were familiar with the property which corroborated most of the above evidence.

We need not decide whether all of defendants' evidence is sufficient to prove actual possession of the land encompassed by the judgment. Plaintiffs submitted a survey and the affidavit of the surveyor who prepared it which indicate that a substantial portion of the modular dwelling, the shed, and the area from which the sand was taken are all located on that portion of the tract which is outside the area encompassed by the deed description as accepted by the trial court. A deed offered as color of title is color of title only for the land within the description in the deed. *Williams v. Robertson*, 235 N.C. 478, 483, 70 S.E. 2d 692, 696 (1952). Actual possession of one tract cannot be constructively extended to an adjoining tract. *Morehead v. Harris*, 262 N.C. at 337, 137 S.E. 2d at 181. Plaintiffs' evidence at least raised an issue of fact as to whether the dwelling, the shed, and the sand area are located on land covered by the deed, and those items of evidence may not be competent to show actual possession.

As to defendants' remaining evidence, the payment of property taxes is evidence of the adverse nature of their claim but it is

not evidence of actual possession. *Chisholm v. Hall*, 255 N.C. 374, 379, 121 S.E. 2d 726, 730 (1961). The posts that defendants placed on the boundaries of the land were not erected until early 1979, and plaintiffs instituted this suit in September 1985. Since the posts were erected less than seven years before this action was commenced, they cannot be used to establish possession. *See Taylor v. Johnston*, 289 N.C. 690, 710, 224 S.E. 2d 567, 579 (1976). Similarly, defendants' granting of permission to operate a food concession in 1984 and 1985 also fails to establish actual possession.

Thus, it is questionable whether defendants have produced any competent evidence of their actual possession of the land covered by the deed for the statutory period. Under these circumstances, the trial court erred in entering summary judgment for defendants on their claim of adverse possession under color of title.

Reversed and remanded.

Judges ARNOLD and BECTON concur.

W. HAROLD MITCHELL, EXECUTOR OF THE ESTATE OF DOVIE L. BOUNOUS v. OLVIE C. LOWERY, DORIS S. PRIVETTE, PEGGY L. SALVAGE, ORIS STARKEY, TODD STONE, JAMES DANIEL LOWERY, ROGER LEE LOWERY, MARY NEIL VOGEL, JOANNE MCMAHON, JACK ERWOOD, JR., AND FRANK ERWOOD

No. 8725SC1158

(Filed 17 May 1988)

1. Wills § 44— per stirpes in equal shares—per capita distribution

The trial court correctly construed the portion of a will which devised property "*per stirpes*, in equal shares to eight people named . . . or the survivors thereof" as making a devise in equal shares as tenants in common as to those of the eight named parties who survive the testatrix. Construing the article to direct a *per stirpes* distribution would require looking outside the will for a common ancester through whom the representative shares of each of the eight parties could be determined; such an interpretation would conflict with testatrix's clear intent that each of the named parties receive an equal share in the property; and applying the *per stirpes* language to the heirs of any of the eight named parties who predeceased testatrix would mean giving the

phrase "or the survivors thereof" a meaning inconsistent with existing case law.

2. **Wills § 44— residuary clause—per capita or per stirpes distribution**

The trial court did not err by construing the residuary clause of a will which directed distribution of the residuary estate in equal shares to eight named people or the survivors thereof as devising equal shares to the named parties who survived testatrix.

3. **Wills § 73— action to construe will—findings and conclusions—correct**

The trial court did not err in a declaratory judgment action to construe a will by failing to make specific findings of fact as to the nature of the defect in the will, the qualifications of the party who drafted the will, or the familial relationships among testatrix and named beneficiaries in the will, or by including its conclusions of law as to two contested articles of the will in a single paragraph. The court's findings were sufficient to determine the questions raised as to the construction of the two contested articles and to support the court's conclusions of law as to the interest of the beneficiaries, and there is no authority for the argument that the court erred by failing to state separate conclusions of law as to each contested article.

APPEAL by defendants James Daniel Lowery, Roger Lee Lowery, Mary Neil Vogel, Joanne McMahon, Jack Erwood, Jr., and Frank Erwood from *Sitton (Claude S.), Judge.* Judgment entered 15 July 1987 in Superior Court, BURKE County. Heard in the Court of Appeals 7 April 1988.

This is a declaratory judgment action filed by the Executor of the Estate of Dovie L. Bounous (hereinafter testatrix), seeking construction of two provisions of testatrix's Will. Article IV of the Will provides the following:

> Upon the death or inability of my sister, Drucilla V. Lowery, to occupy my homeplace as her residence for 2 continuous months, I devise said property, *per stirpes*, in equal shares to eight (8) people named: OLVIE C. LOWERY, DORIS S. PRIVETTE, JACK LOWERY, CARTHEL LOWERY, PEGGY L. SALVAGE, ORIS STARKEY, EDNA D. ERWOOD and TODD STONE, or the survivors thereof, in fee simple absolute.

Article V of the Will contains the following language:

> Upon converting all of my real estate to cash, I direct my Executor to distribute my residuary estate in equal shares to eight (8) people named: OLVIE C. LOWERY, DORIS S. PRIVETTE, JACK LOWERY, CARTHEL LOWERY, PEGGY L.

SALVAGE, ORIS STARKEY, EDNA D. ERWOOD, and TODD STONE, or the survivors thereof, in fee simple absolute.

Testatrix died on 25 May 1986. Three of the eight parties named in Articles IV and V of the Will predeceased testatrix. Drucilla V. Lowery is deceased. Olvie C. Lowery, Doris S. Privette, Peggy L. Salvage, Oris Starkey, and Todd Stone (hereinafter appellees) survived testatrix.

The court below, after making findings of fact, concluded that Articles IV and V of testatrix's Will made bequests and devises to such of the eight named parties as survived testatrix in equal shares as tenants in common. The children of the three named parties who predeceased testatrix, James Daniel Lowery, Roger Lee Lowery, Mary Neil Vogel, Joanne McMahon, Jack Erwood, Jr., and Frank Erwood (hereinafter appellants), appeal.

Haywood, Denny, Miller, Johnson, Sessoms and Patrick, by George W. Miller, Jr., and E. Elizabeth Lefler, for defendant-appellants James Daniel Lowery, Roger Lee Lowery, Mary Neil Vogel, Joanne McMahon, Jack Erwood, Jr., and Frank Erwood.

Patton, Starnes, Thompson, Aycock and Teele, P.A., by Thomas M. Starnes, for defendant-appellees Olvie C. Lowery, Doris S. Privette, Oris Starkey, Peggy L. Salvage, and Todd Stone.

PARKER, Judge.

Appellants raise three issues for review by this Court: (i) whether the trial court erred in construing Article IV of testatrix's Will so that appellants are not entitled to share in the estate; (ii) whether the trial court erred in construing Article V of testatrix's Will so that appellants are not entitled to share in the estate; and (iii) whether the trial court erred in failing to make certain findings of fact as to the nature of the defect in the Will, as to the qualifications of the party who drafted the Will, and as to the familial relationships among testatrix and the eight persons named in Articles IV and V of the Will, and in failing to state separately its conclusions of law as to Article IV and Article V. We find no error and affirm the judgment of the court below.

[1] Whenever the meaning of a will or a part of a will is in controversy, the courts may construe the provision in question and

declare its meaning. *Wachovia Bank v. Livengood*, 306 N.C. 550, 552, 294 S.E. 2d 319, 320 (1982); *Eldridge v. Morgan*, 88 N.C. App. 376, 379, 363 S.E. 2d 197, 199 (1988). The court's fundamental duty is to effectuate the testator's intent insofar as that intent does not conflict with the law or with public policy. *Bank v. Goode*, 298 N.C. 485, 489, 259 S.E. 2d 288, 291 (1979); *Bank v. Carpenter*, 280 N.C. 705, 707, 187 S.E. 2d 5, 7 (1972). The intent that controls must be gleaned from the will as written in its entirety; every word has its purpose and, if possible, should be given meaning and harmonized with the rest. *Bank v. Goode*, 298 N.C. at 489, 259 S.E. 2d at 291; *Eldridge v. Morgan*, 88 N.C. App. at 379, 363 S.E. 2d at 199. However, where parts of the will are dissonant or create an ambiguity, the discord thus created must be resolved in light of the prevailing purpose of the entire instrument. *Bank v. Goode*, 298 N.C. at 489, 259 S.E. 2d at 291; *Eldridge v. Morgan*, 88 N.C. App. at 379, 363 S.E. 2d at 199. With these basic principles in mind, we examine the disputed provisions of the Will in the proceeding now before us.

Article IV of testatrix's Will devises property "*per stirpes*, in equal shares to eight (8) people named . . . or the survivors thereof . . . ." The term "*per stirpes*" "denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living." *Trust Co. v. Bryant*, 258 N.C. 482, 485, 128 S.E. 2d 758, 761 (1963). *See also Walsh v. Friedman*, 219 N.C. 151, 161-62, 13 S.E. 2d 250, 256 (1941). The term "*per stirpes*" literally means by "roots or common stocks" and when used in law relates to a mode of distribution, indicating not who shall take, but the manner in which those who come within the class entitled to take shall take. *Walsh v. Friedman*, 219 N.C. at 161, 13 S.E. 2d at 256. Generally, a *per stirpes* distribution involves a taking by representation from an ancestor who is specifically referred to in the instrument, as where the children of a class of named beneficiaries are to receive the shares of their parents, *per stirpes*, by representation. *See Trust Co. v. Bryant, supra.*

The phrase "in equal shares," however, denotes a contrasting manner of division or distribution. Where beneficiaries "take directly under a bequest or devise as individuals and not in a representative capacity, and the testator provides that the division or distribution shall be in equal proportions, they take *per capita.*"

Wooten v. Outland, 226 N.C. 245, 248, 37 S.E. 2d 682, 684 (1946). *See also Dew v. Shockley*, 36 N.C. App. 87, 90, 243 S.E. 2d 177, 180, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 9 (1978) (a direction that the children of testator's brothers and sisters are to take "in equal shares" is clearly a *per capita* direction).

In the instant case, the issue then is raised as to testatrix's intent in using the apparently conflicting terms "*per stirpes*" and "in equal shares" in reference to the same devise. Our Supreme Court has addressed this issue in three cases, *Walsh v. Friedman*, *supra*, *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949), and *Wachovia Bank v. Livengood*, *supra*.

In *Walsh v. Friedman*, testatrix's Codicil made a bequest to those of her four sons "as may be then living and the children then living of such as may have died *per stirpes*, in equal shares, absolutely." *Walsh*, 219 N.C. at 153, 13 S.E. 2d at 251. The Court concluded the term *per stirpes* indicated an intent to defeat what would otherwise have been a *per capita* distribution. *Id.* at 162, 13 S.E. 2d at 256. In *Lide v. Mears*, testator's Will directed that after a specified period following his death his estate "shall be equally divided between the heirs of my children, and they shall receive all of my property, both real, personal and mixed, *per stirpes.*" *Lide*, 231 N.C. at 114, 56 S.E. 2d at 406. Without discussion, the Court concluded that this language directed the heirs of testator's children should take "by right of representation through their respective parents and not as individuals." *Id.* at 121, 56 S.E. 2d at 411.

In *Wachovia Bank v. Livengood*, testator's Will provided that at the termination of a trust created by the Will, the proceeds "shall . . . be paid over in equal shares to my nieces and Nephews per Stripes [sic]." *Wachovia Bank*, 306 N.C. at 551, 294 S.E. 2d at 320. The Court first distinguished *Walsh*, *supra*, and *Lide*, *supra*, in that the language construed in those two earlier cases referred to the devisees not as a named class in itself, such as "grandchildren," but by reference to their relationship to members of a named class, such as "children" of testator's sons or "heirs" of testator's children. *Wachovia Bank v. Livengood*, 306 N.C. at 553, 294 S.E. 2d at 321. The Court noted that "the words 'in equal shares' can only mean *per capita*," and that the "equal shares" language "not only buttresses the *per capita* presumption, but

also indicates that the term *per stirpes* (which the testator spelled *per stripes*) was not intended to be given its technical meaning." *Id.* at 553, 294 S.E. 2d at 321. Based upon these considerations, the Court drew the following conclusion:

> We conclude that the testator did not intend to use the technical words "*per stirpes*" in their legal or technical sense as his use of the words "in equal shares" indicates otherwise. We therefore apply the general rule that where a bequest is to a class (here nieces and nephews) it takes *per capita* in the absence of clear language showing that the testator intended a different result.

Id. at 553, 294 S.E. 2d at 321. We find the *Wachovia Bank* case to be persuasive in our construction of Article IV in the Will being reviewed.

In this case, to construe Article IV as directing a *per stirpital* distribution to the eight named parties would require looking outside the Will for a common ancestor through whom the representative shares of each of the eight parties could be determined. This we are reluctant to do. *See Trust Co. v. Bryant*, 258 N.C. at 485, 128 S.E. 2d at 761. Moreover, such an interpretation would conflict with testatrix's clear intent that each of the named parties receive an "equal share" in the property. *See Wachovia Bank v. Livengood*, 306 N.C. at 553, 294 S.E. 2d at 321.

Appellants, however, contend that the "*per stirpes*" language applies to the heirs of any of the eight named parties who predeceased testatrix. We disagree.

Article IV of testatrix's Will devised the homeplace property to "eight (8) people named . . . or the survivors thereof . . . ." To reach the result urged by appellants, the Court would have to give the phrase "or the survivors thereof" a meaning inconsistent with existing case law. Interpreting similar language, our Supreme Court in *Hummell v. Hummell*, 241 N.C. 254, 85 S.E. 2d 144 (1954), rejected substantially the same argument made by appellants. In *Hummell*, testatrix's holographic will contained the following language:

> At my death I desere [sic] everything I I [sic] possess or may possess both real & personal or mixed to be equally

deveded [sic] between my children, Magdalene, Leslie Ray Louis & Elizabeth Hummell Briggs or survivors . . . .

Id. at 254, 85 S.E. 2d at 144.

The issue before the Court in *Hummell* was "whether the gift to the four named children *or survivors* carried the entire estate to the three children of the testatrix who survived her, or whether the children of Leslie Ray Hummell, who predeceased the [testatrix], took the share intended for him." *Id.* at 255, 85 S.E. 2d at 145. The Court first defined the word "survivor" as "One who outlives another; one who outlives another person, a time or an event; one who continues to live after the death of those who comprise his group." *Id.* at 255, 85 S.E. 2d at 145. The Court concluded the construction was mandatory that only the three children of testatrix who were living at the time of testatrix's death could qualify as "survivors," and that the children of the son of testatrix who predeceased testatrix were not entitled to the share intended for their father. *Id.* at 258-59, 85 S.E. 2d at 147-48.

The Court's reasoning in *Hummell, supra,* is instructive in construing the language at issue in this case. Therefore, we agree with the trial court that Article IV of testatrix's Will makes a devise in equal shares as tenants in common to those of the eight named parties who survived testatrix, the appellees in this appeal.

[2] For the same reasons, distribution of the residuary estate in Article V of testatrix's Will is likewise in equal shares to the eight named parties who survived testatrix, or appellees. In Article V, testatrix directs that her residuary estate be distributed "in equal shares to eight (8) people named . . . or the survivors thereof . . . ." As we stated earlier, the "equal shares" language is a strong indication that testatrix intended to direct a *per capita* distribution; this language reinforces the presumption of a *per capita* distribution where a devise or bequest is made to named individuals without reference to a common ancestor. *See Wachovia Bank v. Livengood,* 306 N.C. at 553, 294 S.E. 2d at 321. This presumption is even stronger where, as in Article V, there is no mention of a *per stirpes* distribution. Finally, Article V also contains the phrase "or the survivors thereof," which requires that members of the named class survive testatrix in order to qualify

as beneficiaries under that provision. *See Hummell v. Hummell*, 241 N.C. at 258-59, 85 S.E. 2d at 147-48.

[3] Appellants' third and final contention involves the failure of the trial court to make specific findings of fact as to the nature of the defect in the Will, the qualifications of the party who drafted the Will, and the familial relationships among testatrix and those named in Articles IV and V of the Will. Appellants also assert that the trial court erred by including its conclusions of law as to Article IV and Article V in a single paragraph. These contentions are entirely without merit.

In actions tried upon the facts without a jury, the trial court must "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." G.S. 1A-1, Rule 52(a)(1). The trial court need not recite in its order every evidentiary fact presented at hearing, but only must make specific findings on the ultimate facts established by the evidence, admissions, and stipulations that are determinative of the questions raised in the action and essential to support the conclusions of law reached. *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E. 2d 653, 658 (1982). In the instant case, the trial court's findings of fact were sufficient to determine the questions raised as to the construction of Articles IV and V of testatrix's Will and to support the court's conclusions of law as to the interests of the beneficiaries named in the disputed portions of the Will.

Moreover, Rule 52(a)(1) requires only that the trial court's findings of fact be distinguishable from its conclusions of law. *Highway Church of Christ v. Barber*, 72 N.C. App. 481, 483-84, 325 S.E. 2d 305, 307 (1985). Appellants cite no authority, and we can find none, to support their argument that the court erred in failing to state separate conclusions of law as to Article IV and Article V of testatrix's Will.

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

Affirmed.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA v. CLIFTON DELANE DAVIS

No. 8726SC1245

(Filed 17 May 1988)

1. **Burglary and Unlawful Breakings § 5.8— first degree burglary—insufficiency of evidence of intent to rape**

In a prosecution for first degree burglary, evidence was insufficient to show any overt manifestation by defendant of an intended forcible sexual gratification even when it was considered that defendant had been convicted for a rape carried out in the same apartment complex by a similar method.

2. **Arrest and Bail § 6.2— resisting public officer in performance of duty—insufficiency of evidence**

The trial court erred in not dismissing the charge of resisting a public officer in the performance of his duty where the evidence did not disclose that defendant had been arrested for first degree burglary when he ran from a police officer, but instead disclosed that defendant had not been arrested and that the officer was merely investigating the area after responding to a call to go to the scene. N.C.G.S. § 14-223.

APPEAL by defendant from *Gudger, Judge.* Judgments entered 26 August 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 May 1988.

Defendant was charged in proper bills of indictment with first degree burglary in violation of G.S. 14-51, assault on a law-enforcement officer in violation of G.S. 14-33(b)(4), and resisting a public officer in violation of G.S. 14-223. The State's evidence tends to show the following:

On 28 November 1986, Wanda Faye Haskins was living in Apartment 35-D of the Fountain Square Apartments in Charlotte. Her boyfriend visited her and left at approximately 3:30 a.m. Ms. Haskins went to bed approximately five minutes later. Sometime after that Ms. Haskins heard a noise on the steps inside her apartment. She asked who was there and heard no response. She went to the top of the steps and turned on the light. Ms. Haskins was wearing a floor-length nightgown, and she was carrying her son's baseball bat and toy gun. She saw a man on the staircase on the third or fourth step from the bottom. She asked him what he was doing in her apartment, and he told her that he was the maintenance man. He also said, "Wanda, you left the back door open." Ms. Haskins testified that both she and her boyfriend had

checked the back door to make sure it was secure. The man turned around, began using vulgar language, and then went back out the way he came. Ms. Haskins followed him, secured the door and called the police.

Ms. Haskins testified that her name was on a magnetic tag on her refrigerator and on some mail on the living room table. She further testified that she knew all the maintenance men at her complex, and she had never seen defendant as a maintenance man.

Charlotte police officers C. R. Boger and R. B. Davis responded to a call at Fountain Square Apartments at around 4:00 a.m. on 28 November 1986. As Officer Davis was entering the back entrance to the complex he saw defendant duck into an apartment doorway. Davis stopped his patrol car, shined his flashlight on defendant and told him to "come here." Defendant ran around the end of an apartment building. Davis caught up with defendant, and a scuffle ensued. Defendant broke loose and started running again. Defendant ran into some trees, fell over, and was apprehended by officers Davis and Boger. Officer Davis testified that "[a]t that point [defendant] was under arrest for obstructing and delaying and assault on a police officer and resisting arrest." Officer Boger then brought Ms. Haskins to the patrol car where she identified defendant as the man who had been in her apartment.

Defendant was transported to the hospital for treatment of a cut on his forehead. At the hospital Officer Davis read defendant his *Miranda* rights and asked him what he was doing at the apartments. Defendant told him that he went to Apartment 2-E to see his girlfriend, Elaine Kilmer, but she was not there. Defendant explained that he ran from the police because he is married.

Susan Elaine Kilmer Luniewski testified that on 26 August 1973 she lived alone in Apartment 27-A at Fountain Square Apartments. At approximately 5:00 a.m. she was awakened by a noise and found defendant standing in her bedroom doorway. She asked him who he was, and he asked Ms. Luniewski her name, age, place of employment, and marital status. After defendant told Ms. Luniewski that he had a gun he raped her. Ms. Luniewski testified that the police arrived while defendant was still in her bedroom, and defendant told her, "Susan, tell them I am with

you." Ms. Luniewski further testified that she was not his girlfriend and that she had no relationship with him prior to this incident. When she examined her apartment, she found that her sliding glass door in the kitchen, which had been locked, was open. In 1976 defendant was found guilty of the second degree rape of Susan Elaine Kilmer Luniewski.

In the present case defendant was found guilty of first degree burglary and was sentenced to 25 years imprisonment. Defendant was also found guilty of resisting a public officer and assaulting a law-enforcement officer and received a consolidated sentence of 2 years imprisonment. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General K. D. Sturgis, for the State.

Assistant Public Defender Marc D. Towler, and First Assistant Public Defender James Gronquist, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred "by denying defendant's motion to dismiss the charge of first degree burglary where the State's evidence failed to show 'some overt manifestation of an intended forcible sexual gratification' and therefore failed to prove an intent to commit rape as alleged in the indictment." In support of this contention defendant cites *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *aff'd per curiam*, 308 N.C. 804, 303 S.E. 2d 822 (1983), and *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983).

In order to support a verdict of guilty of first degree burglary there must be evidence from which a jury could determine that the defendant broke and entered an occupied dwelling house of another at nighttime, with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). The defendant's intent to commit a felony must exist at the time of entry, and it is no defense that the defendant abandoned the intent after entering. *State v. Wortham*, 80 N.C. App. 54, 341 S.E. 2d 76 (1986), *modified on other grounds*, 318 N.C. 669, 351 S.E. 2d 294 (1987). In the present case the bill of indictment states, "[t]he defendant broke and entered [the dwelling house of Wanda Faye Haskins] with the intent to commit a felony therein, to wit: rape."

Therefore the State was required to introduce "substantial evidence" to permit the jury to find that, at the time defendant broke and entered the dwelling house of Wanda Faye Haskins, he intended to have vaginal intercourse with her by force and against her will. *See State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979), and G.S. 14-27.2 *and* G.S. 14-27.3. Furthermore, the State's evidence must present "some overt manifestation of an intended forcible sexual gratification [by defendant to prevail]." *State v. Planter*, 87 N.C. App. 585, 588, 361 S.E. 2d 768, 769 (1987).

In *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *aff'd per curiam*, 308 N.C. 804, 303 S.E. 2d 822 (1983), the State's evidence showed that in the early morning hours the defendant, wearing dark pants, white fabric gloves, and no shirt, climbed in the window of the room where the victim was sleeping. When she asked who it was, the defendant replied, "Don't holler, don't scream, I got a gun, I'll shoot you." The victim backed up to the head of her bed, and the defendant grabbed her arm. Every time the victim tried to turn on the light the defendant told her not to move. The defendant put his hand over the victim's mouth when she started screaming and then jumped out of the window when the victim's small child started screaming.

The Court found that there was no evidence in that case of "some overt manifestation of an intended forcible sexual gratification." The Court then held that the State's evidence as to the defendant's intent was "at best ambiguous" and was not sufficient to support an inference that at the time he entered the victim's bedroom window he intended to rape the victim. *Id.* at 67, 300 S.E. 2d at 449.

In *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983), the State presented evidence tending to show that the defendant, dressed in a jacket and blue jeans, knocked on the victim's sliding glass door and asked her permission to use the telephone. The victim, who was fully clothed, refused. The defendant forced the door open and pushed his way inside the victim's apartment. The victim managed to push the defendant back outside, but he forced his way in again. The victim again pushed him back outside. The defendant told her, "You shouldn't have enticed me." The victim was unable to close the glass door securely, so she fled through

the front door to a neighbor's apartment where she called the police.

The Court in that case found there to be no evidence to support a finding that at the time defendant broke and entered the apartment, he intended to rape the victim; therefore, the trial court had erred in denying defendant's motion to dismiss the first degree burglary charge.

In the present case, as in *State v. Rushing*, and *State v. Freeman*, there is no evidence of any "overt manifestation of an intended forcible sexual gratification." Here defendant did not touch the victim, and there is no indication that he said anything of a sexual nature to her. Defendant was wearing a jacket and pants and carrying a hat, and the victim was wearing a floor-length nightgown. The evidence in this case shows no overt sexual manifestation by defendant and shows even less sexual suggestion than the evidence in *State v. Rushing* and *State v. Freeman*.

The State concedes in its brief that "[i]t may be that the isolated facts of this defendant's breaking and entering into Ms. Haskins' apartment do not demonstrate the requisite intent." The State then argues that those facts do not stand alone and that the prior conviction of defendant for the rape of Susan Elaine Kilmer Luniewski in the same apartment complex and defendant's statement to Officer Davis that he was at the apartments to see his girlfriend, Elaine Kilmer, leave "no serious doubt about the defendant's intent at the time of the breaking and entry."

We disagree. The evidence of the rape of Ms. Luniewski which occurred 13 years prior to the incident in this case was not alone sufficient to prove intent to commit rape in the present case. The evidence presented by the State fails to show any overt manifestation by defendant of an intended forcible sexual gratification even when it is considered that defendant was convicted for a rape carried out in the same apartment complex by a similar method. By finding defendant guilty of first degree burglary, the jury necessarily found facts which would support defendant's conviction of misdemeanor breaking or entering. The judgment on the verdict of guilty of first degree burglary must be vacated and the cause remanded to the superior court for resentencing on the misdemeanor breaking or entering conviction.

[2] Defendant next assigns error to the denial of his timely motions for a judgment of nonsuit as to the charge of resisting a public officer discharging or attempting to discharge a duty of his office in violation of G.S. 14-223. The bill of indictment charging defendant with resisting a public officer states in pertinent part:

> [Defendant] did unlawfully and wilfully resist, delay and obstruct R. B. Davis, a public officer holding the office of Charlotte Police Officer, by running from said officer. At the time, the officer was discharging and attempting to discharge a duty of his office, taking said defendant into custody after arrest for the crime of burglary.

In order to charge a violation of G.S. 14-223 the bill of indictment must indicate the specific official duty the officer was discharging or attempting to discharge. *State v. Wells*, 59 N.C. App. 682, 298 S.E. 2d 73 (1982), *cert. denied*, 308 N.C. 194, 302 S.E. 2d 248 (1983). The evidence in the present case does not disclose that defendant had been arrested for first degree burglary when he ran from Officer Davis. In fact, the evidence discloses that defendant had not been arrested and that the officer was merely investigating the area after responding to a call to go to Fountain Square Apartments. The evidence is not sufficient to raise an inference that defendant resisted, delayed, or obstructed Officer Davis in attempting to take defendant "into custody after arrest for the crime of burglary." Thus the trial court erred in not dismissing the charge of resisting a public officer in the performance of his duty.

Defendant raises no question on appeal with respect to the judgment entered on the charge of assault on a law-enforcement officer in violation of G.S. 14-33(b)(4). Therefore, we hold that defendant had a fair trial free from prejudicial error on the charge of assault on a law-enforcement officer.

The result is: The judgment entered on the verdict of first degree burglary is vacated and that cause is remanded to the Superior Court of Mecklenburg County for the entry of judgment on the lesser charge of misdemeanor breaking or entering. Since the judgment entered on the verdict finding defendant guilty of assault on a law-enforcement officer was made to run concurrently with the sentence for first degree burglary, the sentence imposed

for assault on a law-enforcement officer will run concurrently with the misdemeanor charge of breaking or entering.

Vacated and remanded in part; reversed in part; no error in part.

Judges WELLS and COZORT concur.

LINDA F. WALKER, ADMINISTRATRIX OF THE ESTATE OF CURTIS WARREN WALKER, DECEASED, AND GUARDIAN *AD LITEM* FOR CURTIS DARRELL WALKER, A MINOR CHILD v. DURHAM LIFE INSURANCE COMPANY

No. 8718SC964

(Filed 17 May 1988)

1. **Insurance § 13— life insurance through employer—decedent not eligible person as defined by policy**

The trial court correctly entered summary judgment for defendant in an action seeking payment under a life insurance policy providing coverage through decedent's employer where all of the evidence of both parties tends to show that decedent was last "at work" at his usual and customary place of employment performing his usual and customary duties of employment on Saturday, 28 September 1985, two days prior to the date the group life insurance policy could have become effective as to him.

2. **Insurance § 13— life insurance—waiver of eligibility requirements—matter of coverage rather than exclusion—summary judgment proper**

In an action seeking payment on a life insurance policy in which summary judgment was granted for defendant, whether defendant waived 90-day employment and eligible person requirements as to the effective coverage date was irrelevant in light of plaintiff's failure to produce a forecast of evidence of coverage. Whether decedent was an eligible person under the policy was a matter of coverage and not a matter of exclusion or exception, so that waiver could not be by implication from conduct or action without an express agreement supported by new consideration, and there was no evidence that the effective coverage date was other than 1 October 1985.

APPEAL by plaintiff from *Collier (Robert A., Jr.), Judge.* Judgment entered 25 August 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 March 1988.

Plaintiff filed this claim as administratrix of the estate of Curtis Warren Walker (herein decedent) and as guardian *ad litem*

for decedent's minor child, Curtis Darrell Walker, seeking payment of $20,000.00 under a certificate of insurance issued to decedent pursuant to defendant's group insurance policy providing coverage to employees of decedent's employer, Team Contractors, Inc. Defendant filed its answer denying the material allegations of the complaint and alleging by way of defense that defendant was not "at work" on the designated effective date of the certificate nor did he return to work thereafter as required by the policy and that defendant was not an "eligible person" within the terms of the policy because he was not an "active full time employee" at the time of his death. Thereafter, defendant moved the trial court for summary judgment. On 25 August 1987, the trial court entered summary judgment in favor of defendant. Plaintiff appeals.

Hunter, Hodgman, Greene, Donaldson, Cooke and Elam, by Robert N. Hunter, Jr., for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey and Leonard, by Reid L. Phillips and Jill R. Wilson, for defendant-appellee.

PARKER, Judge.

In this appeal, plaintiff makes three arguments to support her contention that the trial court erred in ordering that summary judgment be entered in favor of defendant: that decedent was "at work" within the meaning of the policy on the effective date of the certificate and thereafter; that decedent was an "eligible person" as defined by the policy; and that the parties' forecast of evidence raises an issue of fact as to defendant's waiver of policy provisions. We affirm the judgment of the trial court.

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). The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E. 2d 350, 353 (1985). Movant may meet this burden by showing that the opposing party either cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense that would bar the claim. *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981).

Once the movant shows that no genuine issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial. *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 690, 340 S.E. 2d 510, 512 (1986).

[1] The general rule in North Carolina is that the burden of proving coverage under a policy of insurance is on the party claiming benefits under the policy, but the burden of showing an exclusion or exception to policy coverage is on the insurer. *Brevard v. Insurance Co.*, 262 N.C. 458, 461, 137 S.E. 2d 837, 839 (1964); *Reliance Ins. Co. v. Morrison*, 59 N.C. App. 524, 525, 297 S.E. 2d 187, 188 (1982). A person claiming benefits under a group policy has the burden of proving that the employee insured thereunder was, at the time the loss occurred, an employee insured under the policy. *See* 44 Am. Jur. 2d *Insurance* § 1935 (1982); Annot., 68 A.L.R. 2d 8, 145-146 (1959) and cases cited therein. Likewise, where a policy requires that the insured be "at work" on the effective date of the policy, the issue is one of coverage, and claimant bears the burden of proof.

In the case before us, the policy at issue provided the following:

> SECTION—EFFECTIVE DATES OF INSURANCE
>
> The effective date for you is the date shown on the Coverage Card but only if you were at work on that date with your participating employer. If not then at work, your effective date will be the date on which you resume full time work.

The decedent's coverage card stated that the effective date of decedent's insurance under the certificate was 1 October 1985. In his deposition, Douglas A. Breda, the president and manager of decedent's employer, Team Contractors, Inc., an asphalt paving contracting company, stated that decedent was hired in the summer of 1985 as a general superintendent in charge of the daily scheduling of work crews, the planning and scheduling of future jobs, the contacting of inspection agencies where inspection of a job was necessary, and the monitoring of work progress. One of decedent's tasks as general superintendent was to fill out daily crew assignment sheets that recorded, on each particular day, the location and work done by the work crews and noted which em-

ployees were absent, the reason for their absence, and whether they had called in. Breda stated that the last crew assignment sheet filled out in decedent's handwriting was dated Saturday, 28 September 1985. On the crew assignment sheet for Monday, 30 September 1985, decedent was listed as "absent" and in the space marked "reason" was a question mark. The sheet contained a notation that decedent had not called in. The crew assignment sheet for Tuesday, 1 October 1985, also notes that decedent was absent and did not call in. The crew assignment sheets for Wednesday, 2 October 1985, Thursday, 3 October 1985, and Friday, 4 October 1985, indicate that no work was done on those days because of rain. Breda stated that the last day that decedent was present at work was Saturday, 28 September 1985, and that he did not believe that decedent was ever on the premises of Team Contractors, Inc., at any time subsequent to that date.

The record also contains a letter, dated 4 October 1985, addressed to decedent and signed by Breda as president of Team Contractors, Inc., stating the following in relevant part:

> Enclosed you will find your wages through the end of this week (W/E 10-5-85). I regret that it has come to the point of your termination, but your problem with drinking is interfering with your ability to perform on the job and your dependability has deteriorated to the point of not even calling in when you were not coming to work.
>
> Curtis, as you know the last time you were out from July 5th to September 3rd due to this drinking problem. Although Team Contractors, Inc. was not officially formed if you had been available for work you would have been paid for your efforts. After your return to work on September 3rd it was approximately two (2) weeks later that you started coming to work later than usual and I started to notice the smell of liquor about you especially the week of September 23rd to *your last day of September 28th.* I am not the only one that could tell this. The work force that you supervised could also bear witness to your condition. In this condition, drinking both on and off the job, could have serious repercussions.

(Emphasis added.)

The meaning of the policy term "at work" is not defined in the policy, and our research discloses no North Carolina case specifically interpreting such a policy term. Therefore, we rely on general principles of construction to determine whether decedent was "at work" on 1 October 1985, the effective date of decedent's life insurance certificate.

In the construction of a policy of insurance, nontechnical words that are not defined in the policy must be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise. *Grant v. Insurance Co.*, 295 N.C. 39, 42, 243 S.E. 2d 894, 897 (1978); *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970). The phrase "at work" connotes both being at a particular place, the usual and customary place where one is employed, as well as performing particular tasks, the usual and customary duties that one is employed to perform.

In their briefs, both parties cite cases from other jurisdictions interpreting policy terms similar to the phrase "at work." In *Rabinovitz v. Travelers Ins. Co.*, 11 Wis. 2d 545, 105 N.W. 2d 807 (1960), the group life insurance policy at issue provided the following:

> [N]o employee who is not actively at work performing all of the duties of his employment with the employer member at his customary place of employment on the date his insurance is to become effective shall be insured until he returns to active work and the performance of all such duties.

Id. at 547, 105 N.W. 2d at 809. The Supreme Court of Wisconsin held that summary judgment for the insurer was proper where, on the effective date of decedent's certificate, decedent was in the hospital, and he remained there until his death. *Id.* at 553, 105 N.W. 2d at 812. The court based its decision on the plain and unambiguous language of the policy as well as the purpose of the "at work" clause, "to provide a test to determine the reasonably good health of an employee and to exclude an employee in such a poor state of health that he cannot fully perform all his duties at his customary place of employment on the date the policy is to become effective as to him." *Id.* at 551, 105 N.W. 2d at 811. *See also Smillie v. Travelers Ins. Co.*, 102 Mich. App. 780, 302 N.W. 2d 258 (1980) (plaintiff held not entitled to increased coverage where

policy required decedent to be "actively at work" on effective date of coverage and decedent was in the hospital on effective date up to his death). However, in *Lincoln Life v. Comm. Contained*, 229 Va. 132, 327 S.E. 2d 98 (1985), the Supreme Court of Virginia, finding the phrase "actively at work" to be patently ambiguous and uncertain, held that the insured decedent was "actively at work" on the effective date of his group life insurance certificate where he had performed some of his customary and usual business duties while he was terminally ill in the hospital.

In the case before us, plaintiff has failed to produce a forecast of any evidence that decedent was "at work" on the effective date of the insurance certificate, 1 October 1985, or at any time thereafter. All of the evidence of both parties tends to show that decedent was last "at work," at his usual and customary place of employment performing his usual and customary duties of employment, on Saturday, 28 September 1985, two days prior to the date the group insurance policy could have become effective as to him. Therefore, the trial court correctly entered summary judgment in defendant's favor because plaintiff could not produce evidence supporting an essential element of her claim, coverage under the policy issued by defendant.

Because plaintiff has failed to offer a forecast of evidence supporting decedent's coverage under the policy, we find it unnecessary to address the issue of whether decedent was an "eligible person" entitled to coverage under the terms of the policy.

[2] As a final matter, plaintiff contends that there are genuine issues of fact for trial as to whether defendant waived its ninety-day employment and "eligible person" requirements and as to the effective coverage date of decedent's policy. These contentions are meritless.

As we stated above, the "eligible person" requirement is irrelevant in light of plaintiff's failure to produce a forecast of evidence as to coverage. Furthermore, the issue of whether decedent was an "eligible person" under the policy, like the issue of whether decedent was "at work" on the effective date of the policy, is a matter of coverage and not a matter of exclusion or exception. Our Supreme Court has stated,

> "It is well settled that conditions going to the coverage or scope of the policy, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action, without an express agreement to that effect supported by a new consideration. This rule may be, as it often is, otherwise stated that the doctrine of waiver may not be applied to bring within the coverage of the policy risks not covered by its terms, or risks expressly excluded therefrom."

Hunter v. Insurance Co., 241 N.C. 593, 595, 86 S.E. 2d 78, 80 (1955) (quoting Annot., 113 A.L.R. 857 (1938)). *Accord McCabe v. Casualty Co.*, 209 N.C. 577, 183 S.E. 743 (1936); *Currie v. Insurance Co.*, 17 N.C. App. 458, 194 S.E. 2d 642 (1973).

Moreover, although there is some evidence in the record that Breda, as president and manager of Team Contractors, Inc., requested that defendant waive the ninety-day waiting period required before coverage would begin for decedent, there is no evidence whatsoever that the effective coverage date of decedent's group insurance was other than 1 October 1985. In fact, the 1 October 1985 effective date is consistent with a waiver of the ninety-day waiting period in light of the deposition testimony of Janet L. Breda, corporate secretary of Team Contractors, Inc., that the first week decedent worked for Team Contractors, Inc., was the week ending on 29 August 1985.

For the reasons stated herein, the summary judgment entered in favor of defendant is

Affirmed.

Judges ARNOLD and BECTON concur.

CHAPEL HILL SPA HEALTH CLUB, INC. v. DORIS GOODMAN

No. 875DC1074

(Filed 17 May 1988)

1. **Contracts § 6; Consumer Credit § 1— referral sales unlawful and unenforceable**

A referral sale is a transaction in which a person is induced to purchase goods or services upon the representation that the purchaser can reduce or recover the purchase price or earn a commission by referring other prospective buyers to the seller for similar purchases. In recognition of the vast potential for deception and exploitation of the public inherent in referral sales and in furtherance of the vital state interest in protecting citizens from fraud, the legislature, by enacting N.C.G.S. § 25A-37, has condemned all referral sales contracts, declaring them both unlawful and unenforceable.

2. **Contracts § 6; Consumer Credit § 1— spa membership contract—oral referral agreement—contract to renew—one integrated transaction**

An oral referral agreement, an option to renew, and the initial two-year spa membership contract were all parts of an integrated transaction in which the referral plan served as an inducement to purchase the initial spa membership, even though the membership contract contained an integration clause stating that no oral promises, warranties, or representations were made other than those in the contract, since each party, without objection by the other, offered testimony at trial establishing the existence and terms of both the offer to renew and the oral referral agreement; the offer to renew was executed simultaneously with the execution of the membership contract, expressly referred by number to the contract, and was delivered to defendant with the contract as part of a single transaction; and the evidence showed that the referral plan for discounting the renewal price was also explained to defendant during the same discussion and that the low-priced option to renew, coupled with the possibility of obtaining a discount for making referrals, was in fact a basis for defendant's decision to join the spa.

3. **Contracts § 7— spa membership—unenforceable referral agreement**

There was no merit to plaintiff's contention that its contract with defendant was outside the scope of N.C.G.S. § 25A-37 because neither the price of spa membership nor the right to exercise the renewal option was contingent upon the procurement of membership prospects, since the fact that the contingency related to the price of renewal rather than the original membership was of little significance, the promise of something for nothing serving as the incentive to make a purchase.

APPEAL by defendant from *Jacqueline Morris-Goodson, Judge.* Judgment entered 7 August 1987 in District Court, NEW HANOVER County. Heard in the Court of Appeals 31 March 1988.

Shipman & Lea, by James L. Allard, Jr., for plaintiff-appellee.

Legal Services of the Lower Cape Fear, by Barbara von Euler and James J. Wall, for defendant-appellant.

BECTON, Judge.

In this action for breach of a retail installment contract for the sale of a health spa membership, the question presented is whether the contract is void, under N.C. Gen. Stat. Sec. 25A-37 (1986), as an illegal referral sale.

I

On 9 February 1987, defendant Doris Goodman entered into a contract to purchase a two-year spa membership from plaintiff, Chapel Hill Spa Health Club, Inc. (the Spa), at a cash price of $750.00. Goodman made a down payment of $50.00 and agreed to pay the balance pursuant to a "Consumer Credit Retail Installment Contract" which required 24 monthly payments of $34.03. Mr. Dee Best, the Spa's salesperson, also separately executed and gave to Goodman a written offer to renew her membership after two years at a cost of $120.00 for the third and each successive year. In addition, during their discussions prior to the execution of the contract, Best orally promised Goodman that, for every prospective customer she brought to the Spa, she would receive a $20.00 discount on the $120.00 cost of renewal.

Goodman referred several prospects to the Spa and for each she received a certificate entitling her to a $20.00 discount on the cost of renewing her membership.

Upon Goodman's failure to make any of her monthly payments, the Spa instituted this suit for the remaining amount due under the contract. As a defense, Goodman asserted that the contract was void because it violated N.C. Gen. Stat. Sec. 25A-37 which prohibits referral sales. The matter was first heard in magistrate's court, where the Spa's suit was dismissed. Following a trial *de novo* in district court, the trial judge made findings, concluded that the contract between the parties was not a referral sale, and entered judgment against Goodman for $734.92 with interest. From that judgment, Goodman appeals. We reverse.

II

A

[1] Referral sales are prohibited in this state by N.C. Gen. Stat. Sec. 25A-37 which states:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful. Any obligation of a buyer arising under such a sale shall be void and a nullity. . . .

In essence, a referral sale is a transaction in which a person is induced to purchase goods or services upon the representation that the purchaser can reduce or recover the purchase price or earn a commission by referring other prospective buyers to the seller for similar purchases. *See, e.g., State ex rel. Miller v. American Professional Marketing, Inc.*, 382 N.W. 2d 117 (Iowa 1986); *People v. Best Line Products, Inc.*, 61 Cal. App. 3d 879, 132 Cal. Rptr. 767 (1976) and cases cited therein at 913, 132 Cal. Rptr. at 789. For a detailed analysis of the operation of and problems associated with referral schemes, see Comment, *Referral Sales Contracts: To Alter or Abolish?*, 15 Buffalo L. Rev. 669 (1965-1966).

A referral sales program "relies upon the well-known fact that almost everyone wants to get something for nothing." *Commonwealth ex rel. Packel v. Tolleson*, 14 Pa. Cmwlth. 72, 321 A. 2d 664, 691 (1974), *aff'd*, 462 Pa. 193, 340 A. 2d 428 (1975). Referral sales plans, like pyramid distribution schemes and similar "endless-chain" transactions, are widely recognized as inherently fraudulent. Because there is no infinite number of purchasers for any particular product or service in any vicinity, it is mathematically impossible for most referral purchasers to qualify for the promised discounts or commissions by finding new referrals. *See, American Professional Marketing* at 121; *Tolleson* at 691; *State by Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S. 2d 303, 315-316 (1966); Comment, 15 Buffalo L. Rev. at 684-85.

The law of diminishing returns operates against later participants in the plan as the particular market becomes saturated and no prospects remain for them to solicit as customers. Referral schemes have been invalidated by numerous state statutes and court decisions. *See, e.g.*, Ohio Rev. Code Ann., Sec. 1345.02(D) (Anderson 1979); Minn. Stat. Ann. Sec. 325 F. 69(2) (West Cum. Supp. 1988); Mass. Gen. Laws Ann. ch. 271 Sec. 6A (West 1970); Iowa Code Ann. Sec. 714.16(2b) (West 1979); and cases discussed in Annotation, *Enforceability of Transactions Entered into Pursuant to Referral Sales Arrangement*, 14 A.L.R. 3d 1420 (1967).

In recognition of the vast potential for deception and exploitation of the public inherent in referral sales and in furtherance of the vital state interest in protecting citizens from fraud, our legislature, by enacting Sec. 25A-37, has condemned all referral sales contracts, declaring them both unlawful and unenforceable. Careful consideration of the record in this case convinces us that the referral program utilized by the Spa in its promotion and sale of a membership to Goodman violates the terms and the underlying policy of the statute and that the resulting contract is therefore void. In so concluding, we reject arguments by the Spa that its transaction with Goodman does not fall within the purview of Sec. 25A-37 because (1) neither the written offer to renew nor the oral referral agreement are part of the initial two-year membership contract which the Spa seeks to enforce, and (2) neither the price nor anything related to the two-year contract is contingent upon Goodman's procurement of prospective customers for the Spa.

B

[2] We first address the Spa's assertion that the referral agreement and option to renew are separate from the membership contract.

The key to assessing the validity of this type of contractual arrangement, in our view, is not the number of documents involved but whether the sale contract and the referral contract are parts of a single transaction in which the latter serves as an inducement to the former. It is true that, when not prohibited by law, separation of the sale contract from the referral agreement is a commonplace feature of referral sales arrangements which may sometimes legally operate against a buyer if the enforcement

of the installment sale agreement is sought by a holder in due course with no knowledge of the contract's illegal inducement. *See generally,* Comment, 15 Buffalo L. Rev. at 673-80; Annotation, 14 A.L.R. 3d 1420. However, this is not such a case. We are not persuaded that the initial seller, who has full knowledge of all facts relating to the transaction, may avoid the consequences of the law simply by studiously avoiding any reference to the referral agreement within the sale contract.

The Spa apparently seeks to invoke the parol evidence rule by arguing that, because the membership contract contains an integration clause stating that no oral promises, warranties, or representations were made other than those in the contract, the court may not look beyond the four corners of that contract to assess its validity. However, each party, without objection by the other, offered testimony at trial establishing the existence and terms of both the offer to renew and the oral referral agreement. This evidence, though inadmissible to contradict or vary the terms of the written membership agreement, is competent to show the existence of facts which would render the writing inoperative or unenforceable, *i.e.*, that it was fraudulently or illegally procured. *See Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E. 2d 522 (1965); *Deaton v. Coble*, 245 N.C. 190, 95 S.E. 2d 569 (1956); *Parker v. Bennett*, 32 N.C. App. 46, 231 S.E. 2d 10, *disc. rev. denied*, 292 N.C. 266, 233 S.E. 2d 393 (1977).

Further, despite the Spa's careful efforts to separate the membership contract from all other promises made to Goodman, the record belies any assertion that they are truly distinct or unrelated. A general rule of contracts is that all contemporaneously executed instruments relating to the subject matter of the contract are to be construed together in order to determine what was undertaken and to effectuate the intention of the parties. *E.g. Yates v. Brown*, 275 N.C. 634, 640, 170 S.E. 2d 477, 482 (1969); *Matter of Sutton Investments, Inc.*, 46 N.C. App. 654, 659, 266 S.E. 2d 686, 689, *disc. rev. denied and appeal dismissed*, 301 N.C. 90 (1980). In this case, the offer to renew was executed by Best simultaneously with the execution of the membership contract, expressly referred by number to the contract, and was delivered to Goodman with the contract as part of a single transaction, all of which indicate it was intended to be an integral part of the contract. In addition, Best testified that the offer to renew was

"guaranteed" and would not be rescinded. Because an offer may be revoked at any time before it is accepted, in the absence of consideration for the promise to keep it open, *see Normile v. Miller*, 313 N.C. 98, 105, 326 S.E. 2d 11, 16 (1985), this offer, if irrevocable as represented, must necessarily have been included in the membership privileges acquired by Goodman in exchange for the purchase price. Indeed, Best also testified that, when he brought the membership contract in for Goodman to sign, he explained "all the other *benefits of membership* at the same time, *including* her opportunity or offer to renew at the rate of $120.00 for a third year." (Emphasis supplied.)

Most significantly, the evidence shows and the trial judge found that the referral plan for discounting the renewal price was also explained to Goodman during the same discussion and that the low-priced option to renew, coupled with the possibility of obtaining a discount for making referrals, was, in fact, a basis for her decision to join the Spa. All of these factors lead us to conclude that the oral referral agreement, the option to renew, and the initial two-year membership contract are all parts of an integrated transaction in which the referral plan served as an inducement to purchase the initial spa membership.

C

[3] We also reject the Spa's argument that its contract with Goodman is outside the scope of Section 25A-37 because neither the price of the membership nor the right to exercise the renewal option is contingent upon the procurement of membership prospects. The fact that the contingency relates to the price of renewal rather than the original membership is of little significance, since, in either circumstance, the promise of something for nothing serves as the incentive to make a purchase. The Spa represented to Goodman, in effect, that if she purchased the initial membership, she could then obtain an additional year or years of membership free by referring an adequate number of prospects to the Spa. This transaction clearly constitutes a "sale of . . . services . . . with other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser."

For the foregoing reasons, we hold that the contract between Goodman and the Spa constitutes a referral sale, in violation of

N.C. Gen. Stat. Sec. 25A-37, and is void and unenforceable. Accordingly, the judgment of the trial court in favor of the Spa is

Reversed.

Judges ORR and GREENE concur.

STATE OF NORTH CAROLINA v. COLONEL DALIA BRAXTON, JR.

No. 875SC1197

(Filed 17 May 1988)

1. **Searches and Seizures § 11— traffic violation—furtive movements—no probable cause to search vehicle**

Contraband seized from defendant's vehicle should have been excluded from evidence in a prosecution for felonious possession of marijuana where a detective observed defendant driving 58 to 60 miles per hour in a 45-mile per hour zone; the detective, intending only to warn defendant about his speed, turned on his blue light and then his siren; the detective observed that defendant appeared to be stuffing something under the seat; defendant pulled over and stopped; the detective parked behind him and, as the detective was leaving his vehicle, defendant started moving his car forward and again appeared to be stuffing something under the seat; the detective reentered his car and accelerated; defendant immediately pulled into the parking lot of a vacant shopping center approximately 45 to 55 feet from the point where he had initially stopped; defendant left his car and closed his door as the detective approached; the detective "patted down" defendant and twice asked what he had stuffed under the seat of the car; defendant answered neither question; the detective opened the door, reached under the seat, and found a plastic bag containing marijuana; the detective then arrested defendant and seated him in the patrol car; and the detective then went back to defendant's car, renewed the search, and found two additional bags of marijuana, rolling papers, and a knife. The record is devoid of any evidence which would justify finding that the detective had any information concerning criminal conduct or evidence of crime relating to defendant. Defendant's movements, though highly suspicious, cannot be said to be clearly furtive and mere suspicion will not support a finding of probable cause.

2. **Searches and Seizures § 9— stop for traffic violation—search incident to arrest—not proper**

Contraband seized from defendant's car should not have been admitted in a prosecution for felonious possession of marijuana where an officer stopped defendant for speeding, observed that defendant appeared to be stuffing something under the seat, defendant left the car and closed the door as the

detective approached, the detective patted down defendant and asked what had been stuffed under the seat of the car without response, and the detective then reached under the front seat of the car and discovered a plastic bag containing marijuana. The search cannot be justified as being incident to arrest because an incident search cannot precede an actual arrest and serve as a part of its justification, and defendant was not in the car and could not have reached anything under the seat. Moreover, defendant's act of speeding was not a criminal violation but an infraction and the detective had no authority to arrest him.

APPEAL by defendant from *Washington (Edward K.), Judge.* Order entered 11 September 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 12 April 1988.

Defendant was indicted on 3 August 1987 for felonious possession of marijuana, a violation of G.S. 90-95(a)(3). On 10 September 1987, defendant, through counsel, filed a motion to suppress evidence taken from his motor vehicle on 10 April 1987. This evidence was obtained as a result of a search without a warrant. On 10 September 1987, a hearing was held on the motion to suppress. From an adverse ruling, defendant gave notice of intent to appeal pursuant to G.S. 15A-979(b). Without waiving his right to appeal and specifically reserving the same, defendant on 3 November 1987 entered a plea of guilty to the charge of felonious possession of marijuana in the Superior Court of New Hanover County. From a judgment imposing a probationary sentence, defendant appeals.

We are called upon to decide whether the search of defendant's vehicle violates the Fourth and Fourteenth Amendments to the United States Constitution. The facts giving rise to this appeal are uncontroverted. On 10 April 1987, at approximately 8:00 a.m., Detective R. F. Wade of the New Hanover County Sheriff's Department was driving an unmarked patrol car in a northerly direction on N. C. Highway 421 in New Hanover County. Defendant, a resident of Wilmington, North Carolina, was also driving north on the same highway and passed the detective's patrol car. Detective Wade accelerated his vehicle and clocked defendant at a speed of approximately 58-60 miles per hour in a 45-mile per hour speed zone. The detective, intending only to warn defendant about his speed, activated his blue light in order to stop defendant's vehicle. Detective Wade did not see defendant look in his rearview mirror so he turned on his siren to attract defendant's

attention. The detective then observed that defendant appeared to be stuffing something under the seat. Defendant pulled over and stopped outside the traveled portion of the highway. Detective Wade pulled over and parked behind defendant. As the detective was exiting his patrol vehicle, defendant started moving his car forward and again appeared to be stuffing something under the seat. Detective Wade re-entered his patrol car and accelerated. Defendant immediately pulled into a parking lot at a vacant shopping center approximately 45-55 feet from the point where he had initially stopped. As the detective approached defendant's car, defendant exited his automobile and closed the door. Detective Wade approached, "patted down" defendant and on two occasions asked defendant what had been stuffed under the seat of the car. Defendant did not answer on either occasion. The detective opened the door and reached under the front seat of defendant's car where he discovered a plastic bag containing a green vegetable substance that was subsequently determined to be marijuana. The detective then arrested defendant and seated him in the patrol car. Detective Wade returned to defendant's vehicle and renewed the search which resulted in the seizure of two additional bags of marijuana, rolling papers and a knife. Defendant did not consent to the search of his vehicle and none of the items seized were in plain view. Detective Wade testified that before the contraband was found under the car seat he had no intention of taking any action except to warn defendant about his speed. Defendant assigns error to the court's order denying his motion to suppress the evidence seized from his vehicle.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas D. Zweigart, for the State.

Newton, Harris & Shanklin, by Allan Brandon Tise, for defendant-appellant.

SMITH, Judge.

We must first decide whether the initial search of defendant's vehicle was lawful. If it was not, the seizure of the first bag of marijuana was unlawful. Fruits of an unlawful search are not made lawful by the discovery of contraband. *Byers v. United States*, 273 U.S. 28, 71 L.Ed. 520, 47 S.Ct. 248 (1927).

[1] Defendant contends that the uncontroverted facts fail to establish probable cause for the warrantless searches of his vehicle. We agree.

This Court has previously held that gestures which are not clearly furtive are insufficient to establish probable cause for a warrantless search unless the officer has other specific knowledge relating to evidence of crime. *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E. 2d 190 (1977). In the instant case defendant's movements, though highly suspicious, cannot be said to be clearly furtive. Mere suspicion, however, will not support a finding of probable cause. *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963). Detective Wade testified at the suppression hearing that he had no knowledge or information that defendant had contraband or any specific item in his vehicle. The record is devoid of any evidence which would justify a finding that Detective Wade had any information concerning criminal conduct or evidence of crime relating to defendant. Even a "good faith" belief by the detective that defendant was hiding contraband or evidence of crime would be insufficient to establish probable cause unless that " 'faith [was] grounded on facts within [the detective's] knowledge . . . which in the judgment of the court would make his faith reasonable.' " *Carroll v. United States*, 267 U.S. 132, 161-162, 69 L.Ed. 543, 555, 45 S.Ct. 280, 288 (1925), *quoting Director General v. Kastenbaum*, 263 U.S. 25, 68 L.Ed. 146, 44 S.Ct. 52 (1923). There is nothing in the record before us which would indicate that Detective Wade formed any belief, reasonable or otherwise, that defendant was hiding contraband or evidence of crime. *See State v. Beaver*, 37 N.C. App. 513, 246 S.E. 2d 535 (1978). Though deliberately furtive actions are strong indicia of *mens rea*, such actions must be combined with specific knowledge relating the suspect to evidence of crime before they are proper factors to be considered in establishing probable cause. *Sibron v. New York*, 392 U.S. 40, 20 L.Ed. 2d 917, 88 S.Ct. 1889 (1968).

[2] One exception to the rule prohibiting warrantless searches and seizures arises when the search or seizure is incident to a lawful arrest. *Weeks v. United States*, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914). These searches are justified to seize evidence of the crime as well as weapons which might facilitate an escape from custody. *Preston v. United States*, 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964). In the case before us, defendant was not

under arrest. He was not in the car and the detective testified defendant could not have reached anything under the seat. We also hold that the initial search cannot be justified as being incident to arrest because an incident search cannot precede an actual arrest and serve as part of its justification. *Henry v. United States*, 361 U.S. 98, 4 L.Ed. 2d 134, 80 S.Ct. 168 (1959).

The State contends that this search and seizure was lawful because the officer had the authority to stop defendant's vehicle and arrest him for speeding. We disagree. It is unquestioned that Detective Wade had the authority to stop defendant's vehicle and detain defendant. G.S. 20-183(a) and G.S. 15A-1113(b). The officer's testimony was to the effect that he only intended to warn defendant about his excessive speed. The record does not reveal whether this was to be a verbal warning or whether the officer intended to issue a formal warning ticket authorized by G.S. 20-183(b). We note, however, that defendant was speeding at a maximum speed of 60 miles per hour in a 45-mile per hour speed zone. Under the law in effect at the time, this act of speeding was not a criminal violation but rather it was merely an infraction. G.S. 20-141. As defendant was a resident of North Carolina, the detective had no authority to arrest him for the commission of an infraction. G.S. 15A-1113(c)(2). We also point out that the power to arrest does not necessarily include the authority to search a motor vehicle in the absence of probable cause. *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 20 L.Ed. 2d 538, 88 S.Ct. 1472 (1968). Because there was no probable cause for the search in question we find it unnecessary to discuss the authority of a law enforcement officer to search a motor vehicle which has been stopped for an infraction.

Another exception to the rule against warrantless searches was approved in *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968). This so-called "stop and frisk" rule allows an officer investigating suspicious behavior by an individual at close range to determine whether the suspicious person is armed and to neutralize any threat if the officer has a reasonable belief that the suspect is armed or presently dangerous. This "stop and frisk" exception to unreasonable search and seizure has been extended to automobiles. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201, 103 S.Ct. 3469 (1983). In *Long*, the Court acknowledged that investigative detention of persons in automobiles presents a

danger to police officers. The Court then held that those areas of a passenger compartment of a motor vehicle where weapons might be hidden may be searched if the facts, coupled with rational inferences drawn therefrom, reasonably warrant an officer's belief that a suspect is dangerous and may gain control of weapons. The facts now before us do not warrant such a belief. It is uncontroverted that defendant could not obtain any weapon or other item from the car.

As the officer had no probable cause for the initial search of defendant's vehicle, the arrest and subsequent search and seizure were also unauthorized.

> [T]he arrest of . . . defendant[] and the later search of . . . [his] vehicle clearly arose from and were based upon the information obtained by virtue of the unlawful seizure of the [marijuana]. The evidence obtained by virtue of [this arrest] and searches was the product of actions not authorized by law and, thus . . . should have been excluded from evidence. *See Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963), *and Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

State v. Beaver, 37 N.C. App. at 519, 246 S.E. 2d at 540.

For the foregoing reasons we hold that the contraband seized from defendant's vehicle should have been excluded from evidence in the trial court.

New trial.

Judges JOHNSON and PHILLIPS concur.

A. S. PIERCE AND DANIEL W. TUTTLE, PLAINTIFFS v. ASSOCIATED REST AND NURSING CARE, INC., DEFENDANT

No. 8721SC1209

(Filed 17 May 1988)

Venue § 5.1— action to interpret lease—title or interest in property not directly affected—change of venue denied

Defendant's motion for a change of venue was properly denied in an action in which plaintiffs sought a declaratory judgment interpreting a rent adjustment provision in a lease and enjoining defendant from bringing a separate action for ejectment because the primary question was interpretation of the lease in light of relevant legislative changes. The resolution of that issue will not directly affect title or interest in the property and the action therefore need not be tried in the county where the property is located. N.C.G.S. § 1-76.

APPEAL by defendant from *Walker (Ralph A.), Judge*. Order entered 5 November 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 April 1988.

In July 1980, plaintiffs and defendant entered into a five-year lease agreement whereby plaintiffs leased from defendant a 123-bed rest home facility in Henderson, Vance County. The lease contained options to purchase and to extend the lease for an additional five years. The lease agreement provided that rent would be paid in monthly installments which would be adjusted annually on 1 September following an increase in payments to rest home patients under the State-County Special Assistance Program. Adjustments to rent would be 20% of the annual increase for ambulatory patients under the program multiplied by 123.

In July 1986, the General Assembly increased the payments to each patient under the program by $30.00 per month. The increase became effective 1 October 1986 following the 1 September lease adjustment date. Subsequently, a dispute arose between plaintiffs and defendant over whether the legislatively-mandated increase required an immediate adjustment in rent or whether the adjustment should be made on 1 September 1987. When plaintiffs did not make an immediate adjustment in their monthly rent payment, defendant gave them notice that they were in default and threatened eviction.

On 31 March 1987, plaintiffs filed an action in Forsyth County seeking a declaratory judgment pursuant to G.S. 1-253 *et seq.*

and G.S. 1A-1, Rule 57. Plaintiffs requested an interpretation of the rent adjustment provision of the lease and asserted that the adjustment was not required until 1 September 1987. Plaintiffs also sought a preliminary injunction to enjoin defendant from bringing a separate action for ejectment while plaintiffs' action was pending.

On 30 April 1987, defendant filed a motion for change of venue from Forsyth County to Vance County pursuant to G.S. 1-76 and 1-83(1) and (2). On 5 May 1987, defendant filed an answer and counterclaim alleging that plaintiffs were in default and owed back rent. On 5 November 1987, the trial court denied defendant's motion for change of venue. Defendant appeals.

Craige Brawley Liipfert & Ross, by William W. Walker, for plaintiffs-appellees.

Petree Stockton & Robinson, by Jackson N. Steele, and Zollicoffer & Zollicoffer, by A. A. Zollicoffer, Jr., for defendant-appellant.

SMITH, Judge.

Defendant brings forth as its sole assignment of error the trial court's denial of its motion for change of venue. Defendant contends that the instant case directly involves a dispute over a leasehold interest and that pursuant to G.S. 1-76 proper venue is in the county where the property is located. Specifically, defendant argues that plaintiffs' request for an injunction prohibiting defendant from terminating the lease by way of an ejectment action is tantamount to an action affecting title to real property. In its counterclaim, defendant requested a court determination that plaintiffs were in default of the lease. Such a determination, defendant contends, would terminate plaintiffs' leasehold interest and extinguish plaintiffs' option to purchase. Defendant argues that these issues involve the parties' rights to real property and thus G.S. 1-76 applies. We disagree.

First, we note that the case is properly before us. Denial of a motion for change of venue as a matter of right under G.S. 1-76, although interlocutory, is directly appealable. *See Smith v. Mariner*, 77 N.C. App. 589, 335 S.E. 2d 530 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E. 2d 29 (1986); *Klass v. Hayes*, 29 N.C. App.

658, 225 S.E. 2d 612 (1976). We further note that defendant does not assign as error or argue in its brief the trial court's denial of change of venue pursuant to G.S. 1-83(1) and (2). Thus we do not review that portion of the trial court's order. App. R. 10(a) and 28(a).

G.S. 1-76 states in pertinent part:

> Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated . . .:
>
> (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

Pursuant to this statute, an action must be tried in the county where the property is located when the judgment to which a plaintiff would be entitled upon the allegations of the complaint will affect the title to land. *Thompson v. Horrell*, 272 N.C. 503, 158 S.E. 2d 633 (1968). In determining whether the judgment sought by plaintiff would affect title to land, the court is limited to considering only the allegations of the complaint. *McCrary Stone Service v. Lyalls*, 77 N.C. App. 796, 336 S.E. 2d 103 (1985), *disc. rev. denied*, 315 N.C. 588, 341 S.E. 2d 26 (1986).

In the case *sub judice*, plaintiffs seek a declaratory judgment as to the parties' rights under the lease agreement and seek to enjoin defendant from bringing a separate ejectment action pending a determination of rights under the lease. The primary question to be resolved in this action is interpretation of the lease in light of the relevant legislative changes. Resolution of that question will not directly affect title or interest in the property. Therefore, the action need not be tried in the county in which the property is located.

> 'Title to realty must be directly affected by the judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein, or because the judgment that may be rendered may settle the rights of the parties by way of estoppel. It is the principal object involved in the action which determines the question.'

Rose's Stores v. Tarrytown Center, 270 N.C. 201, 206, 154 S.E. 2d 320, 323 (1967), *quoting* 92 C.J.S., Venue, sec. 26, pp. 723, 724.

Defendant cites *Sample v. Motor Co.*, 23 N.C. App. 742, 209 S.E. 2d 524 (1974), and *Gurganus v. Hedgepeth*, 46 N.C. App. 831, 265 S.E. 2d 922 (1980), to support its contention that G.S. 1-76 applies to the present action. However, both of these cases are distinguishable from the one at bar. In *Sample*, plaintiffs asked the court to terminate defendant's lease. In *Gurganus*, plaintiffs asked the court to remove a "cloud upon their leasehold." In each of these cases, plaintiffs requested the court to make a determination as to the interest or right in the property. Here, plaintiffs ask the court to make a determination that the statutory increase in rates for ambulatory patients effective in October 1986 did not require an immediate increase in plaintiffs' rent.

The *McCrary* case cited herein is similar to the one at bar. Plaintiff there sought a declaratory judgment as to its obligations under a quarry lease. Specifically, plaintiff requested the court to determine whether the lease required it to pay defendants for rock removed from plaintiff's land but processed on defendants' land. Defendants filed an answer and counterclaim alleging breach of the lease and requesting termination of the lease. This Court, looking only to plaintiff's allegations, held that the principal object of plaintiff's action was a declaration of plaintiff's obligation to make rental payments and that the lower court properly denied defendants' change of venue motion under G.S. 1-76. "Such a declaration would not directly affect title to the land . . . . Plaintiff simply seeks an interpretation of its leasehold." *McCrary*, 77 N.C. App. at 799, 336 S.E. 2d at 105. Plaintiffs here also sought declaratory relief as to their obligations regarding rental payments, an interpretation of their lease.

The fact that plaintiffs also sought injunctive relief does not alter our result. Plaintiffs have requested only that defendant be enjoined from filing an ejectment action until after a determination is made on plaintiffs' cause of action. The request for the Court to enjoin a potential filing of an ejectment action does nothing to affect defendant's interest in its property. *See Rose's Stores, supra.* (Court of Appeals reversed trial court's granting of defendant's change of venue motion under G.S. 1-76 in action where plaintiff requested injunctive relief against defendant.)

Looking to the allegations of plaintiffs' complaint, we hold that this action is not one which directly affects title or interest in land. Thus G.S. 1-76 is not applicable. Defendant's motion for change of venue was properly denied.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

CONNIE McGAHA v. NANCY'S STYLING SALON AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8730SC1065

(Filed 17 May 1988)

1. **Master and Servant § 110— unemployment compensation—sufficiency of evidence to support Commission's findings**

Evidence was sufficient to support findings by the Employment Security Commission that claimant had worked as a hairdresser for the employer only during the resort season and had quit during the winter months; that the employer never laid claimant off but told her she could stay on and attempt to establish a winter clientele; and when claimant left her job, there was still work for her to do, though at a greatly reduced volume.

2. **Master and Servant § 108— unemployment compensation—employee leaving work voluntarily and without good cause attributable to employer**

The Employment Security Commission did not err in ruling that claimant left work voluntarily without good cause attributable to her employer where the employer never fired claimant or asked her to leave, and claimant's position, under the same terms and conditions she had worked under for three seasons, was still available to her when she left.

APPEAL by claimant from *Downs, Judge.* Judgment entered 12 August 1987 in Superior Court, MACON County. Heard in the Court of Appeals 30 March 1988.

From 1 May 1986 until 11 November 1986 Connie McGaha (claimant) worked as a hairdresser for Nancy's Styling Salon (Nancy's) owned by Nancy Edwards in Highlands. Claimant lived in Franklin but had worked at Nancy's during the resort season each year for three years. At all times claimant was paid strictly on a commission basis. Because Highlands is a resort area, the

business volume at Nancy's falls off during the winter months. Even so, there was some work available during the winter months. The two previous years claimant quit her work at Nancy's at the end of October and looked elsewhere for work.

Upon beginning her third season of work at Nancy's claimant had advised Ms. Edwards that her personal situation had changed so that she needed to be able to work year round. Edwards made no guarantee of year round work. She advised claimant that the business in Highlands was seasonal and that claimant would have to work at building a winter clientele. At the beginning of November 1986 the volume of business at Nancy's began to decline. About this time Edwards stopped listing claimant in her appointment book for taking customers. This was the time of year when, in previous years, claimant had quit. However, claimant informed Edwards that she already had appointments scheduled during the next week or so and wrote her name back in the appointment book. On 11 November 1986 claimant told Edwards that she could not continue to make the drive from Franklin to Highlands because her compensation had dropped so severely that her earnings did not meet her expenses. Edwards told claimant that the only way her off-season commissions would increase was for her to build a winter clientele by being available during the winter months. Claimant left and never returned to work.

Soon thereafter claimant filed an application with the Employment Security Commission (ESC) for unemployment benefits; it was denied. Claimant appealed; the appeals referee denied her claim finding that claimant had voluntarily quit her job without good cause attributable to the employer. Claimant appealed to the ESC which affirmed the referee's decision and adopted it as their own. Claimant appealed the ESC decision to the superior court which affirmed the Commission's decision. Claimant appeals.

Western North Carolina Legal Services, Inc., by James H. Holloway and Lawrence Nestler for claimant-appellant.

No brief filed for Nancy's Styling Salon, appellee.

Chief Counsel T. S. Whitaker and Deputy Chief Counsel V. Henry Gransee, Jr., for the Employment Security Commission of North Carolina, appellee.

EAGLES, Judge.

Claimant presents three issues for review. First, she argues that the trial court used an incorrect standard of review in considering her appeal from the ESC. Second, she contends that the evidence presented does not support the findings of fact. Third, claimant contends that the trial court erred in affirming the ESC decision denying her application for unemployment benefits. We disagree and affirm the trial court's decision.

I

Claimant argues that the trial court used an incorrect standard in reviewing the ESC decision. Claimant contends that the trial court should have used the "whole record" standard of review rather than the "any competent evidence" standard of review. We need not decide this issue because the facts presented here support the ESC decision using either standard of review. *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 349 S.E. 2d 842 (1986).

II

[1] Claimant next argues that under any standard of review three of the Commission's findings of fact were not supported by the evidence. Based on our careful review of the record, we hold that there was competent evidence to support the disputed findings of fact under either standard of review.

Claimant excepted to findings of fact number 4, 9 and 11 set out below:

> 4. The claimant began working for the employer as a hairdresser in 1984. The claimant normally worked from the first of May through the end of October. The claimant normally chose to quit her job at the end of October because her clients began to decrease dramatically at the end of the resort season. The claimant worked as previously described in 1984 and 1985.
>
> 9. The employer did not terminate or lay the claimant off due to lack of work. The employer told the claimant that she could continue working during the winter months in order to establish a year round clientele for herself. The claimant chose to quit her job rather than consider this option.

11. When claimant left the job, continuing work was available for claimant there.

Claimant's own testimony provides evidence for finding of fact number 4. She testified that she had worked at Nancy's since 1984. In each of the two previous years she began her season in May and left Nancy's in late October. Each time her leaving coincided with the end of the resort season. There is substantial evidence to support finding of fact number 4.

Ms. Edwards testified that she did not fire claimant from her position. Claimant admits that Ms. Edwards never guaranteed her work but bases her argument that she was fired on the fact that Ms. Edwards took claimant's name off the appointment book. After noticing her name not in the book, claimant wrote her name back into the book. Ms. Edwards took no action preventing claimant from continuing to work at Nancy's. Furthermore, claimant did not contradict Ms. Edwards' testimony that claimant had been told that she could stay on at the salon and attempt to establish a winter clientele. Both women's testimony showed that on 11 November 1986 claimant told Ms. Edwards that she could no longer afford to work at Nancy's. This evidence supports finding of fact number 9 that claimant was not terminated, but quit.

Ms. Edwards further testified that when new customers called Nancy's they would be put on claimant's schedule. Though the business slowed significantly during the winter, Ms. Edwards indicated that claimant could try to build a customer base for the winter. Accordingly, we find that there is substantial evidence to support finding of fact number 11.

III

[2] Claimant next contends that the appeals referee and ESC erred as a matter of law when they ruled that she left work voluntarily without good cause attributable to the employer. Claimant argues that Ms. Edwards compelled her to leave Nancy's so that her leaving was involuntary and that the diminishing commissions she received for her work constituted good cause attributable to her employer. We disagree.

Our Supreme Court has ruled that for an applicant to be disqualified from unemployment compensation benefits pursuant to G.S. 96-14(1) she must have voluntarily left her position *and* her

leaving must be without good cause attributable to her employer. *In re Poteat v. Employment Security Comm.*, 319 N.C. 201, 353 S.E. 2d 219 (1987). The disqualification statutes are to be strictly construed in favor of the claimant, *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968), with the employer having the burden of proving that the claimant is disqualified. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982).

In determining whether the claimant left her position voluntarily we must review the "external factors motivating the employee's quit." *Poteat* at 205, 353 S.E. 2d at 222. Here Ms. Edwards never fired claimant nor did she ask claimant to leave. Ms. Edwards' uncontradicted testimony was that claimant could have remained at Nancy's and tried to build a winter clientele. Because claimant worked solely on a commission basis, she was particularly dependent upon Nancy's volume of customers. These conditions, however, were the same that she had worked under during her previous seasons at Nancy's. Claimant decided that she could not afford to make the daily drive to Highlands from Franklin with no guarantee of compensation. No evidence of compulsion or coercion on the part of Ms. Edwards appearing, we hold that claimant voluntarily quit her job.

The employer must also show that a claimant has left work without good cause attributable to the employer. "Good cause" means "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work," *Intercraft Industries* at 376, 289 S.E. 2d at 359, while "attributable to the employer" means "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 demonstrate that Ms. Edwards took no actions or caused any actions which precipitated claimant's leaving her job. Uncontradicted testimony showed that claimant's position, under the same terms and conditions she had worked under for three seasons, was still available to her when she left. Accordingly, claimant's quit was not attributable to her employer. Having determined that claimant's quit was voluntary and not attributable to her employer, we hold that the trial court's ruling affirming the ESC decision was correct.

Affirmed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. GEORGE WAYNE ROBERSON

No. 8715SC1039

(Filed 17 May 1988)

1. **Criminal Law § 169.2— murder—defendant's testimony—objections sustained—no motion to strike—no prejudice**

There was no prejudice in a second degree murder prosecution from the court's sustaining an objection to defendant's testimony concerning a menacing statement made by unknown persons two weeks before the murder where the statement was not stricken from the record and the jury was not admonished not to consider it.

2. **Homicide § 21.8— murder—defense of habitation—motion to dismiss prosecution properly denied**

The trial court in a second degree murder prosecution did not err by not dismissing the prosecution at the close of all the evidence where the evidence showed at most a vigorous pounding or kicking upon defendant's mobile home door by the victim and there was no evidence that the victim was armed or testimony that he attempted to force the door's lock or doorknob. The law of self-defense is irrelevant because deceased never gained entry into defendant's home, and the evidence did not establish defense of habitation as a matter of law.

3. **Homicide § 21.7— second degree murder—malice—evidence sufficient**

The State's evidence in a prosecution for murder was sufficient to show malice where there was evidence from which the jury could infer that defendant knew who was at his door, knew why he was there, and intentionally and with malice fired his rifle.

4. **Homicide § 28.4— second degree murder—no instruction on imperfect defense of home—no error**

The trial court did not err in a prosecution for second degree murder by refusing to instruct the jury on imperfect defense of home because North Carolina has not recognized imperfect defense of habitation and the instruction on the recognized defense of habitation rule was more favorable than the imperfect defense of habitation instruction to which defendant claimed he was entitled.

State v. Roberson

APPEAL by defendant from *Battle, F. Gordon, Judge.* Judgment entered 4 June 1987 in ALAMANCE County Superior Court. Heard in the Court of Appeals 30 March 1988.

The defendant was indicted on 9 March 1987 for the murder of Monte James Bradsher. The jury returned a verdict of guilty of second-degree murder, and the trial court sentenced defendant to ten years imprisonment.

The State's evidence tended to prove the following facts: In the early morning hours of 21 December 1986, Bobby Eugene Wilkerson and Pamela Albright drove Monte James Bradsher to the M & W Trailer Park on Highway 54 near Graham in Alamance County in order that Bradsher might pick up his girlfriend, Diane Geyer, who had been living with the defendant. According to Wilkerson's testimony, Bradsher first knocked on defendant's trailer door, then went to a nearby trailer to make inquiry. Upon returning from the second trailer, Bradsher told Wilkerson that a friend had told him that Ms. Geyer was asleep in the first trailer, defendant's. Bradsher then returned to defendant's trailer and resumed knocking, more loudly this time. A neighbor, Johnny Faucette, came out and spoke briefly with Bradsher. Then the latter returned to defendant's trailer and commenced knocking on the door a third time, this time quite loudly. Wilkerson heard Bradsher say a couple of times: "Wayne, come out. I need to talk to you. We need to talk." As Bradsher continued knocking, defendant fired one shot from his 6.5 caliber rifle through the lower left portion of his trailer door. Upon hearing a gunshot, Wilkerson and Albright departed without seeing what happened. Johnny Faucette ran back out, saw Bradsher run a short distance and then collapse. Detective Alan Cates testified that, upon arriving at the scene, he found Bradsher's body near a street light close to the first trailer on the right as one enters the trailer park. Dr. Carl T. Smedberg, the forensic pathologist who performed the autopsy, testified that Bradsher died from bleeding due to a gunshot wound.

Wilkerson and Albright both admitted on cross-examination that Bradsher had been hitting pretty hard on the trailer door. Detective Alan Cates, who investigated the scene of the shooting, testified that he found two pieces of the door lying two to three feet from the door inside the trailer.

The defendant took the witness stand in his own defense. He testified that Ms. Geyer had been staying with him because she had nowhere else to go, that he and Ms. Geyer had formerly been romantically involved, and that they had had a child together. He testified that when he heard a knock on the door, he asked who it was, got no response, and then said, "Well, go on, I've already gone to bed." In response, he heard, "I am going to kick this 'F' door down and coming in there to get . . . ." At the same time, he heard kicking, saw the door bowing in the middle, and the paneling coming off. The defendant testified that he did not know who was outside his door. Fearing for his life, he fetched his rifle and, in an attempt to frighten away whoever was at the door, fired one shot at the lower left corner of the door, under the impression that the person banging on his door was standing directly in front of it on the steps of the trailer.

Roberson further testified that approximately two weeks prior to the shooting incident, two males, identity unknown, had come to his trailer, had cursed, had made a menacing statement, and had kicked a panel out of his trailer door.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Bruce McKinney, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant.

WELLS, Judge.

The defendant brings forward five assignments of error. We overrule them all and find no error.

[1] By his first assignment of error defendant contends the trial court erred in sustaining an objection to defendant's testimony as to the above-mentioned menacing statement. This assignment is meritless. Defendant testified: "They were talking about whipping somebody's butt." Although the trial court sustained an objection to this testimony, apparently on hearsay grounds, the statement was not stricken from the record, nor was the jury admonished not to consider it. Thus, the statement was effectively before the jury, and the prosecutor's objection presumably only highlighted it. Under such circumstances, we find no prejudice to the defend-

ant in the court's ruling. *See State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

[2] By his second assignment the defendant contends that the trial court should have dismissed the prosecution at the close of all the evidence for insufficiency of evidence. This assignment is also meritless. In evaluating a motion to dismiss in a criminal case the court must consider the evidence in the light most favorable to the State and determine "whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime." *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983).

Defendant argues that the evidence in the present case, considered in its best light, established defense of habitation and self-defense as a matter of law. However, the State's evidence showed that Bradsher made no threat of physical assault upon the defendant. At most, the evidence shows a vigorous pounding, or kicking, upon the mobile home door by Bradsher depending on whether one believes the State's witnesses or defendant's account. There was no evidence that Bradsher was armed nor any testimony that he attempted to force the door's lock or doorknob. A defense of habitation requires that an intruder try to force an entrance into a dwelling "in a manner such as would lead a *reasonably* prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates." *State v. Miller*, 267 N.C. 409, 148 S.E. 2d 279 (1966) (emphasis added). The evidence presented in the present case does not establish that defendant acted in reasonable defense of habitation as a matter of law, and the trial court correctly concluded that the issue of the reasonableness of defendant's conduct was for the jury to decide. We find that the law of self-defense is irrelevant to the resolution of this case because the deceased never gained entry into defendant's home. Once an assailant gains entry into an occupied dwelling, the usual rules of self-defense replace the rules governing defense of habitation. *State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979).

[3] Defendant further contends that the State's evidence, considered in its best light, failed to show evidence of malice, which is essential to a proof of second-degree murder. However, as stated above, Wilkerson testified that Bradsher called out a couple of

times, "Wayne, come out. I need to talk to you. We need to talk." Dixie Lee Bradsher, deceased's mother, testified that she had been to the M & W Trailer Park several times either to pick up or drop off Diane Geyer. The deceased's father testified that he had heard his son speak of the defendant as a friend of Ms. Geyer. As indicated above, there was no evidence that Bradsher assaulted or even threatened the defendant. Cumulatively, this was evidence from which, viewed in the light most favorable to the State, a jury might reasonably infer that defendant knew who was at his door, knew why he was there, and intentionally and with malice fired his rifle.

[4] By his fourth assignment, defendant contends that the court erred in refusing to instruct the jury on imperfect defense of home. We disagree. First, our State has not recognized imperfect defense of habitation as a principle of justification or exculpation, and we decline to recognize this defense in this case. Second, the instruction of imperfect defense of habitation to which defendant claims he was entitled is inconsistent with the recognized defense of habitation rule and is less favorable than the instruction actually given by the court. The court instructed on defense of habitation as follows:

> The defendant was justified in using deadly force only to prevent a forcible entry into his home and only if he reasonably believed that such force was necessary to prevent the entry and the circumstances at the time were such that he reasonably feared death or great bodily harm to himself or to other occupants of the home at the hands of the person seeking entry, or reasonably believed that such person intended to commit a felony in the home. It is for you, the jury, to determine the reasonableness of the defendant's apprehension or belief from the circumstances as they appeared to him at the time.

Defendant contends that the jury should have been charged additionally that if it found that defendant reasonably believed that it was necessary to act in defense of his home, but also found that he used excessive force, it must return a verdict of guilty of voluntary manslaughter. We hold, however, that the court properly instructed the jury to *acquit* the defendant if it should determine that defendant reasonably believed deadly force was

necessary under the circumstances. As our Supreme Court elaborated in *State v. McCombs, supra,* one justification for the defense of habitation rule is the need to afford protection to occupants of a dwelling under circumstances where there is no opportunity to see the intruder or clearly ascertain his purpose. Where an unknown assailant attempts to force entrance into a home, there is no duty to calibrate with the precision of 20/20 hindsight the lawful measure of force to repel. Any proof, or finding, of "excessive force" may be irrelevant and in any case will not vitiate, or render imperfect, a defense of habitation defense where the defendant reasonably believed that deadly force was necessary to protect himself or other occupants from serious injury, or reasonably believed that the intruder intended to commit a felony in the home.

We have carefully examined defendant's third and fifth assignments and find them to be without merit.

No error.

Judges PARKER and ORR concur.

DAN PRICE, PLAINTIFF-EMPLOYEE v. BROYHILL FURNITURE, EMPLOYER, AND ARGONAUT INSURANCE CO., CARRIER, DEFENDANTS

No. 8710IC1153

(Filed 17 May 1988)

Master and Servant § 56— workers' compensation—loss of hearing—causation—expert witness not contradicted by self

There was no merit to plaintiff's contention that there was no competent evidence to support the Industrial Commission's finding that his loss of hearing was not caused by exposure to harmful noise in his employment where a medical expert, based on his examination of plaintiff, stated his opinion that plaintiff's hearing loss was more likely the result of a hereditary hearing problem, and the expert did not contradict himself by his responses to hypothetical questions on cross-examination where those questions assumed 35 to 40 years' exposure to a noise level of 90 decibels, while the record showed that plaintiff worked for 20 years in an environment where there was an undetermined level of noise.

Price v. Broyhill Furniture

APPEAL by plaintiff from Opinion and Award of the Industrial Commission entered 29 June 1987. Heard in the Court of Appeals 7 April 1988.

Plaintiff filed a claim seeking workers' compensation benefits for loss of hearing pursuant to G.S. 97-53(28). After a hearing, Deputy Commissioner John Charles Rush entered an Opinion and Award denying plaintiff's claim. The Deputy Commissioner found that plaintiff had a permanent loss of hearing but that it was not caused by exposure to noise in plaintiff's employment. On appeal to the full Industrial Commission, the Commission affirmed the denial of plaintiff's claim and adopted the Deputy Commissioner's Opinion and Award as its own. Plaintiff appeals.

Michaels and Jones Law Offices, P.A., by John Alan Jones and Gregory M. Martin, for plaintiff-appellant.

Young, Moore, Henderson and Alvis, P.A., by B. T. Henderson, II, David M. Duke, and Theodore S. Danchi, for defendant-appellees.

PARKER, Judge.

The sole issue presented on this appeal is whether the Industrial Commission erred in denying plaintiff's claim on the grounds that his hearing loss was not caused by exposure to harmful noise in his employment. In order to obtain an award of workers' compensation for loss of hearing under G.S. 97-53(28), plaintiff must prove that he suffered a loss of hearing in both ears which was caused by harmful noise in his work environment. *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 667, 303 S.E. 2d 795, 797 (1983). The Commission found as a fact that "[t]he plaintiff has a permanent sensorineural loss of hearing in both ears, but is [sic] was not caused by prolonged exposure to harmful noise in his employment."

The Commission's findings of fact are conclusive on appeal when supported by competent evidence even if the evidence could support a contrary finding of fact. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E. 2d 458, 463 (1981). Plaintiff contends that there is no competent evidence to support the Commission's finding that his loss of hearing was not caused by exposure to harmful noise in his employment.

The record shows that plaintiff was born in 1908 and was first employed by defendant Broyhill Furniture in 1928. Plaintiff started work in the finishing room, where there was not much noise. In 1942, plaintiff moved to the machine room where he operated a boring machine. Plaintiff testified that the boring machine and other machines in the room made considerable noise. Plaintiff was not continuously employed by Broyhill, but often worked for other furniture manufacturers. Plaintiff retired from Broyhill in 1973.

Plaintiff first began having hearing problems in his early sixties, and his hearing gradually became worse. After he retired, plaintiff saw doctors for his hearing problem and purchased several hearing aids. Plaintiff filed his workers' compensation claim in 1983. At the request of the defendant insurance carrier, plaintiff was examined by Dr. James L. Darsie, a specialist in ear, nose and throat. Based on his examination of plaintiff, Dr. Darsie concluded that plaintiff's hearing loss was not caused by noise exposure but was more likely the result of a hereditary hearing problem.

Plaintiff presented testimony of another ear, nose and throat specialist, Dr. Patrick Kenan. Dr. Kenan did not personally examine plaintiff but based his testimony upon the results of Dr. Darsie's examination. Dr. Kenan concluded that plaintiff's hearing loss was caused by exposure to noise in his employment. Dr. Kenan also disagreed with certain specific aspects of Dr. Darsie's diagnosis.

Conflicts in the expert testimony do not warrant reversal of the Commission's findings. The Commission is the sole judge of the credibility of the witnesses and it could properly accept Dr. Darsie's opinion and reject the opinion of Dr. Kenan. *See Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E. 2d 696, 700 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E. 2d 924 (1988). Unless Dr. Darsie's opinion is not competent evidence on the issue of causation, the Commission's finding that plaintiff's hearing loss was not caused by work-related noise cannot be disturbed. *See Morrison v. Burlington Industries, supra.*

Plaintiff contends that Dr. Darsie's testimony was not competent because it was contradictory on the issue of causation. Totally contradictory testimony as to causation is not competent

evidence to support the denial of workers' compensation benefits. *Dean v. Cone Mills Corp.*, 83 N.C. App. 273, 278-79, 350 S.E. 2d 99, 102 (1986), *aff'd per curiam*, 319 N.C. 457, 355 S.E. 2d 136 (1987); *Ballenger v. Burris Industries*, 66 N.C. App. 556, 567-68, 311 S.E. 2d 881, 888, *disc. rev. denied*, 310 N.C. 743, 315 S.E. 2d 700 (1984). We are of the opinion, however, that Dr. Darsie's testimony is not contradictory and, therefore, the Commission's findings are supported by competent evidence.

On direct examination, Dr. Darsie testified that the results of his examination of plaintiff indicated that plaintiff's hearing loss was caused by hereditary factors rather than exposure to harmful noise. Plaintiff contends that Dr. Darsie contradicted his opinion on cross-examination. Plaintiff's argument is based on Dr. Darsie's answers to hypothetical questions. In the hypotheticals, Dr. Darsie was asked to assume that plaintiff had worked for thirty-five to forty years in an environment that exposed him to a noise level of ninety decibels. Under these assumed facts, Dr. Darsie responded that noise exposure "could contribute" to or was a "significant contributing factor" to plaintiff's hearing loss.

Dr. Darsie's responses to the hypothetical questions do not contradict his earlier opinion because the facts assumed in the hypothetical were not established by the evidence presented at the hearing. The record shows that plaintiff worked in the machine room at Broyhill from 1942 until he retired in 1973. During that time, however, plaintiff also worked for several other furniture manufacturers, and plaintiff did almost no work for Broyhill during the years 1953 through 1962. There is no evidence in the record concerning the noise levels at plaintiff's other places of employment.

Furthermore, the evidence presented at the hearing did not establish that there was a noise level of ninety decibels in the Broyhill machine room. Because the plant where plaintiff worked has been destroyed, no measurements of the actual noise level could be made. Sound level tests conducted near machines similar to the one operated by plaintiff showed levels of less than ninety decibels. Dr. Kenan testified that, in his opinion, the noise levels where plaintiff worked were over ninety decibels. Since Dr. Kenan was tendered only as a medical expert, however, the credibility of this opinion is questionable and the Commission was free to

disbelieve it. *Pitman v. Feldspar Corp., supra.* The only other evidence concerning the noise level in plaintiff's workplace is the testimony of plaintiff and his wife that it was very loud.

Plaintiff's contention that defendants had the burden to prove that the noise level was under ninety decibels is without merit. Such a burden exists only when the defendant seeks to establish an affirmative defense under G.S. 97-53(28)(a). *McCuiston v. Addressograph-Multigraph Corp., supra.* The initial burden to prove causation is on the plaintiff. *Id.*

Thus, the record in this case conclusively establishes only that plaintiff worked for approximately twenty years in an environment where there was an undetermined level of noise. Therefore, Dr. Darsie's responses to questions which assumed thirty-five to forty years' exposure to a noise level of ninety decibels do not directly contradict his initial opinion. We note that Dr. Darsie's opinion was primarily based upon the results of tests he conducted during his examination of plaintiff. In contrast, the hypothetical questions emphasize plaintiff's work history. An expert medical opinion on causation is not rendered incompetent merely because the witness admits on cross-examination that other possible causes exist. *Buck v. Procter & Gamble Co.*, 52 N.C. App. 88, 94-95, 278 S.E. 2d 268, 272 (1981). Dr. Darsie never contradicted his opinion that plaintiff's test results indicated that his hearing loss was most probably caused by hereditary factors.

For the foregoing reasons, we hold that there was competent evidence to support the Commission's findings and we affirm the Opinion and Award of the Commission.

Affirmed.

Judges WELLS and ORR concur.

JOHN K. ABRON v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 8710SC1016

(Filed 17 May 1988)

Master and Servant § 7.5— dismissal of Department of Correction employee— stated reasons not pretext for racial discrimination—superior court affirmed

The superior court did not err by affirming the State Personnel Commission's decision that the Department of Correction's stated reasons for discharging petitioner were not merely a pretext for racial discrimination where petitioner was employed as an assistant manager of a soap plant and was discharged during his probationary period for violating policy in dealing with inmates; petitioner established a *prima facie* case of discrimination; the Department of Correction produced evidence showing a legitimate, nondiscriminatory reason for its action; and petitioner alleged that the Department of Correction's stated reasons were merely a pretext for intentional discrimination in that petitioner purchased canteen items for inmates, but white employees also purchased canteen items for inmates and were not discharged; some inmates told petitioner that white employees were planning to arrange his dismissal because he was black; and petitioner was the first black ever hired in a supervisory position at the soap plant. The Personnel Commission found that in addition to purchasing canteen items for inmates, petitioner committed at least six other acts of misconduct, many involving breaches of prison security, and there was no evidence that white employees with similar records were retained; even assuming the competency of evidence that petitioner was told by inmates that white employees were plotting against him, there was no evidence that the plotting had any effect on the decision to fire petitioner; and evidence that petitioner's race was considered a positive factor in his initial hiring is some evidence that his termination was not racially motivated.

APPEAL by petitioner from *Bowen, Judge*. Order entered 28 August 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 28 March 1988.

Petitioner is a black male with a master's degree in chemistry and several years of research and teaching experience. Respondent, the North Carolina Department of Correction (the Department), hired petitioner in September 1985 to be an assistant manager of the soap plant at its Harnett County facility. Petitioner was the first black person hired in a supervisory position at the soap plant. One of the Department's considerations in hiring petitioner was that he was black and that the position was in a class in which less than 10 percent of respondent's employees were black. As an incentive for petitioner to accept the position,

the Department requested and received approval for petitioner to be paid at a salary grade higher than the position usually called for.

On several occasions during the next five months, petitioner purchased canteen items for inmates and left inmates unsupervised in unauthorized places within the plant, both in violation of the Department's policies. Petitioner also failed to follow his supervisor's instructions on three occasions. Petitioner was given an oral warning in November about leaving inmates unsupervised. On 14 February 1986, the Department notified petitioner that they were terminating his employment, effective immediately, citing "several instances of poor conduct and judgment in which you violated correction policy in your dealing with inmates and other matters."

Petitioner appealed to the State Personnel Commission alleging that the decision to fire him was racially motivated. In the hearing officer's recommended decision, he concluded that petitioner had made a *prima facie* showing of racial discrimination but that the Department had shown legitimate, nondiscriminatory reasons for discharging petitioner. The hearing officer then concluded that the Department's stated nondiscriminatory reasons were only a pretext for racial discrimination, stating that petitioner should have been given the remaining four months of his probationary period to achieve a satisfactory level of performance and that petitioner would have been given that time had he been white.

The Commission adopted the hearing officer's findings of fact and its conclusions regarding petitioner's *prima facie* case of racial discrimination and the Department's showing of legitimate, nondiscriminatory reasons for its action. However, the Commission disagreed with the hearing officer's conclusion that race was a motivating factor in terminating petitioner. Instead, the Commission concluded that petitioner had failed to carry his burden of proving the Department's stated reasons were merely a pretext for racial discrimination. Accordingly, the Commission upheld the Department's discharge of petitioner. On appeal, the superior court affirmed the Personnel Commission's decision. Petitioner appeals.

Broughton, Wilkins & Webb, by William Woodward Webb, for the petitioner-appellant.

Attorney General Thornburg, by Assistant Attorney General Sylvia Thibaut, for the respondent-appellee.

EAGLES, Judge.

The State Personnel Commission has authority to determine whether a State employee has been discharged because of racial discrimination. *Dept. of Correction v. Gibson*, 308 N.C. 131, 301 S.E. 2d 78 (1983); G.S. 126-36. Once the employee establishes a *prima facie* case of discrimination, the burden shifts to the employer to produce evidence showing a legitimate, nondiscriminatory reason for its action. If the employer carries its burden to produce that evidence, the employee must then satisfy the trier of fact that the employer's stated reasons were merely a pretext for intentional discrimination. *Gibson, supra* at 137-139, 301 S.E. 2d at 82-84. The evidentiary findings of fact here are undisputed. Indeed, in his brief petitioner concedes that the Department has articulated legitimate reasons for firing him. Therefore, the sole issue on appeal is whether the Commission erred in concluding that petitioner failed to show the Department's stated reasons were a pretext for racial discrimination. After careful consideration of the whole record, we find no error.

The reviewing court must affirm an agency's ruling if, after consideration of the "whole record," there is substantial, competent evidence to support it. *Savings & Loan Assoc. v. Savings & Loan Comm.*, 43 N.C. App. 493, 259 S.E. 2d 373 (1979). Here, the record clearly supports the Commission's ultimate finding of fact that petitioner was not a victim of racial discrimination. In considering whether the employer's stated nondiscriminatory reasons were merely a pretext for discrimination, courts may consider the evidence the employee used to establish his *prima facie* case as well as:

(1) evidence that white employees involved in acts of comparable seriousness were retained;

(2) evidence of the employer's treatment of the employee during his term of employment;

(3) evidence of the employer's response to any legitimate civil rights activities of the employee; and

(4) evidence of the employer's general policy and practice regarding minority employees.

Gibson, supra, at 139-140, 301 S.E. 2d at 84. To show the record supports his claim of discrimination, petitioner cites the Commission's findings that white employees also purchased canteen items for inmates, and were apparently not discharged; that some of the inmates told him that the white employees were planning to arrange his dismissal because he was black; and that he was the first black ever hired in a supervisory position at the soap plant.

In addition to purchasing canteen items for inmates, however, the Commission found that petitioner committed at least six other acts of misconduct, many involving breaches of prison security. There is no evidence that white employees with similar records were retained. The number and severity of petitioner's violations of both the Department's policies and his supervisor's instructions are sufficient to distinguish his conduct from that of white employees who allegedly had violated the Departmental policy against selling canteen items to inmates. *See Gibson, supra* (conduct of white employee who failed to make 3 or 4 security checks but did discover an inmate escape considered less serious than conduct of black employee who failed to make 8 security checks, did not discover the escape, and failed to report suspicious situation).

The Commission's finding that petitioner was told by inmates that white employees were plotting against him is similarly unpersuasive. Even assuming *arguendo* the competency of that evidence, in the absence of evidence tending to show that employees' plotting had any effect on the decision to fire petitioner, it has no probative value here. To succeed in this claim, petitioner must show racial discrimination on the part of those Departmental officials who made the decision to discharge him. *See Ambush v. Montgomery Cty. Government, Etc.*, 620 F. 2d 1048, 1054 (4th Cir. 1980) (evidence that the employee had a heated discussion with a white employee is not sufficient to show racial bias, particularly when the white employee was not the person who took the allegedly discriminatory action). The decision to terminate petitioner's employment was made by two people. Both of them testified that

race was not a factor in their decision to fire petitioner. Moreover, evidence that petitioner's race was considered a positive factor in his initial hiring is some evidence that his termination was not racially motivated. *See Ambush v. Montgomery Cty. Government, Etc., supra* at 1054-1055.

From the whole record, there is substantial, competent evidence that the Department's stated nondiscriminatory reasons for firing petitioner were not merely a pretext for racial discrimination. Accordingly, the Department's decision must be affirmed.

Affirmed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

ERNEST D. JEFFERYS, ADMINISTRATOR OF THE ESTATE OF DARRYL LEON JEFFERYS, DECEASED v. JAMES W. TOLIN, JR., GUARDIAN AD LITEM FOR TAMEKA L. LESTER, MINOR, AND DARRYL DEVON LESTER, MINOR; AND THOMAS L. FITZGERALD, GUARDIAN AD LITEM FOR SEDRICK SANCHEZ JEFFERYS AND KENDRICK LACHEZ JEFFERYS, MINORS; AND WALTER B. CATES, GUARDIAN AD LITEM FOR UNKNOWN HEIRS OF DARRYL LEON JEFFERYS, DECEASED

No. 879SC1126

(Filed 17 May 1988)

Limitation of Actions § 11— illegitimate children—timely notice of claim against father's estate—tolling of statute of limitations because of infancy

N.C.G.S. § 1-17, providing for the tolling of most limitations periods during a person's minority, applied to N.C.G.S. § 29-19(b), providing that illegitimate children must give written notice of a claim upon the estate of their putative fathers within six months after the date of first publication or posting of the general notice to creditors; therefore, the notice of plaintiff children's claim which was filed more than six months after publication of the notice to creditors but within six months of the appointment of the guardian ad litem was timely.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiff from *Hobgood (Robert H.), Judge.* Judgment entered 19 August 1987 in Superior Court, PERSON County. Heard in the Court of Appeals 6 April 1988.

This is a declaratory judgment action. Plaintiff is the administrator of the estate of Darryl Leon Jefferys, who died intestate on 14 September 1985. Defendant James W. Tolin, Jr. is the guardian ad litem for Tameka L. Lester and Darryl Devon Lester, both of whom are illegitimate children of Mr. Jefferys. Prior to his death, Mr. Jefferys executed and filed with the district court an acknowledgment of paternity for both Tameka and Darryl.

Beginning on 23 September 1985, plaintiff administrator published a general notice to creditors in a newspaper of general circulation in Person County, stating that all claims against the estate should be served on the administrator by 24 March 1986. Neither of the children nor their mother filed notice of a claim against the estate. On 9 January 1987, Attorney James Tolin was appointed as the children's guardian ad litem. On 1 July 1987, he served plaintiff with notice that the minor children, Tameka and Darryl, were claiming an interest in the estate.

As administrator, plaintiff filed this declaratory judgment action on 13 January 1987 seeking a determination of Mr. Jefferys' rightful heirs. The trial court concluded that the children met the requirements of G.S. 29-19(b)(2) and were therefore entitled to take property from their father's estate. Plaintiff appeals.

Ronnie P. King, for the plaintiff-appellant.

James W. Tolin, Jr., for the defendant-appellee.

EAGLES, Judge.

G.S. 29-19(b) provides that, for purposes of intestate succession, an illegitimate child may take by, through, and from the estate of:

> (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of

> the clerk of superior court of the county where either he or the child resides.
>
> Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

G.S. 29-19(b). The parties do not dispute that Tameka and Darryl Lester qualify under G.S. 29-19(b)(2) and, if timely notice had been given, would take from their father's estate. It is also not disputed that the notice of their claim was filed more than six months after publication of the notice to creditors but within six months of the appointment of the guardian ad litem. G.S. 1-17 provides for the tolling of most limitations periods during a person's minority. Where a guardian ad litem is appointed for a minor, the limitation period begins to run from the time of the appointment. *Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126 (1964). Here, the guardian gave notice of the children's claim within six months after his appointment. Therefore, the dispositive issue is whether G.S. 1-17 applies to toll the six month period in G.S. 29-19(b). We hold that it does.

The applicability of G.S. 1-17 is not limited to the statutes of limitation found in Chapter 1 of the North Carolina General Statutes. In *Whitted v. Wade*, 247 N.C. 81, 100 S.E. 2d 263 (1957), the Court applied G.S. 1-17 to the six month period in which a widow is required to give notice of her dissent from her husband's will. The Court held that since the six month period was a statute of limitations, G.S. 1-17 was applicable. Similarly here, we construe the six month limitation period in G.S. 29-19(b) as a statute of limitation which is subject to being tolled under the provisions of G.S. 1-17. G.S. 29-19 confers upon illegitimate children the same rights enjoyed by legitimate children under our laws of intestate succession once there is proper adjudication or acknowledgment of paternity. Notification of the personal representative within six months of published notice to creditors does not establish or define the illegitimate child's right but merely sets a time limitation for an illegitimate child to seek its enforcement. *See generally Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982). Accordingly, we hold that the trial court correctly declared

that Tameka and Darryl Lester were the rightful heirs of their father's estate.

Affirmed.

Judge PHILLIPS concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

G.S. 1-271 states that "[a]ny party aggrieved may appeal in the cases prescribed in this Chapter." A "party aggrieved" is one whose rights have been directly and injuriously affected by a judgment entered by a court. *Freeman v. Thompson*, 216 N.C. 484, 5 S.E. 2d 434 (1939). Where a party is not aggrieved, his appeal must be dismissed. *Boone v. Boone*, 27 N.C. App. 153, 218 S.E. 2d 221 (1975).

Our Supreme Court in *Dickey v. Herbin*, 250 N.C. 321, 326, 108 S.E. 2d 632, 635 (1959), states:

> An executor or administrator may not secure review of a judgment, order or decree merely determining the rights as between the parties entitled to the estate or distributing the estate or a part thereof among heirs, next of kin, devisees, or legatees where the court had jurisdiction, unless there are exceptional circumstances taking the case out of the general rule. . . .

While I recognize an administrator's right to bring an action for a declaration of rights or legal relations under G.S. 1-255 in order to ascertain a class of creditors, devisees, legatees, heirs, next of kin or others, I do not acknowledge a right to appellate review of a judgment of a court of competent jurisdiction which has declared the administrator's rights and duties in such a way that the testator's estate is not adversely affected. *See Dickey v. Herbin*, 250 N.C. 321, 108 S.E. 2d 632 (1959). I do not find the superior court's judgment in any way adverse to the estate; therefore, the administrator is not a "party aggrieved" and the appeal should be dismissed.

It is the duty of the administrator or executor to preserve and protect the assets of the estate. The administrator or executor is not preserving and protecting the assets of an estate in appealing a decision of the superior court in this case. I am sure the legal expenses incurred in pursuing this appeal will be charged against the estate. All costs in this case, in my opinion, should not be charged against the estate. I vote to dismiss the appeal.

STATE OF NORTH CAROLINA v. TERRY FAISON

No. 874SC598

(Filed 17 May 1988)

1. **Criminal Law § 138.38— assault with a deadly weapon—mitigating factor of provocation—not found—no error**

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury by not finding the mitigating factor of strong provocation where defendant approached the victim at work and a discussion ensued during which no weapons were displayed; defendant left the building after the discussion, went to his car, obtained a rifle and returned to the building; and upon seeing the victim defendant fired a total of eight shots, eventually shooting the victim numerous times.

2. **Criminal Law § 138.30— assault with a deadly weapon—mitigating factors—finding that jury had considered mitigating factors in verdict—improper**

A defendant was entitled to a new sentencing hearing on a conviction for assault with a deadly weapon inflicting serious injury where the defendant had been charged with assault with a deadly weapon with intent to kill inflicting serious injury and the trial court relied on the jury's verdict of the lesser included offense to determine that the statutory mitigating factors of duress, threat and mental condition had been satisfied.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 16 July 1986 in Superior Court, DUPLIN County. Heard in the Court of Appeals 8 December 1987.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was convicted for assault with a deadly weapon inflicting serious injury for which he was sentenced to a term of seven years. From the imposition of this sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Edmond W. Caldwell, Jr., for the State.

C. Branson Vickory, Jr. and Roland C. Braswell for defendant-appellee.

JOHNSON, Judge.

The only issue before this Court is whether the trial court abused its discretion during the sentencing hearing, as appellant contends, for failing to consider four mitigating factors.

On 16 July 1986, the trial judge held a sentencing hearing. The trial judge ruled that the aggravating factors outweighed the mitigating factors and sentenced defendant to an active term of seven years, four years in excess of the presumptive sentence.

Defendant contends that the trial court erred by failing to find the following statutory mitigating factors:

> 1. The defendant committed the offense under duress, . . . which was insufficient to constitute a defense but significantly reduced his culpability. G.S. sec. 15A-1340.4(a)(2)(b)
>
> 2. The defendant committed the offense under . . . threat, . . . which was insufficient to constitute a defense but significantly reduced his culpability. G.S. sec. 15A-1340.4(a)(2)(b)
>
> 3. 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. G.S. sec. 15A-1340.4(a)(2)(d)
>
> 4. The defendant acted under strong provocation, . . . G.S. sec. 15A-1340.4(a)(2)(i)

Where the evidence in support of a mitigating factor is substantial, uncontradicted and inherently credible, it is error for the trial court to fail to find such a mitigating factor. *State v. Matthews*, 69 N.C. App. 526, 317 S.E. 2d 62 (1984). The defendant has the burden of establishing such mitigating factors by a preponderance of the evidence. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E. 2d 732 (1983).

[1] We first address defendant's contention that the trial court erred in failing to find as a mitigating factor that defendant acted under strong provocation. Defendant's contention is without merit.

Provocation within the meaning of G.S. sec. 15A-1340.4(a)(2)(i) requires a showing of a threat or challenge by the victim to the defendant. *State v. Braswell*, 78 N.C. App. 498, 337 S.E. 2d 637 (1985). When evidence is offered to support a claim for a mitigating factor of strong provocation, the trial judge must determine what facts are established by a preponderance of the evidence, and then determine whether those facts support a conclusion of strong provocation. Only if the evidence offered at the sentencing hearing so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn is the court compelled to find that the mitigating factor exists. *State v. Clark*, 314 N.C. 638, 336 S.E. 2d 83 (1985).

In *State v. Highsmith*, 74 N.C. App. 96, 327 S.E. 2d 628 (1985), this Court held that the trial court did not err by failing to find the mitigating factor of strong provocation where, after the original altercation which evidenced a threat or challenge to defendant by the victim, defendant proceeded to his residence six blocks away, obtained a shotgun and shells, and then returned to the vicinity of the original fight. This Court stated that "returning to the vicinity of the original fight manifest[s] actions more consistent with a prior determination to seek out a confrontation rather than a state of passion without time to cool placing defendant beyond control of his reason." *Id.* at 100-01, 327 S.E. 2d at 631.

Similarly, in the case *sub judice*, the evidence showed that defendant approached the victim at work and a discussion ensued during which no weapons were displayed. After the discussion, defendant left the building, went to his car, obtained a rifle and returned to the building. Upon seeing the victim, defendant fired a total of eight shots and eventually shot the victim numerous times. Thus, as in *Highsmith*, in the case *sub judice*, we believe that the evidence does not compel the conclusion that strong provocation has been proved by a preponderance of the evidence.

[2] As to defendant's other three arguments concerning the mitigating factors of duress, threat and mental condition, we

believe the trial court erred when it relied on the jury's verdict of the lesser included offense of assault with a deadly weapon inflicting serious injury to determine that these statutory mitigating factors had been satisfied. The finding by the jury of a lesser included offense does not relieve a trial court from adequately determining the existence of mitigating factors.

The following is the court's colloquy during the sentencing hearing regarding these mitigating factors at issue in the case *sub judice.*

> COURT: Well, I've got some aggravating and mitigating circumstances that I've got to have cleared up. . . . Let the record reflect that this is a Class H felony. The maximum sentence is 10 years, the presumptive sentence is 3. As a mitigating factor the Court finds that . . . [a]s to number 3 you're speaking of, . . . the defendant committed the offense under duress which was insufficient to constitute defense, but significantly reduced the culpability, *I would say in answer to that one, that the jury has answered that one by not convicting him of assault with a deadly weapon with intent to kill.* That takes care of that. Number 5, the defendant committed the offense under threats which was [sic] insufficient to constitute an offense, but sufficiently—*I think the same thing there that the jury saw fit to reduce the charge with intent to kill to assault inflicting serious injury.* Number 9, that you spoke of the defendant was suffering from a mental condition that was insufficient to constitute a defense by significantly reducing this culpability for the defense. *I find the same situation in that. The jury reducted [sic] it or found the defendant guilty of a lesser included offense.*

In *State v. Milam*, 65 N.C. App. 788, 310 S.E. 2d 141 (1984), the trial judge at a sentencing hearing found two aggravating factors and two mitigating factors. However, the trial judge made further findings that the jury *had considered such mitigating factors in its verdict*, and refused to find other mitigating factors that defendant contended were supported by the record. This Court held that,

> [s]uch an inference from the *bare fact* that the jury returned a verdict of guilty of a lesser included offense is untenable, as it would negate the possibility of a defendant receiving the

> benefit of consideration of otherwise clearly established factors in mitigation whenever a verdict of guilty of a lesser included offense . . . is returned. There is no indication contained in the Fair Sentencing Act that the Legislature intended this result, and it is clear that such an application of its provisions would "eviscerate" the Act just as surely as would the failure of the trial judge to find the mitigating factor in the first instance.

Id. at 792-93, 310 S.E. 2d at 144-45.

Similarly, in the case *sub judice*, the trial court made findings that the jury had considered the mitigating factors relating to duress, threat and mental condition by finding the defendant guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury. Such an *ad hoc* determination of the mitigating factors, as was performed in *Milam*, requires this Court to find error in the trial court's judgment. Accordingly, and for the reasons set forth above, we hold that defendant is entitled to a new sentencing hearing on his assault with a deadly weapon inflicting serious injury conviction.

Vacated and remanded.

Judges ARNOLD and ORR concur.

D. W. WARD CONSTRUCTION COMPANY, INC. v. DOLPH O. ADAMS AND JEAN S. ADAMS

No. 8714SC880

(Filed 17 May 1988)

Contracts § 28— construction contract—issues and instructions not consistent

In an action to recover damages under a construction contract, the trial court erred in submitting issues to the jury which were directed to an express contract theory of liability while his instructions combined both express and implied contract theories of recovery; consequently, the jury's verdict was inconsistent on its face where the jury found that plaintiff had not substantially performed its contractual obligations but nevertheless awarded plaintiff damages.

APPEAL by defendant from *George M. Fountain, Judge.* Judgments entered 30 January 1987 and 10 March 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 February 1988.

Pulley, Watson, King & Hofler, P.A., by R. Hayes Hofler, III and Judith V. Siegel for plaintiff-appellee.

Randall, Yaeger, Jervis and Stout by John C. Randall for defendant-appellant.

BECTON, Judge.

Plaintiff D. W. Ward Construction Company, Inc. (Ward Construction) brought this breach of contract action against defendants Dolph O. Adams and Jean S. Adams to recover damages in the amount of $43,046.32 under a construction contract. In the alternative, Ward Construction sought to recover damages in the same amount under a theory of implied contract. A jury found that Ward Construction had not substantially performed its obligations under the contract but, nevertheless, awarded Ward Construction $36,500 in damages. Defendants appeal. We remand for a new trial.

I

Ward Construction contracted with Dolph and Jean Adams to perform extensive remodeling work on their home on 7 May 1984. The contract, drawn by the Adamses' attorney, provided that the work was to be completed within 120 days and in conformity with plans and specifications provided by the Adamses' architect. The Adamses were supposed to make payments as the work progressed and as they received certification of the work's completion from their architect. The total contract price was $78,707.00, but a liquidated damages provision penalized the builder $25.00 per day for each day over the first 120 days that the work was not completed. The parties presented conflicting evidence regarding Ward Construction's performance.

Ward Construction presented evidence that, despite continual complaints and requests for "change orders" from the Adamses—Dolph Adams in particular—it attempted to complete the work specified under the contract. Ward Construction's evidence showed that the Adamses' architect certified every

category of the work under the contract as complete with the exception of some painting valued at $641.00. Yet, the Adamses refused to make payments under the last two certifications and did not pay for some extra work. Ward Construction asserted that it stood ready to complete the job and to repair certain minor discrepancies noted by the Adamses. However, its workmen were dismissed from the worksite by Dolph Adams on 22 January 1985 and thus could not complete the work. The Adamses paid Ward Construction $44,989.00 of the $78,707.00 due under the contract. The Adamses were entitled to a $3,000 credit for wallpaper installed by someone else. Two change orders requested by the Adamses amounted to an additional $12,134.52 in costs. As a result, Ward Construction contended it was owed $42,852.52 under the contract.

The Adamses' evidence showed that they discharged Ward Construction by letter through their attorney on 13 February 1985. They asserted at that time that there were 46 deficiencies in the work and that completion was more than five months overdue. They showed expenses of $9,258 to complete the work. The Adamses contended that they owed nothing to Ward Construction because Ward Construction did not complete its contractual obligations.

II

The Adamses raise two issues on appeal which are so intertwined that we will consider them together. They contend that the trial judge erred (1) by instructing the jury that damages *should* be awarded to Ward Construction for the reasonable value of its goods and services, although it failed to substantially perform its contractual obligations, and (2) by entering judgment on the damages verdict and failing to strike the damages award as inconsistent.

The jury answered the following issues:

1. Did the plaintiff substantially perform its contract with the defendants as alleged in the complaint?

   Answer: No.

2. If so, when was the substantial performance completed?

   Answer:

3. What amount, if any, is the plaintiff entitled to recover of the defendants?

Answer: $36,500.

The Adamses argue, citing *Federal Realty Investment Trust v. Belk-Tyler of Elizabeth City, Inc.*, 56 N.C. App. 363, 289 S.E. 2d 145 (1982), that one whose performance was insufficient to fulfill the terms of an express contract cannot recover the value of its services under an implied contract.

Ward Construction, on the other hand, argues, citing *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 645, 312 S.E. 2d 215, 217 (1984), that "a trial judge has an affirmative duty to charge a jury on both legal and equitable theories of recovery where the pleadings are broad enough to include either theory [and the evidence supports either]."

The case law is clear that when the evidence supports it, a party may recover under either of the three contractual theories —express contract, contract implied in fact, or contract implied in law—provided the trial judge submits issues of fact regarding the different theories and instructs the jury regarding computation of damages under the different theories. See *Ellis Jones, Inc.* Moreover, a party who fails to complete performance may recover the costs of his work if his full performance was prevented by the other party, and the party who prevents his performance is precluded from using his failure to perform the contract as either a defense or as a basis for a counterclaim. *Raleigh Paint and Wallpaper Co. v. Rogers Builders, Inc.*, 73 N.C. App. 648 (1985). In the instant case, the trial judge instructed the jury as follows:

> In the event that you should answer the first issue no, that is, that there has been no substantial performance, then you would go to the third issue to determine what amount, if any, the plaintiff is entitled to recover. Obviously, the work performed, the materials furnished, cannot be returned. So if there has been no substantial compliance, then you would consider and award to the plaintiff such an amount as you find to represent the actual value of services performed and labor performed and the materials furnished, if any, in excess of the amount already paid which is $44,989.

We hold that the instructions and questions presented to the jury are irreconcilably inconsistent. The trial judge submitted issues to the jury that were directed to an express contract theory of liability; however, his instructions combined both express and implied contract theories of recovery. Consequently, the jury's verdict, on its face, is inconsistent. The jury answered "no" to the first issue—finding that Ward Construction had not substantially performed its contractual obligations—but nevertheless awarded damages to Ward Construction when answering the third issue. Such a result can only be accepted if the jury finds an agreement apart from the express one or finds other equitable grounds, such as prevention of performance, on which to base a recovery. The issues, as presented, did not permit the jury to so find.

The Adamses argue further that the damages award should be stricken, leaving Ward Construction with no recovery because they failed to substantially perform. We disagree. This is not a case in which the jury ignored the dictates of the law by entering a special finding of fact inconsistent with its general verdict. *See, e.g., Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973); *Swann v. Bigelow*, 243 N.C. 285, 90 S.E. 2d 397 (1955). Rather, the issues presented to the jury were insufficient to give voice to the judge's instructions. We, therefore, remand this case for a new trial.

New trial.

Chief Judge HEDRICK and Judge SMITH concur.

STATE OF NORTH CAROLINA v. WILLIAM HENSLEY

No. 8724SC1166

(Filed 17 May 1988)

1. Assault and Battery § 16.1— assault with a deadly weapon with intent to kill inflicting serious injury—submission of lesser included offenses not required

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by not instructing the jury on the lesser included offenses of assault with a deadly weapon with intent to kill, assault with a deadly weapon, and simple assault on the grounds that

there was conflicting evidence of serious injury where it was uncontradicted that a deadly weapon—a shotgun—was used to inflict the physical injuries upon the victim; the victim suffered multiple wounds to both legs and knees, the left hip, arm and hand; the victim was hospitalized for three days and three nights; and the victim suffered great pain and continues to suffer great pain as a result of some of pellets remaining in his body. Although the defendant introduced evidence that there was no significant open wound, bone destruction, tendon or ligament damage, and that the victim remained neurovascularly intact, that evidence only points out that the injuries could have been much more serious and does not negate the evidence of serious injury.

2. **Criminal Law § 163.1— assault—failure to define serious injury—waiver of objection**

Defendant in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury waived any objection to the court's failure to define serious injury by neither requesting any specific instruction, nor objecting to or challenging the jury instruction when given the opportunity prior to or after the court's charge.

3. **Assault and Battery § 14.4— assault with a deadly weapon with intent to kill inflicting serious injury—evidence of attempt to kill—sufficient**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the fact that shotgun pellets entering the body of the victim did so at areas away from vital organs and that some of the pellets came out on their own did not negate the inference of an attempt to kill.

APPEAL by defendant from *Lamm, Judge.* Judgment entered 24 July 1987 in Superior Court, YANCEY County. Heard in the Court of Appeals 12 April 1988.

Defendant was tried and convicted upon an indictment proper in form charging him with assault with a deadly weapon with intent to kill inflicting serious injury pursuant to N.C.G.S. sec. 14-32(a). From a verdict of guilty as charged and the imposition of an active sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David R. Minges, for the State.

Wayne O. Clontz for defendant-appellant.

JOHNSON, Judge.

The State's evidence tends to show that Bobby Hensley owns property which adjoins property owned by defendant and defendant's brother, Cono Hensley. On 26 June 1986, at approximately

8:10 p.m., Bobby Hensley was standing on his property in an area where Cono Hensley had been cutting locust timber on Bobby Hensley's property without permission. The area where the timber had been cut was located in the general vicinity of Cono Hensley's home. While Bobby Hensley was standing on his own property and observing the area from which the timber had been cut, Cono Hensley rushed from his house and commenced to swear and curse at Bobby Hensley. Bobby Hensley listened to him for a short while and then turned to walk away. When Bobby Hensley was approximately sixty feet away from Cono Hensley, he looked back and saw defendant William Hensley standing near Cono Hensley, with a shotgun pointing at him (Bobby Hensley). Bobby Hensley pleaded with defendant not to shoot him. Defendant fired the gun, injuring Bobby Hensley in both legs and knees, the left hip, the left arm and hand. Bobby Hensley's pants were soaked with blood from the injuries. The injuries caused him great pain and he was hospitalized for three days and three nights. Some of the buckshot pellets remain in his body and continue to cause him to have pain. At the time Bobby Hensley was shot, he had no weapon in his possession. The State's evidence further tended to show that on 7 March 1986 defendant shot at Bobby Hensley twice and threatened to kill him.

Defendant presented evidence which tends to show that on 26 June 1986, defendant was visiting at his brother's house which is located on land both he and his brother Cono Hensley own. Their land adjoins the property of Bobby Hensley. On the day in question, while he was inside his brother's house, he heard Bobby Hensley threaten to kill everyone at Cono Hensley's house. He looked through the window, saw Bobby Hensley standing on their property and pointing a pistol at his brother Cono. Defendant got Cono's shotgun and went outside. Just as defendant stepped to the outside, Bobby Hensley pointed the pistol at defendant and threatened to kill him. Defendant shot Bobby Hensley just as Bobby Hensley threatened him. Defendant thought Bobby would carry out his threats because on 7 March 1986, Bobby Hensley shot at him twice with a .38 caliber pistol. Defendant presented further evidence which tended to show that although Bobby Hensley was injured from the shooting, he did not suffer any "significant open wound, . . . bone destruction or significant tendon or ligament damage and . . . was neurovascularly intact."

By his sole Assignment of Error brought forward in his brief, defendant contends the trial court erred in failing to instruct the jury on the lesser included offenses of assault with a deadly weapon with intent to kill, assault with a deadly weapon, and simple assault.

[1] First, defendant argues that there was conflicting evidence as to whether any serious injury was inflicted upon the victim; therefore, defendant contends, the trial court was required to submit the possible verdicts of assault with a deadly weapon with intent to kill, assault with a deadly weapon and simple assault. We cannot agree.

The term "inflicts serious injury," as used in G.S. sec. 14-32, means physical or bodily injury resulting from an assault with a deadly weapon. The injury must be serious but it must fall short of causing death. *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978); *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962). Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question for the jury. *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964); *State v. Musselwhite*, 59 N.C. App. 477, 297 S.E. 2d 181 (1982). Some factors the courts consider in determining whether an injury is serious include but are not limited to pain and suffering, loss of blood, hospitalization and time lost from work. *State v. Owens*, 65 N.C. App. 107, 308 S.E. 2d 494 (1983).

In the instant case, it is uncontradicted that a deadly weapon—a shotgun—was used to inflict the physical injuries upon Bobby Hensley; that he suffered multiple wounds to both legs and knees, the left hip, arm and hand; that he was hospitalized for three days and three nights; and that he suffered great pain and continues to suffer pain as a result of some of the pellets remaining in his body. This evidence clearly shows that defendant inflicted serious injuries upon the victim. The evidence which defendant introduced, that there was not any significant open wound, bone destruction, tendon or ligament damage and that the victim remained "neurovascularly intact" does not contradict or negate the evidence of serious injury. It only points out that the injuries could have been much more serious than the evidence shows. But the fact remains that the injuries inflicted were nonetheless serious. The court properly submitted this question

to the jury, and where there is positive and uncontradicted evidence as to the element of a serious injury, an instruction on the lesser offense of assault with a deadly weapon is not required. *Musselwhite, supra.* Likewise, the court is not required to instruct on simple assault where the evidence is uncontradicted that the assault was committed with a deadly weapon *per se. State v. Boykin,* 310 N.C. 118, 310 S.E. 2d 315 (1984); *State v. McKinnon,* 54 N.C. App. 475, 283 S.E. 2d 555 (1981). "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." *State v. Simpson,* 299 N.C. 377, 381, 261 S.E. 2d 661, 663 (1980). When the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, no instruction by the trial court on a lesser included offense is required. *State v. Drumgold,* 297 N.C. 267, 254 S.E. 2d 531 (1979).

[2] Defendant also argues that the court erred in not defining for the jury the phrase "serious injury." We find no merit to this argument. First, defendant neither requested any specific instruction, nor objected to nor challenged the jury instruction when given the opportunity prior to or after the Court's charge. Therefore, any objection to the jury instructions is waived. N.C. Rules of App. P., Rule 10(b)(2).

[3] Next, defendant argues that since the shotgun pellets entering the body of the victim did so at areas away from vital organs and the fact that some of the pellets came out on their own, negates the inference of any attempt to kill. We find this argument meritless. First, it is in contradiction of defendant's contention that the court erred in failing to submit the possible verdict of assault with a deadly weapon *with intent to kill.* Secondly, there was ample evidence from which the jury could find the requisite intent and any conflict in the evidence was for the jury to resolve. *Musselwhite, supra.*

Defendant has not brought forward or argued in his brief one of his assignments of error. We deem it abandoned and decline to review it. N.C. Rules of App. P., Rule 28(a).

For the foregoing reasons, in defendant's trial, we find

No error.

Judges PHILLIPS and SMITH concur.

VIOLA NEWMAN ROBERTSON v. JIMMY DAVID HARTMAN AND WIFE, PATSY L. HARTMAN

No. 8722DC691

(Filed 17 May 1988)

Vendor and Purchaser § 4— deed free from "title irregularities"—genuine issue of fact as to meaning of term

In an action for specific performance of a contract to buy a certain tract of real property, the trial court erred in entering summary judgment for defendants where a genuine issue of fact existed as to whether plaintiff could convey a deed free from "title irregularities"; plaintiff understood "title irregularities" to include only those defects in title which would prevent her from conveying good and marketable title; and defendants understood the term to include the existence of restrictive covenants which would prohibit the placement of a mobile home upon the lot in question.

APPEAL by plaintiff from *Martin, Lester P., Jr., Judge.* Judgment entered 25 March 1987 in District Court, DAVIDSON County. Heard in the Court of Appeals 5 January 1988.

Greeson, Page and Grace, by Michael R. Greeson, Jr., for plaintiff-appellant.

J. Calvin Cunningham for defendants-appellees.

JOHNSON, Judge.

Plaintiff filed this civil action on 22 September 1986 seeking specific performance of a contract reduced to writing on 8 May 1986, in which she agreed to sell and defendants agreed to purchase a certain tract of real property. She also sought damages for the alleged malicious damage to her real property. As an alternative remedy, plaintiff sought the difference between the contract price and the future resale price. Plaintiff appeals from an entry of summary judgment for defendants.

The agreement entered by and between the parties states the following in its entirety:

This agreement by and between Viola Newman Robertson (divorced) and Jimmy David Hartman and wife, Patsy L. Hartman, is for the sale of Lot #9, Midway Acres, for the sale price of NINE THOUSAND TWO HUNDRED FIFTY AND NO/100 DOLLARS ($9,250.00). A deposit of FIVE HUNDRED DOLLARS ($500.00) is received by Viola Robertson this date as a deposit until such time as the deed can be prepared and the title can be searched. The balance of the sale price of EIGHT THOUSAND SEVEN HUNDRED FIFTY AND NO/100 ($8,750.00) shall be paid at the time of the deed delivery. *In the event the sale is not completed because of title irregularities, the said deposit shall be returned.* (Emphasis added).

This the 8th day of May, 1986.

s/VIOLA NEWMAN ROBERTSON (SEAL)
Viola Newman Robertson

s/JIM DAVID HARTMAN (SEAL)
Jimmy David Hartman

s/PATSY L. HARTMAN (SEAL)
Patsy L. Hartman

Prepared in duplicate

Pursuant to the agreement, defendants gave plaintiff a check in the amount of $500.00 on 8 May 1986 as earnest money; completion of the sale pending preparation of the deed and a title search free of "title irregularities." At defendants' direction, Ted S. Royster, Jr., Attorney-at-Law, rendered a title opinion to them on 15 May 1986. The opinion provided that the placement of a mobile home on the lot in question would be in violation of restrictive covenants contained in the deed.

The first covenant, which appears at paragraph four in the deed states in pertinent part: "[n]o residence shall be erected or allowed to remain on said Lot with less than 1300 square feet of floor space on the first floor, exclusive of porches, garages or other outbuildings, whether or not attached to the residence." The second covenant, appearing at paragraph seven states in pertinent part: "[n]o trailer, basement, tent, shack, garage, barn or other outbuilding [shall be] erected on this lot or shall be at any time used as a residence temporarily or permanently."

Upon learning of the existence of the restrictive covenants, defendants stopped payment on the check deposited with plaintiff and have refused to purchase the lot. They contend that the contract to purchase the lot was conditional upon their ability to place a mobile home upon the premises, and the existence of the restrictive covenants which prohibited the placement constitutes a "title irregularity" as contemplated by the agreement.

On 12 November 1986, defendants filed a motion for summary judgment, and on 25 March 1987 their motion was granted. From this order plaintiff appeals.

Plaintiff brings forth one Assignment of Error and argues that the court committed reversible error in granting defendants' motion for summary judgment, because the evidence, when considered in the light most favorable to the non-movant, raises a genuine issue of material fact as to whether the restrictive covenants were equivalent to a "title irregularity." We agree and reverse, as we are convinced of the existence of genuine issues of material fact yet to be decided.

The purpose of a summary judgment motion is to foreclose the need for a trial when, based upon the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are to be decided. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E. 2d 897 (1981). Summary judgment may not be used, however, to resolve factual disputes which are material to the disposition of the action. *Econo-Travel Motor Hotel Corp. v. Taylor and Fletcher v. Foremans, Inc.*, 301 N.C. 200, 271 S.E. 2d 54 (1980). It is usually improper to grant the motion when a state of mind such as intent or knowledge is at issue. *Valdese General Hospital v. Burns*, 79 N.C. App. 163, 339 S.E. 2d 23 (1986).

Where issues surrounding the interpretation of the terms of a contractual agreement are concerned, the generally accepted rule is that the intention of the parties controls, and the intention can usually be determined by considering the subject matter of the contract, language employed, the objective sought and the situation of the parties at the time when the agreement was reached. *Pike v. Wachovia Bank and Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968). When the parties use clear and unambiguous terms, such contracts can be interpreted by the court as a matter of law; however, if the terms employed are subject to more than

one reasonable meaning, the interpretation of the contract is a jury question. *Cleland v. The Children's Home, Inc.*, 64 N.C. App. 153, 306 S.E. 2d 587 (1983).

The resolution of the case *sub judice* must necessarily include settlement of the issue; whether the term "title irregularities," as understood by the parties, includes only those defects in title which would prevent grantor from conveying good and marketable title, or in addition, the existence of restrictive covenants which prohibit the placement of a mobile home upon the lot in question. Plaintiff contends that the former is the correct interpretation, and since no impediment exists which would prevent her from conveying good title, defendants are bound by the contract to purchase the lot. Defendants, on the other hand, assert the correctness of the latter interpretation and argue that the existence of the restrictive covenants constitutes a "title irregularity" and nullifies the contract and relieves them from performance.

Since the disputed term is not a term of common usage, nor does it carry an independent legal definition per se, the question remains unresolved and should have been submitted to a jury with proper instructions for resolution. *See Cleland, supra.* Thus, we have before us a disputed material issue of fact.

This Court has held that where there is a need to "find facts" then summary judgment is not an appropriate device to employ, provided those facts are material. *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E. 2d 527 (1978).

We feel that the need to "find" further facts is apparent and therefore reverse and remand this case for further proceedings so that this may be accomplished.

Reversed and remanded.

Judges PHILLIPS and ORR concur.

TAMARA FISCHELL v. MARTIN ROSENBERG

No. 8715DC901

(Filed 17 May 1988)

Divorce and Alimony § 24.8— child support—reduction of one parent's income—failure to consider improper—failure to show changed circumstances

The trial court erred in concluding that defendant's reduction in income could not be considered on his motion to increase plaintiff's child support obligations; however, the court's order denying defendant's motion is affirmed where defendant presented some evidence of present and future expenses but no evidence of the child-oriented expenses at the time of the prior hearing, and the court therefore did not have all of the evidence necessary to establish a change of circumstances.

APPEAL by defendant from *Betts, Judge.* Orders entered 11 May 1987 and 22 June 1987 in District Court, CHATHAM County. Heard in the Court of Appeals 1 March 1988.

Plaintiff and defendant were married on 23 August 1969. During the marriage the couple had two children, Arianna and Dov Rosenberg, born 11 November 1974 and 15 December 1977 respectively. After difficulties occurred in the marriage, the parties separated. On 15 April 1981, plaintiff filed a complaint seeking custody of the two children and child support. On 25 August 1981, Judge Stanley Peele determined that joint custody would be in the best interest of the children and defendant was ordered to provide medical insurance coverage, pay the medical and dental costs not covered and also pay $100 per month in child support. The parties were divorced on 4 November 1981.

In September of 1983, defendant filed a motion asking that the court award sole custody to him. That motion was granted by Judge Patricia S. Hunt and the order stated that plaintiff would be responsible for the children's expenses while they were living with her and paying the additional tuition that it would cost to keep the children enrolled in the Chapel Hill-Carrboro school system. Plaintiff was also ordered to pay one-half of the medical and dental expenses, including one-half of the health insurance premiums for the children.

On 27 February 1987, defendant filed a motion to increase plaintiff's child support obligations. Defendant later filed a motion

to show cause why plaintiff should not be held in contempt for failing to comply with her child support obligations. In an order entered on 11 May 1987, Judge Lowry Betts denied both of defendant's motions.

Defendant filed a notice of appeal and soon thereafter filed a motion for a new trial which was later changed to a motion for rehearing. Defendant then withdrew his notice of appeal from the original order and the trial court heard his motion for rehearing. The motion was denied by Judge Betts on 22 June 1987. Defendant filed notice of appeal from that order as well as from the trial court's 11 May order.

Long & Long, by Lunsford Long, for plaintiff appellee.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by G. Nicholas Herman, for defendant appellant.

ARNOLD, Judge.

In this case, defendant challenges the trial court's refusal to modify child support. Since defendant withdrew his notice of appeal from the order of 11 May 1987, filed a motion for rehearing and later filed a notice of appeal from the denial of that motion, the only proper appeal before this court is that of the denial of his motion for rehearing. Such a denial will only be overturned on appeal if there has been an abuse of discretion. *Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 267 S.E. 2d 511 (1980). While the trial court erred in certain of its findings of fact and conclusions of law, the order is affirmed based upon defendant's failure to produce sufficient evidence of past child-oriented expenses.

In his brief, defendant correctly argues that the trial court erred in concluding as a matter of law that:

> Defendant has failed to show any reason justifying modification of the prior order other than his voluntary cessation of employment; defendant has failed to request that this Court make a Finding of Fact regarding whether or not he left his employment in good faith to return to school; in any event, *this Court concludes that the cases regarding such a requirement of good faith in order to apply the earning capacity test are not germane to the question where the par-*

ty seeking to return to school has custody of the children as opposed to being the one who simply pays child support to the other parent; under such circumstances, the Court concludes that the custodial parent who returns to school voluntarily must make other arrangements to provide for the level of support he had been providing to the children in his custody, and cannot look to the other parent for such support, for to permit him to do so would be to permit him to obtain an indirect subsidy for his own education. (Emphasis added.)

Under G.S. 50-13.4 and 50-13.7, a party's ability to pay child support is ordinarily determined by the party's actual income at the time the support award is made or modified. *Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E. 2d 751 (1982). However, if there is a finding by the trial court that the party was acting in bad faith by deliberately depressing his or her income or otherwise disregarding the obligation to pay child support, then the party's capacity to earn may be the basis for the award. *Id.* A trial court's conclusion underlying imposition of the earnings capacity rule must be based upon evidence that the actions which reduced the party's income were not taken in good faith. There must be sufficient evidence of the proscribed intent. *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E. 2d 375 (1978).

The trial court in the present case determined that it was not necessary to make a finding of "bad faith" because the party seeking support modification was the custodial parent. There is absolutely no reason for such a determination in view of current case law. The trial court further incorrectly concluded that when a custodial parent seeks a change of child support based upon a reduction in income, that custodial parent must request the court to make a finding of fact as to his or her "good faith." This conclusion simply does not follow established case law. In summary, the trial court erred in concluding that defendant's reduction in income could not be considered on his motion to increase plaintiff's child support obligations. However, the order is affirmed for the following reason.

It has been established in North Carolina that orders for child support must be based upon the amount of support necessary to meet the reasonable needs of the child and the relative

ability of the parties to provide that amount. *Byrd v. Byrd*, 62 N.C. App. 438, 303 S.E. 2d 205 (1983); G.S. 50-13.4. Such an order, however, may be modified at any time, upon a showing of changed circumstances. G.S. 50-13.7; *Tate v. Tate*, 9 N.C. App. 681, 177 S.E. 2d 455 (1970). The changed circumstances with which courts are concerned involve child-oriented expenses. *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E. 2d 116 (1979). The moving party must present evidence of the child-oriented expenses, including the amount of those expenses at the time of the original support hearing. *Waller v. Waller*, 20 N.C. App. 710, 202 S.E. 2d 791 (1974). The movant assumes the burden of showing that circumstances have changed between the time of the original order and the time of the hearing of his or her motion for modification. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967).

While defendant in the case *sub judice* presented some evidence of present and future expenses, he presented no evidence of the child-oriented expenses at the time of the prior hearing. The trial court did not have all of the evidence necessary to establish a change of circumstances and did not err in refusing to modify plaintiff's child support. Therefore, there was no abuse of discretion in the denial of defendant's motion for rehearing.

Affirmed.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. ALPHONZO McNEILL

No. 8710SC1056

(Filed 17 May 1988)

1. Criminal Law § 66.8— photographic identification—admission at trial—no prejudice

There was no prejudice in a prosecution for kidnapping and common law robbery from allowing the State to examine the victim regarding a photographic identification where the victim never connected defendant to any photograph.

2. Criminal Law § 60— fingerprints—taken day of trial—admissible

The trial court did not err in a prosecution for kidnapping and common law robbery by admitting evidence regarding defendant's fingerprints where defendant was surprised when his fingerprints were taken for comparison purposes on the day trial commenced. The State had obtained a search warrant before taking defendant's fingerprints and the fingerprints were taken while defendant was in custody.

3. Criminal Law § 73.4— statements of victim to daughter and police detective—admissible as corroborative evidence

The trial court did not err in a prosecution for kidnapping and common law robbery by admitting testimony of the victim's daughter and a police detective about what the victim said had happened. Although the trial court apparently admitted the testimony under the excited utterance exception of N.C.G.S. § 8C-1, Rule 803(2), there was no prejudice since the testimony was admissible as corroborative of the victim's testimony.

APPEAL by defendant from *Hight, Judge.* Judgment entered 16 April 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 9 May 1988.

Defendant was charged in proper bills of indictment with kidnapping in violation of G.S. 14-39 and with common law robbery. Evidence presented at trial tends to show that on 25 July 1986, a white female drove her automobile to Raleigh to visit her daughter. She became lost and asked a black man how to get to 705 North East Street. The man told her he would take her to where she wanted to go. He directed her, and they went to an apartment, where the victim and the man saw another black man, William Yates. Thereafter, the victim went with the black man who had first offered to assist her to a secluded area where he took her jewelry and told her to get out of the car. She did so, and then walked down to a service station where she called her daughter. Her daughter met her at the service station, and she told her daughter what happened. They then reported the incident to the police. A detective from the Wake County Sheriff's Department went to the apartment where the victim had been and talked to William Yates. At first, Yates refused to identify the man who had come to the apartment with a white woman, but later after being given $200 by detectives, Yates told officers that defendant, Alphonzo McNeill, had come to the apartment with a white woman and said "he was going to rob that old white lady." The Wake County Sheriff's Department lifted a palm print from the exterior of the passenger door of the victim's automobile.

This palm print was identified as being that of defendant. The charge of kidnapping was dismissed by the court, and the jury found defendant guilty of larceny from the person in violation of G.S. 14-72(b)(1). From a judgment imposing a prison sentence of 10 years, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robert G. Webb and Associate Attorney General Richard G. Sowerby, Jr., for the State.

Frederick W. Hehre, III, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant's first assignment of error is set out in the record as follows:

> 1. Did the trial court commit error in allowing, over the objections of the Defendant, the State's witness, Dorothy Phillips Bryan to identify a photograph of some person in a photo line-up where the witness has no present recall of the photograph other than by identification by number on said photographic line-up.

This assignment of error purports to be based on Exception No. 1 noted in the record where the trial judge after voir dire examination of the victim denies the motion "for reasons stated. . . ." The voir dire examination of the victim was ostensibly for the purpose of determining whether her out-of-court identification of defendant from a photographic line-up could be admitted at trial. The ruling of the court seemed to indicate that the court would allow the State to introduce evidence at trial that the victim had picked out defendant's photograph as being the photograph of the perpetrator of the crime charged.

At trial, the victim was unable to remember anything with respect to picking out defendant's photograph. Although she was led repeatedly by the State's attorney, she never identified any of the photographs as being one of defendant nor did she identify defendant as being perpetrator of the crime. Her testimony was sufficient, however, to show a crime had been committed, and coupled with the testimony of her daughter and the police officers, the evidence was sufficient to raise an inference that defendant was the perpetrator of the crime. The exception upon

which defendant's first assignment of error is based does not support the argument in his brief. Assuming *arguendo*, however, that the court erred in denying defendant's motion in regard to the photographic line-up, and in even allowing the State to examine the victim regarding it, such error was in no way prejudicial to defendant inasmuch as the victim never connected defendant to any photograph.

[2] Defendant's second assignment of error is set out in the record as follows:

> 2. Did the trial court commit error in allowing, over the objections of the Defendant, the State's witness Joseph M. Ludas to identify the Defendant's fingerprints as those of the Defendant taken from the vehicle of the victim, when said comparison of the fingerprints were made the day of the trial of the Defendant pursuant to search warrant issued on the date of trial and after the commencement of the trial, and without notice to the Defendant.

This assignment of error appears to be based on an exception to the trial court's overruling of defendant's objection at trial to admission of evidence regarding comparison of defendant's fingerprints to latent fingerprints taken from the automobile of the victim immediately after the crime. Defendant argues that such evidence should not have been admitted because he was surprised when his fingerprints were taken for comparison purposes on the day the trial commenced. Defendant cites no authority in support of his argument. The State obtained a search warrant for taking defendant's fingerprints before trial, and the fingerprints were taken while defendant was in custody. We hold the trial court did not err in allowing the fingerprint expert to testify and compare defendant's fingerprints with those latent fingerprints lifted from the victim's automobile. This assignment of error has no merit.

[3] In defendant's final two assignments of error, he argues the trial court erred by allowing testimony of the victim's daughter and a police detective about what the victim said happened. Defendant contends this testimony was inadmissible hearsay under the Rules of Evidence. Although the State's attorney argued at trial that several exceptions to the hearsay rule would allow the testimony to be admitted, the trial court apparently admitted it under the "excited utterance" exception, G.S. 8C-1, Rule 803(2).

Even if such a ruling were error, defendant was not unduly prejudiced since the testimony was admissible as corroborative of the victim's testimony. Corroborative evidence is supplementary evidence used to strengthen or confirm evidence already given. *State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982). It is not necessary that the evidence tend to prove the precise facts brought out in a witness' testimony before it can be deemed corroborative of such testimony and therefore admissible. *Id.* Further, defendant had an affirmative duty to point out to the trial court any objectionable part which did not corroborate prior testimony, and he did not do so. *State v. Harris*, 46 N.C. App. 284, 264 S.E. 2d 790 (1980). Indeed, defendant at trial was unable to state to the trial judge any basis for his objection to the testimony. For these reasons, we hold the trial court did not err in allowing the testimony.

Defendant has not challenged the sufficiency of the evidence to support his conviction of larceny from the person. We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges WELLS and COZORT concur.

RICHARD JAMES MROSLA v. HYMAN FELDMAN AND FELDMAN'S LIMITED

No. 8714SC1077

(Filed 17 May 1988)

Husband and Wife § 9; Rules of Civil Procedure § 19— loss of consortium claim— denial of motion to join—dismissal for failure to join improper

The trial court erred in denying plaintiff's motion to join his loss of consortium claim with his wife's personal injury action and in dismissing his claim for loss of consortium on the ground that it was not joined with his wife's action.

ON a Writ of Certiorari, plaintiff appeals from *Thomas H. Lee, Judge*. Judgment entered 24 April 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 April 1988.

Richard James Mrosla, pro se.

Hedrick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo and Brian D. Lake, for defendant-appellees.

BECTON, Judge.

Plaintiff, Richard Mrosla, initiated this action seeking to recover for property damages and loss of consortium due to the negligence of defendants, Hyman Feldman and Feldman's Limited. The trial judge granted defendants' motion for partial summary judgment regarding plaintiffs' claim for loss of consortium. Plaintiff appeals. We reverse.

On 4 February 1982, plaintiff's wife, while driving a vehicle owned by plaintiff, collided with a vehicle owned by defendant Feldman's Limited and operated by defendant Hyman Feldman. In early December 1984, an attorney filed a personal injury action against defendants on behalf of plaintiff's wife. By letter dated 7 December 1984, the attorney advised plaintiff that the law firm did not think it should undertake to represent plaintiff's claims since it was representing plaintiff's wife. After unsuccessfully attempting to procure an attorney, plaintiff instituted the present action on 24 January 1985 by filing a complaint, which he subsequently amended on 1 February 1985. He sought to recover for damages to his vehicle. He also alleged and sought the following in paragraph 3(b) of his amended complaint:

> The plaintiff, while not in the accident himself, was emotionally traumatized and affected by the negligent driver's carelessness. As a result of defendant's negligence plaintiff had to watch his wife's excruciating pain and suffering, he had to nurse and care for her during recovery, he shared his wife's embarrassment over temporary and permanent disfigurement and scarring, he experienced shock with total inconvenience for over a month and could not resume his normal activities while his wife was incapacitated, he endured great psychological strain with a severe loss of sleep, he had to take medications he would not have normally taken, he endured great mental anguish and irritability as his wife's condition persisted, he developed a permanent change in sleeping habits that needed clinical help at about 2½ years, and he was damaged financially, physically and emotionally.

> Plaintiff suffered a great loss of service, society, companionship, sexual gratification and affection because of his wife's physical and psychological injuries. Plaintiff contends that there does not exist a monetary yardstick for determining a value of these personal damages. The tangible and intangible elements of plaintiff's loss of consortium, and other personal damages past and future must be determined by a jury trial. Plaintiff places his personal damages at a sum of not less than $25,000.00.

On 15 March 1985, defendants filed an answer in which they moved to dismiss the complaint for failure to state a claim. They also moved for summary judgment on 27 January 1986. On 17 March 1986, plaintiff filed a motion to join his claim in paragraph 3(b) with his wife's action. On 20 March 1986, defendants filed a motion to consolidate plaintiff's case with his wife's case.

On 23 April 1986, Judge Thomas Lee granted partial summary judgment for defendants with respect to plaintiff's loss of consortium claim in paragraph 3(b) because the claim was not joined with the action of his wife. Judge Lee directed a jury trial on plaintiff's property damage claim. Judge Lee also subsequently denied defendants' motions for consolidating the actions.

Plaintiff's wife received a jury verdict in the amount of $30,000 on 13 September 1986. Plaintiff received a jury verdict in the amount of $700 on his property damage claim on 19 January 1987. He did not give notice of appeal. We allowed plaintiff's petition for writ of certiorari on 25 June 1987.

By his two assignments of error, plaintiff essentially presents one question: whether the court erred in dismissing paragraph 3(b) of his complaint.

In *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E. 2d 818 (1980), claims for loss of consortium were recognized again after having been abolished. To preclude the possibility of double recovery, one of the reasons given for abolishing the claims, the Court held that a spouse could "maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is *joined with any other suit the other spouse may have instituted* to recover for his or her personal injuries" (emphasis added). *Id.* at 304.

Recognizing that there would be joinder problems with its holding, the Court noted, in *Cox v. Haworth*, 304 N.C. 571, 284 S.E. 2d 322 (1981), that any joinder questions could be answered by the Rules of Civil Procedure, namely Rules 13, 19, 20, and 21. Under Rule 19, a party is a necessary party and must be joined if the party is united in interest with another party. Rule 21 provides that an action should not be dismissed for misjoinder of parties or claims but the claims or parties should be added or dropped by the court on motion by a party or on its own initiative. Since plaintiff's claim for loss of consortium derived from his wife's cause of action for her personal injuries, *South Carolina Ins. Co. v. White*, 82 N.C. App. 122, 345 S.E. 2d 414 (1986), plaintiff was united in interest with his spouse and thus a necessary party to her action. The court, therefore, erred in denying plaintiff's motion to join his loss of consortium claim with his wife's action and in dismissing his claim for loss of consortium on the ground that it was not joined with his wife's action.

The parties in their briefs also raise the issue whether plaintiff could recover for his mental anguish or emotional distress arising out of his wife's injuries. This issue is not properly before this Court because the trial court dismissed the claim for nonjoinder, not for failure to state a claim. In any event, plaintiff's claim for mental anguish is encompassed within his claim for loss of consortium. *See Bailey v. Long*, 172 N.C. 661, 90 S.E. 709 (1916); Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. Rev. 435 (1980).

For the foregoing reasons, we reverse the order dismissing plaintiff's claim for loss of consortium and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

JAMES W. FOSTER, PLAINTIFF v. BARBARA DANIEL FOSTER, DEFENDANT

No. 8722DC1237

(Filed 17 May 1988)

Divorce and Alimony § 30— equitable distribution—life insurance proceeds for death of child—after separation but before divorce—separate property of plaintiff

The trial court did not err in an equitable distribution action by awarding life insurance proceeds for the death of a child to plaintiff where plaintiff was the owner and beneficiary of the policy and there were no vested rights under the policy at the time of separation. The cash value of the insurance policy at the time of separation was marital property since the premiums to that point had been paid with marital assets, but the premiums after separation were paid with plaintiff's assets and therefore the proceeds from the policy were the separate property of plaintiff.

APPEAL by defendant from *Fuller, Judge*. Judgment entered 16 September 1987 in District Court, DAVIE County. Heard in the Court of Appeals 4 May 1988.

This is a civil action for equitable distribution of marital property under G.S. 50-20. The following facts are uncontroverted:

Plaintiff and defendant were married on 12 November 1959. During the marriage, two children, Richie M. Foster and Kathy Foster Bowling, were born. Plaintiff, who was employed as an insurance agent, purchased insurance policies on the life of each child on 22 March 1982. Each policy had a face value of $10,000 with double indemnity for accidental death. Plaintiff was designated as owner and primary beneficiary, and the premiums were paid by monthly payroll deductions from plaintiff's earnings.

On 8 November 1985, plaintiff and defendant separated. At that time the policy on Richie M. Foster had a cash value of $20 and the policy on Kathy F. Bowling had a cash value of $23. Plaintiff continued making payments for the premiums on each policy after the separation.

On 16 February 1986, Richie M. Foster died from injuries sustained in an accident on 25 January 1986. The $20,000 proceeds from the insurance policy were then paid and subsequently held in a trust account.

Plaintiff filed for divorce on 10 November 1986, and the trial court granted absolute divorce on 10 December 1986. On 16 September 1987, after a hearing with respect to the claim for equitable distribution of the cash value of the insurance policies and the proceeds of the death benefits on the life of Richie M. Foster, the trial court entered an order declaring that the cash value of the policies at the time of separation was $43 and that such cash value was marital property, and the court equitably distributed this amount. The trial court further declared the death benefits in the amount of $20,000 on the life of Richie M. Foster were the separate property of plaintiff, and the court ordered that such amount held in trust be awarded to plaintiff. Defendant appealed.

Petree Stockton & Robinson, by Lynn P. Burleson, for plaintiff, appellee.

Henry P. Van Hoy, II, and G. Wilson Martin, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

The only question presented by this appeal is whether the trial court erred by declaring the proceeds of the insurance on the life of Richie M. Foster were the separate property of plaintiff. Defendant argues this Court should hold that life insurance proceeds collected after separation but before equitable distribution under a policy purchased with marital funds should be classified as marital property to the extent marital funds were used to pay the premiums.

G.S. 50-20 provides, in part:

> (a) Upon application of a party, the court shall determine what is the marital property and shall provide for an equitable distribution of the marital property between the parties in accordance with the provisions of this section.
>
> (b) For purposes of this section:
>
> (1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property in accordance with subdivision

(2) of this section. Marital property includes all vested pension, retirement, and other deferred compensation rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. The expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property.

It is clear that in order for property to be considered marital property it must be "acquired" before the date of separation and must be "owned" at the date of separation.

Defendant relies on *Johnson v. Johnson*, 317 N.C. 437, 346 S.E. 2d 430 (1986), to support her argument that the proceeds were acquired before the separation. In *Johnson*, however, the husband was involved in a serious motorcycle accident *before* his separation and received a settlement after the separation but before equitable distribution. The husband had a claim for damages for personal injuries before the separation and the Supreme Court found that the rights under the claim were marital property. In the present case, however, plaintiff had no claim for the death benefits under the policy at the time of the separation. Indeed, no claim existed at the time of the separation. For this reason, *Johnson* does not support defendant's contention that the proceeds were acquired prior to separation.

In *Hall v. Hall*, 88 N.C. App. 297, 363 S.E. 2d 189 (1987), this Court held that stock options which were vested prior to separation were marital property but those which had not vested prior to separation were separate property. In the present case, at the time of separation there were no vested rights under the insurance policy on the life of Richie M. Foster. The rights only vested at the death of Richie M. Foster, and until then plaintiff, as owner of the policy, could have cancelled the policy or changed the beneficiary. At the time of separation, the cash value of the insurance policies was marital property since the premiums to that point had been paid for with marital assets. The premiums after separation were paid for with plaintiff's assets, and therefore the proceeds from the insurance policy were separate property of plaintiff.

The judgment appealed from is

Affirmed.

Judges WELLS and COZORT concur.

CITY OF FAYETTEVILLE, APPELLEE v. E & J INVESTMENTS, INC., APPELLANT

No. 8712SC1152

(Filed 17 May 1988)

Injunctions § 13.4— temporary injunction banning topless dancing—no irreparable harm to defendant's business—appeal dismissed

Defendant's appeal from a preliminary injunction enjoining defendant from conducting topless dancing at its place of business was dismissed as interlocutory, since preservation of the status quo pending final judgment would not cause defendant irreparable harm in that it could continue to operate its business within the bounds of the law pending final judgment.

APPEAL by defendant from *Ellis, B. Craig, Judge*. Order entered 14 September 1987 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 7 April 1988.

Plaintiff filed this action on 9 February 1987 seeking a permanent prohibitory injunction and an order of abatement com-

manding defendant to discontinue topless dancing at 469 and 475 Hay Street in Fayetteville. Subsequently, on 4 September 1987, plaintiff filed a motion for a temporary restraining order seeking immediate restraint of topless dancing at 471-473 Hay Street, which motion was allowed the same day. Plaintiff simultaneously filed on 4 September a motion for preliminary injunction, seeking to enjoin defendant from conducting topless dancing at 471-473 Hay Street pending disposition of the suit for permanent relief. On 14 September 1987 the trial court granted the preliminary injunction sought, and defendant appealed.

Robert C. Cogswell, Jr., City Attorney for the City of Fayetteville; and Bailey & Dixon, by Alan J. Miles and John N. Fountain, for plaintiff-appellee.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, Charles E. Sweeny, Jr. and Edwin L. Harris, III, for defendant-appellant.

WELLS, Judge.

Defendant-appellant operates "Rick's Lounge," located at 469-475 Hay Street in Fayetteville. The lounge, which originally occupied only 471-473 Hay Street, commenced offering topless dancing in 1968. In March of 1979, the City of Fayetteville amended its zoning ordinance to prohibit topless dancing in the central business district, where "Rick's Lounge" is located; however, defendant was permitted to continue to offer topless dancing as a valid nonconforming use under the Fayetteville City Code until August 1986.

Sometime prior to May 1982, defendant acquired a lease to the adjoining properties of 469 and 475 Hay Street and expanded its lounge into the new premises. Plaintiff subsequently informed defendant that topless dancing would not be allowed in the new lounge areas because such expansion of a nonconforming use is prohibited by the Fayetteville City Code. In August 1986, a fire destroyed over 50% of the building at 471-473 Hay Street, as determined by the city building inspector. The Fayetteville City Code provides that when a building containing a nonconforming use is destroyed by more than 50% of its value, the nonconforming use may not resume. Consequently, prior to issuing permits to rebuild at 471-473 Hay Street, city officials apprised defendant that topless dancing could not recommence at those premises. The

City alleges in its complaint that in November 1986 members of the Fayetteville Police Department observed topless dancing at 469 and 475 Hay Street in violation of the City Code. In August 1987 defendant resumed topless dancing at the rebuilt 471-473 premises, prompting the plaintiff to seek the temporary relief challenged in this appeal.

Plaintiff contends that defendant's appeal should be dismissed as interlocutory. We agree. It is settled in our case law that a preliminary injunction is interlocutory and nonappealable unless it deprives the party enjoined of a substantial right which might be lost should the order escape review before final judgment. *State v. School*, 299 N.C. 351, 261 S.E. 2d 908, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed. 2d 11 (1980). Preliminary injunctions are by definition interlocutory, since they do not dispose fully and finally of the action. The question, therefore, is whether in the present case preservation of the *status quo* pending final judgment will cause defendant irreparable harm. Upon careful review of the record and briefs, we conclude that it will not.

As plaintiff points out in its brief, the preliminary injunction in this case merely enjoins defendant from violating, by offering topless dancing at the 471-473 Hay Street premises, Section 32-10 of the Fayetteville City Code, as plaintiff plausibly construes that code section. The injunction does not affect those areas of defendant's lounge located at 469 and 475 Hay Street. Nor does the injunction prohibit defendant from operating a lounge serving alcoholic beverages at 471-473 Hay Street, or from offering dancing there, so long as it is not topless dancing. Defendant may continue to operate its business within the bounds of the law pending final judgment. If defendant is eager for an expeditious vindication of any right, privilege, or defense, it should seek a speedy determination on the merits.

Appeal dismissed.

Judges PARKER and ORR concur.

THOMAS BRAXTON WARREN v. HALIFAX COUNTY v. DENNIS AUSTIN ROSE, JR. AND WIFE, JANE R. ROSE

No. 876SC1035

(Filed 17 May 1988)

Rules of Civil Procedure § 8.1— motion to dismiss for failure to state a claim upon which relief can be granted—mislabeled claim—complaint erroneously dismissed

The trial court erred in an action for damages for trespass, to quiet title, and for injunctive relief by dismissing the action for failure to state a claim upon which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff did not allege an insurmountable bar to a claim for relief for inverse condemnation. The theory of a claim is to be determined from the evidence and not from the pleadings.

APPEAL by plaintiff from *Barefoot, Judge*. Order entered 3 August 1987 in Superior Court, HALIFAX County. Heard in the Court of Appeals 9 May 1988.

This is a civil action wherein plaintiff seeks to quiet title to disputed land and seeks damages for use of the land, punitive damages and injunctive relief. Defendant Halifax County filed a third-party complaint against defendants Dennis Austin Rose, Jr., and Jane R. Rose.

In his complaint, plaintiff attempts to allege four claims for relief. In the first claim, he alleges defendant Halifax County had asserted a claim of ownership and entered into possession of a portion of his land. In his second claim, he alleges defendant Halifax County had committed acts of waste on the property. In his third claim, he alleges defendant Halifax County continued trespassing on his property. In his fourth claim, he alleges defendant Halifax County trespassed in willful and wanton disregard of the rights and privileges of citizens and in particular his property rights. Plaintiff prayed for the following relief:

> (A) The Court quiet the title to the disputed land by entering a judgment that the Plaintiff is the owner in fee simple and entitled to exclusive possession of the disputed land free from any and all adverse claims of ownership or possession in the disputed land by the Defendant pursuant to the Plaintiff's First Claim for Relief.

(B) The Court enter judgment against the Defendant awarding the Plaintiff a sum in excess of Ten Thousand Dollars ($10,000.00) for the permanent damages to the Plaintiff's land pursuant to the Plaintiff's Second Claim for Relief.

(C) The Court enter judgment against the Defendant awarding the Plaintiff a sum in excess of Ten Thousand Dollars ($10,000.00) for the use of the Plaintiff's land by the Defendant pursuant to the Plaintiff's Third Claim for Relief.

(D) The Court enter judgment against the Defendant awarding the Plaintiff a sum in excess of Ten Thousand Dollars ($10,000.00) as punitive damages pursuant to the Plaintiff's Fourth Claim for Relief.

(E) The Court grant the Plaintiff a permanent injunction enjoining the Defendant from trespassing on the Plaintiff's land pursuant to the Plaintiff's Third Claim for Relief.

(F) The Court order the Clerk of Superior Court to tax the costs of this action against the Defendant.

Defendant Halifax County filed an answer denying the material allegations and made a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). After a hearing, the trial court granted the motion, and the complaint was dismissed on the ground that plaintiff failed to state a claim upon which relief can be granted. Plaintiff appealed.

J. Michael Weeks, P.A., for plaintiff, appellant.

James & Wellman, by W. Turner Stephenson, for defendant, appellee Halifax County.

Parker and Parker, by Rom B. Parker, Jr., for defendants, appellees Dennis Austin Rose, Jr., and Jane R. Rose.

HEDRICK, Chief Judge.

The one question presented on this appeal is whether the trial court erred by dismissing the action for failure to state a claim for which relief could be granted pursuant to Rule 12(b)(6). In ruling on a motion pursuant to Rule 12(b)(6) the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations

state a claim for which relief can be granted. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Generally, a complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Id.*

The allegations in the present case that defendant Halifax County has appropriated to its own use a portion of plaintiff's property are sufficient to withstand a motion to dismiss a claim for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). The theory of a claim is to be determined from the evidence and not from the pleadings. Defendant Halifax County, in the present case, has suggested that plaintiff's claim, if any, is in the nature of a claim for "inverse condemnation." The fact that plaintiff might have mislabeled his claim as one for damages for trespass, one to quiet title, or one for injunctive relief, is of no significance in ruling on the motion to dismiss pursuant to Rule 12(b)(6). Plaintiff has not alleged an insurmountable bar to a claim for relief for inverse condemnation. Thus, the trial court erred in dismissing his "complaint," and the order will be reversed and the cause remanded to the superior court for further proceedings.

Reversed and remanded.

Judges WELLS and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 MAY 1988

EARLEY v. RUTHERFORD HOSPITAL No. 8829SC126	Rutherford (87CVS359)	Dismissed
FRANCISCO PLACE v. TRICO No. 8818DC92	Guilford (86CVD3899)	Affirmed
GREENE v. GREENE No. 8723DC1222	Wilkes (86CVD1106)	Affirmed
GUDGER v. GUDGER No. 8728DC1063	Buncombe (85CVD1000)	Vacated & Remanded
IN RE HILL No. 8727SC1061	Gaston (86J253)	Affirmed
IN RE JACOBS No. 8813DC100	Brunswick (87J44)	Affirmed
IN RE PITTS No. 8727DC1138	Gaston (87J167)	Affirmed
IN RE POOLE No. 8715DC1225	Orange (87J141)	Reversed & Remanded
LICKO v. LICKO No. 884DC28	Onslow (79CVD517)	Affirmed
LUND v. WILSON No. 8726SC346	Mecklenburg (86CVS3533)	Affirmed
NEARBY EGGS v. SMITH No. 888SC98	Wayne (86CVS97)	Affirmed
NOWELL v. DART ENTERPRISES No. 8726SC957	Mecklenburg (86CVS2291)	Affirmed
OWENS v. EPNER No. 8710SC1156	Wake (87CVS6055)	Affirmed in part, reversed in part & remanded
PEARSON v. WEBER No. 8811SC20	Harnett (87CVS0658)	Reversed & Remanded
SIEK v. ROBERTSON No. 8712DC966	Cumberland (83CVD903)	Affirmed

STATE v. ADAMS No. 8726SC1111	Mecklenburg (87CRS10257) (87CRS10258) (87CRS10260) (87CRS10261) (87CRS10262) (87CRS10264)	No Error
STATE v. COOPER No. 8718SC1206	Guilford (86CRS57987)	No Error
STATE v. FRAYLON No. 8726SC1086	Mecklenburg (86CRS90014)	Affirmed
STATE v. HOLMES No. 885SC54	Pender (87CRS303)	No Error
STATE v. JENNINGS No. 8818SC49	Guilford (85CRS91489)	Affirmed
STATE v. KIRBY No. 8717SC1141	Stokes (87CRS66) (87CRS84)	No Error
STATE v. LONG No. 8712SC1087	Cumberland (86CRS35054)	Reversed & Remanded
STATE v. McNEIL No. 874SC1090	Onslow (86CRS16722) (86CRS16723) (86CRS16724) (86CRS16725) (86CRS16730)	Dismissed
STATE v. MARSHALL No. 8726SC1120	Mecklenburg (86CRS40706)	Vacated
STATE v. MASON No. 8710SC1025	Wake (83CRS6679)	No Error
STATE v. MEEKS No. 8710SC1101	Wake (86CRS5746)	No Error
STATE v. NOBLES No. 8722SC1243	Davidson (86CRS15365)	No Error
STATE v. PARRIS No. 8819SC11	Rowan (86CRS2226)	No Error
STATE v. PRATT No. 8720SC1207	Richmond (86CRS7617) (86CRS7618)	No Error

STATE v. STANLEY No. 8713SC1223	Brunswick (86CRS3437) (86CRS3438) (86CRS3439) (86CRS3440)	Appeal Dismissed
STATE v. TAYLOR No. 8718SC1109	Guilford (87CRS20468) (86CRS62571)	Remanded for resentencing
STATE v. TEASLEY No. 8712SC1145	Cumberland (83CRS37307)	Affirmed
STATE v. TURNAGE No. 878SC1098	Lenoir (87CR3260) (87CR4282)	No Error
STATE v. WILDER No. 875SC1212	New Hanover (87CRS12861)	No Error
STATE v. WILLIAMS No. 873SC1139	Pitt (86CRS20641)	No Error
SWINSON v. JENKINS No. 888SC185	Lenoir (85CVS940)	Reversed & Remanded
THOMPSON v. ASHWORTH No. 8725SC1248	Catawba (85CVS1624)	Appeal Dismissed
WALTERS v. INTERIOR SYSTEMS No. 8727DC642	Gaston (84CVD3097)	No Error
WOOTEN v. LYNDHURST No. 8721SC1184	Forsyth (87CVS2159)	Dismissed

STATE OF NORTH CAROLINA v. MARCELLE ANTONIO BOGLE

No. 876SC1068

(Filed 31 May 1988)

1. **Criminal Law § 111.1; Narcotics § 4.5— willful blindness instruction not proper on element of knowledge—defendant not prejudiced by instruction**

Although the doctrine of "willful blindness" is consistent with the law of this State, the Court of Appeals nevertheless declines to adopt it as the basis for a proper jury instruction on the element of knowledge in a criminal case, since the doctrine is merely a slight extension of the principle of implied knowledge which is not needed to combat drug traffickers effectively, and the doctrine is difficult to apply and susceptible to abuse. Defendant was not prejudiced by such an instruction in this case, since it was not an erroneous statement of the law, and defendant did not object to the instruction on the ground that it was confusing, nor did he request a correction or addition.

2. **Narcotics § 4.5— trafficking in marijuana—defendant's good character not substantive evidence—instruction properly refused**

In a prosecution of defendant for trafficking in marijuana, the trial court did not err in refusing to instruct the jury that it could consider evidence of defendant's good character as substantive evidence, since N.C. Rules of Evidence, Rule 404(a)(1) allows an accused only to offer character evidence relating to a pertinent trait of his character; the crimes charged in this case did not involve dishonesty or deception on the part of defendant; and defendant's truthfulness thus was not a pertinent character trait for substantive purposes.

3. **Narcotics § 1.3— trafficking in marijuana by possession and by transportation —one transaction—two offenses**

Defendant could properly be convicted and sentenced for both trafficking in marijuana by possession and trafficking in marijuana by transportation based upon the same transaction.

Judge WELLS dissenting.

APPEAL by defendant from *Phillips (Herbert O., III), Judge.* Judgments entered 2 July 1987 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 30 March 1988.

Defendant was tried and convicted of trafficking in marijuana by transportation and trafficking in marijuana by possession under G.S. 90-95(h). From judgments imposing concurrent sentences of a seven-year prison term and a fine of $25,000 for each offense, defendant appeals.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

PARKER, Judge.

Defendant brings forward three assignments of error. Defendant first assigns error to the trial court's instructions to the jury concerning the element of knowledge in each offense. Defendant next assigns error to the trial court's failure to give a requested instruction that evidence of defendant's good character could be considered as substantive evidence. Defendant's final assignment of error is directed to the trial court's entry of judgment against defendant for both trafficking by possession and trafficking by transportation.

On 7 April 1987, defendant was driving a Toyota truck from Florida to New York. Defendant was stopped for speeding by a North Carolina State Trooper on Interstate Route ninety-five in Northampton County. After the trooper issued a citation for speeding, he asked defendant if he could search the truck. Defendant consented to the search and signed a "Consent to Search" form. The back of the truck contained some furniture and five boxes sealed with duct tape. The trooper opened one of the boxes, found that it contained marijuana, and placed defendant under arrest. A subsequent analysis of the contents of the boxes revealed that they contained approximately 176 pounds of marijuana.

[1] To convict defendant of the charged offenses, the State was required to prove that defendant knowingly possessed and transported the marijuana found in the truck. *See State v. Weldon*, 314 N.C. 401, 403, 333 S.E. 2d 701, 702 (1985). The evidence in this case showed that defendant was not the owner of the truck. Defendant testified that he was promised $1,000 for driving the truck to New York, and he claimed that he was unaware that there was marijuana in the truck. The trial court charged the jury as follows with respect to the element of knowledge:

> [T]he term "knowingly possessed" in this case and under this criminal statute, is not limited to positive knowledge. But

> when the defendant is aware that the fact in question is highly probable, includes the state of mind of one who does not possess positive knowledge merely and only because he consciously avoids so—let me correct myself—so the required knowledge is established if the defendant is aware of a high probability of the existence of the fact in question unless he actually believes it not to exist and consciously avoids enlightenment.
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> [T]he term "knowingly transported" in this criminal statute is not limited to positive knowledge. But includes—but when the defendant is aware that the fact in question is highly probable, it includes the state of mind of one who does not possess positive knowledge only because he consciously avoids it. So, the required knowledge is established if the defendant is aware of a high probability of the existence of the fact in question, unless he actually believes it not to exist and consciously avoids enlightenment.

Defendant contends that the quoted instructions are erroneous because they are not an accurate statement of the law of this State.

The trial court's instructions are based upon the opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Jewell*, 532 F. 2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed. 2d 1188 (1976). Like the defendant in the present case, the defendant in *Jewell* claimed that he had no knowledge of marijuana that was discovered in the vehicle he was driving. The *Jewell* Court held that the trial court in that case did not commit reversible error by instructing the jury that it could convict the defendant if it found that he was not actually aware that there was marijuana in the vehicle but that "his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth." *Jewell*, 532 F. 2d at 700. The Court also held, however, that a proper instruction on deliberate ignorance should require the jury to find (i) that the defendant was aware of a high probability of the presence of the marijuana, and (ii) that the defendant did not actually believe that there was no marijuana in

the vehicle. *Id.* at 704 n.21. *Jewell* has been followed by other federal circuit courts. *See, e.g., United States v. Krowen*, 809 F. 2d 144 (1st Cir. 1987).

Defendant here contends that, under North Carolina law, he cannot be convicted unless a jury finds that he actually knew that there was marijuana in the truck. *See State v. Boone*, 310 N.C. 284, 291-95, 311 S.E. 2d 552, 557-59 (1984). In *Boone*, our Supreme Court held that the trial court erred in instructing the jury that the defendant could be found guilty of possessing marijuana if he knew or had reason to know that it was in his car. *Id.* The Court held:

> [T]he court should have instructed the jury that the defendant is guilty only in the event he knew the marijuana was in the trunk of his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty.

Id. at 294, 311 S.E. 2d at 559 (citation omitted); *see also State v. Stacy*, 19 N.C. App. 35, 197 S.E. 2d 881 (1973). Defendant argues that the doctrine of "willful blindness" as adopted by the Ninth Circuit in *Jewell* is inconsistent with the Supreme Court's decision in *Boone*. We disagree.

In *Boone*, the challenged instruction would have permitted the jury to convict if it found that the defendant had "reason to know" that marijuana was in his car. The Supreme Court was not ruling on a willful blindness instruction. The phrase "reason to know" commonly denotes a basis for liability in certain negligence actions. *See, e.g., Davis v. Siloo Inc.*, 47 N.C. App. 237, 247, 267 S.E. 2d 354, 360, *disc. rev. denied*, 301 N.C. 234, 283 S.E. 2d 131 (1980). In contrast, the doctrine of willful blindness is based on the premise that a conscious effort to avoid knowledge is equivalent to positive knowledge for the purpose of imposing criminal liability. *United States v. Jewell*, 532 F. 2d at 700-01. A willful blindness instruction cannot be given if the defendant merely should have known of the fact in question. Such an instruction is only proper when the evidence indicates that the defendant purposefully avoided knowledge in order to have a defense to criminal charges. *United States v. Alvarado*, 817 F. 2d 580, 584 (9th Cir. 1987).

Although the courts of this State have not yet had the opportunity to adopt the doctrine of willful blindness, the doctrine is consistent with North Carolina law. The question of what amounts to actual knowledge has most often arisen in cases concerning the offense of receiving stolen goods. Under prior law, actual knowledge that the goods were stolen was an essential element of that offense. *See, e.g., State v. Oxendine*, 223 N.C. 659, 27 S.E. 2d 814 (1943). The test was whether the defendant "knew, or must have known" that the goods were stolen. *Id.* Our Supreme Court has looked to the receiving stolen property cases in order to define the element of knowledge in another offense. *State v. Fearing*, 304 N.C. 471, 478-79, 284 S.E. 2d 487, 491-92 (1981) (failure to stop at the scene of an accident resulting in injury or death). The Court defined the element of knowledge as follows:

> [T]he knowledge required may be actual or may be implied. Implied knowledge can be inferred when the circumstances of an accident are such as would lead a driver to believe that he had been in an accident which killed or caused physical injury to a person.

Id. at 477, 284 S.E. 2d at 491; *see also State v. Stathos*, 208 N.C. 456, 181 S.E. 273 (1935) (receiving stolen goods), *quoted in State v. Fearing, supra.*

We cannot see any real distinction between implied knowledge as defined in *Fearing* and willful blindness as defined in *Jewell.* Knowledge may be implied when there is no direct evidence that a defendant actually had knowledge of a certain fact but the circumstances are such as would lead the defendant to believe that the fact existed. Similarly, the doctrine of willful blindness applies when the defendant is aware of a high probability that a certain fact exists. An "awareness of a high probability" is equivalent to being "led to believe." The doctrine of willful blindness merely goes a step further by explicitly stating that, once a defendant has information that would lead him to believe a fact exists, he cannot avoid liability by deliberately ignoring its existence. This extra step is consistent with the principle of implied knowledge.

We also find no direct conflict between the doctrine of willful blindness and the decision of our Supreme Court in *State v. Boone, supra.* In *Boone*, the Court held that a defendant could not

be convicted if he was ignorant of the presence of marijuana in his car even though he may have had "reason to know" of its existence. Similarly, the doctrine of willful blindness does not permit a finding of knowledge if the defendant actually believes that the fact in question does not exist. This aspect of the doctrine prevents the jury from basing a conviction on a negligence standard. The defendant's subjective state of mind, as opposed to the objective standard of the reasonably prudent person, controls and true ignorance on the part of the defendant, no matter how unreasonable, cannot support a conviction. *United States v. Jewell*, 532 F. 2d at 706-07 (Kennedy, J., dissenting).

Although we are of the opinion that the doctrine of willful blindness is consistent with the law of this State, we decline to adopt the doctrine as the basis for a proper jury instruction on the element of knowledge in a criminal case. The reason for this decision is twofold.

First, as we have reasoned above, the doctrine is merely a slight extension of the principle of implied knowledge, and we are not convinced by the State's argument that such an extension is needed to combat drug traffickers effectively. Our Supreme Court has recognized that knowledge often must be inferred from circumstantial evidence and has held that juries are free to make such inferences. *State v. Boone*, 310 N.C. at 294-95, 311 S.E. 2d at 559. We are confident that, in any case where a willful blindness instruction would be appropriate, the jurors will reach the same verdict if they are simply instructed that they may infer knowledge from the circumstances of the case.

Second, and more important, the doctrine is difficult to apply and susceptible to abuse. The federal courts have limited its application to cases where the evidence shows that the defendant deliberately avoided learning the truth in order to establish a defense. *United States v. Alvarado, supra.* In *Alvarado*, the Court held that the instruction was erroneously given because the evidence tended to show actual knowledge rather than a conscious avoidance of knowledge, but the Court found that the error was harmless. *Alvarado*, 817 F. 2d at 586. *Alvarado* illustrates the difficulty in determining what type of evidence will support the instruction. Furthermore, former Judge, now Justice Kennedy has pointed out that there is a danger that the jury will base its con-

viction on a negligence standard if the instruction is not properly phrased, *United States v. Jewell*, 532 F. 2d at 707 (Kennedy, J., dissenting), or if the instruction is not appropriate under the facts of the case. *United States v. Murrieta-Bejarano*, 552 F. 2d 1323, 1326 (9th Cir. 1977) (Kennedy, J., concurring in part and dissenting in part).

We are of the opinion that the potential problems posed by the use of a willful blindness instruction outweigh any advantages its use may entail. Accordingly, we hold that it is not proper to give such an instruction when defining the element of knowledge in a criminal offense. Nevertheless, we find no prejudicial error in the giving of the instruction in the present case.

Although we are rejecting the use of a willful blindness instruction, our decision is based on practical considerations. As we have stated above, the doctrine is consistent with the laws of this State. Thus, the trial court's instruction in this case was not an erroneous statement of law so as to require reversal of defendant's conviction. *Contra, State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E. 2d 649, 654 (1982). Regardless of the particular words employed by the trial judge, an instruction is adequate if it accurately presents the applicable principles of law. *State v. Wilkins*, 34 N.C. App. 392, 399, 238 S.E. 2d 659, 664, *disc. rev. denied*, 294 N.C. 187, 241 S.E. 2d 516 (1977).

Moreover, the evidence in this case supports the instruction under the standards enunciated by the Ninth Circuit. Defendant testified that someone he knew only as "Tony" asked him to drive the truck from Florida to New York. Tony gave defendant $100 for the trip, and promised him $1,000 when he reached New York. Defendant also testified that Tony instructed him that, if he was stopped by the police, he should tell them that the truck belonged to defendant's uncle and that he was going to visit his mother. Under these circumstances, the jury could find that, if defendant had no knowledge that there were drugs in the truck, it was only because he consciously avoided that knowledge. This evidence would also permit the jury to infer from the circumstances that defendant knew the drugs were in the truck.

Defendant also argues that, even if a willful blindness instruction was appropriate in this case, the trial court's instruction was improper. We agree that the instruction is somewhat confus-

ing because the trial court misplaced the phrase "and consciously avoids enlightenment." Defendant did not, however, object to the instruction on these grounds. The record shows that defendant objected to the instruction before it was given on the grounds that it was not an accurate statement of the law in this State and that it was not appropriate in this case. After charging the jury, the trial court asked if there were any specific requests for corrections or additions to the charge, and defendant only renewed his earlier objections. Because defendant failed to object specifically to the wording of the instruction, he cannot raise this issue on appeal. Rule 10(b)(2), N.C. Rules App. Proc.; *State v. Hamilton*, 77 N.C. App. 506, 515, 335 S.E. 2d 506, 512 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E. 2d 33 (1986). The instructions do not constitute plain error so as to permit review in the absence of a properly made objection. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

[2] Defendant next assigns error to the trial court's refusal to instruct the jury that it could consider evidence of defendant's good character as substantive evidence. Defendant presented evidence showing that he had no prior criminal record, and defendant's uncle testified that he had a good reputation for honesty and a good reputation for being a law-abiding citizen. The trial court instructed the jury that evidence of defendant's character for truthfulness could only be considered in assessing defendant's credibility as a witness.

Prior to the enactment of the North Carolina Rules of Evidence, a defendant who testified in his own behalf and introduced evidence of his good character was entitled to have the jury consider such evidence both as it affected his credibility and as substantive evidence on the question of guilt or innocence. *State v. Wortham*, 240 N.C. 132, 134, 81 S.E. 2d 254, 255 (1954). The Rules of Evidence changed this practice in that, under Rule 404(a)(1), the accused can only offer character evidence relating to a "pertinent" trait of his character. *State v. Squire*, 321 N.C. 541, 546-47, 364 S.E. 2d 354, 357 (1988).

The crimes charged in this case do not involve dishonesty or deception on the part of defendant. Thus, defendant's truthfulness is not a pertinent character trait for substantive purposes. *See*

United States v. Jackson, 588 F. 2d 1046, 1055 (5th Cir.), *cert. denied*, 442 U.S. 941, 99 S.Ct. 2882, 61 L.Ed. 2d 310 (1979).

The general trait of being a law-abiding citizen is pertinent to almost any criminal offense. *State v. Squire*, 321 N.C. at 548, 364 S.E. 2d at 358. Unless character is an essential element of a charge, claim, or defense, however, the Rules of Evidence limit the methods of proving character to testimony as to reputation and testimony in the form of an opinion. Rule 405, N.C. Rules Evid. Therefore, evidence of defendant's lack of a prior criminal record was not competent character evidence and did not warrant a jury instruction on substantive character evidence. *See Government of Virgin Islands v. Grant*, 775 F. 2d 508, 512 (3d Cir. 1985).

Defendant's uncle testified that defendant had a good reputation for being a law-abiding citizen. That testimony, however, was limited to the following exchange:

> Q. Do you know his reputation for being a law-abiding citizen?
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> A. I would say excellent. Because there was nothing before this incident.

Although the question above was phrased in terms of reputation, the witness's answer was clearly based on defendant's lack of prior arrests or convictions, which is not competent character evidence. Since this answer is the only evidence in the record that is even arguably competent as substantive character evidence, we find no error in the trial court's refusal to give the requested instruction.

[3] Defendant's final assignment of error is that he could not properly be convicted and sentenced for both trafficking in marijuana by possession and trafficking in marijuana by transportation based upon the same transaction. It is now well-established that convictions for the separate offenses of transporting and possessing a controlled substance are consistent with the intent of the legislature and do not violate the constitutional prohibition against double jeopardy. *State v. Perry*, 316 N.C. 87, 102-04, 340 S.E. 2d 450, 460-61 (1986); *State v. Russell*, 84 N.C. App. 383, 391, 352 S.E. 2d 922, 927, *disc. rev. denied and appeal dismissed*, 319 N.C. 677, 356 S.E. 2d 784, *cert. denied*, --- U.S. ---, 108 S.Ct. 336, 98 L.Ed. 2d 363 (1987). The assignment of error is overruled.

For the reasons stated above, we find that defendant's trial was free of reversible error.

No error.

Judge ORR concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In my opinion, there is no substantial difference in the "willful blindness" instruction given by the trial court in this case and the "reason to know" instruction disapproved of by our Supreme Court in *State v. Boone*, 310 N.C. 284, 311 S.E. 2d 552 (1984). In my opinion, the "willful blindness" instruction given in this case entitles defendant to a new trial, and I therefore respectfully dissent from the majority's no error holding.

HAZEL M. WARD v. DURHAM LIFE INSURANCE CO.

No. 872SC790

(Filed 31 May 1988)

1. **Insurance § 18— life insurance—misrepresentations in application alleged—striking of portions of plaintiff's affidavit improper**

The trial court erred in striking portions of plaintiff's affidavit which were not offered to prove the truth of the matters asserted but were instead offered to show that defendant's agent had knowledge of the insured's driving while impaired conviction and his high blood pressure condition; however, the court properly struck portions of plaintiff's affidavit as to defendant's notice and as to the basis for insured's signing of the application, since those statements were legal conclusions.

2. **Insurance § 18— life insurance—misrepresentations in application alleged—omissions attributable to applicant or insurer—genuine issue of material fact**

In an action to recover on an insurance policy where defendant denied coverage on the basis of misrepresentations in the application for insurance, the trial court erred in entering summary judgment for defendant where there was a genuine issue of material fact as to whether the omission of material facts in the application was attributable to the applicant or to the insurer in

that plaintiff contended that she and her husband gave defendant's agent a complete and truthful disclosure of insured's prior driving while impaired conviction and blood pressure condition; defendant's agent then informed plaintiff that, since these events occurred more than two years earlier, the applicant would not be prevented from obtaining insurance; trusting in the assurances by defendant's agent, insured signed the application in good faith; and there was no suggestion of collusion or fraud between plaintiff's insured and defendant's agent.

Judge PARKER dissenting.

APPEAL by plaintiff from *Llewellyn, Judge.* Judgment entered 1 May 1987 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 14 January 1988.

Stephen A. Graves for plaintiff appellant.

Young, Moore, Henderson & Alvis by Robert C. Paschal and Theodore S. Danchi for defendant appellee.

COZORT, Judge.

Plaintiff filed this action to recover benefits under her deceased husband's life insurance policy which was issued by defendant. Defendant denied coverage on the basis of misrepresentations in the application for insurance and moved for summary judgment. From the trial court's order granting summary judgment, plaintiff appeals. We reverse.

On 15 October 1985, defendant issued a life insurance policy to plaintiff's husband, Vernon Ward. Plaintiff, the beneficiary under the policy, sought to recover its proceeds after her husband was killed in an automobile accident on 26 January 1986. Defendant refused to pay the benefits on the grounds that there were material misrepresentations made in the application for insurance.

On 12 July 1986, plaintiff filed suit to collect the insurance proceeds. Defendant answered alleging that the insurance contract was null and void because of the misrepresentations and moved for summary judgment. Defendant filed supporting affidavits which stated that Mr. Ward had failed to report his past treatment for high blood pressure and a prior conviction for driving under the influence in his application and that his application would not have been approved had this information been included.

Plaintiff submitted an opposing affidavit which stated the following:

On 5 October 1985, plaintiff and her husband agreed to apply for a life insurance policy through Brenda Ward, Mr. Ward's first cousin. Ms. Ward advised them on that day that she was an agent for defendant. Ms. Ward asked plaintiff and her husband questions from an application for insurance; and, after they answered the questions orally, she recorded their responses on the application herself. When they reached question 30(d), Ms. Ward asked Mr. Ward if he had ever been convicted of driving under the influence. Plaintiff and her husband informed her that he had been so convicted in October, 1982. Ms. Ward responded that since the conviction was more than two years old it would not prevent him from obtaining insurance with her company. When they reached question 32(d), she asked Mr. Ward if he had ever been treated for high blood pressure. Mr. Ward informed her that he had been treated for high blood pressure in 1983, but had not had any problems since that time. Ms. Ward responded that since the treatment had occurred more than two years ago it would be all right and would not prevent Mr. Ward from obtaining insurance with her company. After she completed marking the application, Mr. Ward signed it and paid the premium requested.

After plaintiff filed her affidavit, defendant moved to strike several portions of it. The trial court granted this motion and subsequently granted defendant's motion for summary judgment. From this judgment, plaintiff appeals.

[1] Plaintiff argues that the trial court erred in granting defendant's motion to strike the following portions of her affidavit:

> [1] That as to question 30(d) and (k), my husband and I advised Ms. Ward that he had in fact been convicted of driving under the influence in the District Court of Beaufort County in October of 1982 and that he had obtained a limited driving privilege.
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> [2] My husband advised her that he had been treated by Dr. Boyette for high blood pressure in 1983. Then she asked whether or not this had occurred within two years. My husband and I then conferred and advised her that it had been more than two years since he had been treated by

Dr. Boyette and he had not had any problems since that time.

[3] That as a result of the responses that were given by my husband and I to Ms. Brenda Ward, Durham Life Insurance Company had notice of my husband's medical treatment for high blood pressure and his conviction for driving under the influence of alcohol in 1982.

[4] My husband signed the application based on this representation.

N.C. Gen. Stat. § 1A-1, Rule 56(e) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . ." The first two portions of plaintiff's affidavit stricken by the trial court satisfy these requirements. Although these statements, based upon the conversation between plaintiff, her husband and defendant's agent, are hearsay, they were not offered to prove the truth of the matter asserted. Rather, they were offered to show that defendant's agent had notice of Mr. Ward's driving while impaired conviction and his high blood pressure condition. As such, they constituted an exception to the hearsay rule. *See Wilson v. Indemnity Corp.*, 272 N.C. 183, 158 S.E. 2d 1 (1967). Therefore, these statements were admissible into evidence and the trial court erred in striking them from the affidavit.

The remaining two statements which were stricken, however, were legal conclusions. A trial court may not consider portions of an affidavit not based on the affiant's personal knowledge or which merely state the affiant's legal conclusion. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). Therefore, the trial court correctly struck these statements from plaintiff's affidavit.

[2] Plaintiff also argues that the trial court erred in granting defendant's motion for summary judgment. When we consider the two erroneously stricken portions of plaintiff's affidavit along with the other affidavits and pleadings, we agree that summary judgment was erroneously granted.

"The test on a motion for summary judgment made under Rule 56 and supported by matters outside the pleadings is wheth-

er on the basis of the materials presented to the court there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E. 2d 252, 256, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978). The movant has the burden of proof on the "lack of any triable issue of fact by the record properly before the court." *Singleton v. Stewart*, 280 N.C. at 465, 186 S.E. 2d at 403. Once the movant has made and supported his motion for summary judgment, the burden shifts to the other party "to introduce evidence in opposition to the motion setting forth 'specific facts showing that there is a genuine issue for trial.' " *Metal Works, Inc. v. Heritage, Inc.*, 43 N.C. App. 27, 31, 258 S.E. 2d 77, 80 (1979). The party opposing the motion "does not have to establish that he would prevail on the issue involved, but merely that the issue exists." *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E. 2d 524, 526, *disc. rev. denied*, 290 N.C. 308, 225 S.E. 2d 832 (1976).

In the case *sub judice*, plaintiff has shown that there is a genuine issue as to whether the omission of material facts in the application is attributable to the applicant or to the insurer. Although "[a]n insurer's duty under an insurance contract may be avoided by a showing that the insured made representations in his insurance application which were material and false," *Willetts v. Insurance Corp.*, 45 N.C. App. 424, 428, 263 S.E. 2d 300, 304, *disc. rev. denied*, 300 N.C. 562, 270 S.E. 2d 116 (1980), " 'an insurance company cannot avoid liability on a life insurance policy on the basis of facts known to it at the time the policy went into effect.' " *Northern Nat'l. Life Ins. v. Miller Machine Co.*, 63 N.C. App. 424, 429, 305 S.E. 2d 568, 571 (1983). "[K]nowledge of or notice to an agent of an insurer is imputed to the insurer itself, absent collusion between the agent and the insured." *Id.* at 429, 305 S.E. 2d at 571-72. "It is well established that when the evidence raises a question of whether a misrepresentation in an application for insurance is attributable to the insured or to the agent of the insurer alone, the question must be resolved by the finder of fact." *Id.* at 429-30, 305 S.E. 2d at 572.

In this case, there is no forecast of evidence of collusion or fraud between plaintiff's husband and defendant's agent. According to plaintiff's affidavit, plaintiff and her husband gave a complete and truthful disclosure of Mr. Ward's prior driving con-

viction and blood pressure condition. Defendant's agent then informed plaintiff and her husband that since these events occurred more than two years earlier, Mr. Ward would not be prevented from obtaining insurance. Trusting in the assurances by defendant's agent, Mr. Ward signed the application in good faith.

Defendant, relying on *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E. 496 (1937), and *McCrimmon v. N.C. Mutual Life Ins. Co.*, 69 N.C. App. 683, 317 S.E. 2d 709, *disc. rev. denied*, 312 N.C. 84, 322 S.E. 2d 175 (1984), contends that any knowledge by its agent cannot be imputed to it once the insured signed the application. *Inman* and *McCrimmon* provide that an insurer has the right to rely upon the statements and representations contained in an application of insurance, if it is in writing and is signed by the applicant, even if an agent of the insurer filled out the application. Any false statements contained in the application would be imputed to the insured and not the insurer.

We believe that the facts of the present case are distinguishable from those in both *Inman* and *McCrimmon*. In *Inman*, the applicant gave truthful answers about his physical condition to the agent who failed to include this information in the application. The insured signed the application without reading it and when his beneficiary sought to recover the policy proceeds, the trial court dismissed the action. The Supreme Court affirmed and held that the agent's knowledge of the false representation could not be imputed to the insurer. The agent informed the applicant that despite his past medical problems, "I think I can get you by. You don't have to have a medical examination anyhow." This statement should have apprised the insured of the agent's intention to *deceive* the insurance company as to his true physical condition. By signing the application the insured condoned the deception.

In *McCrimmon*, plaintiff purchased life insurance on his son who suffered brain damage at birth. Although plaintiff informed the agent of his son's condition, the agent failed to include this information in the application. Plaintiff, without reading it, signed the completed application which falsely stated that his child did not have a defect or deformity. This Court held that, under *Inman*, the false statements in the application were imputed to plaintiff.

It is important to note that *Inman* did not establish a "bright line" rule that an insurer can avoid coverage every time the application is signed by the insured and the application contains a false answer to a question. The court specifically found that the applicant did not read the application or request that it be read to him and that his failure to do either "was not induced by any fraud on the part of the agent." *Inman*, 211 N.C. at 182, 189 S.E. at 497. Likewise, in the *McCrimmon* case we find no indication that there were any facts to support a theory that the agent fraudulently induced the applicant to sign the application.

The facts here make this case distinguishable. Plaintiff's affidavit clearly raises the factual issue of whether the agent fraudulently induced Mr. Ward to sign the application and whether that action should be imputed to the insurer. Plaintiff's husband signed the application only after the agent assured him that since the events occurred more than two years earlier, it was all right and would not prevent him from obtaining insurance. A jury could reasonably find that Mr. Ward justifiably inferred from the agent's statement that these past events were irrelevant to the insurance company in applying for insurance.

We hold that the pleadings and affidavits present a material issue of fact on whether the knowledge of the misrepresentation should be imputed to the insurer. Therefore, the trial court's judgment granting summary judgment is reversed and the case is remanded for a new trial.

Reversed and remanded.

Judge GREENE concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

Believing as I do that the facts of this case are not distinguishable from *Thomas-Yelverton Co. v. Insurance Co.*, 238 N.C. 278, 77 S.E. 2d 692 (1953), *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E. 496 (1937) and *McCrimmon v. N.C. Mutual Life Ins. Co.*, 69 N.C. App. 683, 317 S.E. 2d 709, *disc. rev. denied*, 312 N.C. 84, 322 S.E. 2d 175 (1984), I respectfully dissent.

In *Thomas-Yelverton, supra,* the Court stated:

> The rule with respect to the knowledge of an agent being imputable to his principal is well stated . . . in the following language: "In the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same." However, it is otherwise when it clearly appears that an insurance agent and the insured participated in a fraud by inserting false answers with respect to material facts in an application for insurance. The knowledge of the agent in such instances will not be imputable to his principal. (citing cases).
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> In the instant case, when the insured signed the application he knew the agent had written the answers to the questions contained in it; and by signing it in the form submitted, he represented that the answers were true.

Id. at 281-83, 77 S.E. 2d at 694-95.

In her brief, plaintiff cites a number of cases beginning with *Fishblate v. Fidelity Co.*, 140 N.C. 589, 53 S.E. 354 (1906) to support the position that the knowledge of the agent is imputed to the insurance carrier. However, *Fishblate, supra,* and *Northern Nat'l Life Ins. v. Miller Machine Co.*, 63 N.C. App. 424, 305 S.E. 2d 568 (1983), *aff'd,* 311 N.C. 62, 316 S.E. 2d 256 (1984), relied upon by the majority, are distinguishable in that in those cases there is either a question or no showing as to the insured's knowledge of the contents of the application. There is no evidence that the insured signed the application. Moreover, it is noteworthy that in *Thomas-Yelverton, supra,* where there was no dispute that insured signed the application after the answers were inserted by the agent, the Court acknowledged *Fishblate* and its progeny, but rejected the plaintiff-appellant's argument. Accordingly, in this case I do not agree with plaintiff's oral argument that this Court in *McCrimmon, supra,* misinterpreted *Inman, supra.*

In the instant case from the uncontradicted evidence, plaintiff would have been uninsurable and rejected for insurance had

the questions been answered truthfully. The rule is, and plaintiff does not dispute, that misrepresentations as to questions affecting insurability are material as a matter of law. *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952).

The sole purpose of the application is to obtain accurate information for underwriting purposes. Without the false statement inserted by the agent, the uninsurable applicant would not have received a policy. Plaintiff has made no showing that her husband was prevented or prohibited from reading the application before he signed. When Mr. Ward signed the application, he adopted the statements and represented that they were true. If Mr. Ward had corrected the false statements, he would not have obtained the insurance; by signing, he benefited from the agent's action. Defendant has tendered the return of the premiums with interest thereon, and in my view owes nothing more.

Furthermore, even under the majority's theory of the case, I do not think the evidence is sufficient to raise an inference that insured was induced not to give a truthful application by statements of the agent. According to plaintiff's affidavit, the agent told plaintiff and her husband that because Mr. Ward's conviction and treatment for high blood pressure had occurred more than two years before the date of the application, "this was all right and would not prevent [Mr. Ward] from obtaining insurance with [defendant]." Although this statement may have led plaintiff and her husband to believe that the omitted information was not especially important, the agent did not expressly state that they were not required to report it. Plaintiff did not aver that the agent told them that the questions only required information from the past two years, nor did she aver that the agent advised or suggested that her husband not include the omitted information in the application.

For the foregoing reasons, I vote to affirm.

JAMES PEARSON, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. 8718SC994

(Filed 31 May 1988)

Insurance § 79— cancellation of automobile insurance—failure to comply with statutory notice requirements

Mid-term cancellation by the insurer of a compulsory automobile insurance policy for nonpayment of premium installments is not effective unless and until the insurer has strictly complied with the notice requirements of N.C.G.S. § 20-310(f); therefore, the policy under which plaintiff sought coverage had not been cancelled at the time of the accident in question where defendant gave only twelve days' notice of cancellation rather than fifteen as required by the statute.

APPEAL by plaintiff from *Ross, Judge.* Judgment entered 12 June 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 March 1988.

Haworth, Riggs, Kuhn, Haworth and Miller by Barbara K. Moreno for plaintiff appellant.

Henson, Henson, Bayliss & Coates by Paul D. Coates for defendant appellee.

COZORT, Judge.

Plaintiff won a judgment against defendant's insured and then sued defendant to collect part of the judgment under the insured's automobile liability policy. Defendant denied plaintiff's claim, however, because defendant claimed the auto policy had been cancelled for nonpayment of premiums. Plaintiff argues that the notice of cancellation to defendant's insured did not conform with N.C. Gen. Stat. § 20-310(f) and was ineffective. Plaintiff contends that defendant should be forced to pay the insured's judgment debt to plaintiff to the extent of the policy's liability limits. The trial court granted summary judgment for defendant and denied summary judgment for plaintiff. We reverse and remand for entry of summary judgment for plaintiff.

The pertinent facts are:

Plaintiff sued defendant to force defendant to pay a judgment obtained against defendant's insured, Barbara Harrington.

Defendant insured Mrs. Harrington on an automobile liability policy. Mrs. Harrington's husband, Charles Harrington, negligently caused an accident in which plaintiff was injured while he was riding as a passenger in Mrs. Harrington's car, which was being driven by Mr. Harrington. Plaintiff sued the Harringtons and won a $73,000 judgment. Defendant Nationwide was served with a copy of the complaint. Plaintiff's judgment was docketed but remains unsatisfied.

The defendant denied plaintiff's claim under Mrs. Harrington's liability policy. Defendant answered that the policy had been cancelled before the accident because Mrs. Harrington did not pay her premium. The relevant dates and events are as follows:

17 April 1981—Nationwide issued the insurance policy, with Mrs. Harrington agreeing to pay a total premium of $78.79 for six months of coverage.—Mrs. Harrington pays $40.40, and agrees to pay $38.39, the balance of the premium due, upon billing from Nationwide.

8 June 1981—Nationwide mails Mrs. Harrington a premium notice asking her to pay the balance of her premium, $38.79, by 28 June 1981.

6 July 1981—Nationwide mails notice of cancellation for nonpayment of premium to Mrs. Harrington notifying her that cancellation will be effective 20 days after payment was due.

20 September 1981—Plaintiff injured in auto accident while Mr. Harrington is driving.

17 October 1981—Original 6-month term of the insurance ends.

Plaintiff contends that defendant's notice of cancellation to Mrs. Harrington was ineffective. Specifically, plaintiff argues that defendant's cancellation notice did not conform with the provisions of N.C. Gen. Stat. § 20-310(f)(2) because it failed to provide a fifteen-day period between the date the notice was mailed and the cancellation date. Under plaintiff's theory, the defendant should be ordered to pay to the extent of policy limits because the accident occurred before the policy expired on 17 October 1981.

N.C. Gen. Stat. § 20-310(f) provides as follows:

(f) *No cancellation* or refusal to renew by an insurer of a policy of automobile insurance *shall be effective unless the insurer shall have given the policyholder* notice at his last known post-office address by certificate of mailing a written *notice of the cancellation or refusal to renew.* Such notice shall:

* * *

(2) State the date, not less than 60 days after mailing to the insured of notice of cancellation . . . on which such cancellation or refusal to renew shall become effective, except that *such effective date may be 15 days from the date of mailing or delivery when it is being canceled or not renewed for the reasons set forth in subdivision (1) of subsection (d) and in subdivision (4) of subsection (e) of this section*; . . . (Emphasis added.)

Subsection (d)(1) of § 20-310 provides:

(d) No insurer shall cancel a policy of automobile insurance except for the following reasons:

(1) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof . . . .

Subsection (e)(4) of § 20-310 provides:

(e) No insurer shall refuse to renew a policy of automobile insurance except for one or more of the following reasons:

* * *

(4) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy of any installment thereof . . . .

The cancellation of the policy was based on failure to pay premiums. It is clear that the fifteen-day notice rule under § 20-310(f)(2) applies. Defendant mailed the notice of cancellation to Mrs. Harrington on 6 July 1981. The notice stated the effective

date of cancellation to be 20 days after payment was due, which computes to 18 July 1981. Defendant's notice of cancellation was defective because it provided only a twelve-day period between notice and the computed effective date of cancellation. N.C. Gen. Stat. § 20-310(f)(2) obviously requires the insurer to provide a fifteen-day notice period before cancellation becomes effective. The cancellation was ineffective and Mrs. Harrington's policy was still in effect when the accident occurred between plaintiff and Mr. Harrington.

Defendant contends that the cancellation notice "substantially complied" with N.C. Gen. Stat. § 20-310(f)(2), and therefore properly cancelled the policy. We do not agree.

We do not read § 20-310(f)(2) as a "substantial compliance" statute; rather, we believe the General Assembly established a "strict requirement." The language is plain: "No cancellation . . . shall be effective unless the insurer shall have given the policyholder notice . . . of the cancellation . . . . Such notice shall: . . . [s]tate the date . . . on which such cancellation . . . shall become effective . . . ." As to the length of notice required, the statute plainly reads: "Not less than 60 days after mailing . . . except that such effective date may be 15 days from the date of mailing or delivery when it is being canceled [for nonpayment of premiums]." The statute simply does not contemplate a notice of less than 15 days. On this issue, the Supreme Court has said:

> It is true that the provisions for notice of termination under the 1957 Act (G.S. 20-310) do create the possibility of an hiatus of fifteen days or more in insurance coverage. The Legislature undertook to bridge the gap by making it a misdemeanor for an owner to fail to surrender forthwith his registration certificate and plate upon cancellation or failure to renew his policy. However, the possibility of gaps between periods of coverage still remains. We believe that the Legislature was advertent to this possibility and accepted it as the lesser of two hardships.

Faizan v. Insurance Co., 254 N.C. 47, 55, 118 S.E. 2d 303, 309 (1961).

More recently, the Supreme Court said:

> We recognize that where a compulsory automobile insurance policy is cancelled by the insurer mid-term or where the carrier refuses to renew a compulsory policy, it is a serious matter for the insured. The provisions of N.C.G.S. 20-310 exist for precisely such cases. They require the carrier to give the policyholder specific notice and in addition provide the insured with the opportunity for a hearing and the right to apply to the Insurance Commissioner for a review of the actions of the insurer in cancelling or refusing to renew the policy.

Smith v. Nationwide Mut. Ins. Co., 315 N.C. 262, 272, 337 S.E. 2d 569, 575 (1985).

In determining whether there is merit to defendant's argument of "substantial compliance," we have also looked at the language of the Notice of Cancellation itself. The "DATE OF NOTICE" specified on the notice is "07-06-81." The notice does not state the date of cancellation. Rather, one must compute the cancellation date by comparing different sections of the cancellation notice. In the upper right-hand corner is found: "PAY PREMIUM OF $39.39 DUE DATE JUNE 28, 1981." Over on the left-hand side, in miniscule print barely discernible to the naked eye, is found: "Because . . . Your premium has not been received, this auto policy is terminated at 12 01 A.M. on the 20th day after the due date." This language obviously falls far short of the statutory requirement that notice of cancellation "shall [s]tate the date . . . on which such cancellation . . . shall become effective . . . ." [A xerographic copy of the notice appears at the end of this opinion.] The defendant's argument concerning "substantial compliance" has no merit.

Defendant also argues that even if the notice did not effectively cancel the policy on the date computed from the notice (18 July 1981), the notice nevertheless was sufficient to cancel the policy fifteen days after it was mailed making cancellation effective 21 July 1981. Under this argument, the policy was still cancelled before plaintiff's accident on 20 September 1981. In support of his argument, defendant relies on *Nationwide Mutual Insurance Company v. Cotten*, 280 N.C. 20, 185 S.E. 2d 182 (1971). We find defendant's argument unpersuasive.

First, we believe defendant's reliance on *Cotten* is misplaced because of distinguishable issues of fact and law. In *Cotten*, the Nationwide Insurance Company filed a declaratory judgment action to determine whether a policy it issued to Cotten afforded coverage for Cotten's liability arising out of an automobile collision on 26 May 1968, or whether there was coverage by reason of an uninsured motorist clause in a policy issued by Allstate Insurance Company to the persons injured in the collision. The decision would be based on whether Nationwide's policy issued to Cotten had been cancelled prior to the collision. The policy was initially issued by Nationwide to Cotten on 8 March 1966 for a one year term. The policy was renewed for a second year, from 8 March 1967 to 8 March 1968. Forty-five days prior to 8 March 1968, Nationwide offered to renew the policy for another year by mailing to Cotten a notice of the renewal premium. When Cotten did not pay the premium by the date specified, Nationwide mailed to Cotten a written notice of termination. That notice of cancellation gave more than 15 days' notice. Nationwide also notified the North Carolina Motor Vehicles Department (the Department) of the termination; however, the notice to the Department was mailed *after* the 8 March 1968 termination date. The questions before the Supreme Court were (1) whether the cancellation was ineffective because Nationwide failed to give *the Department* 15 days notice prior to the effective date of the cancellation; and (2) if so, did the notice given by Nationwide to the Department terminate Nationwide's risk under the policy 15 days after Nationwide notified the Department?

The specific holding by the Supreme Court was that Cotten, the insured, had elected to terminate the policy by taking no action to renew it. Since the policy was terminated by the *insured*, termination was not contingent upon notice to the Department. *Cotten*, 280 N.C. at 29, 185 S.E. 2d at 188. In a dictum statement, the court went on to say that, if notice to the Department had been an issue, delayed notice *to the Department* could extend the life of the policy by 15 days from the date of the giving of the notice. *Id.* at 30, 185 S.E. 2d at 188. The issue of notice to the *insured* did not arise at all in *Cotten*.

As is readily apparent, the facts and issues below are easily distinguishable. In the case at bar, we are concerned with (1) failure to timely pay installments on the initial policy, as opposed

to failure to renew; (2) cancellation mid-term by the insurer, as opposed to termination by the insured; and (3) notice of cancellation to the insured, as opposed to notice of termination to the appropriate State agency. Given these differences, we do not believe the dictum statement in *Cotten* should control the result here. As Justice Lake stated in *Cotten*:

> The purpose of the notice to the Department of Motor Vehicles is not the same as the purpose of the notice of termination given to the policyholder. The purpose of the notice to the Department is to enable it to recall the registration and license plate issued for the vehicle unless the owner makes other provision for compliance with The Vehicle Financial Responsibility Act.

Id. at 29-30, 185 S.E. 2d at 188.

Strict compliance with § 20-310 is a necessity when the insurer cancels a compulsory policy mid-term. *Smith*, 315 N.C. at 272, 337 S.E. 2d at 575.

> "Once a certificate of insurance . . . has been issued by the insurance company and filed with the Commissioner, the contract of insurance ceases to be a private contract between the parties. A supervening public interest then attaches and restricts the rights of the parties in accordance with the statutory provisions. Many common-law contractual rights are restricted by the statute. Thus, for example, there is, at common law, the absolute right to refuse to renew a policy upon the expiration of its term but this is restricted by the statute so that the policy continues in force after its expiration date without a renewal, *unless and until notice of termination is given in accordance with the statute.*"

Perkins v. Insurance Co., 274 N.C. 134, 142, 161 S.E. 2d 536, 541 (1968), *quoting Teeter v. Allstate Insurance Company*, 192 N.Y.S. 2d 610, 616, *aff'd*, 212 N.Y.S. 2d 71 (1961) (emphasis added).

We hold that mid-term cancellation by the insurer of a compulsory insurance policy for nonpayment of premium installments is not effective unless and until the insurer has strictly complied with the provisions of N.C. Gen. Stat. § 20-310(f).

Thus, the policy at issue had not been cancelled at the time the accident occurred on 20 September 1981. The policy remained

Pearson v. Nationwide Mutual Ins. Co.

NOTICE OF CANCELLATION DATE OF NOTICE
07-06-81

PLEASE RETURN THIS NOTICE WITH YOUR PAYMENT

FOR NON-PAYMENT OF PREMIUM
ADJUSTED SEMI ANNUAL RENEWAL
FOR POLICY TERM BEGINNING 04-17-81

611-365-519 06 28 8
**32* 041 11 2979

PAY $39.39 DUE JUNE 28, 1981

1 XX 0204 000000 00 1.10

BARBARA ROBBINS
HARRINGTON
598 W GRIMES STREET
HIGH POINT
NC 27260

Because . . . . Your premium has not been received, this auto policy is terminated at 12:01 A.M. on the 30th day after the due date

IMPORTANT

You may keep this protection continuous if your payment is received before the termination date. We would like to continue serving you. Won't you take a minute now to send your payment? Make sure you have continuous protection against serious financial loss.

If you've sent your payment, please accept this as our thanks.

See your agent for information regarding your rights to review or hearing

132 11 08 365519 9 3939 000748

ISSUED THROUGH OFFICE AT:
NATIONWIDE MUTUAL INS. CO.
4401 CREEDMOOR RD.
RALEIGH, N.C. 27656

NATIONWIDE INSURANCE

NOTICE OF CANCELLATION I.L.ROGLE 2979 BARBARA ROBBINS HARRING
Agent's Copy 611-365-519 06 28 81 32 041 0015 598 W GRIMES STREET HIGH POINT
COVERAGE

"I CERTIFY THIS IS A TRUE AND CORRECT RECONSTRUCTED COPY OF THE NOTICE OF CANCELLATION FOR POLICY NUMBER 611-365-519."

(signature) 4-29-87 (date)

NCRF ASSESSMENT RECOUP		1.82
NCRF LOSS RISK RECOUP		5.23
NCRF CLEAN RISK RECOUP		0.43
RENEWAL PREM	32.00	

$39.39 INSTALLMENT DUE INCLUDES $1.00 INSTALLMENT PREMIUM LOADING

SEE YOUR POLICY FOR LIMITS AND ANY DEDUCTIBLES

in effect until 17 October 1981, the termination date specified in the policy when it was issued, because defendant failed to give notice in accordance with the statutory provisions. The trial court should have granted plaintiff's motion for summary judgment. Accordingly, the order of the trial court is reversed and the case remanded for entry of summary judgment for plaintiff.

Reversed and remanded.

Judges EAGLES and SMITH concur.

IN THE MATTER OF AN EASEMENT OF RIGHT OF WAY IN FAIRFIELD PARK SUBDIVISION AS DEPICTED ON PLAT OF SURVEY OF RECORD IN THE CASWELL COUNTY, NORTH CAROLINA REGISTRY IN PLAT BOOK 6, PAGE 46

No. 8717DC218

(Filed 31 May 1988)

Municipal Corporations § 33— private street—no authority of county to close easement of right of way

A county board of commissioners is without the authority under N.C.G.S. § 153A-241 to close an easement of right of way in a street in which the public has not acquired rights by dedication or prescription.

APPEAL by appellants, George M. Harris, Individually, and on behalf of other owners and lawful occupants of Fairfield Park Subdivision, from *McHugh (Peter M.), Judge.* Judgment entered 4 June 1986 in District Court, CASWELL County. Heard in the Court of Appeals 25 September 1987.

W. Osmond Smith, III, for appellants.

Farmer & Watlington, by R. Lee Farmer, for appellees.

GREENE, Judge.

This is an appeal from a judgment of the district court affirming the Caswell County Board of Commissioners' decision to close an easement of right of way held by certain property owners within a subdivision.

This appeal arises out of two separate actions. In the first action, the appellants, various homeowners in the Fairfield Park Subdivision in Caswell County, sought to enjoin the appellees, William and Brenda Hodges, from blocking a private street leading from Carrol Drive in the subdivision to what formerly was U.S. Highway 158. The appellants sought to have their interest in the street declared a permanent easement of right of way for the benefit and use of the property owners in the Fairfield Park Subdivision. At the hearing for the preliminary injunction, the trial court ruled the Hodges were not entitled to block the street and ordered them to remove a barricade they had placed across the street.

The street is approximately thirty feet wide and 200 feet long and is bounded on the south by the Hodges' property and on the north by property owned by Sarah Farmer, Margaret Hatchett, and Nettie Blackwell. None of the adjacent owners to the street own the strip of land over which the street runs. The street appears on a recorded plat of Fairfield Park in the Caswell County Registry as an "existing 30' street."

In a second action following the issuance of the preliminary injunction, the Hodges requested that the Caswell County Board of Commissioners close the appellants' easement of right of way pursuant to N.C.G.S. Sec. 153A-241 (1983). The Board gave the required notice and held a hearing on 3 December 1984. After hearing evidence, the Board closed what it termed the "street-easement" and ordered all right, title, and interest in the "street-easement" vested in the Hodges and the other adjacent property owners.

The appellants then appealed to the district court for a trial *de novo* on the Board's decision. That appeal was consolidated with appellants' action seeking to permanently enjoin the Hodges from blocking the easement. Appellants filed a motion to dismiss the Board's action and dismiss the appeal based on the Commissioners' alleged lack of subject matter jurisdiction over the easement in question.

The court, sitting as fact finder, determined the following issues: (1) whether appellants held an easement of right of way in the street and, if so, whether it was a public or private easement, and (2) whether the Board of County Commissioners had the

authority pursuant to N.C.G.S. Sec. 153A-241 to close the easement.

The court determined these issues in two separate judgments. In the first judgment, the court found that an easement by estoppel existed in favor of the Hodges and other owners of real property in Fairfield Park. In reaching this conclusion, the court found that L. F. Hodges had reserved an easement of right of way across a portion of his real property from conveyances made in 1947 and thereafter. This right of way had been used since 1947 as a "means of access to other property of L. F. Hodges and his successors in title," including various property owners in the subdivision. He further found that these owners had acquired their property by deeds referring to the recorded plat and had relied upon the plat's indication of an easement of right of way for the benefit of their property as access to former U.S. Highway 158. The judge also found the right of way had not been dedicated to nor accepted by the public in any matter recognized by law and that no public authority had ever "accepted, opened, supervised, or in any way maintained the subject easement of right of way or exercised supervision or dominion over [it]." Finally, the court found the owners adjacent to the street had blocked it by constructing a fence across it even though they had no right to do so. The court determined the owners in Fairfield Park possessed a permanent easement of right of way in the street by estoppel for the purposes of ingress and egress and that this easement was subject to protection just as any other private property right.

The court then decided in a second proceeding heard *de novo* whether the Board of Commissioners could properly close the easement of right of way. In that judgment the court made the following pertinent findings of fact:

> IV. That the aforesaid described easement is not under the control or supervision of the North Carolina Department of Transportation or a municipality.
>
> V. That the aforesaid described easement is not maintained by any public or private entity nor are traffic control devices located or maintained thereon.
>
> VI. That the aforesaid described easement is outside of the confines of the Fairfield Park Subdivision which is

located in Yanceyville Township, Caswell County, North Carolina.

VII. That the closing of the aforesaid easement is not contrary or detrimental to the public interest or to any individual property rights.

VIII. That the closing of the aforesaid easement does not deprive or bar an individual owning property in the vicinity of the easement or in Fairfield Park Subdivision of a reasonable means of ingress and egress to their property.

. . . .

X. That the closing of the aforesaid easement is in the best interest of the safety of the public and motoring traffic.

The court then ordered the easement of right of way permanently closed and vested all right, title and interest in the easement in the Hodges and the other adjoining landowners.

Appellants appeal from this judgment contending the district court should have granted their motion to dismiss for lack of subject matter jurisdiction. After one extension, the time expired for the filing of the record on appeal under N.C.R. App. P. 12 (1988). The appellants then filed a petition for writ of certiorari. This court granted that petition on 10 January 1987.

The sole issue presented is whether N.C.G.S. Sec. 153A-241 authorizes a county board of commissioners to close an easement of right of way in which the public has acquired no rights.

Section 153A-241 provides:

Closing Public Roads or Easements

A county may permanently close any public road or any easement within the county and not within a city, except public roads or easements for public roads under the control and supervision of the Department of Transportation. The board of commissioners shall first adopt a resolution declaring its intent to close the public road or easement and calling a public hearing on the question. The board shall cause the resolution to be published once a week for four successive

> weeks before the hearing, a copy of the resolution to be sent by registered or certified mail to each owner as shown on the county tax records of property adjoining the public road or easement who did not join in the request to have the road or easement closed, and a notice of the closing and public hearing to be prominently posted in at least two places along the road or easement. At the hearing the board shall hear all interested persons who appear with respect to whether the closing would be detrimental to the public interest or to any individual property rights. If, after the hearing, the board of commissioners is satisfied that closing the public road or easement is not contrary to the public interest and (in the case of a road) that no individual owning property in the vicinity of the road or in the subdivision in which it is located would thereby be deprived of reasonable means of ingress and egress to his property, the board may adopt an order closing the road or easement. A certified copy of the order (or judgment of the court) shall be filed in the office of the register of deeds of the county.
>
> Any person aggrieved by the closing of a public road or an easement may appeal the board of commissioners' order to the appropriate division of the General Court of Justice within 30 days after the day the order is adopted. The court shall hear the matter de novo and has jurisdiction to try the issues arising and to order the road or easement closed upon proper findings of fact by the trier of fact.
>
> . . . .
>
> Upon the closing of a public road or an easement pursuant to this section, all right, title, and interest in the right-of-way is vested in those persons owning lots or parcels of land adjacent to the road or easement, and the title of each adjoining landowner, for the width of his abutting land, extends to the center line of the public road or easement.

Appellants essentially argue this statute only allows for the closing of easements that have been offered for public dedication and accepted by a public authority. *See Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E. 2d 898 (1956) (no dedication to public until governing authorities accept on behalf of municipality or acceptance occurs by some other means recognized by law).

Appellees argue the language of N.C.G.S. Sec. 153A-241 is clear in that it grants counties the power to close any easement regardless of whether the public has ever acquired rights in the easement.

Article VII, Section 1 of the North Carolina Constitution gives the General Assembly the authority to provide for the organization and government of counties, including the granting of such powers and duties to the counties as it deems advisable. As an agent of the State, a county has no inherent power, but may exercise only those powers prescribed by statute and those necessarily implied by law. *Stam v. State*, 47 N.C. App. 209, 219, 267 S.E. 2d 335, 343 (1980), *aff'd in part, rev'd in part*, 302 N.C. 357, 275 S.E. 2d 439 (1981).

Chapter 153A was enacted in 1973 in order to consolidate, revise, and amend the general statutes relating to counties. 1973 N.C. Sess. Laws ch. 822. In defining a "public road" or "road" as it is used in N.C.G.S. Sec. 153A-241, N.C.G.S. Sec. 153A-239 provides:

> In this Article "public road" or "road" means *any road, street, highway, thoroughfare, or other way of passage* that has been irrevocably dedicated to the public or in which the public has acquired rights by prescription, without regard to whether it is open for travel. [Emphasis supplied.]

From this provision and N.C.G.S. Sec. 153A-241, it is clear a county does not have the power to close a way of passage which has not been dedicated to the public or in which the public has not acquired rights by prescription. *Cf.* N.C.G.S. Sec. 136-67 (1986) (providing the definition of neighborhood public roads subject to alteration, extension or discontinuance under N.C.G.S. Secs. 136-68 through 136-70 "shall not be construed to embrace any street, road or driveway that serves an essentially private use . . ."). Appellees do not assign error to the court's finding of an easement of right of way held by the subdivision owners. This easement of right of way granted a right of passage to the homeowners in Fairfield Park over the street shown in the recorded plat. The court found that an easement in the street had never been granted to the public by dedication nor had the public acquired any other lawful right to use the street. Accordingly, the county had no authority to close the street as a "public road." We

therefore inquire as to whether it could close an "easement" in the street pursuant to Chapter 153A in which the public held no rights. We hold it could not.

In construing statutes, a court should give effect to the intent of the legislature. "In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose." *State v. Harvey,* 281 N.C. 1, 19-20, 187 S.E. 2d 706, 718 (1972).

We do not believe the General Assembly intended to allow a county to close a private street under the pretext of closing a private easement of right of way in that street. Here, the Board of Commissioners in effect closed the street by closing the easement. To adopt appellees' interpretation which would allow counties to close an easement in a private street, would circumvent the General Assembly's clear intent that the public have some right in a street before permitting a county to close it.

It is also well-settled that statutes in *pari materia* are to be construed together and that courts should harmonize such statutes if possible and give effect to the various provisions. *Blowing Rock,* 243 N.C. at 371, 90 S.E. 2d at 904. "[T]hat is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible." *Id.* Our Supreme Court, in using this rule of construction, applied the notice requirements of a county's former procedure to close a road under N.C.G.S. Sec. 153-9(17) (1953) to a municipality's former procedure to close streets and alleys under N.C.G.S. Sec. 160-200(11) (1953). *See Blowing Rock.*

Section 160A-299(a) now gives cities and towns the authority to close "any street or public alley." Section 160A-299(d) states that the section shall apply to "any street or public alley within a city or its extraterritorial jurisdiction that has been irrevocably dedicated to the public, without regard to whether it has actually been opened." This language clearly indicates that the public must have acquired some right in the street or alley before the municipality may act to close it.

Therefore, we hold a county board of commissioners is without the authority under Section 153A-241 to close an easement of right of way in a street in which the public has not acquired rights by dedication or prescription. In doing so, we do not determine whether the Legislature intended that the public acquire rights in any type of easement before the county commissioners can act to close it under N.C.G.S. Sec. 153A-241. *But see* N.C.G.S. Sec. 153-9(17) (Interim Supp. 1973) (granting county commissioners the power to close and remove from dedication all easements except those lying within a municipality that were dedicated whether by recording of a subdivision plat or otherwise). The district court's judgment is reversed and this matter is remanded with directions that the district court enter an order vacating the order of the Caswell County Board of Commissioners.

Reversed and remanded.

Judge COZORT concurs.

Judge PHILLIPS concurs in result.

MILLER BREWING COMPANY v. MORGAN MECHANICAL CONTRACTORS, INC.

No. 8717SC989

(Filed 31 May 1988)

Contracts § 10— defendant's agreement to construct and alter conveyor systems— defendant's agreement to hold plaintiff harmless—agreement against public policy

Where an employee of defendant suffered an accident at a time when defendant was performing work for plaintiff pursuant to an agreement to construct and/or alter an appliance, any promise by defendant in connection with that agreement to indemnify or hold plaintiff harmless was against public policy, void, and unenforceable under N.C.G.S. § 22B-1; furthermore, there was no merit to plaintiff's contention that a clause requiring a contractor to obtain insurance covering the owner's indemnification rendered valid an indemnity provision which was otherwise void under N.C.G.S. § 22B-1 because it was an "insurance contract" or an "agreement issued by an insurer," since such an interpretation would render the statute meaningless, and the terms "insurance

contract" and "any other agreement issued by an insurer" refer to contracts of insurance and insurers defined, authorized, and regulated by Chapter 58 of the General Statutes.

APPEAL by plaintiff from *Morgan (Melzer A., Jr.), Judge.* Judgment entered 14 July 1987 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 8 March 1988.

Smith, Helms, Mulliss and Moore, by J. Donald Cowan, Jr., and Kathy E. Manning, for plaintiff-appellant.

Petree, Stockton and Robinson, by James H. Kelly, Jr., and Sharon L. Parker, for defendant-appellee.

PARKER, Judge.

Plaintiff filed this declaratory judgment action seeking indemnification from defendant for a claim filed against plaintiff by defendant's employee, Charles J. Meeks. The trial court held that defendant is not obligated to indemnify plaintiff for any amount that Meeks is adjudged entitled to recover from plaintiff and is not liable to plaintiff for costs, expenses, or attorneys' fees incurred in defense of the Meeks lawsuit. We affirm.

On appeal, plaintiff contends that the trial court, sitting without a jury, erred in its conclusions of law (i) that the indemnity and hold harmless provisions printed on the back of the purchase order are against public policy, void, and unenforceable under G.S. 22B-1 because G.S. 22B-1 does not apply to contracts for the assembly and installation of equipment and because the contract provisions fall under the insurance contract exception to G.S. 22B-1; (ii) that the terms of the agreement set out in the purchase order were not in effect between the parties because there was no meeting of the minds; and (iii) that there was no express contract of indemnity between the parties under the Workers' Compensation Act at the time of Meeks' accident at plaintiff's plant. Defendant, on the other hand, contends the trial court erred in its conclusion of law that plaintiff did not intentionally waive its right to rely on the indemnity provisions printed on the back of the purchase order.

I.

The evidence presented at trial tended to show that plaintiff, a Wisconsin corporation, owned and operated a plant in Eden,

North Carolina. Sometime prior to 3 January 1985, plaintiff's engineering department sent out a bid package, including plans and specifications, to three contractors, one of which was defendant, requesting bids for "Job No. E93207," which involved the assembly and installation of a forty-foot conveyor system linking a depalletizer with an existing depalletizer and conveyor system. The bid submitted by defendant, dated 3 January 1985, was the low bid for the project.

Sometime prior to 29 January 1985, plaintiff's engineer in charge of the project informed defendant by telephone that it was the low bidder on the project and requested that defendant begin the project soon to minimize "down time" on the equipment. In the meantime, plaintiff's purchasing agent prepared a two-part "purchase order" form addressed to defendant and dated 18 January 1985. The following language was typed on the face of the form, in the column headed "Description":

> NOTE: The signed acceptance copy must be returned to the Miller Brewing Company, Eden Brewery, Eden, NC 27238-2099 to put this order into effect.
>
> Install conveyors on B-9 and B-10 depalletizer area to connect this equipment as requested and quoted from Job No. E93207.
>
> Contract price taken from Morgan Mechanical's quotation dated 1-3-85. All conditions and plant rules listed under the request for quotation to remain the same.

Also typed on the face of the purchase order form, in the columns headed "Quantity," "Unit of Issue," "Price/Unit," and "Total," was the following language:

> The Seller agrees to furnish to Buyer's Company prior to commencement of any work hereunder, evidence satisfactory to it, of a valid policy or policies of insurance covering: (1) Seller's liability for bodily injury and property damage within minimum limits of $250,000/$1,000,000 bodily injury, $1,000,000 property damage and (2) Liability arising under workmen's compensation laws, for any compensable injury to or death of any of the employees of the Seller or of any subcontractor under him while engaged in any work hereunder.

This provision shall not be construed as authorizing subcontracting of the work unless authorized in writing herein.

TOTALPRICE [sic] NOT TO EXCEED: $5,426.00

Below the above terms, in bold print, was the following statement:

THIS ORDER IS ACCEPTED ONLY UNDER THE CONDITIONS STATED ABOVE AND ON BACK HEREOF.

On the back of the purchase order form were fifteen paragraphs of "boilerplate" listing "conditions." One of these paragraphs stated the following:

9. Seller is to save harmless and indemnify Buyer from any and all judgments, costs, expenses, including attorneys' fees, and claims on account of damaged property or personal and bodily injuries (including death) which may be sustained by Seller, Buyer, Seller's or Buyer's employe [sic], or other persons arising out of or in any way connected with the work done or goods furnished under this P.O., and to provide adequate insurance (at least in the amount, if any, specified on the face of this P.O.) indemnifying Seller and Buyer against all such claims, and prior to the commencement of any work under this P.O. Seller is to provide Buyer with a certificate of such insurance which shall be non-cancellable during the pendency of the work.

Defendant's employees, Charles J. Meeks and Richard Watkins, began work on the project at plaintiff's plant on 29 January 1985. Meeks and Watkins worked eight hours on 29 January and returned to the plant at 7:00 a.m. the following day to continue work on the project. At approximately 9:00 a.m. on 30 January 1985, Meeks and Watkins left the plant building where they were working to pick up some additional materials. Meeks was thirty-five to forty feet from the door of the building and still on plaintiff's plant premises when he slipped and fell on some ice, causing him severe injuries. Meeks later filed suit against plaintiff alleging that plaintiff was negligent in venting steam from the plant onto an outside area causing ice to form on the walkway.

On 1 February 1985, plaintiff's purchasing office received the acceptance copy of the purchase order described above. The form

was signed by Jessie W. Morgan, president of defendant, and dated 30 January 1985. Both Mrs. Morgan and her husband, Jack Vaugh Morgan, defendant's secretary and treasurer, testified that they usually receive defendant's daily mail between 11:00 a.m. and 2:00 p.m. Mrs. Morgan testified that when she receives a purchase order, she dates and signs it the same day that it is received; she generally mails it back to the purchasing office on the same day or the next morning. Both Jessie and Jack Morgan testified that they had done work for plaintiff on numerous occasions prior to January 1985, and on each such occasion they had executed a purchase order like the purchase order described above; however, prior to the institution of this suit, neither had read the "boilerplate" conditions printed on the back of the purchase order.

II.

The court below concluded that at the time of Meeks' accident, defendant was performing work for plaintiff "pursuant to an agreement to construct and/or alter an appliance" and that, therefore, any promise by defendant in connection with that agreement to indemnify or hold plaintiff harmless was against public policy, void, and unenforceable under G.S. 22B-1. We agree.

General Statute 22B-1 provides the following:

> Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the

> sole negligence of the promisor, its agents or employees. This section shall not affect an insurance contract, workmen's compensation, or any other agreement issued by an insuror, nor shall this section apply to promises or agreements under which a public utility as defined in G.S. 62-3(23) including a railroad corporation as an indemnitee. This section shall not apply to contracts entered into by the Department of Transportation pursuant to G.S. 136-28.1.

In plaintiff's specifications for "Job No. E93207," the "Scope of Work" for the project was described as follows:

> Install new conveyor between lines B9 and B10 depalletizers to connect the two depalletizers. Objective is to allow B10 line to be fed from B9 depalletizer. Approximately 38' of conveyor and five (5) drive motors to be energized from Modicon panel CP-10A. All conduit and wire to be furnished by contractor.

An "Engineering Service Manager" for plaintiff's Eden plant testified that the project required defendant to hook up ten-foot sections of conveyor and drill and anchor them to the concrete floor of the plant. Richard Watkins, the employee of defendant working with Meeks on the project, stated that "Job No. E93207" required the men to erect and install the conveyor as well as to install the conveyor's driving motors, chain, and side guards. The project also required some cutting of the new conveyor sections as well as cutting into the old existing conveyor where the two systems joined.

General Statute 22B-1 nowhere defines the terms that appear therein. However, according to general rules of statutory construction, "Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning." *In re Trucking Co.*, 281 N.C. 242, 252, 188 S.E. 2d 452, 458 (1972). Further, for guidance, "courts may, and often do, resort to dictionaries for assistance in determining the common and ordinary meaning of words and phrases." *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E. 2d 47, 48 (1970).

Webster's Third New International Dictionary defines "construction" as "the act of putting parts together to form a complete integrated object." "Alteration" is defined as "the act or

action of altering," and "to alter" is defined as "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else." "Appliance" is defined as "a tool, instrument, or device specially designed for a particular use." Synonyms of the word "appliance" are given as "implement" or "machine."

In light of the foregoing natural and common meanings of the terms in G.S. 22B-1, we conclude that "Job No. E93207" involved both the construction of a new appliance and the alteration of an existing appliance within the meaning of the statute. As such, any promise on the part of defendant to indemnify or hold plaintiff harmless made in or in connection with the agreement to perform "Job No. E93207" is invalid unless this agreement falls under an exception stated in the statute.

Plaintiff argues that G.S. 22B-1 is inapplicable because the terms of the purchase order place this agreement within the exception created by the statute for insurance contracts. We disagree.

General Statute 22B-1 states, "This section shall not affect an insurance contract . . . or any other agreement issued by an insuror . . . ." Plaintiff argues that the indemnity provision on the back of the purchase order for "Job No. E93207" falls within this exception because it requires defendant "to provide adequate insurance (at least in the amount, if any, specified on the face of this [purchase order]) indemnifying Seller and Buyer against all such claims [connected with the work done under the purchase order]." This contention is without merit.

Chapter 58 of the General Statutes governs contracts of insurance in this State. General Statute 58-3 defines a "contract of insurance" as "an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest." Application of this broad definition of the term "insurance contract" to G.S. 22B-1 would render G.S. 22B-1 meaningless because all promises or agreements purporting to indemnify or hold a party harmless against liability would be "insurance contracts" under G.S. 58-3. However, G.S. 58-29 further provides that

it is unlawful for any company to make any contract of insurance concerning any property, interest, or lives in this State, or with any resident in this State, except as authorized by the provisions of Chapter 58.

In construing a statute, the cardinal principle is that the intent of the Legislature is controlling. *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E. 2d 338, 350 (1978). "A construction which will defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *In re Hardy*, 294 N.C. 90, 96, 240 S.E. 2d 367, 372 (1978). *See also Ballard v. Charlotte*, 235 N.C. 484, 487, 70 S.E. 2d 575, 577 (1952). Wherever possible, a statute should be given a construction that, in practical application, tends to suppress the evil the Legislature intended to prevent. *In re Hardy*, 294 N.C. at 96, 240 S.E. 2d at 372. In construing a statute, the court must normally adopt an interpretation that avoids bizarre or absurd consequences under the presumption that the Legislature acted in accordance with reason and common sense and did not intend untoward results. *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E. 2d 324, 329 (1978).

To accept the interpretation urged by plaintiff in this case—that a clause requiring a contractor to obtain insurance covering the owner's indemnification renders valid an indemnity provision that is otherwise void under G.S. 22B-1 because it is an "insurance contract" or an "agreement issued by an insurer"—would, in practical application, render G.S. 22B-1 meaningless. In our view, the Legislature intended, by exempting insurance contracts or other agreements issued by an insurer, to prevent insurance policies which name the buyer of construction services as an insured from being invalidated. Therefore, we hold that the terms "insurance contract . . . or any other agreement issued by an insuror" refers to contracts of insurance and insurers as defined, authorized, and regulated by Chapter 58 of the General Statutes. Consequently, the indemnity and hold harmless provision printed on the back of the purchase order signed by the parties does not fall under the exception for contracts of insurance and is void under G.S. 22B-1.

III.

Because we find the indemnity and hold harmless provisions printed on the back of the purchase order invalid under G.S. 22B-1, we find it unnecessary to address the remaining issues raised in this appeal. For the reasons stated, the judgment of the trial court is

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. JOE HAYWOOD DILLARD

No. 8729SC1241

(Filed 31 May 1988)

1. **Rape and Allied Offenses § 3— second degree sexual offense—indictment proper**

An indictment which was captioned "SECOND DEGREE SEXUAL OFFENSE" and which charged that "defendant . . . unlawfully, willfully and feloniously did engage in a sex offense with [victim's name] age 8, by force and against that victim's will. At the time of this offense the defendant was at least 12 years old and at least 4 years older than the victim" contained all the information necessary to charge defendant with either first or second degree sexual offense, and the statements regarding the victim's and defendant's ages did not render the indictment insufficient to charge a violation of N.C.G.S. § 14-27.5.

2. **Rape and Allied Offenses § 4— second degree sexual offense—8-year-old victim—leading questions proper**

In a prosecution of defendant for second degree sexual offense, the trial judge did not abuse his discretion by allowing the district attorney to ask leading questions of the victim since the subject matter of the 8-year-old victim's testimony, whether and how the sexual act was committed, was a delicate matter.

3. **Rape and Allied Offenses § 5— second degree sexual offense—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for second degree sexual offense where it tended to show that the victim was asleep in the bed with her stepfather; she awoke when defendant put his hand in her underwear and "went around and around in [her] bing bing"; she testified that her "bing bing" meant her "private place"; the victim stated that

the offense occurred while her sister was away at their grandmother's house to help hang curtains; and the grandmother testified that the victim's sister visited to help hang curtains the third week of October 1985 and the victim had complained of vaginal discomfort two to three weeks before 15 November 1985 when the victim told her what had happened.

4. Rape and Allied Offenses § 6— time of offense—jury instructions not improper

In a prosecution of defendant for second degree sexual offense, the trial court did not err in instructing the jury that the offense could have occurred any time during the month of November 1985, since defendant did not object to the instruction; the instruction did not have a probable impact on the jury's finding of guilt; time was not of the essence of the offense; and defendant did not rely on alibi evidence for the date alleged in the indictment or the dates shown by the State's evidence.

5. Rape and Allied Offenses § 6— defendant's intention to place finger in vagina or in vaginal area—instructions proper

Defendant was not prejudiced by the court's instruction that an element of attempted second degree sexual offense was that defendant intended to insert his finger in the vagina or "vaginal area" of the victim where the charge, when considered as a whole, made it clear that the jury had to find that defendant intended to penetrate the vaginal opening as a necessary element of the crime of second degree sexual offense.

APPEAL by defendant from *Snepp (Frank W.), Judge*, and *Downs (James U.), Judge*. Order entered 22 October 1986 and judgment entered 28 July 1987 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 3 May 1988.

Defendant was indicted for second-degree sexual offense involving his eight-year-old stepdaughter, a violation of G.S. 14-27.5. Defendant's oral motion to quash the indictment was denied by Judge Snepp on 22 October 1986. At trial, the jury found defendant guilty of attempt to commit a second-degree sexual offense. Judge Downs sentenced defendant to three years in the custody of the State Department of Corrections. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. David Steinbock, for the State.

Carnes and Franklin, by Hugh J. Franklin, for defendant-appellant.

SMITH, Judge.

Defendant brings forward five assignments of error. First, he contends the trial court erred by denying his motion to quash the

indictment. Second, he assigns error to the State's use of leading questions during the direct examination of the victim. Defendant's third assignment of error is that the trial court erred by denying his motion to dismiss at the close of the evidence. Fourth, he assigns error to the court's jury instruction that the offense could have been committed any time during the month of November 1985. Finally, defendant contends the trial court erred in its instruction on attempted second-degree sexual offense. We have reviewed each assignment of error and conclude there was no prejudicial error in the proceedings below.

[1] Defendant first assigns error to the denial of his motion to quash the indictment. The indictment charges a violation of G.S. 14-27.5 and is captioned "SECOND DEGREE SEXUAL OFFENSE." It specifically states: "defendant . . . unlawfully, willfully and feloniously did engage in a sex offense with [victim's name] age 8, by force and against that victim's will. At the time of this offense the defendant was at least 12 years old and at least 4 years older than the victim." Defendant contends the indictment is insufficient to allow him to determine whether the State intended to proceed on the theory of first or second-degree sexual offense and should therefore be dismissed.

Although not cited by either defendant or the State, G.S. 15-144.2(a) sets forth the requirements for sexual offense indictments. For an indictment to be legally valid under the statute, it must contain only the following: the name of the accused, the date of the offense, the county in which the offense was allegedly committed, the averment "with force and arms," the allegation that the accused unlawfully, willfully and feloniously engaged in a sex offense with the victim by force and against the victim's will, and the victim's name. G.S. 15-144.2(a). An indictment including such information is sufficient to charge first-degree sexual offense, second-degree sexual offense, attempt to commit a sexual offense or assault. *Id.* The statute provides that if the indictment contains the additional averment that the victim was under age 13, the indictment is sufficient to charge first-degree sexual offense and all lesser included offenses. G.S. 15-144.2(b). The indictment in this case contains all the information necessary to charge defendant with either first or second-degree sexual offense. The statements regarding the victim's and defendant's ages do not render the in-

dictment insufficient to charge a violation of G.S. 14-27.5. This assignment of error is overruled.

We also note that on defendant's "Waiver/Certification of Arraignment" form he entered a plea of not guilty to the offense of second-degree sexual offense. Thus, defendant was well aware of the offense for which the State intended to prosecute. Furthermore, even though defendant could have been tried for first-degree sexual offense, the only difference between the first and second-degree offenses on the facts of this case are the ages of the victim and defendant, a distinction that would not affect defendant's preparation for trial.

[2] Defendant's second assignment of error is that the trial court abused its discretion by allowing the district attorney to ask leading questions during the direct examination of the victim. We note that defendant excepted only to the court's ruling allowing one question: "And were you afraid back then to sleep in your own bed?" With this question, the prosecutor was merely seeking to establish background information; he was not attempting to elicit crucial testimony of the elements of the crime charged. Defendant was not prejudiced by the ruling. Neither was the ruling error. The rule is that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." G.S. 8C-1, Rule 611(c). The application of this rule is within the discretion of the trial judge and the ruling is reversible only for abuse of discretion. *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985). The trial court is "allowed wide latitude in the questioning of a witness of tender years or when the subject concerns a delicate matter such as sexual conduct." *State v. Wilson*, 322 N.C. 91, 96, 366 S.E. 2d 701, --- (1988). In this case, the subject matter of the young victim's testimony, whether and how the sexual act was committed, was indeed a delicate matter. We hold that the trial judge did not abuse his discretion by allowing the district attorney to ask leading questions of the victim in this case.

[3] Defendant next assigns error to the trial court's denial of his motion to dismiss made at the close of all the evidence. He contends that: (1) there was no evidence of force or threat of force to commit the offense; (2) the victim did not testify to a specific sexual act; and (3) the testimony as to the date of the offense was too

confusing and inconsistent to support a conviction. The test for a motion to dismiss is whether, considering the evidence in the light most favorable to the State and giving the State the benefit of all discrepancies and every reasonable inference, there is substantial evidence of each material element of the offense. *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981). Thus, the trial court's ruling was proper if there is substantial evidence of each element of second-degree sexual offense.

G.S. 14-27.5(a) provides:

> A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally defective, mentally incapacitated, or physically helpless.

As the trial court charged only on the elements of second-degree sexual offense in G.S. 14-27.5(a)(1), the question for our consideration is whether there is substantial evidence that the sexual act was by force and against the victim's will.

"[T]he common law implied in law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep . . . and therefore could not resist or give consent." *State v. Moorman*, 320 N.C. 387, 392, 358 S.E. 2d 502, 505-06 (1987). The phrase "by force and against the will" used in the first and second-degree rape statutes and the first and second-degree sexual offense statutes "means the same as it did at common law when it was used to describe some of the elements of rape." *State v. Locklear*, 304 N.C. at 539, 284 S.E. 2d at 503. It makes no difference in the case of a sleeping or similarly incapacitated victim whether the State proceeds on the theory of a sexual act committed by force and against the victim's will or whether it alleges an incapacitated victim; force and lack of consent are implied in law. *See State v. Moorman, supra.* The victim testified that she was asleep in the same bed with her stepfather, defendant, and was awakened by defendant committing the sexual act charged. We

hold there was sufficient evidence of force to deny defendant's motion to dismiss.

Defendant also contends his motion to dismiss should have been granted because the victim did not testify to a specific sexual act. The victim testified that she was asleep in the same bed with defendant and when she woke up defendant "put his hand down in my panties and went around and around in my bing bing." She also testified that "bing bing" meant her "private place" and that she felt defendant's finger "inside" her "bing bing." The victim's grandmother testified that the victim told her the same things to which the victim testified. It is clear from the grandmother's testimony that the victim used the words "bing bing" to refer to her vagina. "Although the victim did not use the word 'vagina,' or 'genital area,' when describing the sexual assault perpetrated upon her, she did employ words commonly used by females of tender years to describe these areas of their bodies, of which they are just becoming aware." *State v. Rogers*, 322 N.C. 102, ---, 366 S.E. 2d 474, 476 (1988). The testimony was sufficient to require submission of defendant's guilt of second-degree sexual offense to the jury.

Defendant also contends his motion to dismiss should have been granted because the date the offense occurred was not shown by the evidence. The victim testified that the offense occurred while her sister was away at their grandmother's house to help hang curtains. She also testified that she thought it was weeks after it happened before she told her grandmother. The grandmother testified that the victim's sister visited to help hang curtains the third week of October 1985 and that the victim had complained of vaginal discomfort two to three weeks before 15 November 1985 when the victim told her what had happened.

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

State v. Wood, 311 N.C. 739, 742, 319 S.E. 2d 247, 249 (1984) (citations omitted). For the reasons stated, the trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

[4] Defendant's fourth assignment of error is that the trial court erred in instructing the jury that the offense could have occurred any time during the month of November 1985. Defendant did not object to the instruction as required by App. R. 10(b)(2). Thus, defendant relies on "plain error," error which denies defendant a fundamental right or results in a miscarriage of justice. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). We hold that defendant has not shown prejudicial error in the jury instruction. In determining whether a defect in the jury instruction is "plain error," we must decide if the instructional error had a probable impact on the jury's finding of guilt. *Id.* We hold that the instruction did not have such an impact. Additionally, "[w]here time is not of the essence of the offense charged and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal." *State v. Locklear*, 33 N.C. App. 647, 653-54, 236 S.E. 2d 376, 380, *disc. rev. denied*, 293 N.C. 363, 237 S.E. 2d 851 (1977). Defendant did not present alibi evidence for the date alleged in the indictment or for the dates shown by the State's evidence; he simply denied committing the offense. As defendant did not rely on the date charged in the indictment, the variation in the State's evidence did not deprive him of his right adequately to present his defense or ensnare him in any way. Under these circumstances, the variance between the date in the indictment and that indicated in the charge is not prejudicial. This assignment of error is overruled.

[5] Defendant's final assignment of error is that the trial court erred in instructing the jury on the definition of attempt to commit second-degree sexual offense. The court instructed the jury in part as follows:

> For you to find him guilty of attempted second degree sexual offense, the State must prove two things beyond a reasonable doubt, first of all considering all the elements I heretofore gave you what constitutes second degree sexual offense, [the first element of attempt is that he intended to

commit a second degree sexual offense by inserting his finger into the vagina or vaginal area] of the alleged victim and included among that and within that are the fact to be considered by you that he used --- that he attempted to use or attempted to threaten the use of force sufficient to overcome any resistence she might have and that she did not consent and it was against her will.

Defendant objects to the bracketed part of the instruction contending it would allow the jury to find him guilty of the attempted crime if it found he intended to place his finger in the "vaginal area," an act not a crime under the statute since there would be no intent to penetrate the genital opening. We hold that while the instruction was not technically correct, there was no prejudice to defendant. Earlier in the charge, the court properly instructed the jury that to prove a second-degree sexual offense the State had to prove that defendant engaged in a sexual act with the victim and defined sexual act as "any penetration, however slight, by an object into the genital opening of a person's body." Our Supreme Court has held that "it is fundamental that the charge of the court will be construed contextually, and isolated portions will not be held to constitute prejudicial error when the charge as a whole is free from objection." *State v. Hutchins*, 303 N.C. 321, 346, 279 S.E. 2d 788, 803 (1981). Construing the charge contextually, the jury must have understood that they had to find defendant intended to penetrate the vaginal opening as a necessary element of the crime of attempted second-degree sexual offense. This assignment of error is overruled.

No error.

Judges JOHNSON and PHILLIPS concur.

PHILIP R. STURM v. JOHN GOSS

No. 8721SC948

(Filed 31 May 1988)

1. **Partnership § 6— misappropriation of partnership business opportunity alleged—improper party sued**

Where plaintiff alleged that defendant misappropriated a partnership business opportunity in violation of their partnership agreement and plaintiff sought an accounting of profits allegedly earned by defendant from that business opportunity, the trial court properly entered summary judgment for defendant where the uncontroverted evidence presented by defendant established that the business in question was acquired by a company called Total Marketing, a partnership of corporations in which defendant's wholly-owned corporation was a partner; defendant was never individually a partner in Total Marketing; defendant had no authority in his individual capacity to render the requested accounting of Total Marketing's profits; and the demand instead should have been directed to defendant's corporation or to defendant in his capacity as agent for the corporation.

2. **Partnership § 1.1— misappropriation of partnership business opportunity alleged—no partnership between parties**

The trial court properly granted summary judgment for defendant in plaintiff's action to recover damages for an alleged misappropriation of a partnership business opportunity where the undisputed evidence revealed that there was no partnership between plaintiff and defendant in that, after a stated time, defendant did not receive a direct share of the profits of the partnership, though defendant's wholly-owned corporation did share in the profits; plaintiff executed tax returns for the business which named only himself and various corporations as co-owners and which were prepared by accountants from information supplied by plaintiff; there was an oral agreement to substitute the corporations for their individual owners as partners; and plaintiff could not recognize and benefit from the organization of a partnership of corporations for tax purposes but disregard that structure for other purposes.

3. **Partnership § 9— dissolution upon expressed will of any partner—judicial decree of dissolution superfluous**

A judicial decree of dissolution of a partnership would have been superfluous where the partnership in question was without any definite term or undertaking to be accomplished and therefore could be dissolved by the express will of any partner without violating the partnership agreement; dissolution occurred automatically by operation of law upon any partner's unequivocal expression of an intent and desire to dissolve the partnership; the filing of this lawsuit constituted such an unequivocal expression; and the partnership was automatically dissolved on the date the suit was instituted, assuming the will to dissolve was not expressed by any partner earlier. N.C.G.S. § 59-61(1)(b) and (2).

Sturm v. Goss

APPEAL by plaintiff from *W. Douglas Albright, Judge.* Judgment entered 1 June 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 February 1988.

Robert D. Hinshaw for plaintiff-appellant.

Allman, Spry, Humphreys, Leggett, and Howington, P.A. by William D. Spry, Jr. for defendant-appellee.

BECTON, Judge.

This civil action for damages, instituted by plaintiff, Philip R. Strum, against defendant, John Goss, is based upon claims of fraud, unfair competition, and breach of contractual and fiduciary obligations to a partnership by the misappropriation of a partnership business opportunity.

I

The essential allegations of the Complaint are as follows: Strum, Goss, and Edward F. Schiff formed a partnership under the name Marketing Resource Group (MRG) to provide marketing and consulting services to various businesses. The partnership agreement provided that the three partners would share equally in the business's profits and losses and that any business or profits from a partnership client were the property of the partnership.

Pursuant to the agreement, the partners provided extensive marketing and consulting services to Jeno's, Inc., a frozen food company, for approximately two years. Sometime in late 1985, the partners learned that Pillsbury, another food company, was purchasing Jeno's. Knowing that additional business could be obtained, Goss, nevertheless, repeatedly told Sturm that, based on information Goss received from a friend who was a Jeno's employee, no new business would be obtained by MRG from Pillsbury or the Jeno's division of Pillsbury once the takeover was completed. While continuing to participate in MRG, Goss became associated with another company, Total Marketing, and secretly began providing marketing services to Pillsbury and its Jeno's division for his own personal gain and without accounting to Sturm for any of the profits of that business activity. When Sturm learned that Goss had acquired the additional Jeno's business, he immediately asserted that it was property of the

partnership and demanded an accounting of past and future profits, but Goss refused to render an accounting.

Based on these allegations, Sturm prayed for a judgment dissolving the partnership and requiring Goss to account for and pay over to Sturm one-third of the net profits from any past or future business transactions with clients of MRG.

Goss answered the Complaint, denying many of the material allegations and asserting, among numerous other defenses, that he was not individually a partner in the MRG partnership and that any business with Pillsbury or Jeno's was not conducted by him in his individual capacity but through his wholly owned corporation, Oakcrest, Inc. (Oakcrest). Thereafter, Goss moved for summary judgment and the motion was granted. From that judgment, plaintiff Sturm appeals. We affirm.

II

A

At the hearing on his motion for summary judgment, Goss presented affidavits, depositions of both parties, and exhibits, by which he sought to establish that Sturm had sued the wrong party by instituting this action against Goss instead of Goss's corporation, Oakcrest. Goss's evidence showed, in pertinent part, that Sturm and Goss formed the original MRG partnership pursuant to a written agreement executed on 18 September 1983. Subsequently, Edward Schiff was made a partner by oral agreement. In early 1985, the partners discussed restructuring MRG by removing Goss and Schiff as individual partners and by adding as partners certain corporate entities owned by each of the three men. To this end, several drafts of an "Amended and Restated Partnership Agreement" were prepared, but none of them were ever signed by Sturm or Goss. However, the company began, on 1 May 1985, to make all partnership distributions to the partners and in the proportions designated in one of the drafts, namely: 1% to Philip Sturm; 32 1/3% to Winston-Salem Productions, Inc. (a corporation owned by Sturm); 33 1/3% to Oakcrest, Inc. (a corporation owned by Goss); and 15% and 18 1/3% respectively to Twining Lane Investments, Inc. and Potomac Marketing Services, Inc. (corporations owned by Schiff or his nominees). No partnership distributions were made to Goss individually after that date.

In addition, the affidavit of Danny Newcomb, an accountant for MRG, stated that Newcomb was present at a meeting shortly before 1 May 1985 at which Sturm, Goss, and Schiff agreed that MRG would be operated as a partnership of these corporations with Sturm retaining a 1% personal interest. Accordingly, the federal and state partnership tax returns filed for MRG for the period 1 May 1985 through 31 December 1985, and signed by Sturm, listed the corporations and Sturm as the owners of the partnership.

In January 1986, Goss approached Sturm about expanding the business of MRG. When Sturm declined, Goss considered the partnership terminated. The same month, Goss's corporation, Oakcrest, became a partner in a firm called Total Marketing which was a partnership of corporations. After 10 March 1986 and following the completion of Pillsbury's acquisition of Jeno's Total Marketing began marketing several food brands owned by Pillsbury, including some brands for which MRG had previously provided marketing services.

B

Summary judgment is proper whenever the materials before the court show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, Rule 56 (1983); *Kent v. Humphries*, 303 N.C. 675, 281 S.E. 2d 43 (1981). A defending party is entitled to summary judgment if he can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 341 S.E. 2d 61 (1986). Having carefully examined the affidavits, depositions, and exhibits which were presented to the trial court, we conclude, for the reasons that follow, that defendant Goss has conclusively established a legal bar to Sturm's claims.

[1] First, Sturm seeks an accounting of profits allegedly earned by Goss from business transactions with Pillsbury and its Jeno's division. However, uncontroverted evidence presented by Goss establishes that this marketing business, which Sturm claims was a partnership opportunity of MRG, was acquired by a company called Total Marketing, a partnership of corporations in which Oakcrest is a partner. The evidence also shows that Goss has

never individually been a partner in Total Marketing. Under these circumstances, Goss has no authority in his individual capacity to render the requested accounting of Total Marketing's profits. Instead, the demand should have been directed to Oakcrest or to Goss in his capacity as agent for Oakcrest.

[2] Second, Sturm's claims presuppose the existence of a partnership, and, thus, a fiduciary relationship, between the parties as individuals. However, the North Carolina Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. Sec. 59-36(a) (1982). Co-ownership and sharing of any actual profits are indispensable requisites for a partnership *See, e.g., McGurk v. Moore,* 234 N.C. 248, 67 S.E. 2d 53 (1951); *Zickgraf Hardwood Co. v. Seay,* 60 N.C. App. 128, 298 S.E. 2d 208 (1982).

The undisputed evidence forecast by Goss clearly shows that, after 1 May 1985, although MRG operated at a substantial profit, Goss did not receive a direct share of the profits but that Oakcrest on the other hand, did share in the profits. This fact alone constitutes *prima facie* evidence that Oakcrest, not Goss, was a partner in MRG. *See* N.C. Gen. Stat. Sec. 59-37(4) (1982); *Davis v. Davis,* 58 N.C. App. 25, 293 S.E. 2d 268, *disc. rev. denied,* 307 N.C. 127, 297 S.E. 2d 399 (1982). Furthermore, "[t]he filing of a partnership tax return is significant evidence of a partnership." *Davis* at 31, 293 S.E. 2d at 272, *quoting Reddington v. Thomas,* 45 N.C. App. 236, 240, 262 S.E. 2d 841, 843 (1980). There is uncontroverted evidence in this case that Sturm executed tax returns for the business which named only himself and the various corporations as co-owners and which were prepared by accountants from information supplied by Sturm. This constitutes a significant admission by Sturm against his present interest in denying that MRG was a partnership of corporations. *See Davis* at 31, 293 S.E. 2d at 272; *Reddington* at 240, 262 S.E. 2d at 843. In our opinion, these factors, coupled with the evidence of an oral agreement to substitute the corporations for their individual owners as partners, establishes as a matter of law that Goss was not individually a partner in the business after 1 May 1985. Consequently, any contractual or fiduciary duties to MRG or to Sturm after that time were duties of the corporate partner, Oakcrest, and any claim Sturm may have for breach of those duties must be against

Oakcrest or against Goss in his capacity as agent for his corporation.

In reaching this conclusion, we reject Sturm's contention that materials offered by him in opposition to the summary judgment motion create a genuine issue regarding the identity of the partners in MRG. A "genuine issue" is one which can be maintained by substantial evidence. *E.g., Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). Documentary evidence presented by Sturm to show a partnership relationship between himself and Goss as individuals includes a bank account signature card, a report sent from Dun and Bradstreet to Sturm for verification, a tax withholding application form, and correspondence from the Employment Security Commission, all of which are dated later than 1 May 1985. Of these documents, only the bank account authorization is signed by Goss, and that document lists only Sturm and Goss as partners in MRG, a state of affairs denied by both parties. Having carefully reviewed all the documentary evidence and the arguments concerning its import, we find it to be so insubstantial as to raise no triable issue of fact.

We have also considered the affidavit and deposition of Sturm in which he stated that, following 1 May 1985, distributions were made to the corporations solely to save taxes and that the parties did not recognize the corporations as the partners. According to Sturm, they continued to operate the business in the same way and utilized the corporations merely "as conduits for [their] money." However, in our view, Sturm may not recognize and benefit from the organization of a partnership of corporations for tax purposes but disregard that structure for other purposes. Moreover, although Sturm argues in a general way that Goss was merely the "alter ego" of Oakcrest and that to require Sturm to sue Oakcrest is to promote form over substance, he has neither alleged in his complaint, nor presented evidence of, facts (such as undercapitalization or non-compliance with corporate formalities) which would entitle him to pierce the corporate veil of Oakcrest and impose liability upon Goss individually. *See Glenn v. Wagner*, 313 N.C. 450, 455, 329 S.E. 2d 326, 330-31 (1985) (explaining requirements for piercing the corporate veil).

For all the foregoing reasons, we conclude that any liability which might exist for the acts alleged in the Complaint belongs to

Goss's corporation, Oakcrest, and that, accordingly, summary judgment for defendant Goss was properly granted.

C

[3] In addition to an accounting of Total Marketing's profits, Sturm has also demanded a judicial dissolution of the MRG partnership. However, all the evidence shows that MRG was a partnership at will, *i.e.*, without any definite term or undertaking to be accomplished, and, as such, could be dissolved by the express will of any partner without violating the partnership agreement. *See* N.C. Gen. Stat. Sec. 59-61(1)(b) (1982). Moreover, dissolution occurs automatically by operation of law upon any partner's unequivocal expression of an intent and desire to dissolve the partnership. N.C. Gen. Stat. Sec. 59-61(1)(b) and (2). *See generally* 59A Am. Jur. 2d *Partnership*, Section 814 (1987). In our view, the filing of this lawsuit constituted such an unequivocal expression, and, assuming the will to dissolve was not expressed by any partner earlier, the partnership was automatically dissolved on that date. Thus, a judicial decree of dissolution would have been superfluous, and the trial court's failure to declare the partnership dissolved was not error.

III

In response to Sturm's appeal, Goss has suggested several other grounds upon which he claims summary judgment in his favor was proper. However, in view of our resolution of the foregoing issues, we deem it unnecessary to address these additional arguments. The judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge SMITH concur.

STATE OF NORTH CAROLINA v. BOYD WILLIAM ADKERSON, JR. AND EARL RAY EANES

No. 8717SC860

(Filed 31 May 1988)

1. **Searches and Seizures § 12— reasonable suspicion that driver was impaired—investigatory stop**

An officer's stop of defendant's vehicle did not violate his Fourth Amendment rights where the officer first noticed that the headlights of defendant's car were darting back and forth as he approached it; the officer turned around and followed the car for about a quarter of a mile and within that distance the car weaved back and forth in its lane five or six times and ran off the side of the road once; and these observations were enough to create a reasonable suspicion that the vehicle was being driven by someone impaired.

2. **Arrest and Bail § 3.8— warrantless arrest for drunk driving—existence of probable cause**

Probable cause existed to justify an officer's warrantless arrest of defendant where the officer noticed defendant weaving back and forth and once running off the highway; after the officer made the stop, he noticed that defendant's eyes were extremely red and glassy and that he appeared to be in a daze; the officer detected "a moderate odor of alcohol about his breath"; and the officer thus had a good faith belief that defendant was guilty of driving while impaired.

3. **Searches and Seizures § 9— warrantless arrest for impaired driving—warrantless search of car proper**

A bag of marijuana cigarettes found without a warrant in defendant's car was lawfully seized where the search of the car was incident to a lawful arrest.

4. **Criminal Law § 64— officer's opinion that defendant was high and on drugs—evidence admissible**

The trial court did not err in allowing an officer to testify as to his opinion that defendant appeared to be high and that he had consumed an impairing substance, since the officer based his opinion on the manner in which defendant drove his car, the fact that defendant's eyes were red and glassy, the way defendant moved, and the fact that he appeared nervous and not normal, and the officer's opinion was helpful to the jury. N.C.G.S. § 8C-1, Rule 701.

5. **Searches and Seizures § 12— arrest for impaired driving—pat-down search of passenger proper**

Circumstances in this case warranted an officer's decision to make a pat-down search for weapons of one defendant who was a passenger in a vehicle whose driver was stopped for driving while impaired where the officer observed a paper bag and jacket under defendant passenger's feet; in order to search them the officer asked defendant to exit the vehicle; and once defendant was outside the vehicle the officer was justified in making a protective

search for weapons given the late hour, the rural surroundings, and the officer's vulnerable position if he leaned over toward the floor of the car with someone standing behind him.

APPEAL by defendants from *Morgan, Judge.* Judgments entered 28 May 1987 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 2 February 1988.

Attorney General Lacy H. Thornburg by Associate Attorney General David M. Parker for the State.

A. Wayne Harrison for defendant appellants.

COZORT, Judge.

Defendants Adkerson and Eanes were charged in indictments proper in form with possession of a controlled substance. Both filed motions to suppress certain evidence; the motions were denied after a hearing. Subsequently, under a plea arrangement with the State, each defendant pled guilty to misdemeanor possession of a controlled substance. From the judgments sentencing each defendant to a minimum and maximum two-year suspended term, each defendant appeals. We affirm.

At the Suppression Hearing on this matter, the State's evidence showed that on 11 October 1986, at approximately 2:00 a.m., State Trooper Ron Robles was traveling west on Highway 158 in Rockingham County when he met a 1976 Buick traveling east. As he approached the vehicle, he noticed that its headlights were darting back and forth as if it were weaving. Trooper Robles testified that he turned around to monitor the car's progress and noticed that within a quarter of a mile it weaved back and forth in its lane five or six times and ran off the right side of the road once. As a result of these observations, Trooper Robles stopped the vehicle.

In the car were the driver, defendant Boyd William Adkerson, Adkerson's son, defendant Earl Ray Eanes, and Eanes' wife. Trooper Robles testified that Adkerson was "in a daze," that his "eyes were extremely red," and that he had "a moderate odor of alcohol about his breath." After Adkerson got out of the car, Trooper Robles stated that he "just stared around and moved sort of slowly," and in his opinion, Adkerson "was not normal." As a result of Adkerson's driving and behavior and because in

Trooper Robles' opinion defendant "had consumed some type of impairing substance to the extent that it had appreciably impaired both his mental and physical faculties," Trooper Robles arrested Adkerson for driving while impaired.

After arresting Adkerson, Robles escorted him to his patrol car and conducted a pat-down search incident to arrest. In the process, Robles removed a three-inch plastic straw from Adkerson's pocket. Inside the straw was a white powdery substance which Robles concluded to be, and which was later verified as being, cocaine.

After placing Adkerson in the patrol car, Robles returned to Adkerson's car where he saw, in plain view, a small cloth bag on the driver's seat. He opened the bag and inside found nine marijuana cigarettes. In completing his search of the vehicle, Trooper Robles noticed that Eanes, who was seated directly behind the driver's seat, had his feet placed on a jacket and a brown paper bag on the floor of the car. Trooper Robles asked Eanes to get out of the car so that he could inspect the jacket and bag. Trooper Robles testified that he felt he would place himself in a vulnerable position if he leaned over into the car with Eanes standing behind him. He decided to conduct a pat-down search of Eanes for weapons before searching the back seat of the car. When he asked Eanes to place his hands on top of the car so that he could frisk him, Eanes reached part way up and then turned around and struck Trooper Robles with the back side of his arm. Eanes then "lunged his hand into his right front pocket." Trooper Robles grabbed his arm, handcuffed him, and placed him under arrest. Trooper Robles proceeded to conduct a search incident to that arrest and discovered in Eanes' right front pocket a knife and a small plastic container. Inside the container, Trooper Robles found a white powdery substance which was later verified as being cocaine.

Ira Tillery, an officer with the Madison Police Department who was riding with Trooper Robles at the time of the stop, testified in corroboration of Trooper Robles' testimony.

Defendants' sole witness was Pamela Eanes, wife of defendant Eanes. She testified that there was nothing wrong with the way Adkerson drove that night and that his car did not go off the road.

On 30 April 1987, the trial judge entered an order denying defendants' Motions to Suppress. On 28 May 1987, under plea arrangements with the State, defendant Adkerson pled guilty to misdemeanor possession of marijuana, misdemeanor possession of cocaine, and misdemeanor possession of drug paraphernalia; and defendant Eanes pled guilty to misdemeanor possession of cocaine. Both defendants were sentenced to a minimum and maximum two-year term, which sentences were suspended. From the denial of their motions to suppress and the entry of judgments against them, defendants appeal pursuant to N.C. Gen. Stat. § 15A-979.

[1] Defendant Adkerson first argues that the initial stop of his vehicle was in violation of the Fourth Amendment to the United States Constitution. We disagree.

"The Fourth Amendment applies to seizures of the person including brief investigatory stops such as the stop of the vehicle here." *United States v. Cortez*, 449 U.S. 411, 417, 66 L.Ed. 2d 621, 628, 101 S.Ct. 690, 694-95 (1981). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.* at 417, 66 L.Ed. 2d at 628, 101 S.Ct. at 695. This objective manifestation must be based on the totality of the circumstances—the whole picture must be taken into account. *Id.* at 417, 66 L.Ed. 2d at 629, 101 S.Ct. at 695.

In the case at bar, the totality of the circumstances justified Trooper Robles' decision to make an investigatory stop of defendant's vehicle. Trooper Robles first noticed that the headlights of defendant Adkerson's car were darting back and forth as he approached it. He turned around and followed the car for about a quarter of a mile and within that distance the car weaved back and forth in its lane five or six times and ran off the side of the road once. These observations were enough to create a reasonable suspicion that the vehicle was being driven by someone impaired. Therefore, we hold that the stop of Adkerson's vehicle did not violate his Fourth Amendment rights.

Defendant Adkerson next argues that his arrest and the search of him and his car also violated his Fourth Amendment rights. We disagree.

"To be lawful, a warrantless arrest must be supported by probable cause." *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E. 2d 140, 145 (1984). " 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . .' " *Id.* This requires less than " 'evidence which would justify . . .' conviction." *Id.* at 261, 322 S.E. 2d at 146. In determining if probable cause exists, one must examine the particular facts and circumstances of each case. *Id.*

[2] In this case, we hold there was sufficient evidence to support Trooper Robles' belief in good faith, that defendant was guilty of driving while impaired. Before making the stop of the vehicle he noticed Adkerson weaving back and forth and once running off the highway. After he made the stop, he noticed that Adkerson's eyes were extremely red and glassy and that he appeared to be in a daze. He stated that Adkerson "moved sort of slowly" and that "he appeared to be nervous and in [his] opinion he was not normal." Finally, Trooper Robles testified that he detected "a moderate odor of alcohol about his breath." As a result of Adkerson's driving, appearance and behavior, Trooper Robles placed him under arrest for driving while impaired. We hold that probable cause existed to justify this action.

[3] Once Trooper Robles made his arrest he was authorized to make a warrantless search of Adkerson incident to that arrest. *See State v. Wooten*, 34 N.C. App. 85, 237 S.E. 2d 301 (1977). The search of Adkerson's car was also lawful, because "when a police officer has effected a lawful custodial arrest of an occupant of a vehicle, the officer may, as a contemporaneous incident of that arrest, conduct a search of the passenger compartment of the vehicle extending to the contents of containers found within the passenger compartment." *State v. Cooper*, 304 N.C. 701, 703-04, 286 S.E. 2d 102, 103-04 (1982), *construing New York v. Belton*, 453 U.S. 454, 69 L.Ed. 2d 768, 101 S.Ct. 2860 (1981). Therefore, the bag of marijuana cigarettes found in Adkerson's car was lawfully seized.

[4] Defendant Adkerson argues that the trial court erred in allowing Trooper Robles to testify as to his opinion that Adkerson appeared to be high and that he had consumed an impairing substance. Adkerson contends that this evidence was not rational-

ly based on Trooper Robles' perception and that without it there is no evidence of probable cause to arrest and search him. We find no error.

Rule 701 of the N.C. Rules of Evidence provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (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.

"[A] lay witness who has personally observed a person may give his opinion as to whether that person was under the influence of intoxicants." *State v. Lindley,* 286 N.C. 255, 258, 210 S.E. 2d 207, 209 (1974).

In the case below, Trooper Robles based his opinion upon the manner in which Adkerson drove his car, the fact that Adkerson's eyes were red and glassy, the way Adkerson moved, and the fact that he appeared nervous and not normal. Trooper Robles' opinion was based on his personal observation and was helpful to the jury as to Adkerson's condition. Therefore, we hold that the trial court correctly allowed him to offer his opinion on this matter.

[5] Defendant Eanes argues that the search of him by Officer Robles violated his Fourth Amendment rights. We disagree.

When an officer makes a lawful arrest of an occupant of an automobile and conducts a contemporaneous search of the automobile incident to that arrest, he may ask passengers to step out of the vehicle so he may complete his investigation. *State v. Collins,* 38 N.C. App. 617, 248 S.E. 2d 405 (1978). "When there are reasonable grounds to order an occupant out of the car, then he may be subjected to a limited search for weapons when the facts available to the officer justify the belief that such an action is appropriate." *Id.* at 619-20, 248 S.E. 2d at 407. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio,* 392 U.S. 1, 27, 20 L.Ed. 2d 889, 909, 88 S.Ct. 1868, 1883 (1968).

The circumstances in this case warranted Trooper Robles' decision to make a pat-down search for weapons of Eanes. In order to properly search the paper bag and jacket under Eanes' feet, Trooper Robles asked him to exit the vehicle. Once Eanes was outside the vehicle Trooper Robles was justified in making a protective search for weapons. This search was justified given the late hour, the rural surroundings, and Trooper Robles' vulnerable position if he leaned over towards the floor of the car with someone standing behind him. Given these circumstances, we hold that Eanes' Fourth Amendment rights were not violated by this search.

Finally, both Adkerson and Eanes argue that the trial court's findings of fact are not supported by the evidence and therefore do not support the conclusions of law. We disagree.

Our review of the record reveals only one discrepancy between the transcript and the findings of fact. Finding of Fact No. 11 states that "Rural Paved Road 1001 . . . at this time of the early morning, carries little traffic," while there was no evidence offered as to the traffic on this road. We do not feel that this minor discrepancy constitutes reversible error and find that the remaining findings of fact are supported by evidence in the record. Therefore, we find no merit in this argument.

Accordingly, we affirm the judgments of the trial court.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

JAMES HERBERT, ADMINISTRATOR OF THE ESTATE OF MICHAEL WALTER HERBERT v. BROWNING-FERRIS INDUSTRIES OF SOUTH ATLANTIC, INC., JAMES LEE THOMPSON, GERRARD TIRE COMPANY, INC., L&N TIRE SERVICE, INC., AND BRAD RAGAN, INC.

No. 8726SC959

(Filed 31 May 1988)

Negligence § 29— disintegrating tire—fatal accident—genuine issues of material fact—summary judgment for tire recapper improper

In a wrongful death action where the left front tire of a BFI truck disintegrated and the truck collided head-on with deceased's vehicle, the trial court

erred in entering summary judgment for defendant Gerrard, a tire recapper, where there were genuine issues of material fact as to whether Gerrard rather than another recapper did in fact repair and retread the front tire and thus had a legal duty; whether Gerrard negligently repaired and retreaded the tire; and whether Gerrard's negligent repair of the tire was the direct cause of the tire's disintegration and the subsequent accident.

APPEAL by plaintiff and defendants Browning-Ferris Industries of South Atlantic, Inc. and James Lee Thompson from *Snepp, Judge.* Orders entered 16 July 1987 and 24 July 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 March 1988.

Winfred R. Ervin, Jr., attorney for plaintiff-appellant.

Moore & Van Allen, by James C. Smith and Robert C. Ervin, attorneys for defendant-appellants Browning-Ferris Industries of South Atlantic, Inc. and James Lee Thompson.

Hamel, Helms, Cannon, Hamel & Pearce, by H. Parks Helms, attorney for defendant-appellee Gerrard Tire Company, Inc.

ORR, Judge.

On 30 August 1984, the left front tire on a Mack truck, owned by defendant Browning-Ferris Industries of South Atlantic, Inc. (BFI) and driven by its employee, defendant James Lee Thompson (Thompson), self-destructed, causing Thompson to lose control of the vehicle. The truck then crossed the highway median and collided head-on with the car of Mr. Michael Walter Herbert. Mr. Herbert died shortly thereafter from injuries suffered during the collision. An examination of the disintegrated tire disclosed that it had been repaired and retreaded prior to the accident.

James Herbert, administrator of Mr. Michael Herbert's estate, brought suit against BFI, Thompson, and Gerrard Tire Company, Inc. (Gerrard), contending BFI had negligently maintained the truck and trained the driver; Thompson had negligently driven the truck; and Gerrard had negligently repaired and retreaded the tire. Subsequently, BFI and Thompson cross-claimed for indemnity against Gerrard, alleging Gerrard had improperly repaired and retreaded the tire.

After responding to defendants' cross-claim, Gerrard moved for summary judgment, which the trial court granted.

BFI and Thompson filed a motion asking the trial court to rehear and reconsider its order granting summary judgment for Gerrard. The trial court denied defendants' motion, finding that defendants had failed to establish the existence of any genuine issues of material fact.

From the trial court's orders granting summary judgment for Gerrard and denying BFI and Thompson's motion for rehearing and reconsideration, plaintiff and defendants BFI and Thompson appeal.

A motion for summary judgment is properly granted under N.C.G.S. § 1A-1, Rule 56(c) of the Rules of Civil Procedure "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."

"In ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any genuine issue of material fact. If different material conclusions can be drawn from the evidence, then summary judgment should be denied." *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 164, 336 S.E. 2d 699, 700 (1985). "[A] fact is material if it would constitute or would irrevocably establish any material element of a claim or defense." *Bernick v. Jurden*, 306 N.C. 435, 440, 293 S.E. 2d 405, 409 (1982).

In a negligence action, summary judgment is proper when a defendant either (1) proves an essential element of the claim is nonexistent, or (2) shows through discovery that the opposing party cannot produce evidence establishing an essential element of the claim. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190 (1980).

"Negligence has been defined as the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 731, 348 S.E. 2d 162, 164 (1986), *cert. denied*, 318 N.C. 695, 351 S.E. 2d 748 (1987).

In the present negligence action, four essential elements must be established: (1) the existence of a legal duty or obligation;

(2) breach of that duty; (3) injury caused directly or proximately by the breach; and (4) actual loss or damage caused by the injury. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190; *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 348 S.E. 2d 162.

Gerrard contends the forecast of the evidence was insufficient to establish: (1) that Gerrard had, in fact, repaired and retreaded the tire, thus creating a legal duty on the part of Gerrard, and (2) that Gerrard's repair and retread of the tire, if done, had been negligently performed.

In support of the summary judgment motion, Gerrard submitted the affidavit of its president, James Gerrard, who testified in pertinent part:

> I have examined photographs of a tire tread and tire carcass identified in my deposition on May 12, 1987 as Defendant's Exhibits 1., 2., and 9. From a close examination of the aforementioned Exhibits, including the tire tread, the markings on the tire carcasses, and the yellow oval shaped mark on Defendant's Number 1. These photographs do not appear to be of tires retreaded by Gerrard Tire Company, nor do they appear to be of a tread design manufactured by the Oliver Rubber Company.

The trial court also considered other evidence in the case file, including Gerrard's answers to interrogatories and James Gerrard's deposition. These documents describe in detail the products and processes used by Gerrard to repair and retread BFI tires. However, none of Gerrard's evidence, other than James Gerrard's affidavit, addresses the repairs and retreading performed on the tire involved in the accident.

BFI and Thompson submitted two affidavits in opposition to Gerrard's motion for summary judgment. The first affidavit was given by Eric A. Black, District Manager of BFI's Charlotte district, who said in substance that he had examined the tire at the scene of the accident and had found the tire to be a retreaded Michelin with part of an embossed yellow circular seal still remaining on the tire's damaged side. His affidavit further said that since April 1981 all BFI tires were retreaded by either Gerrard or by L&N Tire Service, Inc. In addition, he testified that tires

retreaded by Gerrard were identified by a yellow circular seal bearing Gerrard's Department of Transportation recapper number embossed on the side of the tire.

The second affidavit considered by the trial court was made by BFI's tire expert, James D. Gardner, who testified in pertinent part:

> On September 1, 1984, I personally inspected a Michelin tire, tube type size 13/80R20, which had been removed from the left front wheel of a 1980 Mack truck owned by Browning-Ferris Industries of South Atlantic, Inc. ("BFI"). I was advised by BFI's Charlotte district manager, Eric A. Black, that the BFI truck had been involved in a head-on collision caused by a sudden blowout of this left front tire. . . . Upon examining the tire, I observed that it had been retreaded. The tread pattern had an appearance identical to a tread design manufactured by the Oliver Rubber Company. . . . Aside from its tread design, the tire bore few identifying marks. It had the number 833962 branded into its sidewall, and it had part of a yellow circular seal or patch embossed on the sidewall of the tire. Only about one-half of the yellow circular seal was still there; the rest of the seal had been scuffed away, as had the Department of Transportation recapper number that normally would be on the tire.

After reviewing the parties' evidence, the trial court granted summary judgment for Gerrard. In response, BFI and Thompson moved for a rehearing and reconsideration of the trial court's summary judgment order. To support their motion, defendants submitted two additional affidavits.

James Gardner, BFI's tire expert, made a second affidavit in which he testified:

> After I completed my examination of the retreaded tire in question, I concluded that the tire had sustained a major injury and that a repair of the injury had been attempted. Unfortunately, the attempted repair was not adequate to correct the injury and allow the tire to be returned to service. In my professional opinion, the tire failed as a direct result of this prior injury and the subsequent inadequate attempt to repair it. Based on my examination of the tire, I was unable

to determine whether the attempted repair was made before or after the tire was retreaded. However, if the attempted repair of the injury was made prior to or at the time of the retreading of the tire, then the tire should have been rejected by the recapper and definitely should not have been retreaded.

The other affidavit supporting the rehearing motion was made by Charles E. Younts, BFI's Charlotte District Shop Manager, who said:

> During the period that I have been BFI's Shop Manager, [since May 1982] BFI has not performed any repairs on any of its front tires (size 13/80/R20). Whenever a front tire needs repairing, it is BFI's policy to send it to a tire recapper (either Gerrard Tire Company, Inc. or L&N Tire Service, Inc.) for possible retreading, and the recapper determines whether retreading is appropriate. Additionally, during the period that I have been Shop Manager, BFI has never sent its front tires to a recapper or anyone else for repairs only. The only repairs performed on tires used on the front wheels of BFI's trucks are those repairs performed incident to the retreading process. Based on the foregoing information, I believe that the tire involved in this lawsuit was repaired at the time it was retreaded.

After consideration, we find the following statements made in defendants' affidavits were sufficient to raise material issues of fact.

First, Younts said that repairs to BFI's front tires were made only by recappers. Younts and Black said the only recappers employed by BFI were Gerrard and L&N Tire Service, Inc. In Gerrard's deposition, President James Gerrard testified his company used Oliver rubber and tread designs to retread BFI tires, whereas L&N Tire Service used Bandag rubber and tread designs in its retreading process. James Gerrard further testified there was a distinctive difference between the Oliver rubber and tread designs and the Bandag rubber and tread designs.

In addition, James Gerrard said in his affidavit that a yellow circular shaped mark with the identifying letters RHKU was molded on the sidewall of a tire retreaded by Gerrard. In con-

trast, L&N's president, C. C. Leonard, testified in his affidavit that L&N did not use an identifying patch on its retreaded tires until March 1985, seven months after Michael Walter Herbert's death. Furthermore, L&N's patch consisted of an oval shape with a blue border on yellow printing with the words "certified Bandag dealer." Finally, BFI's tire expert, James Gardner, testified that the tire involved in the accident was retreaded with an Oliver tread design and had part of an embossed yellow circular seal on its sidewall.

The statements by Gerrard, Leonard, and Gardner clearly raise a material issue of fact as to whether Gerrard did repair and retread the BFI front tire, and thus, had a legal duty.

In addition, Gardner's second affidavit said that the retreaded tire had been damaged and then inadequately repaired. Younts testified that repairs to BFI's front tires were made only by recappers prior to retreading. Gardner further said that if the inadequate repair to the tire was made before its retreading, the recapper improperly chose to retread the tire. This evidence is sufficient to raise a material issue of fact as to whether Gerrard negligently repaired and retreaded BFI's front tire.

Third, Gardner's second affidavit also said that the retreaded tire failed as a direct result of the inadequate repair of its injury. This statement raises an issue of fact as to whether Gerrard's negligent repair of the tire was the direct cause of the tire's disintegration and the subsequent accident.

Finally, neither party contests that Mr. Herbert's loss of life was caused by the accident.

The question here is not whether plaintiff's, BFI's, and Thompson's version of the facts will prevail at trial, but whether there are genuine issues of fact. As the foregoing shows, there are genuine issues of material fact for consideration by the jury.

Accordingly, the trial court's granting of summary judgment for Gerrard is reversed.

Reversed.

Chief Judge HEDRICK and Judge JOHNSON concur.

MARY TAY v. DAVID T. FLAHERTY

No. 8718SC951

(Filed 31 May 1988)

Social Security and Public Welfare § 1— food stamps—child going off to college—demand for verification of child's status and income premature

A county's demand for verification by 11 August 1986 of plaintiff's daughter's student status and income was not authorized by 7 C.F.R. § 273.2(f)(8)(ii) as verification of a change reported during a certification period, since the daughter did not leave home until 14 August 1986, and plaintiff was under no duty to report the change until that date; therefore the county acted improperly in terminating food stamp benefits to plaintiff's entire household when plaintiff did not supply the requested information by the given deadline.

APPEAL by plaintiff from *Seay, Judge*. Order entered 17 August 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 March 1988.

Plaintiff, pursuant to N.C.G.S. § 150B-43, sought review in superior court from a final decision of the North Carolina Department of Human Resources Division of Social Services. From the order of superior court affirming the decision of the Department of Human Resources, plaintiff now appeals.

The record in the case contained the following evidence.

Plaintiff Mary Slade Tay and her four children constituted a household receiving food stamp benefits from the Guilford County Department of Social Services prior to May 1986. As routinely required, plaintiff's household was recertified on 15 May 1986. During recertification, plaintiff told her social worker, Ms. Leslie S. Hardie, that her daughter Dawn Tay, a member of her household, *might* be attending college in the fall of 1986.

In response to plaintiff's statement, Ms. Hardie flagged the case file for future investigation in August 1986. On 1 August 1986, Ms. Hardie mailed plaintiff a letter requesting information as to: (1) Dawn Tay's student status; (2) whether Dawn was receiving any grants, loans or scholarships; and (3) the tuition costs for Dawn's college attendance.

This information, the letter said, was necessary for determining if Dawn, as a member of plaintiff's household, would continue

to be eligible for food stamps. The letter further said: "Failure to provide the needed verification or to contact us by 8/11/86 will be considered a refusal to cooperate and we may take action to close your case."

After receiving the letter, plaintiff was unable to reach Ms. Hardie until after the 11 August deadline. When Ms. Hardie did not receive the requested information by 11 August, she sent plaintiff a notice on 12 August, terminating food stamp benefits to plaintiff's entire household.

Several days after 12 August plaintiff succeeded in contacting Ms. Hardie regarding the 1 August letter. At the time of this conversation, unbeknownst to Ms. Hardie, plaintiff had not received the 12 August notice terminating her food stamp benefits.

In the conversation, plaintiff told Ms. Hardie that she had been unable to supply the requested information during the ten day period because her daughter Dawn had taken all the documentation with her on a two week vacation in Maryland, beginning 1 August and ending 14 August. Plaintiff further explained that Dawn was going to attend college and, therefore, would not be living at home.

Ms. Hardie, assuming plaintiff was aware her benefits were terminated, told plaintiff that if she brought verification of Dawn's student status and reapplied for food stamps before the end of August, she would not lose her food stamp benefits for the month of September 1986.

Plaintiff never received the 12 August notice terminating her food stamp benefits. She mailed verification of Dawn's student status to Ms. Hardie's office on 26 August, but she did not reapply for food stamps during August.

On 10 September 1986, plaintiff contacted Ms. Hardie upon learning she would not receive food stamps for September. When informed the termination was irrevocable for that month, plaintiff appealed the Guilford County Department of Social Services' decision to State Hearing Officer J. McRay Harward. Mr. Harward affirmed Guilford County's termination of plaintiff's food stamp benefits, and his decision became final ten days later when plaintiff failed to appeal it to the Chief Hearing Officer of the Department of Human Resources.

Plaintiff, pursuant to N.C.G.S. § 150B-43, appealed the administrative decision to superior court, which reaffirmed the decision of the State hearing officer.

From the superior court order, plaintiff appeals.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, attorney for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Associate Attorney General Joe L. Webster, for defendant-appellee (Secretary of the North Carolina Department of Human Resources).

ORR, Judge.

> When an appellate court is reviewing the decision of another court—as opposed to the decision of an administrative agency—the scope of review to be applied by the appellate court under G.S. § 150A-52 is the same as it is for other civil cases. That is, we must determine whether the trial court committed any errors of law. *See* N.C. Gen. Stat. § 7A-27(b) (1981) and Rule 10(a) of the North Carolina Rules of Appellate Procedure.

American Nat'l. Ins. Co. v. Ingram, 63 N.C. App. 38, 41, 303 S.E. 2d 649, *cert. denied*, 309 N.C. 819, 310 S.E. 2d 348 (1983).

The trial court, when reviewing the Department of Human Resources' decision, was governed by the standard of review set out in N.C.G.S. § 150B-51(b):

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

On appeal, plaintiff contends the procedures used by the Guilford County Department of Social Services violated N.C.G.S. § 150B-51(b)(3) by allowing the county to improperly require verification of Dawn Tay's student status and income. We agree.

Federal regulations govern verification of information concerning a food stamp recipient by a state agency.

In the present case, since plaintiff is not an initial food stamp applicant, the applicable regulation is 7 C.F.R. § 273.2(f)(8). This regulation allows verification of information after initial certification in two situations.

First, 7 C.F.R. § 273.2(f)(8)(i) authorizes the verification of certain mandatory factors and all questionable information, when a recipient's food stamp benefits are recertified.

Second, 7 C.F.R. § 273.2(f)(8)(ii) permits verification of any changes in a food stamp household reported during a certification period. These are the only two instances when the federal regulations provide for the verification of information supplied by an established food stamp recipient.

Based on 7 C.F.R. § 273.2(f)(8)(i) and (ii) and the facts in this case, we find no basis for verification of any factor affecting the food stamp benefits of plaintiff's household at the time this incident took place.

Plaintiff's statement that her daughter Dawn might attend college in the fall of 1986 merely notified Guilford County of a *potential* change in the household at a *future* date. Furthermore, this statement, when made to social worker Hardie in May 1986 during recertification, was insufficient to prevent plaintiff's household from being recertified as eligible for food stamps. Thus, the checking of Dawn Tay's student status and income in August 1986 was not authorized under 7 C.F.R. § 273.2(f)(8)(i), as verification of questionable information for the purpose of recertification.

As the record further discloses, Dawn Tay did not leave the plaintiff's household until 14 August 1986, three days after the expiration of Guilford County's 11 August deadline for verification. Consequently, at the expiration of the deadline no change in plaintiff's household had occurred to be verified. Nor had plaintiff's duty to report the change arisen prior to 11 August 1986.

7 C.F.R. §§ 273.12(a)(1)(ii) and (2) govern the reporting of changes in a household during a certification period. These subsections require the household to report a change within ten days after the change becomes known.

Although Dawn Tay planned to attend college, her actual departure from the household could not be "known" until it, in fact, had taken place. Thus, plaintiff's duty to report the change, pursuant to 7 C.F.R. § 273.12, did not arise until 14 August 1986.

Accordingly, we conclude Guilford County's demand for verification by 11 August 1986 was not authorized by 7 C.F.R. § 273.2(f)(8)(ii), as verification of a change reported during a certification period.

Consequently, the verification procedure as used in this particular case by Guilford County is unsupported by the federal regulations, and, therefore, is in violation of N.C.G.S. § 150B-51(b)(3).

This Court acknowledges the importance of agency monitoring of the food stamp program. However, it is difficult to comprehend its application in this case. Here a food stamp recipient has a daughter planning to attend college—a commendable endeavor. Moreover, the food stamp recipient voluntarily and in advance of any actual change informed Social Services that her daughter *might* be leaving home to attend college. An honest effort to inform Social Services of potential changes should be encouraged. Instead, plaintiff's willingness to inform Social Services in advance and her subsequent failure to confirm the information to Social Services quickly enough, resulted in her entire family being terminated from the program under a flawed procedural requirement. Such a result is clearly unacceptable.

For the reasons discussed above, we reverse the judgment of the superior court with directions for that court to reverse the

judgment of the Department of Human Resources Division of Social Services.

In light of our present decision, we decline to address plaintiff's remaining assignments of error.

Reversed.

Chief Judge HEDRICK and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. ANTHONY TYRONNE LEAK

No. 8819SC30

(Filed 31 May 1988)

1. **Criminal Law § 75.8— Miranda warnings—repetition not required**

There was no merit to defendant's contention that an officer should have repeated the *Miranda* warning to defendant before proceeding with the interrogation where the evidence showed that, when defendant initially advised officers that he did not wish to answer questions without an attorney being present, the interrogation ceased, and it was only as the charges were being explained to defendant that he volunteered that he wanted to tell his side of the story; the length of time between the giving of the first warning and the interrogation was at most a matter of minutes; the *Miranda* warning and the interrogation took place in the same office with the same person as the interrogating officer the entire time; though defendant had an I.Q. of 71, he was coherent, was not under the influence of alcohol or drugs, and understood what was transpiring; there was no evidence that defendant was so mentally deficient that he had forgotten or was unaware of his *Miranda* rights; and the subject remained the same, and nothing occurred between the interrogation and defendant's statement which would dilute the initial warning in any respect.

2. **Criminal Law § 75.4— custodial interrogation—invocation of right to counsel—subsequent confession**

Defendant's confession made after he had previously invoked his right to counsel during interrogation was not inadmissible under *Edwards v. Arizona*, 451 U.S. 477, where interrogation ceased when defendant indicated he wanted counsel, the officer was explaining the charges to defendant when defendant stated that he wanted to tell his side of the story, and defendant thus initiated the conversation which led to his incriminating statements.

3. **Criminal Law § 75.2— 4½-hour delay in taking defendant before judicial officer—no coercive factor rendering confession involuntary**

There was no merit to defendant's contention that a 4½-hour delay in taking him before a judicial officer after service of the warrant was a coercive fac-

tor which rendered his confession involuntary, since defendant did not show any causal connection between the confession and the delay.

APPEAL by defendant from *Boner (Richard D.), Judge.* Order entered 17 August 1987 and judgments entered 20 August 1987 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 10 May 1988.

Defendant was charged in separate bills of indictment with the offenses of felonious larceny, first-degree rape, first-degree burglary, first-degree kidnapping and first-degree sexual offense. From verdicts of guilty to each of the offenses and judgments entered thereon, defendant appeals.

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

Clark R. Bell for defendant-appellant.

SMITH, Judge.

Prior to trial, defendant made a motion to suppress any statement made by him to law enforcement officers during a custodial interrogation. Defendant's sole assignment of error is that the trial court erred in denying his motion. We disagree.

The State's evidence offered at the suppression hearing tends to show that the crimes for which defendant stands convicted were committed on 15 March 1987. In the late afternoon of 18 March 1987 following an extensive manhunt, several law enforcement officers of the Randolph County Sheriff's Department (RCSD) and the State Bureau of Investigation, some dressed in camouflaged clothing, went to Allred's Trailer Park to arrest defendant for the offenses charged in the bills of indictment. The officers first saw defendant hiding under a trailer. Subsequently, Detective Barry Bunting (Bunting) observed defendant on the floorboard of an automobile parked at the trailer park. Bunting drew his service revolver and twice ordered defendant to exit the vehicle. When defendant refused to comply, Bunting grabbed defendant by his hair, pulled him from the vehicle and pushed him to the ground. Defendant began to squirm, and Bunting told defendant to cease or he would "blow [defendant's] brains out." At the time defendant was taken into custody, all officers present

had their weapons drawn. Defendant was subsequently placed in a police car and while seated therein Deputy Sheriff Tony Hasty told defendant that he "ought to blow [defendant's] head off."

Defendant was then transported to the RCSD offices where he was subsequently turned over to Litchard Hurley, the officer in charge of the investigation. Hurley took defendant to his office, a room approximately 12 feet 8 inches by 10 feet (12' 8" x 10') which had two small desks, several chairs and some filing cabinets located therein. Also present in the office were RCSD Officers Earl Small and James Allred. All the officers present had their weapons with them. At approximately 6:30 p.m., Allred began to read defendant his *Miranda* rights while Hurley was filling out the back of the warrants of arrest which had been previously issued. As each component of the *Miranda* warning was read to defendant, he was asked if he understood. If defendant acknowledged that he did understand, a check-mark was placed on the rights form beside the particular right. When asked if he was "willing to talk . . . without having a lawyer present," defendant said "no." Hurley then started to give defendant copies of each warrant and began telling defendant the offenses with which he was charged. While this exchange was proceeding, defendant said he would like to tell his side of the story. Defendant then gave an inculpatory statement. Hurley reduced the statement to writing and gave it to defendant who read it and signed it on the last page.

The State's evidence further tends to show that while in Hurley's office, no one ever threatened defendant or promised him anything. The officers did not smell any alcohol on defendant and he did not appear to be disoriented. He spoke coherently and appeared to understand what was transpiring. At some point while in Hurley's office, though the record is unclear as to when, defendant was told that a co-defendant had been arrested and had made a confession which implicated defendant. Everyone in the room was sitting down and at least one of the officers left the room to get defendant a cup of coffee. Defendant was also allowed to use the bathroom. At the time of the interrogation, the door to the office was closed. The officers remained in the room with defendant for at least two hours. The court found unbelievable defendant's evidence that he was under the influence of drugs and alcohol, that he made no statement and that he did not waive his

rights. Approximately four hours after defendant's arrest, he was taken before a magistrate. In the trial court's order denying defendant's motion to suppress, the trial judge made extensive findings of fact and conclusions of law which generally encompass the facts as herein related.

Initially, we point out that the findings of fact made by the trial court at the *voir dire* hearing on the voluntariness of a confession are binding on this court if supported by any competent evidence in the record. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155, 102 S.Ct. 1741 (1982). All of the trial judge's extensive findings are supported by such evidence. We therefore address the trial court's conclusions on which it based its order admitting defendant's statement into evidence.

[1] The test to determine the admissibility of defendant's confession under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), is whether the confession is voluntary under the totality of the evidence in this case. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). In deciding this issue, we first address defendant's contention that Officer Hurley should have repeated the *Miranda* warning to defendant before proceeding with the interrogation. The evidence shows, however, that when defendant initially advised the officers that he did not wish to answer questions without an attorney being present, the interrogation ceased. It was only as the charges were being explained to defendant that he volunteered that he wanted to tell his side of the story.

In addition to the totality of the circumstances, some of the factors which must be considered in determining whether initial warnings have become so stale and remote that there is a possibility that a defendant is not aware of his constitutional rights at the time of a subsequent interrogation are: (1) the length of time between the warning and the interrogation; (2) whether the warnings were given and the subsequent interrogation occurred in the same place; (3) whether the warnings and interrogation were conducted by the same officer; (4) the extent to which a subsequent statement differs from a previous statement, if any; and (5) the apparent intellectual and emotional state of a suspect. *State v. Artis*, 304 N.C. 378, 283 S.E. 2d 522 (1981); *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death sentence vacated*, 428 U.S.

904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976). Here, the length of time between the giving of the first warning and the interrogation was, at most, a matter of minutes. The *Miranda* warning and the interrogation all took place in the same office, and Officer Hurley was the interrogating officer the entire time. Though the record indicates that defendant has an I.Q. of 71, it appears from the record and the trial court found that defendant was coherent, was not under the influence of any alcohol or drugs and understood what was transpiring. Though defendant's mental condition is a factor to be considered, that factor standing alone will not render an otherwise voluntary confession inadmissible. *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983); *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976). It is apparent that the trial court did consider defendant's mental capacity in reaching its conclusion that defendant's confession was voluntary because it also found that defendant's intelligence level was not so low as to render the waiver of his rights involuntary or otherwise invalid. There was no evidence that defendant was so mentally deficient that he had forgotten or was unaware of his *Miranda* rights or that an inordinate amount of time passed between the officer advising defendant of his rights and the interrogation. *State v. Artis, supra.* The subject remained the same and the record discloses that nothing occurred between the interrogations which would dilute the initial warning in any respect. *State v. McZorn, supra.* We thus hold that it was unnecessary for the officers to repeat the *Miranda* warnings.

[2] Defendant further contends that this case is controlled by *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1880, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984, 101 S.Ct. 3128 (1981). Defendant's reliance on *Edwards* is misplaced. *Edwards* merely holds that once a defendant has invoked his right to counsel at a custodial interrogation, he may not thereafter be subjected to further questioning until counsel is provided unless the accused initiates the communication, exchange or conversation with police. *Id.*

In the case at bar, defendant initiated the further communication. The only statements by the officer concerned the nature of the charges against defendant. These statements cannot be said to be an interrogation for " 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (*other than those normally attendant to*

arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed. 2d 297, 308, 100 S.Ct. 1682, 1689-90 (1980) (emphasis added). G.S. 15A-401(a)(2) requires that arrest warrants be served on a defendant. *State v. Underwood*, 84 N.C. App. 408, 352 S.E. 2d 898 (1987). Officer Hurley was attempting to complete service of the warrants when defendant indicated he wished to talk.

[3] Lastly, defendant contends that the four and one-half hour delay in taking defendant before a judicial official after service of the warrants was a coercive factor which renders defendant's confession involuntary. Defendant, however, has not shown any causal connection between the confession and the delay as required by *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). No constitutional provision requires exclusion of the statement on this ground. *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978).

The only factors concerning defendant's arrest and interrogation which could have arguably been coercive were the statements made at the scene of defendant's arrest by officers Hasty and Bunting. Though we highly disapprove of those statements, we hold that defendant's statement was voluntary considering the totality of the evidence.

The record in this case is otherwise devoid of any evidence that defendant's inculpatory statement was a response to any overbearing police procedures or questioning which were designed to elicit the statement. *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973); *State v. Blackmon*, 284 N.C. 1, 199 S.E. 2d 431 (1973). The trial court's conclusions that defendant's statement was made "freely, voluntarily and understandingly" with knowledge and understanding of "his right to counsel" coupled with the conclusion that defendant "knowingly, intelligently, and voluntarily waived . . . [these] rights" are fully supported by the findings of fact. We find

No error.

Judges JOHNSON and PHILLIPS concur.

DONALD A. BRACE v. DONALD C. STROTHER, SR., AND MARY G. STROTHER, COLLECTORS OF THE ESTATE OF DONALD C. STROTHER, JR. (DECEASED)

No. 8710SC699

(Filed 31 May 1988)

1. **Executors and Administrators § 19.1— claim against decedent arising from auto accident—failure to file within six months—all claims in excess of amount of insurance dismissed**

The trial court in a personal injury action properly dismissed all of plaintiff's claims in excess of $25,000 where plaintiff's claim arose on 2 July 1984, the day of the automobile accident and defendants' son's death; pursuant to N.C.G.S. § 28A-19-3, plaintiff had an outside time limit of six months, until 2 January 1985, to file an action against decedent's estate; and since plaintiff did not initiate this action until 13 June 1986, he was clearly barred from recovering anything from decedent's estate except "to the extent that the decedent . . . [was] protected by insurance coverage with respect to such claim."

2. **Executors and Administrators § 19.1; Insurance § 69— claim against decedent arising from auto accident—failure to file within six months—no coverage under plaintiff's underinsured motorist coverage**

There was no merit to plaintiff's contention that the underinsured motorist coverage contained in his automobile insurance policy fell within the exception to the six-month limitations period of N.C.G.S. § 28A-19-3, since that statute provides an exception to the limitations statute only for claims where there is insurance under which the *decedent* was an insured, and plaintiff's underinsured motorist coverage protected him only and not the decedent; moreover, since plaintiff was only legally entitled, by statute, to recover $25,000 and nothing more from decedent, he could not bring a claim for a greater amount against defendant insurance company under his underinsured motorist endorsement.

3. **Executors and Administrators § 9— parents of decedent as collectors of decedent's property by affidavit—suit against parents improper**

Plaintiff's personal injury action against defendants, parents of the driver of the automobile in which plaintiff was a passenger, was properly dismissed, since defendants were merely collectors by affidavit of decedent's estate, and plaintiff was required to bring his action against the collector or personal representative of decedent. N.C.G.S. § 28A-25-1.

APPEAL by plaintiff from *Barnette, Judge.* Order entered 12 March 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 5 January 1988.

Howard, From, Stallings & Hutson by John N. Hutson, Jr., for plaintiff appellant.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker by Gary S. Parsons and Alan J. Miles for defendant appellees.

COZORT, Judge.

Plaintiff filed this personal injury action to recover damages incurred in an automobile accident while riding with defendants' deceased son. Defendants denied negligence and filed a motion for summary judgment. From the trial court's order granting partial summary judgment in defendants' favor, plaintiff appeals. We affirm.

On 2 July 1984, plaintiff was a passenger in an automobile owned and operated by defendants' son. An accident occurred which killed defendants' son instantly and severely injured plaintiff.

At the time of the accident defendants' son had an automobile liability insurance policy with Nationwide Mutual Insurance Company (Nationwide). This policy provided bodily injury coverage of up to $25,000.00. Plaintiff also had an automobile insurance policy with Nationwide which provided underinsured motorists coverage up to $100,000.00.

On 10 August 1984, defendants applied to the Wake County Clerk of Superior Court for issuance of an affidavit for collection of personal property for their deceased son's estate. On 27 December 1984, defendants filed a final affidavit of collection, disbursement and distribution of their son's personal property with the Clerk of Superior Court. Defendants were never appointed collectors or personal representatives for their son's estate.

On 13 June 1986, plaintiff filed a complaint against defendants as collectors for their son's estate. His complaint alleged that defendants' son's negligence was the proximate cause of his injuries and that defendants' son was underinsured under the terms of plaintiff's policy with Nationwide. He further alleged that he had tried to recover under the underinsured motorists provision of his policy, but that Nationwide had refused to pay. Plaintiff then prayed for the following relief: (1) actual damages in excess of $300,000.00 against defendants; (2) punitive damages in excess of $100,000.00 against defendants; (3) actual damages against Nationwide for the limits of its underinsured motorist coverage; and (4) appointment of an administrator for the estate of defendants' son.

After answering the complaint, defendants and Nationwide filed a motion for summary judgment. The trial court considered the motion as one for partial summary judgment and ruled only on the issues argued at the summary judgment hearing. Accordingly, the trial court granted summary judgment to defendants and Nationwide on the following issues: (1) plaintiff's claim for punitive damages; (2) plaintiff's claim against defendants because they lacked capacity to be sued; (3) plaintiff's claims in excess of $25,000.00; and (4) plaintiff's claims against Nationwide. From this order, plaintiff appeals.

[1] Plaintiff first argues that the trial court erred in dismissing all of his claims in excess of $25,000.00 and in dismissing his claim against Nationwide. We disagree.

N.C. Gen. Stat. § 28A-19-3, "Limitations on presentation of claims," provides:

> (b) All claims against a decedent's estate which arise at or after the death of the decedent, . . . founded on contract, tort, or other legal basis are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent unless presented to the personal representative or collector as follows:
>
> * * * *
>
> (2) With respect to any claim other than a claim based on a contract with the personal representative or collector, *within six months after the date on which the claim arises.*
>
> * * * *
>
> (i) Nothing in this section shall bar:
>
> (1) Any claim alleging the liability of the decedent or personal representative; . . .
>
> * * * *
>
> to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim . . . . (Emphasis added.)

In the present action, plaintiff's claim arose on 2 July 1984, the day of the automobile accident and defendants' son's death.

Plaintiff had an outside time limit of six months, or until 2 January 1985, to file an action against the decedent's estate. Since plaintiff did not initiate this action until 13 June 1986, he is clearly barred from recovering anything from the decedent's estate, except "to the extent that the decedent . . . is protected by insurance coverage with respect to such claim . . . ." N.C. Gen. Stat. § 28A-19-3(i) (1984). The decedent in this case had an automobile liability insurance policy with Nationwide with policy limits of $25,000.00 for bodily injury. Plaintiff may recover only up to this amount if he prevails in his negligence action against decedent's personal representative or collector.

[2] Plaintiff concedes that his recovery is limited to the amount of insurance applicable to this claim, since he filed suit more than six months after the decedent's death. He contends, however, that the underinsured motorist coverage contained in his automobile insurance policy also falls within the exception to the limitations statute. We disagree.

The language of N.C. Gen. Stat. § 28A-19-3(i) provides an exception to the limitations statute only for claims where there is insurance under which the *decedent* was an insured. Plaintiff's underinsured motorist coverage protected himself only and not the decedent. In addition, the right to recover under an "uninsured motorist endorsement is derivative and conditional." *Brown v. Casualty Co.*, 285 N.C. 313, 319, 204 S.E. 2d 829, 834 (1974). Unless an insured is " 'legally entitled to recover damages' . . . from the uninsured motorist the contract upon which he sues precludes him from recovering against [the insurance company]." *Id.* The insurance company assumes liability only for damages that an insured may recover in a court of law in an action against the uninsured motorist. *Id.* at 320, 204 S.E. 2d at 834. "Any defense available to the uninsured tort-feasor should be available to the insurer." *Id.* at 319, 204 S.E. 2d at 834. We believe the same principles should apply to underinsurance provisions.

All that plaintiff may recover from the underinsured decedent is the $25,000.00 coverage the decedent had under his policy with Nationwide. Since plaintiff is only legally entitled, by statute, to recover this amount and nothing more from the decedent, he may not bring a claim for a greater amount against Nationwide under his underinsured motorist endorsement. Ac-

cordingly, we hold that the trial court properly dismissed all claims against Nationwide and limited plaintiff's claim to $25,000.00.

[3] Plaintiff next argues that the trial court erred in dismissing the action against defendants on the grounds that defendants lacked the capacity to be sued. We disagree.

N.C. Gen. Stat. § 28A-18-1(a) provides that "[u]pon the death of any person, all demands whatsoever, and rights to prosecute or defend any action . . . against such person . . . shall survive to and against the *personal representative* or *collector* of the estate." (Emphasis added.) This statute serves a twofold purpose: "(1) To declare what causes of action survive the death of the person in whose favor or against whom they have accrued; and (2) to designate the persons who *may* sue or *be sued* upon such surviving causes of action." *McIntyre v. Josey*, 239 N.C. 109, 110, 79 S.E. 2d 202, 203 (1953) (emphasis added).

In addition, N.C. Gen. Stat. §§ 28A-11-3(a)(4) and 28A-13-3(a)(15) provide that collectors and personal representatives respectively may defend actions against an estate. A collector by affidavit, however, has no such authority under N.C. Gen. Stat. § 28A-25-3, which lists the duties of a collector by affidavit. The procedure for collection of property by affidavit provides an informal means of collecting and distributing the property of a small estate with less than $10,000.00 in property. N.C. Gen. Stat. § 28A-25-1 (1984).

In the case at bar, plaintiff was required by N.C. Gen. Stat. § 28A-18-1 to bring his action against the collector or personal representative. He filed his action against defendants in their representative capacity as collectors. Defendants were merely collectors by affidavit under N.C. Gen. Stat. § 28A-25-1. Since plaintiff failed to bring his action against the proper party or parties, his action against defendants was properly dismissed.

Finally, plaintiff argues that the trial court erred in denominating its order as one for partial summary judgment. We agree with plaintiff's contention; however, we find no reversible error.

The trial judge below granted summary judgment as to the issues argued by defendants at the summary judgment hearing.

This order fully disposed of all plaintiff's claims against defendants and Nationwide and barred plaintiff from any further proceedings against these parties on these issues. The only issue left from plaintiff's complaint is his request that an administrator be appointed for decedent's estate. A superior court judge lacks jurisdiction to appoint an administrator, because the original and exclusive jurisdiction to appoint administrators lies with the clerk of superior court. *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976); N.C. Gen. Stat. § 28A-2-1 (1984). Therefore, the trial court erred in denominating its order as one for partial summary judgment because there were no issues left to be decided in this action. Mislabeling the judgment as "partial" was not reversible error because the trial court's substantive rulings were correct.

We hold that the order of the trial court should be affirmed, even though erroneously denominated as one for partial summary judgment.

Affirmed.

Judges PARKER and GREENE concur.

KEN-MAR FINANCE, PLAINTIFF v. LYNETTE McKENZIE HARVEY, DEFENDANT

No. 888DC24

(Filed 31 May 1988)

1. **Consumer Credit § 1; Unfair Competition § 1— security interest taken in debtor's household furnishings—practice not unfair or deceptive**

Plaintiff's action in taking a nonpossessory, nonpurchase money security interest in defendant's household goods and furnishings was neither unfair nor deceptive, since federal regulations specifically stating that such action is an unfair and deceptive trade practice were not in effect when the original loan agreement was executed, and N.C.G.S. § 53-180(f), in existence at the time of the loan, provided that real property was the only type of property which could not be used to secure a loan under N.C.G.S. § 53-173.

2. **Consumer Credit § 1; Homestead and Personal Property Exemptions § 6— security agreement taking interest in debtor's household furnishings—practice not deceptive—debtor entitled to personal property exemption**

A security agreement taking an interest in defendant's household goods and furnishings was not deceptive in light of N.C.G.S. § 1C-1601(c) which en-

titles a debtor to retain free from judgment $2,500 worth of household goods and furnishings, since the exemption is available at the election of the debtor, and, had defendant not made the election, her property would be subject to seizure and plaintiff's action for possession of the property would be an action permitted by law.

3. **Consumer Credit § 1; Unfair Competition § 1— acceptance of assigned note and security interest in household furnishings—no unfair and deceptive trade practice**

Plaintiff's acceptance of an assigned note and security interest in household goods and furnishings subsequent to the enactment of federal regulations specifically stating that such action was an unfair and deceptive trade practice did not violate N.C.G.S. § 75-1.1, since the assignment was merely a transfer of the original creditor's rights to plaintiff and did not create a new contract between defendant and plaintiff.

4. **Consumer Credit § 1— creditor in possession of debtor's car—money judgment for creditor proper—no double recovery**

The trial court did not err in granting a money judgment when plaintiff already had possession of defendant's car, since the car was worthless, the trial court had exempted all of defendant's household furnishings, and there was therefore no double recovery.

APPEAL by defendant from *Goodman (Rodney R.), Judge.* Judgment entered 3 September 1987 in District Court, WAYNE County. Heard in the Court of Appeals 5 May 1988.

On 8 February 1985, defendant executed a note and security agreement to Imperial Finance Company of Goldsboro, Inc. (Imperial Finance) in the amount of $644.83. The agreement provided for scheduled payments of $38.00 per month over a period of 24 months. To secure the loan, defendant put up her car and various household goods and furnishings as collateral.

On 16 May 1986, plaintiff, a North Carolina corporation doing business in consumer finance, purchased defendant's note from Imperial Finance. At the time of the acquisition of the note, defendant was three months behind in her payments. Plaintiff's president, Kenneth Davis, testified that on 4 June 1986 defendant came into plaintiff's office to make a $15.00 payment on her account. Davis talked to defendant about the arrearages in her account and although he told defendant that a reduced payment was unacceptable he accepted her check. Davis further testified that plaintiff's employees made several unsuccessful efforts by telephone to collect on defendant's account.

On 22 July 1986, plaintiff filed a complaint for money owed and a complaint to recover possession of personal property. On 7 August 1986, the Clerk of Superior Court in Wayne County entered an Order of Seizure in Claim and Delivery which awarded plaintiff possession of defendant's car and the household goods and furnishings covered by the security agreement. Defendant subsequently made a timely appeal to the district court. On 5 September 1986, the district court modified the clerk's order and exempted from seizure defendant's household goods and furnishings. The court concluded that these items were nonpossessory, nonpurchase money household goods and thus exempt from seizure under G.S. 1C-1601(a)(4) and (e)(7).

On 11 August 1986, defendant filed an answer and counterclaim to plaintiff's complaint for money judgment alleging that defendant was not in default as plaintiff failed to give required notice that it would no longer accept partial payment. Defendant further alleged that plaintiff willfully committed unfair and deceptive trade practices in violation of G.S. 53-180(g) and G.S. 75-1.1.

On 3 September 1987, the district court entered judgment for plaintiff in the amount of $373.00 plus 8% interest from the date of defendant's last payment. Defendant appeals.

B. Geoffrey Hulse for plaintiff-appellee.

North Carolina Legal Services Resource Center, by Margot Roten, for defendant-appellant.

SMITH, Judge.

Defendant brings forth in the record on appeal 12 assignments of error; however, her brief fails to address several of them. Those assignments of error not argued in defendant's brief are deemed abandoned and will not be addressed. App.R. 28(a). In her remaining assignments of error, defendant contends that the district court erred by not finding that the loan was void due to plaintiff's unfair and deceptive trade practices and that the court erred in granting plaintiff a money judgment when plaintiff had already taken possession of defendant's car. We disagree with both of these contentions.

[1] Defendant's contentions regarding plaintiff's alleged unfair and deceptive trade practices center around plaintiff's non-

possessory, nonpurchase money security interest in defendant's household goods and furnishings. Defendant argues that the taking and attempt to enforce such a security interest violates North Carolina statutes and Federal Trade Commission (FTC) regulations against unfair and deceptive trade practices and that it also violates the common law and equity principles.

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." Those engaged in such practices are subject to both civil penalties and private civil actions. G.S. 75-15.2 and G.S. 75-16. Additionally, the North Carolina Consumer Finance Act, G.S. 53-164 *et seq.*, renders void any loan contract in which the licensed lender engages in unfair competition or deceptive trade practices.

There is no precise definition of "unfair" or "deceptive." Determining whether certain acts or practices are deceptive or unfair depends upon the facts of each case and the impact of those acts or practices on the marketplace. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981). Our courts have previously held that "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscruplous (sic) or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980). Further, a practice is deceptive if it "has the capacity or tendency to deceive. . . . Proof of actual deception is unnecessary." *Id.* at 265, 266 S.E. 2d at 622. Good faith is not a defense to allegations under G.S. 75-1.1. The effect of the actor's conduct on the marketplace is the relevant gauge as to whether unfairness or deception has occurred in a transaction. *Marshall, supra.* In applying the above-mentioned criteria to the facts of this particular case, we hold that plaintiff's actions and practices were neither unfair nor deceptive so as to violate G.S. 75-1.1 and G.S. 53-164 *et seq.*

Defendant points to FTC Credit Practices Rule 16 C.F.R. Section 444.2(4) (1985) which specifically provides that the taking of a nonpossessory, nonpurchase money security interest in household goods is an unfair and deceptive trade practice and to federal decisions which have found that taking that kind of security interest constitutes an unfair and deceptive trade practice. Because

of the similarity in language between G.S. 75-1.1 and Section 5(a)(1) of the FTC Act, 15 U.S.C. Section 45(a)(1), our courts may look to federal court decisions which interpret the FTC Act for guidance in construing G.S. 75-1.1. *Johnson, supra.* However, the above-cited federal regulation was not in effect when the original loan agreement was executed. A subsequent regulation may not be given retroactive effect if it impairs an obligation under a contract or disturbs vested rights. *See Hospital v. Guilford County,* 221 N.C. 308, 20 S.E. 2d 332 (1942). Our analysis, therefore, must be based on the laws and conditions in existence at the time defendant entered into the loan agreement. At that time, G.S. 53-180(f) provided that real property was the only type of property which could not be used to secure a loan under G.S. 53-173 of the North Carolina Consumer Finance Act. Thus, when defendant entered into the security agreement, a lender could presumably secure a loan by taking a security interest in any type of personal property. *Barclays American/Credit Co. v. Riddle,* 57 N.C. App. 662, 292 S.E. 2d 177, *disc. rev. denied,* 306 N.C. 555, 294 S.E. 2d 369 (1982).

[2] Defendant next argues that the security agreement was deceptive in light of G.S. 1C-1601(c) which entitles a debtor to retain free from judgment $2,500.00 worth of household goods and furnishings. Defendant reasons that by entering into and attempting to enforce the agreement plaintiff violated G.S. 75-51(6) which prohibits a creditor from representing to the debtor that nonpayment of a debt will result in seizure of the debtor's property even though such seizure is not, in reality, permitted by law. Thus, defendant argues plaintiff misled defendant by letting her believe that it could seize the property when actually her property was protected under G.S. 1C-1601(c).

The record before us does not reveal whether plaintiff knew at the time it acquired the note what the property was worth. The security agreement does not indicate the values of the secured properties. However, even if the values were listed on the agreement, there still would be no deception because the exemption under G.S. 1C-1601(c) is available at the election of the debtor. G.S. 1C-1603. Had defendant not made the election, her property would be subject to seizure and plaintiff's action for possession of the property would be an action permitted by law. *See* G.S. 25-9-501.

[3] Defendant further asserts that plaintiff's acceptance of the assigned note and security interest on 16 May 1985 violated G.S. 75-1.1. We disagree. In determining one's obligations under a contract, it has been a long-held rule that the law in effect at the time the contract comes into existence is the law which governs the duties of the parties. *Hamilton v. Travelers Indemnity Co.*, 77 N.C. App. 318, 335 S.E. 2d 228 (1985), *disc. rev. denied*, 315 N.C. 587, 341 S.E. 2d 25 (1986). The assignment here is merely a transfer to plaintiff of Imperial Finance's rights under Imperial Finance's contract with defendant. The assignment does not create a new contract between defendant and plaintiff as there was no meeting of the minds between them—an essential element to the formation of a contract. *See* 6 Am. Jur. 2d, *Assignments*, Section 109. At the time defendant signed the note and security agreement, there was no statutory or regulatory prohibition against taking a nonpossessory, nonpurchase money security interest in defendant's household goods and furnishings.

We also note that had the FTC regulation been in effect, violation of its provisions would not, as defendant contends, constitute a *per se* violation of G.S. 75-1.1. The regulation would serve only as guidance in construing this statute. *See Johnson, supra.*

[4] Finally, defendant contends that the court erred in granting a money judgment when plaintiff already had possession of defendant's car because such a judgment allowed plaintiff to enjoy a double recovery. The record shows that prior to the money judgment award, the district court exempted from judgment all of defendant's household furnishings which were put up as security. Additionally, testimony from both plaintiff and defendant at the hearing for a money judgment tended to show that the car which defendant had also put up as security and which plaintiff had already repossessed was worthless. G.S. 25-9-501 provides that when a debtor is in default "a secured party . . . may reduce his claim to judgment, foreclose or otherwise enforce the secured interest by any available judicial procedure. . . . The rights and remedies . . . are cumulative." Plaintiff, because of the court's prior exemption of defendant's household goods and the apparent worthlessness of defendant's car, secured what was owed to it under the promissory note by way of a money judgment. While we do not approve of plaintiff having filed both claims simul-

taneously, we hold that given the particular facts of this case, there was no double recovery and that defendant was not prejudiced by plaintiff's actions. For the foregoing reasons, the judgment of the lower court is

Affirmed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ANGELA SERAPHEM

No. 8712SC955

(Filed 31 May 1988)

1. **Constitutional Law § 45— court-appointed counsel removed—defendant appearing pro se—court's explanations sufficient**

The trial court complied with N.C.G.S. § 15A-1242 when he allowed defendant to remove her court-appointed counsel and allowed her to proceed *pro se* where the trial court explained to defendant the maximum penalties for the charges against her and emphasized the seriousness of her plight, and defendant stated on several occasions during the judge's explanations that she understood her situation completely, that she did not want the court-appointed counsel to represent her, and that she wanted to represent herself.

2. **Constitutional Law § 46— court-appointed counsel removed—same attorney appointed as standby counsel—no error**

The trial judge did not abuse his discretion by appointing a particular attorney as standby counsel after removing him as counsel, and there was no merit to defendant's contention that the attorney had a "conflict of interest" because defendant was contemplating a lawsuit against him and the public defender's office for his alleged neglect and misconduct in handling her case. N.C.G.S. § 15A-1243.

3. **Forgery § 2.2— forgery of and uttering forged check—sufficiency of evidence that checks were forged**

In a prosecution for forgery and uttering a forged check, there was no merit to defendant's contention that the State failed to prove that checks were actually forged where the checks in question were drawn by John Holbrook, but the president of the bank on which the checks were drawn testified that the sole name on the signature authorization card of the checking account was Jan Holbrook; there was thus evidence that the checks were falsely made; and there is a presumption that one in possession of a forged instrument, who attempts to obtain money or goods with that instrument, has either forged or consented to the forging of the instrument.

4. Constitutional Law § 66— defendant's absence from trial because of suicide attempt—defendant not prejudiced

Defendant was not prejudiced by her absence during the jury's deliberation and delivering of its verdict, since the jury was not informed that defendant was absent due to her attempted suicide, and standby counsel was present throughout the proceedings.

APPEAL by defendant from *Coy E. Brewer, Jr., Judge.* Judgment entered 18 May 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 8 March 1988.

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

James R. Parish for defendant-appellant.

BECTON, Judge.

Defendant, Angela Seraphem, also known as Janet Holbrook, was convicted of two counts of forgery and two counts of uttering a forged check for which she was sentenced to imprisonment for four four-year terms. She appeals. We find no error.

I

The State presented evidence that on 24 January 1986 defendant presented a check and deposit slip to Denice Walters, a teller at the drive-in window of the Cumberland Road branch of North Carolina National Bank (NCNB). Walters noticed that the zip code on the check did not match the address. She then examined the account and discovered that the name on the account was different from the name on the deposit slip. She advised defendant that the transaction would take a few extra minutes. The name on the deposit slip was Jan Holbrook Reeves. The check was drawn for $88.34. The net deposit was $20.00, and defendant was to receive $68.34. The check was drawn on an Ohio State Bank account in the name "Save Now," a business. It was signed by John Holbrook, payable to Jan Holbrook Reeves, and endorsed by Jan Holbrook Reeves. During the delay in processing, defendant drove away. Walters then phoned other branches of NCNB to alert them regarding the checks.

Later that day, defendant presented a check to Catherine Duncker, a bank teller at the drive-in window of the Spring Lake

branch of NCNB. Duncker was suspicious of the check because she had been alerted earlier by another bank that a woman was passing questionable checks on a "Save Now" account of the Ohio State Bank. Defendant's check was drawn on such an account. The check was payable to Sharon Satory in the amount of $194.81. Defendant presented a deposit slip with the check, and attempted to deposit $100.00 and to receive $94.81. The name of the drawer was illegible but contained the letters JOH. Duncker attempted to stall defendant as another teller phoned the police. However, defendant became impatient and departed. A Spring Lake police patrolwoman arrived as defendant drove away. She and several other officers pursued defendant and arrested her. Maps of several North Carolina cities, license plates, checks and deposit slips from the Ohio State Bank, a checkbook for an account in the name Jan Holbrook, an ID activity card containing a photograph of defendant under the name Janet Holbrook, and a duplicate Virginia motor vehicle registration card for Wanda Sue Holbrook were all found in defendant's car.

The Vice President of Ohio State Bank testified that an account in the business name "Save Now" was opened by Jan Holbrook on 10 October 1979 and closed 24 January 1980. He stated that Jan Holbrook's name alone appeared on the signature card for that account.

Defendant testified that she did not author the checks and that the checks were passed by Janet Holbrook who died 24 January 1986.

II

Defendant raises six issues on appeal.

A

[1] Defendant first contends that the trial judge erred by failing to comply with N.C. Gen. Stat. Sec. 15A-1242 when allowing her to remove Mr. Jerome P. Trehy, Jr., her court appointed counsel, and allowing her to proceed *pro se*. Section 15A-1242 provides:

> Defendant's election to represent himself at trial.
>
> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only

after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Defendant argues that the trial judge failed to make inquiries sufficient to affirmatively show that she knowingly, voluntarily and understandingly waived counsel. She argues that the trial judge did not make the appropriate inquiries at the time he heard her motion to remove Mr. Trehy. Rather, the trial judge removed Mr. Trehy, then on the following day, just before trial, inquired of defendant's intentions to proceed on her own behalf.

We are satisfied by our examination of the transcript and record that the trial judge's inquiry complied with Section 1242 and that defendant knowingly, intelligently, and voluntarily waived her right to counsel. The trial judge explained to the defendant the maximum penalties for the charges against her and emphasized the seriousness of her plight. Defendant stated on several occasions during the judge's explanations that she understood her situation completely, that she did not want Mr. Trehy to represent her, and that she wanted to represent herself.

B

[2] Defendant next contends that the trial judge erred by appointing Mr. Trehy as standby counsel after removing him as counsel. N.C. Gen. Stat. Sec. 15A-1243 provides:

> When a defendant has elected to proceed without the assistance of counsel, the trial judge *in his discretion* may appoint standby counsel to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion. (Emphasis added.)

We first note that appointment of standby counsel is a discretionary matter for the trial judge. Thus, our standard of review is

abuse of discretion. *See State v. Kuplen*, 316 N.C. 387, 343 S.E. 2d 793 (1986). In the instant case, defendant argues, not that standby counsel should not have been appointed, but rather that a particular attorney was somehow unfit to serve as standby counsel. Defendant argues that Mr. Trehy had a "conflict of interest" because defendant was contemplating a lawsuit against him and the public defender's office for his alleged neglect and misconduct in handling her case. Furthermore, defendant advised the trial judge that she had lost confidence in Mr. Trehy and would not consider any of his advice.

As we noted earlier, defendant did not attempt or desire to replace Mr. Trehy with different counsel. She did not question his competence. She was disturbed that he had not devoted the amount of time to her case that she thought appropriate. This complaint, coupled with her general criticisms of the public defender's office, do not rise to the level of a "conflict of interest." Moreover, defendant conferred with Mr. Trehy repeatedly during her trial. The trial judge did not abuse his discretion by appointing Mr. Trehy as standby counsel.

C

[3] Defendant's third and fourth contentions are that the trial judge erred by denying her motions to dismiss the charges of forgery and uttering a forged check. Simply stated, defendant argues that the State failed to prove that the checks were actually forged. Consequently, she could not be convicted of either forgery or uttering a forged check.

The offense of forgery consists of three elements: (1) a false making or alteration of some instrument in writing; (2) a fraudulent intent; and (3) an instrument apparently capable of effecting a fraud. *State v. Phillips*, 256 N.C. 445, 124 S.E. 2d 146 (1962). Defendant asserts that the State presented no direct evidence that she signed the checks or that the signatures on the checks were false. She argues, therefore, that the first element is not satisfied. We disagree. The State presented evidence of a false making. An instrument is demonstrated false when it is shown that a person who signed another's name did so without authority. *Id.* The checks were drawn by *John* Holbrook. However, the Vice President of Ohio State Bank testified that the sole name on the signature authorization card of the "Save Now" checking ac-

count was *Jan* Holbrook. Thus, there was evidence the checks were falsely made.

There is a presumption that one in possession of a forged instrument, who attempts to obtain money or goods with that instrument, has either forged or consented to the forging of the instrument. *State v. Roberts*, 51 N.C. App. 221, 275 S.E. 2d 536, *disc. rev. denied*, 303 N.C. 318, 281 S.E. 2d 671 (1981). The mere offer of the false instrument with fraudulent intent constitutes an uttering. *State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22 (1968). The State presented substantial evidence that defendant presented two falsely made checks to tellers at two branches of NCNB on 24 January 1986 and thereby attempted to obtain money. This assignment of error is overruled.

D

[4] Defendant next contends that the trial judge erred by failing to declare a mistrial and by allowing the jury to deliberate, review evidence, and deliver its verdict in defendant's absence due to her attempted suicide. In our view, defendant was not prejudiced by her absence at that stage of the proceedings. The jury was not informed of the reason for her absence. Moreover, standby counsel was present throughout the remainder of the proceedings. This assignment of error is overruled.

Judgment is no error.

Judges ARNOLD and PARKER concur.

IN THE MATTER OF LYNETTE H., A MINOR CHILD

No. 8710DC1255

(Filed 31 May 1988)

Insane Persons § 13— statute defining mental illness as applied to minor—statute unconstitutionally vague

N.C.G.S. § 122C-3(21)(ii), which defines mental illness when applied to a minor, is unconstitutionally vague and cannot stand, and the statute is not capable of uniform understanding and application even with the help of medical experts.

In re Lynette H.

APPEAL by petitioner from *Leonard, Judge.* Order entered 6 August 1987, *nunc pro tunc,* 28 January 1987 in District Court, WAKE County. Heard in the Court of Appeals 4 May 1988.

On 24 January 1987, respondent's (Lynette H.) parents requested her admission to Holly Hill Hospital under G.S. 122C-221. A qualified physician examined respondent and determined that she was suffering from mental illness and was in need of treatment. Respondent was then admitted to Holly Hill Hospital.

On 27 January 1987, a hearing was held as required by G.S. 122C-223. Evidence presented at the hearing tended to show the following facts.

Dr. Thomas Cornwall testified that he was respondent's attending psychiatrist at Holly Hill Hospital and that, in his opinion, respondent suffered from a mental illness. He identified the mental illness as "Atypical Depression." Dr. Cornwall stated in support of his opinion that 1) respondent was depressed at home and at school and had left home to live with an older male; 2) as a result of her depression, respondent had not attended school regularly and did not have any friends at school; 3) respondent used alcohol and marijuana to cope with her depression; 4) respondent had been worried that she might be pregnant and talked about "going out with guys" in the middle of the night; 5) respondent told him that she "got real upset and out of control" and started throwing things when she found out her boyfriend no longer wanted to marry her; 6) respondent's judgment was very poor; and 7) respondent could benefit from treatment at Holly Hill Hospital but was an inappropriate candidate for out-patient treatment because she would not cooperate in any reasonable way.

Respondent's mother testified that respondent violated curfew, associated with older males (ages 19 to 21), and on one occasion she and respondent's father had to pick respondent up from the police station after respondent and a friend had been picked up by a man and taken to a motel. She also testified that respondent "walked the streets" and accepted rides from strangers. She further testified that respondent had run away from home three times from 23 December 1986 to 6 January 1987 and had spent one week living with an older male in his apartment. She finally stated that she was concerned that respondent was suicidal based on letters found in respondent's room.

Respondent testified that she was 16 years old and could "handle" her depression "pretty well." She stated that she hoped to graduate from high school, attend college and join a police force. She admitted that she was unable in the past to abide by a contract she had made with her parents regarding house rules, but stated that she would like to return home, "make a few compromises" and "be friends" with her parents. Respondent also stated that she was willing to attend out-patient therapy.

The trial court found that the evidence did not support a finding of mental illness under G.S. 122C-3(21)(ii) and entered a verbal order discharging respondent from Holly Hill Hospital. In a written order entered 6 August 1987, *nunc pro tunc*, 28 January 1987, Judge Leonard found the following facts:

1) Upon attaining the age of 16 years, Respondent learned she was no longer subject to parental authority as enforced through the Juvenile Courts by "undisciplined" and "delinquency" proceedings.

2) She then began to fail to adhere to rules established by her parents.

   a) Respondent became sexually promiscious [sic] to the point that she cohabitated briefly with her boyfriend.

   b) Respondent has used marijuana on several occasions.

3) Respondent is depressed by the deterioration of her relationships with her parents and her boyfriend.

4) Respondent is still enrolled in high school and there is no indication her attendance or grades have fallen off.

5) Respondent and her parents have allowed the parent-child relationship to deteriorate to a point that they cannot effectively communicate with their child.

6) Respondent does not desire to be institutionalized in a mental treatment facility.

The trial judge further found that "[e]vidence tending to establish suicidal idealizations was received but found not to be credible."

Judge Leonard concluded that G.S. 122C-3(21)(ii) which defines "mental illness" as applied to minors "is unconstitutionally

vague" and that respondent did not fall within the criteria for involuntary commitment as an adult. From the order of the trial court, petitioner appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Gerald M. Swartzberg, for petitioner appellant.

Elisabeth P. Clary for respondent appellee.

ARNOLD, Judge.

In North Carolina a minor is entitled to the constitutional safeguards of due process in a civil commitment hearing. *In re Long*, 25 N.C. App. 702, 214 S.E. 2d 626, *cert. denied*, 288 N.C. 241, 217 S.E. 2d 665 (1975). This Court stated in *Long*:

> It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent —which commands observance of the constitutional safeguards of due process.

Id. at 706, 214 S.E. 2d at 628 (quoting *Heryford v. Parker*, 396 F. 2d 393 (10th Cir. 1968)).

Vagueness and uncertainty obviously may void a statute. *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969). "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* at 531, 169 S.E. 2d at 888. A statute should prescribe boundaries sufficiently distinct for judges to interpret and administer it uniformly. *See United States v. Petrillo*, 332 U.S. 1 (1946).

G.S. 122C-3(21)(ii) defines mental illness when applied to a minor as

> [a] mental condition, other than mental retardation alone, that so lessens or impairs the youth's capacity either to develop or exercise age appropriate or age adequate self-control, judgment, or initiative in the conduct of his activities and

> social relationships as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control.

A finding of mental illness under the statute justifies commitment of a minor to a mental health facility even though the minor objects. G.S. 122C-3(21)(ii) can be read so that any minor who fails to exercise "age appropriate initiative" in his "activities and social relationships" so as to make it "advisable" for him to receive "guidance" is by definition mentally ill. Under this standard, it appears that very few individuals escape mental illness during their teenage years.

The definition of mental illness in G.S. 122C-3(21)(ii) is clearly susceptible to different interpretations and arbitrary applications. The excessive use of the conjunction "or" compounds the uncertainty inherent in the statute, and the terms "age appropriate" and "age adequate" are subject to varying explanations. The statute fails to prescribe an ascertainable standard to enable judges to interpret it and administer it uniformly. Accordingly, G.S. 122C-3(21)(ii) is unconstitutionally vague and cannot stand.

Petitioners argue that G.S. 122C-3(21)(ii) is capable of being understood and objectively applied with the help of medical experts. Petitioners rely on *In re Salem*, 31 N.C. App. 57, 228 S.E. 2d 649 (1976), in support of their argument. In *Salem* this Court upheld the constitutionality of the following definition of mental illness:

> The words "mental illness" shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs, and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. G.S. 122-36(d).

The Court stated in *Salem* that the definition of mental illness contained in G.S. 122-36(d) was capable of being understood and applied with the help of medical experts.

The definition of mental illness construed in *Salem* differs from the definition of mental illness at issue in the present case. The terms "age appropriate" and "age adequate" are not found in the statute construed in *Salem*. The conjunction "or" is not as extensively used in the *Salem* statute to indicate alternative stand-

ards for determining the existence of mental illness. Moreover, the definition of mental illness in *Salem* required an additional finding of imminent danger to self or others in order to result in involuntary commitment.

The definition of mental illness in G.S. 122C-3(21)(ii) is unconstitutionally vague and is not capable of uniform understanding and application even with the help of medical experts.

The trial court applied the adult standard for involuntary commitment under G.S. 122C-268(j) to respondent. G.S. 122C-268(j) states:

> To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to himself or others or is mentally retarded and, because of an accompanying behavior disorder, is dangerous to others. The court shall record the facts that support its finding.

Respondent, the trial court found, did not fall within the criteria for involuntary commitment as an adult. The definition of mental illness as applied to an adult, found in G.S. 122C-3(21)(i), differs from the definition of mental illness as applied to a minor. Furthermore, the adult standard for involuntary commitment requires a finding of dangerousness to self or others.

The trial court properly applied the adult standard for involuntary commitment after finding G.S. 122C-3(21)(ii) void for vagueness. Evidence supports the trial court's findings of fact, and the facts support the conclusion that respondent could not be involuntarily committed to a mental health facility. *See In re Frick*, 49 N.C. App. 273, 271 S.E. 2d 84 (1980). The order of the trial court is

Affirmed.

Judges ORR and GREENE concur.

STATE OF NORTH CAROLINA v. JAMES KENT HARTMAN

No. 8728SC1227

(Filed 31 May 1988)

1. **Criminal Law § 76.10— defendant's out-of-court statements—failure to raise question of lawfulness of defendant's arrest—question not considered on appeal**

Where trial counsel argued four contentions concerning the voluntariness of defendant's out-of-court statements but did not attack the admission of the statements on the ground that defendant was unlawfully arrested, defendant could not properly raise the question before the court on appeal.

2. **Rape and Allied Offenses § 5— attempted second degree rape—second degree sexual offense—sufficiency of evidence**

In a prosecution for attempted second degree rape and second degree sexual offense, evidence was sufficient to be submitted to the jury, though the victim initially identified another person as her assailant and never identified defendant as her assailant, where defendant's own statements placed him at a package store which was the crime scene, in the cooler with a woman, and in a truck as it left the package store; defendant's appearance was consistent with the general descriptions given by the victim and a store customer; defendant altered his appearance immediately after the incident; and defendant left the state when an investigator attempted to contact him and initially told the investigator that he had walked home after his car had broken down.

3. **Rape and Allied Offenses § 4— person identified by victim as assailant—charges dropped—evidence admissible**

There was no plain error in the trial court's allowing an investigator to testify that charges against the person originally identified by the victim as her assailant had been dropped.

ON writ of certiorari to review the judgment of *Ferrell, Judge.* Judgments entered 1 June 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 13 April 1988.

Defendant was charged in proper bills of indictment with attempted second degree rape in violation of G.S. 14-27.3 and second degree sexual offense in violation of G.S. 14-27.5. Evidence presented at trial tended to show the following facts.

On 3 July 1980, the victim was working at the Last Chance Package Store in Buncombe County. At approximately 10:00 p.m. a man entered the store, walked to the back of the store and left. He reentered the store, spoke to a customer and again left. He entered a third time and asked the victim to retrieve some wine from the cooler. As the victim opened the cooler, the man pushed

her inside, shoved her to the floor and fondled her. The assailant apparently heard something, told the victim to stay put and left the cooler. The victim heard the front doorbell and got up to leave the cooler. However, the assailant returned, shoved her to the floor and began to remove her clothing. He forced her to perform fellatio and then attempted to engage in intercourse but failed. The assailant left and the victim waited about a minute, left the cooler and asked some customers in the store for help. The victim described the assailant as about six feet tall with shoulder length blond hair and a full beard and mustache. She described his clothing as wet and dirty blue jeans and a brown t-shirt.

On 24 July 1980, Investigator Margaret Mull of the Buncombe County Sheriff's office showed the victim a photographic lineup. The victim identified the photograph of Michael Morgan as her assailant. The victim never identified defendant as the assailant, but she stated at trial that she had doubts that Michael Morgan was the assailant.

Eddie Putnam and three other men had been drinking and were at the Last Chance Package Store the same evening. When Putnam and his friends drove up in a truck, a man with long hair and a beard in wet and dirty clothes asked for a ride. Putnam and his friends made some purchases and left the store. The man came out of the store, said he wanted to look for some wine and went back inside the store two times. After approximately five or ten minutes, Putnam went back into the store for some cigarettes and told the man to "come on." The man got into the back of the truck and they all left. Putnam and his friends dropped the man off near I-74 which was close to defendant's home. Putnam was unable to identify the rider.

David Raley was also at the package store that evening. He testified that Michael Morgan came back from the cooler and walked out of the store shortly before the victim came out of the cooler asking for help. Raley saw Putnam's truck leave the parking lot with a rider in the back.

Investigator Mull arrested Michael Morgan after he was identified by the victim and Raley. The charges against Morgan were later dropped and defendant was arrested in Colorado.

On 31 March 1981, Investigator Mull interviewed defendant in Colorado. Defendant told Mull that on 3 July 1980 his car had broken down after a picnic and he had walked home. The next day defendant gave a written statement in which he stated:

> On or about the 3rd of July, 1980 I was intoxicated and involved in the following incidents as follows. After attending a Fourth of July party which was held at Sandy Bottoms Park, I was highly incapacitated by the influence of intoxicating liquors and marijuana and was traveling in my automobile, when suddenly I found I had blacked out or something of the sort and ran off a turn that I was intending to make. When I became aware that I had missed the road and was sitting in someone's yard, I was startled again, so I to no avail tried to get my auto out but kept hitting trees that I couldn't even see. When I couldn't get it out, I opened the door and ran, not really knowing where to. Then once again I found myself shocked at not knowing what I was doing, leaving a store where I had been with a lady in some type of cooler. After leaving the store, I caught a ride and ended up pretty close to my home that was at that time in Gerton, North Carolina.

On 3 July 1980, defendant had long hair and a beard and when he reported for work after the July 4th holiday, he had cut his hair and shaved his beard. The package store was .35 miles from the site of defendant's accident and there is a creek between the accident site and the store. Investigator Mull first attempted to contact defendant about the case on 22 July 1980. Defendant's last day of work was 22 July 1980 and he gave no notice of quitting.

The jury found defendant guilty of both offenses and he was sentenced to a 10-year term of imprisonment for attempted second degree rape and an 18 to 24-year term of imprisonment for second degree sexual offense. Defendant was not advised of his right to appeal and this Court allowed his petition for writ of certiorari on 24 June 1987.

Attorney General Lacy H. Thornburg, by Associate Attorney General Barbara A. Shaw, for the State.

James R. Parish for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in failing to suppress his out-of-court statements. Defense counsel argued four contentions concerning the voluntariness of the statements but did not attack the admission of the statements on the ground that defendant was unlawfully arrested. The trial court concluded that defendant's statements were given voluntarily and freely, and the statements were admitted at trial.

In *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982), our Supreme Court addressed an almost identical issue. The defendant in *Hunter* generally attacked the voluntariness of his confession at the voir dire hearing and failed to raise a fourth amendment challenge to his arrest. The defendant first raised the issue on appeal and the Court held that it was not timely raised. The Court stated:

> [w]hen a confession is challenged on other grounds which are not clearly brought to the attention of the trial judge, a specific objection or explanation pointing out the reason for the objection or motion to suppress is necessary. In order to clarify any misunderstanding about the duty of counsel in these matters, we specifically hold that when there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence.

Id. at 112, 286 S.E. 2d at 539 (citations omitted).

In the case *sub judice*, defendant failed to raise the issue of his alleged unlawful arrest in a timely manner. Therefore, the question is not properly before this Court.

[2] Defendant next contends that the trial court erred in failing to dismiss the charges against him because the evidence was insufficient. We do not agree.

> In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the

> evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve.

State v. Earnhardt, 307 N.C. 62, 67, 296 S.E. 2d 649, 652-53 (1982) (citations omitted).

Defendants' own statements in the present case place him at the Last Chance Package Store, in the cooler with a woman, and in the truck. His appearance was consistent with the general descriptions given by the victim and Eddie Putnam. The fact that defendant altered his appearance immediately after the incident, left the state when Investigator Mull attempted to contact him and initially told Mull that he had walked home after his car had broken down is also evidence against defendant. The trial court did not err in refusing to dismiss the charges against defendant.

[3] Defendant finally contends that the trial court committed plain error in allowing Investigator Mull to testify that the charges against Michael Morgan had been dismissed. We disagree.

Defendant failed to object to the admission of the testimony at trial. A failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Our Supreme Court has indicated, however, that on rare occasions the "plain error" rule first announced in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), may allow a party relief even though no objection was made. *State v. Mitchell*, 317 N.C. 661, 346 S.E. 2d 458 (1986). Before relief will be granted under the "plain error" rule,

> the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

State v. Walker, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986) (citations omitted).

We are not convinced that Investigator Mull's testimony concerning the dismissal of the charges against Michael Morgan "tilted the scales" and caused the jury to reach its verdicts of guilty. Thus, we find no plain error.

Defendant had a fair trial, free of prejudicial error.

No error.

Judges ORR and GREENE concur.

MICHAEL HOLLERBACH, PLAINTIFF v. MONIQUE HOLLERBACH, DEFENDANT AND THIRD-PARTY PLAINTIFF v. CRAFTLINE CONSTRUCTION, INC., THIRD-PARTY DEFENDANT

No. 8711SC940

(Filed 31 May 1988)

Rules of Civil Procedure § 52; Receivers § 2— additional compensation for receiver —ruling based on evidence in entirely separate matter—insufficient basis for findings

The trial court erred in denying petitioner's request for additional compensation for his services as receiver of plaintiff's corporation where the court's order was based on evidence presented at a hearing on an entirely different matter; petitioner was not a party to that action and had not been notified that evidence at that hearing would be considered by the trial court in deciding whether to grant his motion for additional compensation; and petitioner had no opportunity to rebut the evidence or present additional evidence.

APPEAL by petitioner from *Bowen (Wiley F.), Judge.* Order entered 13 March 1987 in Superior Court, LEE County. Heard in the Court of Appeals 2 March 1988.

On 19 August 1983 plaintiff filed a complaint seeking divorce from bed and board from defendant and joint custody of their minor children. Defendant filed an answer and third-party complaint against Craftline Construction, Inc., alleging that all of the assets of the corporation were marital property (plaintiff is the sole shareholder) and seeking a temporary restraining order preventing plaintiff from dissipating these assets.

Defendant filed a motion to transfer the action to superior court and to appoint a corporate receiver for Craftline, alleging

that the corporation was either insolvent or in immediate danger of insolvency. Plaintiff joined in the motion to appoint a receiver.

On 1 August 1984 the court appointed attorney Richard B. Hager (petitioner) as receiver. The appointment authorized Hager to take certain actions on behalf of the corporation, including in part the following:

> . . . said Receiver be and he is hereby authorized and directed, until the further orders of this Court, to continue the operations of Craftline Construction, Inc. as a going concern and, insofar as practical, to complete all existing construction contracts and projects presently outstanding, and for that purpose to employ such personnel and assets of the corporation, and to do and perform such other matters and things as may be reasonably necessary for the performance of his duties as herein set forth.
>
> . . .
>
> IT IS FURTHER ORDERED that the Receiver may in his discretion and without the further order of the Court, if funds in his hands from other sources are not available for such purpose, borrow money as such Receiver to the extent that it is necessary for the preservation and protection of the estate in his possession and as security for such money so borrowed to execute in his name as Receiver notes, security agreements and otherwise pledge the assets of the estate.

Pursuant to this grant of authority petitioner ran the corporation for approximately two years. During this time the court allowed petitioner's motion for reasonable compensation for his services as receiver and awarded him $19,699.25 for fees and expenses.

Petitioner moved to resign as receiver on 28 May 1986 and sought additional compensation for his services. On 29 May 1986 several creditors informed the court that their pre-receivership claims were still unpaid. The court then ordered petitioner to "immediately cease and desist all activities as receiver for Craftline Construction, Inc." and removed him as receiver. Charles W. Jeffries, C.P.A. was appointed as the new receiver and instructed to conduct an audit. The court did not rule on petitioner's request

for additional compensation when it removed him as receiver. On 22 December 1986, the court notified petitioner that it was inclined to deny his motion for additional fees based upon the information before the court to date, unless the petitioner could show cause for additional fees.

After another request by petitioner on 31 December 1986 the court agreed to hold a hearing on his request for additional compensation on 23 January 1987. Petitioner did not introduce any new evidence at this hearing but directed the court's attention to the report he had filed with his motion. This report contained a detailed accounting of Craftline's receipts and disbursements during his receivership and a list of duties performed. No order was entered at this time.

On 3 February 1987 the court held another hearing. This hearing was requested by Charles Casper, president of Greater Carolina Construction Co. Apparently during his receivership, petitioner agreed to pay Casper 3 percent of the gross value of each contract which plaintiff executed with landowners referred to him by Casper. After petitioner was removed as receiver, Casper presented a claim for $39,571.40 to Jeffries representing nineteen such referrals. Jeffries refused to pay the claim and Casper moved the court to hold a hearing to determine its validity. Petitioner was present at this hearing, but was not a party. He was not notified that any evidence would be considered by the court on the question of additional receiver fees.

On 13 March 1987 the court entered an order denying petitioner's request for additional compensation. The court's findings of fact, however, contained evidence introduced at the 3 February hearing on Casper's claim. Many of these findings relate to business dealings between Casper and petitioner. The only evidence of these transactions was introduced in the hearing on 3 February 1987 on Casper's claim.

Bailey & Dixon, by Gary S. Parsons and Patricia P. Kerner, attorneys for petitioner-appellant.

Gerald E. Shaw and Moretz & Silverman, by J. Douglas Moretz and Jonathan Silverman, attorneys for receiver-appellee.

ORR, Judge.

Petitioner contends the trial court erred in considering evidence introduced at the hearing on 3 February 1987 as a basis in its order for denying petitioner additional compensation. We agree.

Where a trial court sitting without a jury makes findings of fact, the sufficiency of those facts to support the judgment may be raised on appeal. *Little v. Little*, 9 N.C. App. 361, 176 S.E. 2d 521 (1970). The standard by which we review the findings is whether any competent evidence exists in the record to support them. *Id.*

Here the trial court made findings relating to an entirely different issue than that properly before the court. These unnecessary findings related to the validity of Casper's claim and the business dealings underlying them. As stated above, these business dealings came to light at the 3 February hearing, and were not in the record before that time.

Although petitioner was present at the 3 February hearing on the validity of Casper's claim, petitioner was not a party to that proceeding and had not been notified that evidence at this hearing would be considered by the trial court in deciding whether to grant his motion for additional compensation. Thus he had no motive to cross-examine witnesses or introduce rebuttal evidence.

When issues of fact are tried by the trial court, it must state its findings and conclusions separately. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E. 2d 29, 33 (1968). It is the trial court's duty to consider all competent evidence before it. *Id.* (citation omitted). At the 23 January 1987 hearing the trial court had no evidence before it other than petitioner's report.

The trial court erred in considering evidence presented at the 3 February 1987 hearing because this evidence was not before it on 23 January 1987, and petitioner had no opportunity to rebut the evidence or present additional evidence. *See* N.C.G.S. § 1A-1, Rule 52 (1983); *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982) (Rule 52(a) requires that findings of fact be established by evidence, admissions, and stipulations determinative of the issues involved in the action).

The remaining assignments of error need not be addressed at this time pending the outcome of a new hearing. We vacate the trial court's order and remand this matter to the Lee County Superior Court and instruct it to conduct a new hearing on petitioner's claim for additional compensation not inconsistent with this opinion.

Remanded.

Chief Judge HEDRICK and Judge JOHNSON concur.

A. W. GOFF, JR. v. DONNA C. GOFF

No. 8726DC1019

(Filed 31 May 1988)

Judgments § 10; Trial § 6.1— stipulation that consent judgment followed—relief from provisions improper

The trial court erred in ordering plaintiff to reimburse defendant for the portion of escrowed funds which were used to pay plaintiff's tax obligations as a result of a pay-off of a note to plaintiff, since defendant's attorney stipulated that the language of the parties' earlier consent judgment was literally followed when the funds were used to pay plaintiff's obligations; the provisions of the consent order concerning the division of property had been fully executed and satisfied; and the trial court was therefore without authority to order plaintiff to reimburse defendant.

APPEAL by plaintiff from *Jones (William G.), Judge*. Order entered 30 June 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 9 March 1988.

Plaintiff and defendant were married on 3 July 1954. During the marriage, the parties had four children. On 2 July 1979, the parties separated and in February of 1980 they entered into a "Separation and Property Settlement Agreement" which addressed custody of the one minor child, division of marital property, alimony and the tax liabilities involved. Plaintiff filed an action for divorce which was granted in August of 1980. The divorce judgment incorporated the terms and conditions of the separation agreement previously agreed to by the parties.

In 1986, plaintiff filed a motion to reduce the alimony being paid defendant, and defendant filed a motion requesting that plaintiff reimburse her for certain costs expended on household appliances. While these motions were being heard, the parties began negotiating for a complete settlement of the matters involved. The hearings were adjourned to allow for such negotiation.

On 1 July 1986, the parties presented to the court an order to which they had both consented and they asked that it be entered on that date. The court entered the order which stated in part:

> 1. *Cash Payment of Defendant*: Upon the execution of this Order, the plaintiff shall pay to the defendant a cash payment of $34,410.15. This amount represents one half of the net payoff of a certain promissory note dated December 29, 1978, in the original principal amount of $930,320.00 executed by McGuire Investment Group #4 in favor of the plaintiff, defendant and three children of the parties hereto plus payments received from McGuire during May and June of 1986 on a second note. The net cash payment was computed as follows:

April payment on note received by defendant	$ 144.97
April payment on note received by plaintiff	7,587.44
Payoff on note received by defendant	123,446.72
May and June payments to plaintiff	4,440.70
May and June payments to defendant	84.62
	$138,043.43
Less Tax Escrow	– 60,000.00
Balance to be divided	$ 78,043.43
Amount due each party	$ 39,021.715

Distribution:

	A. W. Goff, Jr.	Donna C. Goff
McGuire note payments	$135,434.86	$ 2,608.57
Less Tax Escrow	60,000.00	
	$ 75,434.86	
Less payment to Donna C. Goff	2,003.00	2,003.00
	$ 73,431.86	
Less balance due Donna C. Goff	34,410.15	34,410.15
	$ 39,021.71	$ 39,021.71

2. *Tax Treatment of Cash Payment.* The cash payment made by plaintiff shall not be deducted by him for tax purposes and shall not be included in the defendant's gross income for the 1986 tax year. The provisions of the 1984 Tax Reform Act shall apply to this Order.

3. *Tax Escrow.* Upon execution of this Order, the plaintiff shall deliver to Earl C. Roller, Trustee (hereinafter called "Trustee") the sum of $60,000.00 which shall be placed immediately in an interest bearing account with the interest thereon to accrue to and be added to the account. The plaintiff shall cause to be prepared on or before April 15, 1987, two separate State and Federal tax returns. The first set of such returns shall reflect his 1986 tax obligations as if the aforesaid $930,320.00 Note had not been paid. The second such set of returns shall reflect his 1986 tax obligation including the payoff of the $930,320.00 Note. The Trustee shall disburse proceeds payable to the taxing authorities in an amount equal to the difference in the two sets of returns. The remaining balance, if any shall be divided equally between the plaintiff and the defendant. Pending disbursement, the certificates or other evidence of deposit shall be delivered to Richard A. Lucey.

4. *Assignment of Second Note.* There remains unpaid a certain Note in favor of the plaintiff, the defendant and three

of their children executed by McGuire Investment Group #4 on December 29, 1978 in the original principal amount of $378,880.00 (the "Note"). Such note is subject to no offsets except a potential 30 percent discount which is available under conditions specified in Paragraph 8 of a letter dated April 3, 1980 from McGuire Investment Group #4 to the plaintiff. At the present time, the plaintiff is the owner of 52/56 undivided interest in such Note and the defendant is the owner of a 1/56 undivided interest in said Note. Upon the execution of this Order, plaintiff shall execute an Assignment, sufficient in form to be recorded in the Office of the Register of Deeds for Mecklenburg County, North Carolina, assigning unconditionally to defendant 25.5/56 of his interest in such Note so that both parties will then own one half of a 53/56 interest in the Note. The plaintiff shall not have any authority to act as the defendant's agent as provided in the Note but shall continue to deal with McGuire and shall notify the defendant of any and all material communications oral or written which may be received from McGuire. The plaintiff and defendant shall act independently during any negotiations concerning this Note and no agreement involving such Note shall be finalized without the written approval of both parties.

In early 1987, Earl C. Roller, the trustee, prepared the two sets of state and federal income tax returns for plaintiff as required in paragraph 3 of the consent order. He determined that $56,069.00 would be needed to pay the additional tax incurred due to the $930,320.00 note being paid to plaintiff in 1986. The trustee, however, also included in his calculations the fact that the $378,880.00 note had been paid that year. This resulted in part of the $60,000.00 escrow account being used to pay off plaintiff's tax liability for the second note as well as the first. Defendant, with her individual funds, had already paid her tax liability due to the pay-off of the smaller note in which she had one-half ownership. However, the trustee requested that defendant's attorney release the escrowed funds to him so that the tax liability resulting from his calculations could be paid. Defendant's attorney did so under protest and included a letter to the trustee which stated in part:

> I have reviewed the proposed returns of Mr. Goff that you submitted to me under cover of your letter of March 27, 1987. As was confirmed in your office when I met with you to

discuss the returns, you have included the payment of the second McGuire Note (original principal amount of $378,880.00 referred to in Paragraph 4 of the Consent Order entered July 1, 1986), in all of your calculations. The result is that joint assets (the $60,000.00 tax escrow fund established in Paragraph 3 of the Consent Order) are being used to pay Mr. Goff's tax liability incurred due to the payoff of the "second note." On the other hand, Mrs. Goff is using her own assets to pay her liability. While this result might very well be within the literal reading of Paragraph 3 of the Consent Order, it certainly is patently offensive to Mrs. Goff's interest and the historical development of the Order that was signed by Judge Jones.

On 19 May 1987, defendant filed a motion requesting the court to enter an order directing plaintiff to reimburse defendant for the portion of the escrowed funds that were used to pay plaintiff's tax obligations as a result of the pay-off of the second note. At the hearing on that motion, defendant's attorney stipulated that the language set forth in paragraph 3 of the consent order was literally followed in determining the disbursement of the tax escrow account. The trial court, however, found that the literal reading and interpretation of that paragraph was contrary to the intent of the parties and the court at the time the order was entered. The trial court also found "that it would be a gross injustice to enforce the literal language of the Consent Order." The court further held that there was no intention that the tax obligation incurred by plaintiff as a result of the pay-off of the second note be paid with money from the escrow account. The court, therefore, concluded that defendant was "entitled to relief pursuant to Rule 60(b)(1) and (6)," and ordered plaintiff to reimburse defendant for one-half of the escrow account funds used to pay plaintiff's tax liability as a result of the sale of the second note. From this judgment, plaintiff appeals.

Alvin A. London and Charles M. Welling for plaintiff appellant.

Richard A. Lucey for defendant appellee.

ARNOLD, Judge.

Plaintiff correctly argues that the trial court erred in ordering a refund to defendant of a payment which was made pursuant to the provisions of a prior consent order.

While this Court has some doubt that the provisions of paragraph 3 were properly carried out according to the consent order as it is worded, defendant stipulated that the provisions were literally followed in determining the disbursement of the tax escrow account. Why defendant made such a stipulation involving the crux of her case is not a matter for this Court.

The public policy of this state is to promote certainty and finality in domestic dispute resolutions. *Reavis v. Reavis*, 82 N.C. App. 77, 345 S.E. 2d 460 (1986). Generally, courts are reluctant to allow collateral attacks on consent judgments. *Id.* Therefore, only property divisions which have not been satisfied may be modified. *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983). Since the provisions of the consent order concerning the division of property had been fully executed and satisfied, the trial court was without authority to order plaintiff to reimburse defendant.

Reversed.

Judges BECTON and PARKER concur.

DAN ALLEN HARSHBARGER, INDIVIDUALLY, DAN ALLEN HARSHBARGER, ADMINISTRATOR OF THE ESTATE OF SUE K. HARSHBARGER, DECEASED, AND SABRINA K. HARSHBARGER, A MINOR, BY AND THROUGH HER DULY APPOINTED GUARDIAN AD LITEM, DAN ALLEN HARSHBARGER v. DAVID BAXTER MURPHY, AND NIGHT CLUBS, INC., D/B/A THE FOXY LADY NIGHTCLUB

No. 8710SC775

(Filed 31 May 1988)

Intoxicating Liquor § 24— dram shop liability—failure to show whereabouts of driver for 2 hours preceding accident—action dismissed

Plaintiff's evidence was insufficient to establish a valid claim under the dram shop liability statute, N.C.G.S. § 18B-305(a), where the evidence tended to show that the intoxicated driver was present at defendant's nightclub from

3:00 p.m. to 5:30 p.m.; the driver's companion testified that, when they left the bar at 5:30 p.m., the driver had no trouble walking, talking, or driving his vehicle; the driver took his companion home, leaving there at 6:50 p.m.; and there was no evidence establishing the driver's whereabouts from 6:50 p.m. until 8:42 p.m. when the accident occurred.

APPEAL by plaintiff from *Bailey, James H. Pou, Judge.* Judgment entered 5 May 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1988.

Johnny S. Gaskins and DeMent, Askew, Gammon & Salisbury, by Russell W. DeMent, Jr., for plaintiffs-appellants.

Teague, Campbell, Dennis & Gorham, by C. Woodrow Teague and Dayle A. Flammia, and Parker, Sink, Powers, Sink & Potter, by William H. Potter, Jr., for defendant-appellee.

JOHNSON, Judge.

This is a civil action to recover damages from a nightclub, for injuries and death sustained in an automobile accident due to the actions of an intoxicated driver, under a dram shop liability theory.

Plaintiff, in his individual capacity, and in his capacity as the administrator of the estate of his deceased wife, Sue K. Harshbarger, and duly appointed guardian ad litem for his child, Sabrina K. Harshbarger, instituted this civil action on 6 August 1985 to recover for damages sustained on 19 April 1985, when a vehicle driven by David Baxter Murphy collided head-on with the vehicle in which plaintiff and his family were riding. Plaintiff and his child were injured and his wife was killed in the collision.

The original suit was instituted against defendant driver and his wife, who filed a third-party complaint against Night Clubs, Inc., d/b/a The Foxy Lady Nightclub. The plaintiff then amended his complaint to name "The Foxy Lady" as an additional defendant, and alleged that the establishment's employees had served defendant-driver alcohol while he was visibly intoxicated, in violation of N.C.G.S. 18B-305(a).

Subsequently, the claim leveled against Murphy's wife was dismissed, and the claim asserted against defendant-driver was settled and dismissed.

At trial against the remaining defendant, "The Foxy Lady," the trial court granted defendant's motion for a directed verdict made at the conclusion of plaintiff's evidence, and dismissed the action with prejudice. From this judgment, plaintiff appeals.

We have before this Court one issue to review: whether the trial court committed prejudicial error in granting defendant's motion for a directed verdict pursuant to G.S. 1A-1, Rule 50(a). For the reasons noted below, we find that defendant's motion was properly allowed.

A motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the nonmoving party. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981). Upon defendant's motion for a directed verdict, the trial court is required to take plaintiff's evidence as true and to consider it in the light most favorable to the nonmovant, giving him the benefit of every reasonable inference, with contradictions, inconsistencies and conflicts in the evidence resolved in plaintiff's favor. *Oliver v. Royall*, 36 N.C. App. 239, 243 S.E. 2d 436 (1978). The reviewing court is confronted with the identical task, that is, to determine whether the evidence, when considered in the light most favorable to the nonmovant, was sufficient to have been submitted to the jury. *Meacham v. Montgomery County Board of Education*, 59 N.C. App. 381, 297 S.E. 2d 192 (1982).

Although rarely appropriate in negligence cases, a verdict may be directed for defendant where plaintiff is unable to offer evidence sufficient to establish, beyond mere speculation, every essential element of negligence. *Oliver* at 242, 243 S.E. 2d at 439. Bearing these principles in mind, we shall consider plaintiff's evidence.

The driver of the automobile testified that he left his place of employment a little after noon on 19 April 1985, the day of the fatal accident. He was accompanied by a co-employee and friend, Charles C. Eddins. They consumed three twelve ounce cans of beer each during the next three hour span and then arrived at the establishment in question, "The Foxy Lady," a little after 3:00 p.m. While there, Murphy drank an additional six to eight twelve ounce cans of beer, played pool and pinball machines, and watched topless dancers perform. He left the bar at around 5:30 p.m. and drove his companion home. Murphy remained at Eddins' home un-

til around 6:50 p.m. Murphy also testified that he could not recollect where he went after he left Charlie Eddins' home. He only remembered later sitting at a countertop bar which has uneven strips of wood, and seeing red and yellow vending machines near a corner of the bar. He also had no recollection of the automobile accident.

Charles Eddins testified that when he and Murphy left "The Foxy Lady" together, Murphy did not appear intoxicated, did not appear to have trouble understanding what he said, did not have trouble walking, and had no trouble driving his vehicle.

Dr. Arthur McBay, an expert in the field of toxicology, and an employee in the State medical examiner's office, testified that in order for Murphy to have had a blood alcohol level of 0.15 at 10:56 p.m., which he had at the time when he was examined after the accident, he would have had to have consumed at least an additional six, four percent alcohol content beers between the hours of 6:50 p.m., when he left Eddins' home, and 8:42 p.m., when the accident occurred. He further testified that Murphy's blood alcohol level would have been 0.18 at 8:42 p.m. when the accident occurred.

Plaintiff presented no conclusive evidence as to Murphy's whereabouts between the hours following his departure from Eddins' home, and the time of the fatal accident. No witness whatsoever was presented who placed Murphy at defendant's establishment between 6:50 p.m. and 8:42 p.m.

Viewing the evidence in the light most favorable to the plaintiff, we find that it was insufficient to have been submitted to the jury on the question of defendant's liability premised upon a violation of N.C.G.S. 18B-305(a).

The statute in question provides that "[i]t shall be unlawful for a permittee or his employee or for an ABC Store employee to knowingly sell or give alcoholic beverages to any person who is intoxicated." N.C.G.S. 18B-305(a). Although we acknowledge this Court's recognition of dram shop liability in *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), we feel that the evidence presented was insufficient to establish a valid claim. The irreducible minimum of evidence required of the plaintiff was to at least place the intox-

icated person upon the premises of the establishment which he was attempting to hold liable.

The only evidence which we have of Murphy's appearance at the defendant's nightclub, is his presence at "The Foxy Lady" between the hours of 3:00 p.m. and 5:30 p.m. His companion testified that when they left the bar at 5:30 p.m., Murphy had no trouble walking or talking, or driving his vehicle. No witness testified to the contrary. We have before us no evidence whatsoever which shows that Murphy displayed any manifestations of intoxication or impairment during the time when he was served alcoholic beverages at defendant's nightclub.

We are guided by the reasoning of *Hutchens, supra* at 18, 303 S.E. 2d at 595 as follows: "[w]e conclude that for purposes of imposing civil liability, before a violation of G.S. 18A-34 may be found, [since repealed now codified at G.S. 18B-305(a)] the plaintiff must allege and prove (1) that the patron was intoxicated and (2) that the licensee or permittee knew or should have known that the patron was in an intoxicated condition at the time he or she was served." The plaintiff has failed to produce any evidence of either element, insofar as Murphy's only proven visit to defendant's establishment was concerned.

We therefore hold that the trial court's granting of defendant's motion for a directed verdict was proper.

Judges PHILLIPS and ORR concur.

HUGH D. BRIDGES, PLAINTIFF v. LINN-CORRIHER CORPORATION, DEFENDANT

No. 8710IC747

(Filed 31 May 1988)

Master and Servant §§ 68, 69.1— workers' compensation—obstructive lung disease—worker unable to obtain job—insufficient findings

The Industrial Commission erred in concluding that a cotton mill worker who was temporarily disabled by his obstructive lung disease improved to the extent that he was no longer disabled because he was employable outside the cotton textile industry at the same wages he had previously earned, since the Commission failed to establish that this worker could obtain a job taking

into account his specific limitations, and it was not sufficient to establish that jobs were available or that the average job seeker could get one.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 31 March 1987. Heard in the Court of Appeals 6 January 1988.

Thomas M. King for plaintiff appellant.

Teague, Campbell, Dennis & Gorham, by George W. Dennis III, for defendant appellee.

PHILLIPS, Judge.

After working in cotton mills in Cabarrus and Rowan Counties for 33 years, 16 of the last 17 in the defendant's mill in Landis, on 24 July 1984 plaintiff, because of chronic obstructive lung disease acquired during his employment, became incapable of processing cotton any longer and defendant discharged him. The Industrial Commission found and concluded, in brief, that: Plaintiff's lung disease was contributed to by cotton dust in the workplace and thus was occupationally incurred; because of the disease plaintiff was temporarily totally disabled from 24 July 1984 to 19 April 1985 and entitled to medical benefits and compensation under the Workers' Compensation Act accordingly; by 19 April 1985, due to rest, medical treatment, and freedom from cotton dust, plaintiff's lung condition had improved to the extent that he was no longer disabled because he "was employable outside the cotton textile industry" and "could have earned the same wages he was earning prior to July 24, 1984." The specific findings as to plaintiff's employability were as follows:

> [P]laintiff had the capacity to perform the same type textile work he had previously performed in mills where only synthetic fibers were processed. In addition, he was physically able to drive a taxi, truck, or other motorized vehicles, could have worked in a service station, furniture store, carpet store, convenience store, a factory or assembly line, and there were jobs available in his locality of this character where he could have earned the same wages he was earning prior to July 24, 1984.

Plaintiff's appeal hinges on whether these findings of fact as to his employability are supported by competent evidence. If they are the decision must be affirmed since under our workers' com-

pensation law the Industrial Commission is the fact finder with all the prerogatives of a jury, *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976), and an occupationally injured or diseased worker who is employable at wages equal to those earned before the injury or disease was incurred is not disabled. G.S. 97-2(9).

Plaintiff argues, not without some basis, that the findings as to his capacity to perform the various jobs listed are not supported by evidence. Because the evidence indicates without contradiction that plaintiff is capable of doing only light work—"occupations that do not require strenuous or prolonged exertion" or involve walking long distances or lifting heavy objects, or that expose him to irritating dust, fumes or smoke—and no evidence was presented that the jobs listed are free of those impermissible incidents. The only evidence presented concerning the jobs was a survey prepared by the Employment Security Commission office in Rowan County, which merely listed the available jobs in the area, along with the pay scale and fringe benefits. Thus, some of the findings are contrary to reality, since it is commonly known that taxi drivers have to lift their patron's weighty luggage and many convenience and other store employees without managerial or business experience have to lift heavy merchandise cartons and rarely is any service station free of dust, smoke and other fumes. But plaintiff's argument along this line need not be pursued because assuming *arguendo* that he is able to perform all the jobs listed, the Commission's findings as to his employability are nevertheless unsupported because no evidence whatever was presented that plaintiff could have obtained or can obtain any of the jobs.

Under our workers' compensation law one unable to obtain employment and earn wages, not because of general economic conditions, but because of an occupational injury or disease, is disabled. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E. 2d 798 (1986); *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). Thus, to be employable when employment is generally available the claimant not only must be capable of filling a job, he must also be able to get it. The Workers' Compensation Act was enacted to ameliorate the consequences of injuries and illnesses in the workplace and one of those consequences, at least on occasion, is that a recuperated worker capable of holding a job cannot get

one. A capable job seeker whom no employer needing workers will hire is not employable. The plaintiff in this case is 61 years old and went only to the fifth grade in school; his employment experience, essentially limited to carding cotton, would be of little or no benefit in any other employment; and his medical history includes longstanding, easily aggravated breathing difficulties, and several months in 1984 and 1985 when his wheezing, coughing and gaspings for breath prevented him from working, required much medical treatment to the considerable expense of his employer, and caused him to be fired. That such a person can get a job in any urbanized area in this State, where the pool of unskilled employment seekers always includes persons who are younger, healthier, and better educated, cannot be assumed, but must be proved and no proof was offered.

The only recorded evidence that directly bears upon plaintiff's ability to get a job, as distinguished from the availability of employment in the area, a different matter entirely, tends to indicate that he is not hireable. For he testified without contradiction that though he applied for many of the jobs listed each application was rejected after he truthfully revealed his work experience, education and medical history, and nothing in the evidence suggests that he was turned down for any reason other than his deficient experience, education and health. That plaintiff did apply without success for several of the jobs listed the Commission found as a fact, but it did not find why none of the employers hired him. If he was not hired and is not hireable because of his age, occupational lung incapacity, and limited experience and education, he is disabled within the purview of the Workers' Compensation Act and entitled to compensation. *Peoples v. Cone Mills Corp., supra.* If plaintiff's unsuccessful efforts to obtain employment are sufficient to establish his unemployability, the law does not require him to continue searching for a job that does not exist for him. *Hilliard v. Apex Cabinet Co., supra.* Under similar circumstances, except that the unemployed claimant was younger and better educated than plaintiff, our Supreme Court had the Commission determine whether the claimant's inability to get employment was due to her age, limited experience, physical condition, and education, *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983), and a similar determination is necessary here. For before it can be determined that this plaintiff is employable

and can earn wages it must be established, not merely that jobs are available or that the average job seeker can get one, but that *he can obtain a job taking into account his specific limitations. Little v. Anson County Schools Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). Thus, we vacate the opinion and award appealed from and remand this matter to the Industrial Commission for further findings and conclusions in accord with this opinion.

In view of the decision reached plaintiff's other contentions need not be considered.

Vacated and remanded.

Judges JOHNSON and ORR concur.

POLLY LUCAS v. BUNN MANUFACTURING CO., SELF-INSURED (ALEXSIS, INC., SERVICING AGENT)

No. 8710IC696

(Filed 31 May 1988)

Master and Servant § 77.1— workers' compensation—back injury—return to work—increased pain—inability to work—change of condition—sufficiency of evidence

The Industrial Commission's finding of fact that a substantial change occurred in plaintiff's condition was supported by competent evidence where plaintiff and her husband testified that her condition was worse after she went back to work than it was when the Industrial Commission determined that she had a 15% permanent partial disability of the back; they also testified that she was not able to work in the mill or to do her housework; her doctor testified that her condition had changed considerably and she needed further treatment for the condition; she had more limited motion and spasm in the muscles; and the doctor testified that she could not work. N.C.G.S. § 97-47.

APPEAL by defendant from the Opinion and Award of the North Carolina Industrial Commission filed 2 February 1987. Heard in the Court of Appeals 5 January 1988.

On 30 April 1984, while working as a hemmer in defendant's garment factory, plaintiff sustained an injury to her back covered by the Workers' Compensation Act. Surgery was required and in

December 1984, at the end of the healing period, based upon the opinion of plaintiff's surgeon, Dr. Dhillon, the parties agreed with the Industrial Commission's approval that plaintiff, though able to return to work, had a 15% permanent partial disability of the back for which the last payment was made on 21 February 1985. On 3 January 1985 plaintiff resumed working as a hemmer—not with defendant who then had no openings but with another apparel manufacturer—but had to quit on 1 February 1985 because of increasing back pain. After examining plaintiff and prescribing some therapy that had to be discontinued because she could not tolerate it, Dr. Dhillon was of the opinion that a myelogram and other tests of plaintiff's back were needed before he could prescribe for her further. Defendant refused to authorize and pay for the tests, contending that its obligations to plaintiff terminated with the Commission's approval of the foregoing agreement. Following hearings requested by plaintiff Deputy Commissioner Lawrence B. Shuping, Jr. found and concluded that a substantial change occurred in plaintiff's condition after the December 1984 agreement was approved and that she was then temporarily totally disabled and entitled to further workers' compensation benefits. Defendant appealed to the Full Commission, which adopted and affirmed the opinion and award.

Kelly & West, by J. Thomas West, for plaintiff appellee.

Maupin Taylor Ellis & Adams, by Richard M. Lewis and Steven M. Rudisill, for defendant appellant.

PHILLIPS, Judge.

Though the December 1984 agreement upon being approved by the Industrial Commission became in effect a final award, since it determined the extent of plaintiff's permanent disability and left no other issue for determination, the award is nevertheless subject to modification, as both parties concede, if a substantial change of condition has occurred, as the Commission found. G.S. 97-47; *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E. 2d 27 (1960). Thus, the sole question for determination is whether the Commission's finding of fact that such a change in plaintiff's condition did occur is supported by any competent evidence. If it is the Commission's finding is conclusive and the decision must be affirmed. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981).

Quite clearly the Commission's finding is supported by competent evidence. In addition to the testimony of plaintiff and her husband to the effect that her condition was worse after she went back to work than it was when the agreement was made, and that now she is neither able to work in the mill nor do her housework, Dr. Dhillon stated, either in his testimony or 23 February 1985 letter, the following:

> It is also my opinion that this patient's condition has considerably changed from the November time when she was discharged from here and that she needs further treatment for this condition.
>
> * * *
>
> [O]n February 1, 1985 . . . [s]he had marked limitation of motion. There was spasm in the muscle, and I felt that the symptoms were due to scarring following the operation, pinching the nerve. She was put on medication, advised to rest, use heat. Saw her again on February 8. Symptoms had persisted, with pain in back and leg. She was advised to take traction; took one or two courses of traction but could not tolerate it.
>
> . . . .
>
> Q When you rated her, was she having pain down to the end of her feet?
>
> A She was having back pain and some discomfort in her legs. I think her leg symptoms are worse.
>
> . . . .
>
> Q Have you any objective findings at this time that she has a recurrent disc rupture or nerve root compression or bulging disc?
>
> A Mostly based on her symptoms of increased spasm and limited motion.
>
> . . . .
>
> Q So, the only difference at this time is her increased complaints of pain?

A Increased complaints of pain and more limited motion and spasm in the muscles.

. . . .

The most likely cause of symptoms is irritation of nerve.

. . . .

[W]hen she returned in the month of February, her symptoms were a little more than before and she had increased spasm, more limited motion, and at that time I did not release her for work.

. . . .

Q In February you felt like she could not work at all?

A She could not work.

Defendant's argument that no substantial change of condition had occurred because plaintiff's pain and other symptoms were only "slightly worse" than before misses the point. In determining if a change of condition has occurred entitling an employee to additional compensation under G.S. 97-47 the primary factor is a change in condition affecting the employee's physical capacity to earn wages, *Pratt v. Central Upholstery Co., Inc., supra*; and while the physical and symptomatic changes that occurred here—increases in the intensity and frequency of pain and muscle spasms and a decrease in the movement of the back muscles—may not appear to be great when considered by themselves and measured in the abstract, their effect upon the plaintiff was very profound, indeed, reminiscent of the straw and the camel's back, because they changed her from a person capable of working and earning wages five days a week to one incapable of working at all and earning anything.

Affirmed.

Judges JOHNSON and ORR concur.

Pieper v. Pieper

LORIS M. PIEPER, PETITIONER/APPELLANT v. GARY L. PIEPER, RESPONDENT/APPELLEE

No. 8726DC1110

(Filed 31 May 1988)

Parent and Child § 10— educational support for child past majority—foreign decree unenforceable under URESA

Petitioner could not use URESA as a vehicle to enforce in North Carolina a foreign support decree requiring respondent to provide educational support for the parties' child until he reached 22 years of age, since such a decree could not have been rendered under North Carolina law, and it is the law of the state where the obligor is found, the "responding state," which applies in actions under URESA. N.C.G.S. § 52A-8.

APPEAL by petitioner from *Johnston, Robert P., Judge.* Order entered 29 July 1987 in MECKLENBURG County District Court. Heard in the Court of Appeals 13 April 1988.

Petitioner and her husband were divorced in Iowa on 19 March 1975. Petitioner was awarded custody of the parties' son, Mark, born 7 November 1965, and respondent was ordered to pay child support until the child reached the age of eighteen. On or about 1 August 1984 the District Court of Iowa, Linn County, entered a Supplemental Decree and Ruling modifying the original decree and ordering respondent to pay petitioner educational child support in the amount of $85 per week for Mark, commencing 10 August 1984 and continuing until Mark reached the age of 22, so long as he in good faith attended a college, university, or area school. Respondent appealed this modified decree to the Iowa Supreme Court, which affirmed the trial court on 19 June 1985. On 1 October 1985 petitioner obtained in the District Court of Iowa, Linn County, a Supplement to Supplemental Decree, ordering the commencement date of the educational child support payments retroactively modified to 20 December 1983.

Mrs. Pieper subsequently secured registration of her Iowa decree in Mecklenburg County pursuant to N.C. Gen. Stat. Ch. 52A, which is our State's version of the Uniform Reciprocal Enforcement of Support Act (URESA), and moved to enforce the foreign decree. Respondent filed in response separate motions to vacate the registration and to dismiss the action. By order entered 29 July 1987 the district court granted respondent's motion to dismiss, and petitioner appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith, for petitioner.

Petree Stockton & Robinson, by Peter E. Lane and David B. Hamilton, for respondent.

WELLS, Judge.

The question is whether petitioner may use URESA as a vehicle to enforce in our State a foreign support decree which could not have been rendered under North Carolina law. The district court made, *inter alia*, the following findings of fact:

> 1. Mr. Pieper has been a resident of North Carolina since 1975.
>
> 2. Mr. and Mrs. Pieper entered no agreement for the payment of support for their son beyond the age of eighteen years.
>
> 3. N.C. Gen. Stat. § 52A-8 provides in part as follows: "Duties of support applicable under this Chapter are those imposed or imposable under the laws of any state where the obligor was present during the period or any part of the period for which support is sought."
>
> 4. Pursuant to N.C. Gen. Stat. § 50-13.4(c), payments ordered for the support of a child terminate when the child reaches the age of eighteen, with two exceptions which are inapplicable in this case.

Based on the facts found the district court concluded as follows:

> 1. Pursuant to N.C. Gen. Stat. § 52A-8, the duties of support of Mr. Pieper in this action are those imposed or imposable under the laws of North Carolina.
>
> 2. The duties of support which Mrs. Pieper seeks to enforce in this action are not imposable and cannot be imposed under the laws of North Carolina, and the Iowa foreign support orders which have been registered cannot be enforced by this Court.
>
> 3. Because the duties of support sought to be enforced by Mrs. Pieper in this action cannot be enforced by this Court, this action should be dismissed.

We agree with the conclusions of the trial court, and we therefore affirm the dismissal of petitioner's enforcement action.

N.C. Gen. Stat. § 52A-8 clearly provides that it is the law of the state where the obligor is found, the "responding state," that applies in actions under URESA. *See, e.g.,* 2 R. E. Lee, *North Carolina Family Law* § 169 at 340 (4th ed. 1980); *see also,* W. J. Brockelbank and F. Infausto, *Interstate Enforcement of Family Support* 30-36 (2d ed. 1971). In the absence of an enforceable contract, North Carolina courts are without authority to order child support for a child who has attained the age of majority, *Bridges v. Bridges,* 85 N.C. App. 524, 355 S.E. 2d 230 (1987), with two exceptions which are not applicable in this case. In North Carolina a child reaches his majority at age eighteen. N.C. Gen. Stat. § 48A-2. Thus, petitioner's Iowa supplemental decree imposes upon respondent a support duty not imposable under North Carolina law and hence not enforceable under our URESA. Only support decrees that could have been rendered under the laws of our State can be enforced via URESA in North Carolina. *Cf. Shaw v. Shaw,* 25 N.C. 53, 212 S.E. 2d 222 (1975).

Petitioner contends that child support payments are within the protection of the full faith and credit clause of the federal constitution unless the rendering state has the power to annul or modify the decree as to overdue and unsatisfied installments. We do not disagree. While there is no question that petitioner remains free to seek enforcement of her foreign judgment via alternative, well-trodden legal routes, *see, e.g., Sistare v. Sistare,* 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905 (1910); *Fleming v. Fleming,* 49 N.C. App. 345, 271 S.E. 2d 584 (1980), plaintiff did not pursue such routes in this case.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

DOROTHY ROGERS v. GENE ROGERS AND LEWIS ROGERS

No. 8730DC1115

(Filed 31 May 1988)

Divorce and Alimony § 30— equitable distribution—tractor company as gift to husband—no appreciation through efforts of spouses—company as separate property

The trial court in an equitable distribution proceeding properly determined that a tractor company owned by defendant was separate and not marital property where the evidence showed that the company was a gift to defendant and his brother from their father, and where there was no evidence of active appreciation of the value of the company due to contributions of plaintiff and/or defendant.

APPEAL by plaintiff from *John J. Snow, Jr., Judge.* Order entered 19 August 1987 in District Court, HAYWOOD County. Heard in the Court of Appeals 6 April 1988.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiff-appellant.

Stephen J. Martin for defendant-appellees.

BECTON, Judge.

Plaintiff, Dorothy Rogers, brought this action against defendant, Gene Rogers, seeking a divorce and equitable distribution of their marital property which was not previously disposed of under a separation agreement. Specifically, this nondisposed property consisted of a business known as Haywood Tractor and Implement Company (Haywood Tractor) which defendant managed through a partnership with his brother, co-defendant Lewis Rogers. The trial judge found that Gene and Lewis Rogers acquired Haywood Tractor by gift from their father, Ernest Rogers, during Gene's marriage to plaintiff. However, because there was no evidence that the marital estate contributed to an increase in Haywood Tractor's value, it was not subject to equitable distribution. Plaintiff appeals. We affirm.

I

Dorothy and Gene Rogers were married in April 1955. During the latter part of 1955 or early in 1956, Gene Rogers began

working for Haywood Tractor, which was then owned by his father, Ernest Rogers. Lewis Rogers also worked for Haywood Tractor on a part-time basis. During the first six months of his employment, Gene did not receive a salary, but he was permitted to take money from the company for food, and he was provided a free house and automobile. After six months, he was paid a salary of $50.00 per week. His salary increased to $90.00 per week during the early 1960's. It increased to $150.00 per week in the 1970's and remained so until the date of separation.

On 27 October 1981, Gene and Lewis Rogers executed a partnership agreement regarding the ownership of Haywood Tractor. The value of the business at the time it was acquired by Ernest Rogers, as well as its value at the time it was transferred to Gene and Lewis Rogers is unknown.

Dorothy Rogers takes exception to all of the trial judge's findings of fact regarding the manner in which Gene and Lewis Rogers acquired the business. Her sole contention on appeal is that the trial judge erred by concluding that Haywood Tractor and Implement Company was Gene Rogers' separate property.

II

N.C. Gen. Stat. Sec. 50-20(b) defines marital and separate property, in pertinent part, as follows:

> (1) "Marital property" means all real and personal property *acquired by either spouse* or both spouses *during the course of the marriage and before the date of the separation* of the parties, and presently owned, *except property determined to be separate* property in accordance with subdivision (2) of this section.
>
> (2) "Separate property" means all real and personal property acquired by a spouse before marriage or *acquired by a spouse by* bequest, devise, descent, or *gift during the course of the marriage.* (Emphasis added.)

Under N.C. Gen. Stat. Sec. 50-20(c), only marital property is subject to distribution. The only evidence regarding the transfer of the business to Gene and Lewis Rogers was their testimony and that of Ernest Rogers. Each of them testified that in 1978, Ernest Rogers gave the business to the two brothers without any

consideration. Gene Rogers had no ownership interest before that time. The trial judge's conclusion that Gene Rogers' interest in Haywood Tractor was separate property was thus supported by competent evidence.

The inquiry does not end here, however. This Court recognized in *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985), that active appreciation of the value of separate property due to contributions of either spouse during marriage is nonetheless marital property, and therefore, is subject to equitable distribution. Thus, if the evidence showed active appreciation of the value of Haywood Tractor due to contributions of Gene and/or Dorothy Rogers, then that increase would be subject to equitable distribution. Although Dorothy Rogers presented evidence of Gene Rogers' seemingly meager salary when he worked for the business during the time before and after he acquired an ownership interest, the record is devoid of any evidence that his salary was less than the standard compensation for someone in his position. Thus, there is no evidence of any surreptitious contributions by him to Haywood Tractor and Implement Company. Similarly, the record is devoid of any evidence of resulting active appreciation of the Haywood Tractor and Implement Company, notwithstanding the evidence of the business' value in 1978, when it was acquired by Gene Rogers, and its value in 1983, when the parties separated. This assignment of error is therefore overruled.

Judgment is affirmed.

Judges JOHNSON and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 31 MAY 1988

BLACK-DEK ENTERPRISES v. APPLE COMPUTER No. 8726SC1155	Mecklenburg (86CVS14065)	Appeal Dismissed
BRANDSTETTER v. N.C. EMPLOYMENT SECURITY COMMISSION No. 8715SC1129	Orange (87CVS692)	Affirmed
CARLTON v. CARLTON No. 8719SC1189	Rowan (86SP163)	Affirmed
CHESNUTT v. PRIVATE INVESTMENT CORP. No. 889DC186	Granville (87CVD296)	Affirmed
COMMISSIONERS OF CLAY COUNTY v. SHERIFF OF CLAY COUNTY No. 8830SC29	Clay (87CVS42)	Affirmed
GRIFFIN ROOFING CO. v. GRIFFIN BLDRS., INC. No. 8826DC161	Mecklenburg (85CVD4645)	Appeal Dismissed
IN RE BARBER No. 8711DC1187	Lee (75J71)	Affirmed
McNEIL v. CUDDY FARMS No. 8820SC193	Anson (87CVS266)	Affirmed
MAHMOUD v. FOXX No. 8724SC1095	Watauga (87CVS543)	Reversed & Remanded
MOORE v. MOORE No. 8818DC163	Guilford (87CVD5655)	Appeal Dismissed
PHARR v. RENNICK No. 8819DC222	Rowan (86CVD1102)	Appeal Dismissed
REASON v. HIATT No. 878SC1059	Wayne (87CVS959)	Affirmed
STATE v. BOISSIERE No. 8824SC47	Watauga (87CRS2124)	Affirmed
STATE v. COLVIN No. 8713SC669	Columbus (86CRS9739) (86CRS9740)	No Error

STATE v. DANIEL No. 8728SC1032	Buncombe (84CRS9159)	Appeal Dismissed
STATE v. FOX No. 8718SC954	Guilford (86CRS74084)	No Error
STATE v. HALES No. 872SC1174	Beaufort (87CRS07366) Camden (86CRS223)	Affirmed
STATE v. JAMES No. 8724SC1215	Watauga (86CRS4623) (86CRS4625)	No Error
STATE v. JOHNSON No. 8723SC1146	Wilkes (86CRS1753)	No Error
STATE v. KIRKPATRICK No. 8830SC6	Macon (86CRS1148) (87CRS558)	Reversed & Remanded
STATE v. McGREGOR No. 8820DC2	Moore (85CRD3429) (85CRD3430)	Order striking judgment of forfeiture will be vacated & cause is remanded to District Court for entry of an order reinstating the judgment of forfeiture.
STATE v. PARHAM No. 8719SC1044	Randolph (87CRS3501)	Dismissed
STATE v. ROBINETTE No. 8722SC1001	Alexander (86CRS3349)	No Error
STATE v. RORIE No. 8726SC928	Mecklenburg (86CRS99842)	No Error
STATE v. SIMMONS No. 875SC566	New Hanover (86CRS24906) (86CRS24907) (86CRS24908) (86CRS24909) (86CRS24911) (86CRS24912) (86CRS25264)	No Error
STATE v. SOLOMON No. 8714SC1149	Durham (87CRS2038)	No Error

STATE v. TAYLOR No. 8816SC192	Robeson (86CRS23789)	No Error
STATE v. UNDERHILL No. 878SC1154	Wayne (87CRO1695)	No Error
STATE v. UNDERWOOD No. 8715SC1091	Orange (85CRS9543)	Affirmed
STATE v. WESTON No. 876SC646	Hertford (86CRS2374)	No Error
STATE v. WHITTINGTON No. 8825SC121	Caldwell (86CRS913)	Affirmed
WALLACE v. HIGH No. 877SC974	Nash (83CVS1048)	Affirmed

STATE OF NORTH CAROLINA v. LAFAITE NARCISSE

No. 8711SC902

(Filed 7 June 1988)

1. **Narcotics § 4.3— cocaine—constructive possession—evidence sufficient**

There was sufficient evidence of constructive possession in a prosecution for possession of cocaine with intent to sell and trafficking in cocaine where evidence for the State indicated that in early or mid-December 1986 defendant moved into another man's mobile home and two days later sold cocaine to McCormack; on 30 December 1986 McCormack returned to the mobile home to see whether defendant and a third man were there and to ascertain whether they had a sufficient supply of cocaine to be able to sell $2,100 worth; McCormack then left to get the money, returned with the money and counted it out on a table to both defendant and the third man; as she counted the money out to defendant and the other man, logs of crack were lying on the table; as the other man multiplied figures on a newspaper, trying to determine the number of logs McCormack was to receive for $2,100, he conversed with defendant in a foreign language and defendant occasionally nodded his head; and law enforcement officials entered the mobile home shortly after McCormack left with the cocaine and found the $2,100 which McCormack had used to purchase the cocaine along with 21.46 grams of cocaine hidden in a heating unit in the same general area where the drug transaction had taken place.

2. **Narcotics § 4— sale of cocaine—evidence sufficient**

The evidence was sufficient to deny defendant's motion to dismiss the charge of sale of cocaine where, although defendant contended he was merely present when the transfer took place between Jarbath and McCormack, defendant's involvement in the transaction was evidenced by his consultation with Jarbath, his proximity to the table where the money was counted out to Jarbath and him, and defendant's close proximity to where the transfer of money and cocaine occurred.

3. **Arrest and Bail § 3.4; Searches and Seizures § 23— sale of cocaine—warrantless arrest—probable cause for search**

The trial court did not err in a prosecution for possession of cocaine with intent to sell, sale of cocaine, and trafficking in cocaine by possession by denying defendant's motion to suppress evidence seized from a mobile home pursuant to a search warrant where the warrant was obtained after officers had forced entry to a mobile home and arrested defendant and another man. There was probable cause to enter the mobile home in that the officer had information which if submitted to a magistrate would have required the issuance of an arrest warrant, the offense occurred in the presence of the officer in that he acquired knowledge of it through monitoring a body transmitter, and there was compliance with the requirements of N.C.G.S. § 15A-401(e)(1), (2) in the forcible entry of the dwelling.

APPEAL by defendant from *Allen, J. B., Judge.* Judgment entered 7 May 1987 in Superior Court, HARNETT County. Heard in the Court of Appeals 7 March 1988.

Defendant was tried and convicted upon indictments proper in form charging him with possession of cocaine with intent to sell, sale of cocaine, and trafficking cocaine by possession. From judgments imposing active sentences, defendant appeals.

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

D. K. Stewart and Donald E. Harrop, Jr., for defendant-appellant.

JOHNSON, Judge.

The State presented evidence tending to show the following. In 1986, Detective Bill Wade of the Harnett County Sheriff's Department was working as an undercover drug agent in the county. Around the middle of September, 1986, he went to Gloria McCormack's mobile home located in Angier, North Carolina and made a purchase of cocaine from her. McCormack, who had a reputation of being a drug dealer, told Detective Wade that she acquired cocaine from some Haitians. Detective Wade did not arrest McCormack at this time because his intent was to learn the identity of the persons supplying McCormack with the drugs.

Defendant lived in a mobile home located approximately 150 yards behind McCormack's mobile home with two other persons, Louis Pompee and Charlemagne Jarbath. Defendant moved into the mobile home around early or mid December 1986. Approximately two days after defendant had moved in, McCormack purchased $60.00 worth of cocaine from him. On five or six other occasions McCormack purchased cocaine from Pompee or Jarbath.

On 30 December 1986, at or about 3:30 p.m., Detective Wade returned to McCormack's mobile home to make another purchase. He told her that he wanted to purchase $2,100.00 worth of crack. McCormack went to the mobile home where defendant was living to inform defendant and Jarbath that she wanted to make a buy, and "to make sure they had enough 'crack' (cocaine) for the amount of money [she] was going to bring." Defendant and Jarbath were both inside the mobile home. McCormack returned to

her mobile home and advised Detective Wade that defendant and Jarbath had the crack to sell. McCormack also told Detective Wade that she thought that he was a narcotics agent; that she wished that he was because she needed help; and that she would help him "bust the Haitians." She stated that she needed help because her husband had lost all of his money and was not buying food for her and the children. Detective Wade left the mobile home for a short period of time to confer with Detectives Randy Sturgill, Myles Tart and Sabrina Currin. Detective Wade then returned to McCormack's mobile home with Detective Currin and a body transmitter. He then identified himself and Detective Currin to McCormack. McCormack agreed to make a drug purchase from defendant and Jarbath while wearing the body transmitter.

McCormack returned to the mobile home where defendant was living to make the purchase. She went to the kitchen table where defendant and Jarbath were standing and counted the money out to both of them. While she counted the money defendant and Jarbath talked to each other in a foreign language which she did not understand. Jarbath then took the $2,100.00. There was a newspaper on the table and under it was a number of logs of crack. Jarbath used the newspaper for figuring, in order to determine the number of crack logs McCormack could purchase for $2,100.00. Defendant and Jarbath were charging $60.00 per crack log. Jarbath multiplied some six different sets of figures for approximately five minutes before determining that $2,100.00 would purchase 35 logs of crack at $60.00 each. Each time Jarbath multiplied a set of figures he would converse with defendant in a foreign language. Defendant would occasionally nod his head as he and Jarbath conversed. After determining the number of crack logs McCormack should get, Jarbath counted them out from the crack logs on the table and gave them to her. McCormack then left, returned to Detectives Wade and Currin who were waiting nearby, gave them the logs of crack and told them what had transpired. Detective Wade could hear the conversations being transmitted by the body transmitter McCormack was wearing but could only understand conversations Jarbath had had with McCormack. He could not understand conversations between defendant and Jarbath because they spoke in a foreign language.

From the time McCormack was fitted with the body transmitter until the time she returned to Detectives Wade and Currin

and gave them the drugs, she was never out of the detectives' sights, with one exception, during the time she was with defendant and Jarbath inside the mobile home. No one else entered or left the mobile home during this time. After McCormack had given the detectives the drugs she had purchased and related to them what transpired, Detectives Wade, Tart and Sturgill went to the mobile home to arrest defendant and Jarbath. Detective Wade knocked on the front door of the mobile home and announced, "police!" He then heard a lot of "scrambling and running" coming from inside the mobile home. He again yelled, "police!" No one answered the door so he kicked it open and entered. Upon entering the mobile home, he observed defendant standing in the kitchen-den combination area and to his right he saw Jarbath crawling underneath a bed. Defendant and Jarbath were both arrested. Lying on the kitchen table were the newspaper Jarbath had used to multiply the figures and what "appeared" to be small pieces of crack. Agent Sturgill was then dispatched to get a search warrant which he in fact obtained. After returning with the search warrant it was read to the occupants of the mobile home and the premises were then searched. The search of the premises revealed the $2,100.00 McCormack had used to purchase the crack. The serial numbers had been previously recorded. The money was found in a heating unit together with 21.46 grams of cocaine. The heating unit was located in the kitchen-den area. Also, $2,726.00 was found in a jacket pocket in a bedroom. Defendant stated that the $2,726.00 belonged to him. The State's evidence further tended to show that the cocaine which McCormack purchased from defendant and Jarbath weighed 11.81 grams, and the cocaine found on the kitchen table weighed less than one gram.

Defendant, testifying in his own behalf through an interpreter, presented evidence tending to show that he is from Haiti and speaks very little English. He has been in the United States for seven years working as a migrant farm worker. He met Louis Pompee several years prior to December 1986 while working in North Carolina. He came to North Carolina on 28 December 1986 from Florida to visit Pompee who had agreed to assist him in buying a car. Before leaving Florida he withdrew $3,000.00 from the bank. When he arrived at Pompee's mobile home, Pompee and Jarbath were there. Until 28 December 1986 he had never met

Jarbath. He had never met nor had he ever heard of Gloria McCormack until 30 December 1986 when she went to Pompee's mobile home where he was living temporarily. He did not know why McCormack was there. When she arrived she and Jarbath went into the bedroom and he remained in the kitchen. He never sold any drugs to McCormack and did not see any drugs on the table. Defendant presented other evidence which tended to show that Pompee told the detectives that drugs sold to McCormack and found in the mobile home did not belong to defendant but belonged to him.

The State presented evidence in rebuttal tending to show that defendant does understand and speak the English language well. Other evidence offered by the State tended to show that while in jail awaiting trial, defendant served as an interpreter for another Haitian and a Mexican who did not speak English.

[1] By his first Assignment of Error defendant contends the trial court erred in the denial of his motions made at the close of all the evidence for dismissal of the charges of possession with intent to sell cocaine and trafficking cocaine by possession. Defendant argues that the evidence was insufficient to show the element of his actual or constructive possession of the cocaine seized in the mobile home and recovered from Gloria McCormack.

> A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. . . . Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. . . . All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. . . . If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied.

State v. McKinney, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975) (citations omitted).

In reviewing the denial of a motion to dismiss, we are required to examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. *State v. McKinnon*, 306 N.C. 288, 293 S.E. 2d 118 (1982). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that the essential element exists. *Id.*

The dispositive question on this issue is whether substantial evidence was adduced which could support the contention that defendant was in constructive possession of the cocaine seized in the mobile home and recovered from McCormack. There was no evidence adduced that defendant was in actual possession.

In a prosecution for possession of contraband materials the State is not required to prove actual physical possession of the materials. Proof of constructive possession is sufficient and that possession need not always be exclusive. *State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450 (1986).

> A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing. As with other questions of intent, proof of constructive possession usually involves proof by circumstantial evidence. However, in testing the sufficiency of the evidence, the test to be used 'is the same whether the evidence is direct, circumstantial or both.' 'In ruling on the motion, evidence favorable to the State is to be considered *as a whole* in determining its sufficiency.'

State v. Beaver, 317 N.C. 643, 648, 346 S.E. 2d 476, 480 (1986) (citations omitted) (emphasis in original).

Evidence for the State indicates that in early or mid December 1986 defendant moved into Pompee's mobile home and two days later sold cocaine to McCormack. On 30 December 1986, McCormack returned to the mobile home to see whether defendant and Jarbath were there and to ascertain whether they had a sufficient supply of cocaine to be able to sell $2,100.00 worth. Once having determined that they could indeed sell her such an amount, McCormack left to get the money, returned with the money and counted it out on a table to both defendant and Jar-

bath. As she counted the money out to defendant and Jarbath, logs of crack (cocaine) were lying on the table. As Jarbath multiplied figures on a newspaper, trying to determine the number of logs McCormack was to receive for $2,100.00 at $60.00 per log, he conversed with defendant in a foreign language and defendant occasionally nodded his head. Shortly after McCormack left with the cocaine, law enforcement officials entered the mobile home, and pursuant to a search warrant, found the $2,100.00 which McCormack had used to purchase the cocaine along with 21.46 grams of cocaine hidden in a heating unit. The heating unit was in the same general area where the drug transaction had taken place.

Considering this evidence as a whole, we find it to be substantial from which a jury could reasonably infer that defendant had the intent and capability to maintain control and dominion over the cocaine sold to McCormack and the cocaine seized from the table and heating unit, and that defendant had the intent to sell the controlled substance. Thus, the evidence was sufficient for the jury to find the essential elements of the crimes beyond a reasonable doubt.

[2] Next, defendant contends the court erred in denying his motion at the close of all the evidence to dismiss the charge of the sale of cocaine. Defendant argues that he was merely present when the transfer took place between Jarbath and McCormack. We find no merit in defendant's contention.

It is uncontroverted that a sale took place between Jarbath and McCormack. The question then becomes whether there was substantial evidence adduced which would support the State's assertion that defendant had participated in that sale. Without again detailing the evidence discussed in defendant's first assignment of error, we find that the evidence is sufficient to show defendant's involvement in the transaction, evidenced by his consultation with Jarbath, his proximity to the table where the money was counted out to Jarbath and him, as well as his close proximity to where the transfer of money and cocaine occurred. Again, this is substantial evidence from which a jury could find the essential elements of the crime beyond a reasonable doubt.

[3] By his third Assignment of Error defendant contends the trial court erred in denying his motion to suppress evidence

seized from the mobile home. Defendant argues that the officers did not have probable cause to enter the mobile home and that evidence seized pursuant to the search warrant, which was obtained after the entry, was tainted by the illegal entry.

Upon defendant's motion to suppress, the court conducted a *voir dire* hearing. Pursuant to G.S. 15A-977(f), the trial judge made detailed findings of fact and conclusions of law. Among its findings the court found that Detective Wade had probable cause to arrest defendant and the legal right to enter the mobile home to make the arrest. Facts found by the trial court are conclusive and will not be disturbed on appeal if they are supported by competent evidence. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

G.S. 15A-401(b)(1) provides that an officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence. Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971). One has probable cause if he has information of facts which if submitted to a magistrate would require the issuance of an arrest warrant. *Id.*

Black's Law Dictionary 1065 (5th ed. 1979) states that

> [a]n offense is committed in the "presence" or "view" of an officer, within the rule authorizing arrest without warrant, when the officer sees the act constituting it, though at a distance, or when circumstances within his observation give probable cause for belief that defendant has committed an offense, or when he *hears a disturbance created by the offense* and proceeds [at] once to [the] scene, or if the offense is continuing, or has not been fully consummated when the arrest is made.

(Emphasis supplied.)

In *Webster's Third New International Dictionary 1793* (1968) "presence" is defined in one sense as "a quality in sound reproduction that gives a listener the illusion of being in the same room as the original source of sound rather than in the room with the sound reproducing system."

Clearly under the evidence of this case Detective Wade had information of facts which if submitted to a magistrate would

have required the issuance of an arrest warrant for defendant prior to the time defendant was arrested. Detective Wade had given McCormack money to make the drug purchase from defendant, he listened to the drug purchase transaction take place through the use of a body-bug transmitter worn by McCormack, and immediately following the transaction, McCormack delivered the drugs to the officer and gave him a detailed account of the transaction. Thus, the officer had probable cause to believe that defendant had committed a felony. We also hold that the offense occurred in the presence of the officer, as he acquired knowledge of it through his sense of hearing as he monitored the conversations and drug transaction through the body-bug transmitter worn by McCormack.

Having probable cause to believe that defendant had committed a felony in his presence, Detective Wade was authorized to arrest defendant without a warrant pursuant to G.S. 15A-401(b)(1). To perfect this warrantless arrest the officer was authorized under G.S. 15A-401 to enter the mobile home.

> A law-enforcement officer may enter private premises . . . to effect an arrest when [t]he officer has in his possession a warrant or order for the arrest of a person or *is authorized to arrest a person without a warrant* or order having been issued. . . .

G.S. 15A-401(e)(1)(a) (emphasis added).

We believe that there was sufficient compliance with the requirements of G.S. 15A-401(e)(1) and (2) which mandate that entrance be demanded and denied before a police officer can forcibly enter a dwelling for the purpose of making an arrest, where the officer knocked, identified himself twice, heard a lot of scrambling and running noises coming from within the dwelling, and received no reply before he forcibly opened the door. We therefore hold that the trial court's findings of fact are supported by competent evidence and that the court properly denied defendant's motion to suppress.

Defendant's remaining assignments of error not brought forward are deemed abandoned. Rule 28(b)(5), N.C.R. of App. Pro.

In the trial of defendant's case we find

No error.

Chief Judge HEDRICK and Judge ORR concur.

IN RE: PARKER, MINOR CHILDREN

No. 8730DC1122

(Filed 7 June 1988)

1. **Parent and Child § 1.6— termination of parental rights—finding sufficient**

In an action to terminate parental rights, detailed findings of fact entered by the trial judge depicted circumstances and events existing prior to removal of the children from the home by DSS as well as those occurring while the children were in foster care, and the evidence of neglect existing prior to removal of the children from the home and the conduct of the mother while the children were in foster care supports the conclusion of the trial court that at the time of the termination proceeding, the children were neglected pursuant to N.C.G.S. § 7A-289.32(2).

2. **Parent and Child § 1.5— termination of parental rights—dispositional stage—no abuse of discretion**

The trial court did not abuse its discretion in the dispositional stage of a termination of parental rights proceeding by terminating parental rights where the court entered findings that two experts were of the opinion that the children would be harmed if they were returned to the mother, the guardian ad litem was of the opinion that it would be in the best interest of the children to terminate parental rights, and the children had been in foster care for three years and were seven and nine years of age.

3. **Evidence § 29.3— termination of parental rights—hospital records of mother—excluded—no error**

The trial court did not err in a termination of parental rights proceeding by excluding the mother's hospital records because of a lack of adequate foundation where the mother did not attempt to follow proper procedure for introducing the records at the hearing, there was no evidence that she attempted to authenticate the documents through any of the procedures set out in N.C.G.S. § 8-44.1, and the record on appeal does not show the substance of the excluded evidence and prejudice could not be determined. N.C.G.S. § 8C-1, Rule 103(a)(2).

4. **Parent and Child § 1.6; Appeal and Error § 48.4— termination of parental rights—statements of children—excluded—prejudice not shown**

The mother in a termination of parental rights proceeding failed in her burden to show that alleged error was prejudicial where the court sustained objections to the introduction of statements of the children made to the mother outside of court. N.C.G.S. § 8C-1, Rule 803(3).

In re Parker

APPEAL by respondent-mother from *Davis (Danny E.), Judge.* Judgment entered 2 July 1987 in District Court, CHEROKEE County. Heard in the Court of Appeals 6 April 1988.

Merinda Swanson Woody for petitioner-appellee.

McPeters & Davis, by M. Ellen Davis, for respondent-appellant.

Deborah L. Nichols, P.A., as Guardian ad Litem.

GREENE, Judge.

This proceeding arises from the Cherokee County Department of Social Services' petition to terminate the parental rights of the parents of two minor children. The trial court granted the petition and the mother appeals from the portion of the order terminating her rights.

The Department of Social Services (hereinafter "DSS") filed the petition in May 1986 alleging as grounds for terminating the mother's parental rights, N.C.G.S. Secs. 7A-289.32(2) (neglect or abuse), 7A-289.32(3) (children willfully left in foster care for 18 months) and 7A-289.32(4) (1986) (parents' willful failure to pay reasonable portion of care cost of children in foster care). The trial court concluded grounds existed for termination under all three subdivisions. Since we hold the trial court's findings of fact support its conclusion of law that the mother's parental rights could be terminated under N.C.G.S. Sec. 289.32(2), it is unnecessary to determine if termination was proper pursuant to the other subdivisions. *See* N.C.G.S. Sec. 7A-289.31(a) (1986) (a court may issue order terminating parental rights if court determines any one of the conditions authorizing termination exists).

The issues presented are: I) whether the findings of fact support termination of the mother's parental rights on the grounds the children were neglected pursuant to N.C.G.S. Sec. 7A-289.32(2), II) whether the trial court abused its discretion in determining that it was in the best interests of the children to terminate the mother's parental rights, and III) whether the trial court erred in excluding from evidence certain hospital records of the mother and statements made by the children to the mother.

I

[1] To support termination of parental rights under N.C.G.S. Sec. 7A-289.32(2), there must be clear, cogent and convincing evidence that neglect exists at the time of the termination proceeding. *In re Ballard*, 311 N.C. 708, 716, 319 S.E. 2d 227, 232 (1984). Where there has been a prior adjudication of neglect as here, "evidence of neglect by a parent prior to losing custody of a child —including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E. 2d at 232. The trial court is required to consider all relevant evidence of "circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect." *Id.* at 716, 319 S.E. 2d at 232-33 (emphasis in original). However, while the court may admit into evidence and consider any previous adjudications of neglect, a prior adjudication of neglect is not dispositive on the issue of neglect under N.C.G.S. Sec. 7A-289.32(2). *Id.* at 715, 319 S.E. 2d at 232.

The mother has not preserved any exceptions or assignments of error to the essential findings of fact entered by the trial court because she fails to bring them forward and argue them in her brief. *See Baker v. Log Systems, Inc.*, 75 N.C. App. 347, 350-51, 330 S.E. 2d 632, 635 (1985) (where appellant does not bring forth exceptions in his brief to certain findings of the trial court, he is deemed to have abandoned them under N.C.R. App. P. 28(b)(5)). Therefore, we only determine if the findings made by the trial judge support the conclusions of law.

In its findings of fact, the trial court incorporated by reference the 3 April 1984 order adjudicating the children to be neglected and abused, the three subsequent orders of review, and three service agreements entered into between the mother and DSS.

In the 3 April 1984 order, the trial court found the mother's boyfriend had abused the children and the mother had not provided the children with adequate nutrition and a proper living environment. The court also found the children were "continuously filthy" and had been treated at the local hospital on five different occasions for ingestion of foreign materials. The trial court con-

cluded the children had been abused and neglected and placed physical and legal custody of them with DSS.

The 12 September 1984 review order found the mother had visited with her children only once in six months and had failed to establish a residence. The trial court ordered regular visits between the mother and her children to occur twice a month. The 6 March 1985 review order found the mother had visited with her children on three occasions since 12 September 1984 and had not yet established a residence. On 6 March 1985, the mother was ordered to terminate her association with her boyfriend and to keep DSS informed of her current address. The 23 August 1985 review order found the mother continued to associate with her boyfriend, ordered custody to continue with DSS, and ordered the mother to begin child support payments in the amount of $10 per week.

The service agreements entered into by DSS and the mother required, among other things, that DSS provide foster care for the children and make the children available for visits with the mother. DSS agreed to arrange transportation for the mother to go to and from the mental health center. The mother agreed to visit with her children twice a month, to participate in mental health counseling sessions, to attend parenting classes, to keep DSS advised of her current residence, to do volunteer work in a child care unit, and to terminate her relationship with her boyfriend, Claude Hartness. The 11 October 1984 agreement specifically provided that the mother's failure to abide by the agreement could result in a petition for termination of parental rights.

On the issue of neglect in the present case, the trial court entered the following relevant findings:

> 20. The conditions leading to the removal of the children from the home in that order of adjudication and disposition entered April 3, 1984 and signed April 20, 1984 were:
>
> (a) That the conduct of said Claude Hartness toward the child, Jennifer, was abusive, in that he kissed the child on the mouth, pressing his teeth against hers, and forcing his tongue into her mouth.
>
> (b) That Jennifer has been subjected to other physical abuse, as in December, 1983, said child was seen to have

welts on her back, beginning at her shoulder blades, and extending to the backs of her knees, and the Court finds that the cause of those welts has not been satisfactorily explained by the mother.

(c) That as early as January, 1983, the child, Jason, then age 4 years, 2 months, had to be treated for an abscessed tooth. The Court finds that such a condition is unusual in such a young child, and is the result of the neglect of the mother, in that she failed to provide proper dental care, proper nutrition, and proper supervision to make sure Jason brushed his teeth on a regular basis and in a correct manner. The Court further finds that the mother, as a recipient of AFDC, also received Medicaid, which program would have paid for all necessary dental care without charge to the mother.

(d) That the mother has engaged in a pattern of neglect, as a result of which the children have had to be treated at the emergency room of Murphy Medical Center, for the ingestion of foreign objects, on the following dates:

1. January 4, 1981—Jason reported to have swallowed a glass thermometer. X-Rays failed to show anything;

2. April 23, 1981—Jason swallowed Prestone antirust fluid for radiators. No treatment was necessary as the substance was a mineral oil compound;

3. October 17, 1981—Jason swallowed overdose of Dimetapp, an antihistamine, and Ampicillin, an antibiotic. He was treated with Syrup of Ipecac, which induced vomiting;

4. October 3, 1981—Jennifer, in the course of emergency treatment for a purported fall, reported to have swallowed glass earlier in the day;

5. November 4, 1982—Jennifer ate soap. She was given a lot of fluids.

The Court finds the pattern of neglect to be particularly hazardous to the children due to the possibility they might ingest a more dangerous substance that could prove fatal.

(e) That the children have been living in an environment which is dangerous and injurious to their health and welfare,

in that the mother has failed to provide a stable home for the children, living in at least four different locations in Cherokee County within the last eighteen months. The Court finds further that the mother has not made a real effort to establish a home for the children, and that she has been more interested in her own personal gratification of being with Claude Hartness, than in the welfare of her children.

. . . .

23. Of 59 visits which were scheduled for Merris Parker to visit with her children, she missed 25 visits . . . .

24. The social worker testified Jennifer was emotionally upset when her mother would cancel visits; . . . an expert witness in the field of psychology . . . testified that when visits with the mother were canceled by the mother, Jason became abusive toward others.

25. Merris Parker . . . had four different admissions to Smoky Mountain Mental Health, three of the four having to be terminated because of her non-attendance; she is currently continuing to be seen in her last admission of March 16, 1987.

26. Merris Parker did not attend any parenting skills classes through Developmental Evaluation Center for failure to take the Minnesota Multiphasic Personality Inventory test; she did attend 6 out of 22 parenting skills classes offered to her from the Cherokee County Home Extension Office.

. . . .

31. Merris Parker did find adequate housing in March 1986 but lived there for 4 months and then left the area and did not return to the area until October, 1986; that she presently resides in a two bedroom house in Cherokee County, North Carolina with her husband, Claude Hartness.

32. In the Order dated April 3, 1984, the Court found Merris Parker moved four times in 18 months prior to that hearing; and this Court finds that since the hearing on April 3, 1984, Merris Parker has moved seven times.

33. For a total period of fourteen months Cherokee County Department of Social Services did not know the whereabouts of Merris Parker . . . .

34. Merris Parker did not send Christmas presents to the children in December, 1984.

. . . .

36. The juvenile order entered in March 5, 1985 ordered Merris Parker not to associate with Claude Hartness.

. . . .

42. Jennifer expressed fear toward Claude Hartness.

. . . .

45. Turner Guidry's expert opinion was that it would cause Jennifer harm if she were returned to her mother . . . .

46. Judge Snow, in the order entered on April 3, 1984, made a finding in that order that Claude Hartness had sexually abused Jennifer; and the Court now finds that Claude Hartness married Merris Parker on June 5, 1986 while Claude Hartness was in prison, and that they now live together as husband and wife.

47. Merris Parker did attend Smoky Mountain Mental Health sporadically and did not attend often enough for the counselor, Mary Ricketson to form an opinion as to whether Merris had made any progress.

. . . .

52. Carl Deischer testified that in his expert opinion it would be harmful for Jason to be returned to his mother . . . .

On the issue of neglect, the trial court entered the following pertinent conclusions of law:

5. Merris Parker has neglected the children in that she left three different periods of time for a total of 14 months during the past three years the children have been in foster

care, thus withholding her companionship, her society and her parental affection from the children.

. . . .

10. Merris Parker does not have a suitable home for the children in that they would be living in an environment injurious to their welfare in that Claude Hartness lives there.

The detailed findings of fact entered by the trial judge depict the circumstances and events existing prior to the removal of the children from the home by DSS as well as those occurring while the children were in foster care. Prior to their removal: the mother and children had lived with the mother's boyfriend who had abused the children, over a period of several months the children were treated in the local hospital emergency room for five different incidents of ingestion of foreign materials including glass, antihistamines, and antirust fluid, and the mother and children had lived in four different locations over an eighteen-month period. While in foster care the mother: missed 25 out of 59 scheduled visits, attended only 6 out of 22 scheduled parenting classes, was terminated from mental health counseling because of nonattendance, moved her residence seven times, failed to advise DSS of her whereabouts for a period of 14 months, and married the boyfriend who had been found to have abused her children.

The evidence of neglect existing prior to removal of the children from the home and the conduct of the mother while the children were in foster care supports the conclusion of the trial court that at the time of the termination proceeding, the children were neglected pursuant to 7A-289.32(2). *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E. 2d 246, 252 (1984) (a child may be found to be neglected if parent does not correct within a reasonable time the conditions giving rise to neglect).

II

[2] Once a petitioner meets its burden of proof at the adjudicatory stage, the court's decision to terminate the parental rights is discretionary. *Montgomery*, 311 N.C. at 110, 316 S.E. 2d at 252. There is no requirement that the adjudicatory and dispositional stages be conducted at two separate hearings. *In re White*, 81 N.C. App. 82, 85, 344 S.E. 2d 36, 38, *disc. rev. denied*, 318 N.C. 283, 347 S.E. 2d 470 (1986).

At the dispositional stage a court is required to issue an order of termination unless it "determine[s] that the best interests of the child require that the parental rights of such parent not be terminated." N.C.G.S. Sec. 7A-289.31(a). In determining the best interests of the child, the trial court should consider the parents' right to maintain their family unit, but if the interest of the parent conflicts with the welfare of the child, the latter should prevail. *See Montgomery*, 311 N.C. at 116, 316 S.E. 2d at 256.

The trial court entered findings that two experts were of the opinion the children would be harmed if they were returned to the mother. Additionally, the court found the guardian ad litem for the children was of the opinion it would be in the best interests of the children to terminate the parental rights. The children had been in foster care over three years and at the time of the hearing were seven and nine years of age. We therefore find no abuse of discretion in the trial court's decision that it was in the best interests of the children to terminate the parental rights of the mother.

III

[3] The mother finally argues the trial judge erred in excluding certain evidence tendered by the mother during the course of the termination proceeding. The trial court sustained objections to the mother's efforts to introduce her hospital records because of a lack of an adequate foundation. A hospital record is a business record, and is admissible into evidence upon the laying of a proper foundation. A proper foundation consists of testimony from a hospital librarian or custodian of the records or other qualified witnesses to the identity and authenticity of the record and the mode of its preparation. In addition, it must be shown that the entries were made at or near the time of the event, made by persons having knowledge of the data set forth, and made "*ante litem motam.*" *Donavant v. Hudspeth*, 318 N.C. 1, 6, 347 S.E. 2d 797, 801 (1986). The mother did not attempt to follow this procedure at the hearing nor is there any evidence that she attempted to authenticate the document through any of the procedures set out in N.C.G.S. Sec. 8-44.1 (1986) which provides methods for the authentication of medical records. In any event, even had the exclusion been error, the record does not show the substance of

the excluded evidence and we are unable to determine if the ruling of the court was prejudicial. N.C.G.S. Sec. 8C-1, Rule 103(a)(2) (error may not be predicated on exclusion of evidence unless the "substance of the evidence was made known to the court" by an offer of proof or was apparent from the context of the questions asked). *See also State v. Satterfield*, 300 N.C. 621, 628, 268 S.E. 2d 510, 515-16 (1980).

[4] The trial court also sustained objections to the mother's efforts to introduce statements of her children made to her outside the court. The mother argues this evidence is admissible under the exception to the hearsay rule, N.C.G.S. Sec. 8C-1, Rule 803(3), as reflecting the then existing mental and emotional state of the children. However, as the mother has failed in her burden to show that the alleged error was prejudicial, we do not determine whether the court erred in excluding the evidence. *Cook v. Southern Bonded, Inc.*, 82 N.C. App. 277, 346 S.E. 2d 168 (1986) (to prevail on appeal, appellant must show not only error, but that error was material and prejudicial, amounting to denial of substantial right and likely affecting result), *disc. rev. denied*, 318 N.C. 692, 351 S.E. 2d 741 (1987).

The judgment of the trial court terminating the parental rights of the mother is therefore

Affirmed.

Judges BECTON and JOHNSON concur.

MINNIE ALICE GREGORY, EMPLOYEE, PLAINTIFF v. SADIE COTTON MILLS, INC., EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER; AND/OR LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER; AND/OR NATIONAL YARN MILLS, EMPLOYER; LUMBERMENS MUTUAL INSURANCE COMPANY, CARRIER; AND/OR EAGLE YARN MILLS, EMPLOYER; AMERICAN MUTUAL INSURANCE COMPANY, CARRIER; AND/OR MUR-GLO SPINNING COMPANY, EMPLOYER; MARYLAND CASUALTY COMPANY, CARRIER; DEFENDANTS

No. 8810IC83

(Filed 7 June 1988)

Master and Servant § 68— workers' compensation—date of total disability—effect of working a few days per year

The evidence supported a determination by the Industrial Commission that plaintiff became totally disabled on 1 October 1968 from chronic obstructive pulmonary disease and that her compensation should be based on the version of N.C.G.S. § 97-29 in effect on that date, although she worked a few days in some of the years from 1969 to 1980, since plaintiff's unsuccessful attempts to work during those years, when considered with the medical evidence, demonstrated her total incapacity to earn wages.

APPEAL by plaintiff from Opinion and Award of the Industrial Commission filed 21 October 1987. Heard in the Court of Appeals 5 May 1988.

On 27 July 1984, plaintiff filed a claim for compensation for disability arising from an occupational lung disease listing Sadie Cotton Mills, Inc. as her last employer. On 22 October 1984, plaintiff filed a motion to add as defendants Eagle Yarn Mills, National Yarn Mills and Mur-Glo Spinning Company. This motion was allowed by Deputy Commissioner Burgwyn. On 25 November 1985, Deputy Commissioner Haigh allowed the motion of Sadie Cotton Mills and its carrier Liberty Mutual Insurance Company to add as a defendant Lumbermens Mutual Casualty Company for the period it provided insurance coverage for Sadie Cotton Mills.

On 13 November 1986, Deputy Commissioner Haigh filed an Opinion and Award concluding that plaintiff was totally disabled as a result of an occupational disease, chronic obstructive pulmonary disease, from 1 October 1968 to 1 April 1969 and from 1 July 1969 to date. The Commissioner determined that plaintiff's last injurious exposure to the hazards of her occupational disease occurred while she was employed by Sadie Cotton Mills in 1968

and ordered Sadie Cotton Mills and its carrier in 1968, Lumbermens Mutual Casualty Company, to pay the award under the provisions of G.S. 97-29 in effect on 1 October 1968. Plaintiff was awarded a lump sum payment of $12,000.00, less $3,000.00 in attorney's fees, as well as medical expenses and costs. Plaintiff appealed to the full Industrial Commission. On 21 October 1987, the Industrial Commission changed the lump sum award from $12,000.00 to $13,520.00 but otherwise affirmed and adopted Commissioner Haigh's Opinion and Award. Plaintiff appeals.

Lore & McClearen, by R. Edwin McClearen, for plaintiff-appellant.

Michael K. Gordon for defendants-appellees Sadie Cotton Mills, Inc. and Lumbermens Mutual Casualty Company.

SMITH, Judge.

Defendants filed motions to dismiss the appeal as to each defendant. Without opposition from plaintiff, the motions were granted as to all defendants except Sadie Cotton Mills, Inc. and Lumbermens Mutual Casualty Company. As to these remaining defendants, plaintiff brings forward several assignments of error designated in her brief as one argument. Plaintiff sets forth as the primary issue on appeal the extent of her disability and the date on which it occurred. The date of total disability determines which version of the compensation statute applies and thus the amount of compensation due. The Industrial Commission found plaintiff became totally disabled on 1 October 1968 and awarded compensation under the statute in effect on that date. Plaintiff contends that she was only partially disabled at that time and that she did not become totally disabled until 13 January 1980. Thus, she seeks total disability compensation, attorney's fees, and medical compensation under the version of the total disability statute, G.S. 97-29, in effect in 1980. Plaintiff also asks this Court to remand this case to the Industrial Commission for findings to determine whether she is entitled to compensation for partial disability from 1 July 1969 to 13 January 1980. We have reviewed plaintiff's assignments of error and affirm the Opinion and Award of the Industrial Commission.

Deputy Commissioner Haigh's findings of fact, adopted by the Industrial Commission, are that plaintiff was born on 7 March

1908 and began working in cotton textile mills at the age of 15. She worked in textile mills at least parts of each year from 1923 to 1980 except for the years 1961, 1963-64, 1970-73, and 1975-79. Plaintiff was employed at over 100 textile mills but worked for only brief periods and earned less than $100.00 at most of these mills. Her highest annual earnings were $3,221.00 at Sadie Cotton Mills during her last full year of work, 1967. She worked for Sadie Cotton Mills the first three quarters of 1968; for Mur-Glo Spinning Company part of the second and third quarters of 1969, earning $581.14; for Sadie Cotton Mills for 33 hours in 1974, earning $79.53; for Eagle Yarn Mills for 32 hours in 1974, earning $84.00; and for National Yarn Mills for two days in 1980, earning $64.00.

At an undetermined time, plaintiff began experiencing breathing problems, including a smothering sensation, wheezing and coughing up phlegm. She has been treated by physicians for her breathing problems since the 1950's and was hospitalized for breathing problems in June and August 1976 and June 1977. She was discharged from the hospital in June 1976 with no symptoms and on no medication. Plaintiff has smoked an average of one pack of cigarettes daily since around 1925 and, although she quit smoking for three years, currently smokes seven to eight cigarettes a day. The Industrial Commission found that plaintiff continued to experience breathing problems while working for Mur-Glo Spinning Mills in 1969, for Sadie Cotton Mills and Eagle Yarn Mills in 1974, and for National Yarn Mills in 1980. Her breathing problems continued after she last worked in 1980.

Plaintiff's average weekly wage in the third quarter of 1968, when she worked for Sadie Cotton Mills, was $56.34. Except for the period in 1969 when plaintiff worked for Mur-Glo Spinning Company, her breathing problems have made her unable to "hold out" in textile jobs.

The Industrial Commission found that plaintiff developed chronic obstructive pulmonary disease with components of emphysema, asthmatic bronchitis, and byssinosis to the extent that she had severe pulmonary impairment by October 1968. Cotton dust exposure, cigarette smoking and asthmatic bronchitis were found to have contributed to her lung disease. The byssinotic element of the disease was found to have been caused by exposure to cotton dust although cigarette smoking and old age have con-

tributed to the progression of the disease. The Industrial Commission also found that none of the employment after her employment with Sadie Cotton Mills in 1968 had individually "proximately augmented" the disease. Finally, the Industrial Commission found that due to age, limited education, work experience and physical limitations of the chronic obstructive pulmonary disease, plaintiff was incapable of earning any wages with Sadie Cotton Mills or any other employer from 1 October 1968 to 1 April 1969 and from 1 July 1969 to date.

Based on these findings of fact, the Industrial Commission made several conclusions of law. It determined plaintiff's chronic obstructive pulmonary disease was an occupational disease under the provisions of G.S. 97-53(13) and awarded plaintiff total disability compensation from 1 October 1968 to 1 April 1969 and from 1 July 1969 to date. The Industrial Commission also concluded that Sadie Cotton Mills was plaintiff's employer during her last injurious exposure in a single employment to the hazards of the occupational disease and ordered Sadie Cotton Mills and Lumbermens Mutual Casualty Company to pay the compensation awarded.

On appeal, plaintiff excepts to the findings of fact and conclusions of law regarding the 1968 date of disability and the compensation awarded based on this date. Compensation is payable under the Workers' Compensation Act for incapacity from total disability. G.S. 97-29. "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." G.S. 97-2(9). In occupational disease cases, disablement is treated as an injury by accident. G.S. 97-52. Disablement in occupational disease cases other than asbestosis and silicosis is the equivalent of disability as defined by G.S. 97-2(9). G.S. 97-54. Thus, plaintiff is entitled to compensation for total disability from her occupational disease if her disablement resulted in the incapacity to earn the wages she was earning before her disablement in the same or other employment.

To support the conclusion of disability, the Industrial Commission must find that because of plaintiff's injury she was incapable of earning the same wages she had earned before her injury either in the same or other employment. *Hilliard v. Apex*

Cabinet Co., 305 N.C. 593, 290 S.E. 2d 682 (1982). The Industrial Commission found that plaintiff's average weekly wage when she last worked regularly during the third quarter of 1968 was $56.34. The Industrial Commission also found that due in part to plaintiff's occupational disease she was incapable of earning any wages from 1 October 1968 to 1 April 1969 and from 1 July 1969 to date in her employment with Sadie Cotton Mills or any other employer. The Commission also found that the wages earned after 1 July 1969 "were meager at most and were earned only sporadically and for a brief period of time." "The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding. However, the Commission's legal conclusions are reviewable by the appellate courts." *Hilliard v. Apex Cabinet Co.*, 305 N.C. at 595, 290 S.E. 2d at 684 (citations omitted). In this case, the Commission's findings of fact are supported by the evidence and are binding on appeal. Further, the findings are sufficient to support the conclusion that plaintiff was totally disabled for the dates indicated.

Plaintiff contends that the wages she earned after 1969 compel a finding that she was not totally disabled until 1980, when she last worked. Her brief cites her testimony that she did not work after 1969 because transportation was inconvenient and she wanted to rest and that, although she was not sure she could "hold out," she might have been able to work. We disagree that the testimony requires a different finding for the date of disability. The fact that plaintiff worked a few days in some of the years from 1969 to 1980 "do[es] not tend to negate the evidence in the record that the plaintiff was incapable of earning the 'same wages' [she] was receiving at the time [she] first suffered injury from the occupational disease." *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 710, 304 S.E. 2d 215, 220 (1983), *reh'g denied*, --- N.C. ---, 311 S.E. 2d 590 (1984). Plaintiff's attempts to work after 1969 are evidence of her inability to earn the same wages as before her disability. Dr. Shanks testified that plaintiff had severe respiratory impairment since 1968. Her own testimony was that she left the job in 1969 because of her breathing problems and that she had to quit the other jobs after this time because she was having breathing problems and could not "hold out." The Industrial Commission's conclusion that plaintiff was totally dis-

abled in 1969 is supported by the findings of fact which are in turn supported by the evidence.

Plaintiff cites *Smith v. American & Efird Mills*, 305 N.C. 507, 290 S.E. 2d 634 (1982), as requiring a finding that plaintiff was partially disabled from 1969 to 1980 and totally disabled after 1980. In *Smith*, the employee left his job at a textile mill in 1968 due to breathing problems and obtained other sedentary employment. His weekly wages began to decline in 1970 and continued to decline until 1973. He had no earnings for the fourth quarter of 1973 or for 1974, 1975, or 1976. During each quarter of 1977, he had some earnings but had no earnings since the end of 1977. He filed a claim for workers' compensation benefits on 8 June 1978. The Industrial Commission awarded compensation for 300 weeks beginning 1 January 1970, the point in time when the employee's average weekly wage showed its first decline, and medical expenses for the same 300-week period. There was no appeal from the Commission's finding of permanent partial disability from 1970-78. In deciding which version of the compensation statute applied, our Supreme Court found that "[a]ll of the evidence in this record discloses that [the employee] did not become totally disabled until 1978." *Id.* at 511, 290 S.E. 2d at 637. Plaintiff contends *Smith* controls and requests this Court to remand her case for determinations regarding partial disability from 1969 to 1980 and total disability from 1980. We disagree. The record in this case discloses that plaintiff did not continue earning wages after 1969; plaintiff's unsuccessful attempts to work during these years when considered in conjunction with the medical evidence merely demonstrate her total incapacity to earn wages.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

Columbus County Auto Auction v. Aycock Auction Co.

COLUMBUS COUNTY AUTO AUCTION, INC., PLAINTIFF; THOMPSON CADILLAC-OLDSMOBILE, INC., INTERVENOR PLAINTIFF v. AYCOCK AUCTION COMPANY, INC., D/B/A AYCOCK AUTO AUCTION, SILK HOPE AUTOMOTIVE, INC., CLINTON McLAURIN, D. WAYNE HOOD, D/B/A HOOD'S USED CARS, R. E. DOWDY AND WILLIAM S. HIATT, AND THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES, DEFENDANTS, AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THIRD PARTY DEFENDANTS

No. 8710SC762

(Filed 7 June 1988)

1. **Public Officers § 9; State § 4.1— negligence by Commissioner of Motor Vehicles—immunity from liability**

The Commissioner of Motor Vehicles was immune from liability for mere negligence in the issuance of certificates of title for stolen vehicles.

2. **State § 4— negligence action against DMV—superior court without jurisdiction**

The superior court had no jurisdiction of a crossclaim against the Division of Motor Vehicles for negligence in the issuance of certificates of title for stolen vehicles; rather, the Industrial Commission had exclusive jurisdiction of such claim.

3. **State § 4— third-party action against DOT—jurisdiction of superior court**

The superior court had jurisdiction of a defendant's third-party claim against the Department of Transportation for indemnification based upon the primary negligence of the Department of Transportation in issuing certificates of title for stolen vehicles since the State may be joined as a third-party defendant in a tort action for indemnification in the state courts under N.C.G.S. § 1A-1, Rule 14(c).

APPEAL by defendant Aycock Auction Company, Inc., d/b/a Aycock Auto Auction from *Stephens, Donald W., Judge.* Order entered 8 June 1987 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 6 January 1988.

L. Austin Stevens for appellant Aycock Auction Co., Inc., d/b/a Aycock Auto Auction.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jane P. Gray and Assistant Attorney General Mabel Y. Bullock, for appellees William S. Hiatt, North Carolina Division of Motor Vehicles and North Carolina Department of Transportation.

JOHNSON, Judge.

There is only one issue for this Court to decide: whether the trial court erred in dismissing appellant's crossclaim against William S. Hiatt, Commissioner of Motor Vehicles, and the North Carolina Division of Motor Vehicles (DMV), and its third-party complaint against the North Carolina Department of Transportation (DOT).

On 26 September 1986, the plaintiff, Columbus County Auto Auction, Inc. (Columbus), filed its original complaint against the following defendants: Aycock Auction Company, Inc., d/b/a Aycock Auto Auction (Aycock), Silk Hope Automotive, Inc. (Silk Hope), Clinton McLaurin, Howard McLaurin, Shelby McLaurin, D. Wayne Hood, d/b/a Hood's Used Cars (Hood), William S. Hiatt, Commissioner of the DMV, R. E. Dowdy, Inspector of the DMV, and lastly the DMV. Plaintiff sought to recover from the defendants $180,000.00 plus interest for eleven automobiles alleged to have been purchased by the plaintiff from Aycock during the year 1985. The vehicles originated from Silk Hope. The vehicles were sold by Silk Hope to Hood who sold the same through Aycock at various times during 1985. Plaintiff purchased the vehicles at the auction sales and the North Carolina certificates of title were signed by Hood to Columbus to Thompson Cadillac-Oldsmobile, Inc. (Thompson).

The vehicles were later examined by the DMV, declared to be stolen vehicles, and were seized by the DMV from Thompson. Thompson sued all parties except Aycock and recovered judgment against the plaintiff, Columbus. Thompson was allowed to intervene in this action since its judgment was unsatisfied.

It was alleged by plaintiff (Columbus), that Silk Hope purchased wrecked and salvaged vehicles from out-of-state and removed the vehicle identification plate from each vehicle and placed the same on a stolen vehicle of the same make and year model. Silk Hope then allegedly presented each vehicle to R. E. Dowdy, Inspector of the DMV, as a repaired vehicle, together with the out-of-state salvage title. R. E. Dowdy then authorized the issuance of a North Carolina certificate of title for each vehicle.

On 22 December 1986, Aycock filed an answer, crossclaim, and third-party complaint, alleging that ten vehicles were pur-

chased at its auction sales and that if it were determined that it was liable to plaintiff (Columbus) on any of the vehicles, that the DOT and the remaining defendants would become liable to Aycock, based upon warranty of titles and negligence in the issuance of North Carolina certificates of title for stolen vehicles.

On 16 January 1987, defendants William Hiatt and R. E. Dowdy filed a motion to dismiss the crossclaims of Aycock against them, and defendant DOT filed a motion to dismiss the third-party complaint of Aycock against it based upon lack of subject matter and personal jurisdiction and for failure to state a claim for which relief may be granted. Silk Hope filed an answer and Hood did not file an answer nor any other pleadings.

On 8 June 1987, an order was entered by Judge Donald W. Stephens, finding that the court lacked subject matter and personal jurisdiction over William Hiatt, the DMV and the DOT and granted their motions to dismiss the crossclaims and third-party complaint. In addition, the court dismissed Columbus' original complaints against defendants Hiatt and the DMV. As to defendant, R. E. Dowdy, the court denied his motions. From entry of the order granting defendants' motions to dismiss, appellant Aycock appeals.

Appellant contends that the trial court committed reversible error in dismissing its crossclaim and third-party complaint, because Rule 14(c) of the North Carolina Rules of Civil Procedure specifically authorizes such joinder, notwithstanding the provisions of the Tort Claims Act.

[1, 2] As to Commissioner Hiatt, we believe we are bound by *Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automotive, Inc.*, 87 N.C. App. 467, 361 S.E. 2d 418 (1987), *disc. rev. denied*, 321 N.C. 480, 364 S.E. 2d 672 (1988), where this Court held that state officers, i.e., public officials, are immune from liability for mere negligence. The crossclaim in the case *sub judice* against Commissioner Hiatt alleged nothing more than mere negligence. There are no allegations of corrupt or malicious actions, actions outside the scope of defendant's duties, or gross negligence. *See Wiggins v. City of Monroe*, 73 N.C. App. 44, 326 S.E. 2d 39 (1985). Thus, as in *Thompson*, where this Court determined that defendant Hiatt, as Commissioner of the DMV, was a public official rather than an employee, the crossclaim has failed to state a claim for which

relief can be granted. We find the crossclaim subject to dismissal under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. "The trial court's having erroneously stated in its order as a basis for dismissal Rules 12(b)(1) and 12(b)(2) worked no prejudice to the plaintiff." *Thompson*, at 472, 361 S.E. 2d at 421, *citing Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E. 2d 453, 454 (1981). As to the DMV, the crossclaim against it is in essence a direct action, and "an action in tort against the State and its departments, institutions, and agencies is within the exclusive and original jurisdiction of the Industrial Commission, [and] a tort action against the State is not within the jurisdiction of the Superior Court." *Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522, 539-40, 299 S.E. 2d 618, 628 (1983). Thus, the orders of dismissal as to defendant Hiatt and as to defendant DMV are affirmed.

[3] We now address plaintiff's appeal of the trial court's order dismissing the action against defendant DOT.

Rule 14(c) of the North Carolina Rules of Civil Procedure specifically provides that "the State of North Carolina may be made a third party under subsection (a) or a *third-party defendant* under subsection (b) in any tort action" notwithstanding the provisions of the Tort Claims Act which provides that the claim must be filed before the Industrial Commission. Aycock's third-party complaint in the case *sub judice* was a claim for indemnification against the State as the primarily and actively negligent party.

Our Supreme Court in *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E. 2d 182, 187 (1982), determined the applicability of Rule 14(c) in a third-party action against the State when it stated:

> [t]he only controversy is whether the State courts are the proper forum for such actions. We recognize that actions for indemnification, as well as actions for contribution, are generally brought by means of a third-party complaint. Rule 14(c) does not limit the nature or character of third-party actions permissible against the State. We therefore hold that the State may be joined as a third-party defendant, whether in an action for contribution or in an action for *indemnification*, in the State courts.

Accord, In re Huyck Corp. v. Mangum, Inc., 309 N.C. 788, 309 S.E. 2d 183 (1983).

We note that in other cases in which an agency of the State is sued in a direct tort action and not as a third-party defendant, our Courts have consistently held that the Industrial Commission is the proper forum for such claims and that the Superior Court is without jurisdiction to hear such claims. *See, Guthrie, supra.* However, the facts in the case *sub judice* are not of the same import, where here the State was the subject of an action as a third-party defendant for indemnification pursuant to Rule 14(c). Thus, we believe the trial court erred when it dismissed the third-party complaint against the DOT.

Therefore, based on the aforementioned reasons, we affirm the judgment of the trial court as to defendant Commissioner Hiatt and defendant DMV and reverse and remand the judgment of the trial court as to defendant DOT.

Affirmed in part, reversed in part and remanded.

Judges PHILLIPS and ORR concur.

JANICE LYNN HEWETT v. RONALD R. ZEGARZEWSKI

No. 8728DC739

(Filed 7 June 1988)

Divorce and Alimony § 28.1; Judgments § 21.2— Florida divorce judgment—alleged fraud in separation agreement incorporated into judgment—intrinsic fraud

The trial court properly granted defendant's motion to dismiss an action seeking to set aside a Florida divorce judgment where the parties had entered into a deed of separation in North Carolina, then entered into a stipulation and property settlement agreement in North Carolina which incorporated the deed of separation, the agreement represented that both parties were each fully aware of the assets and financial condition of the other party, a Florida court incorporated each and every provision of the agreement into its final judgment of dissolution of marriage, and plaintiff subsequently brought this action upon learning that defendant had allegedly concealed the existence of a separate stock account. The type of fraud which plaintiff alleges is not that which will support a challenge to a judgment rendered in a foreign court in that the fraud

which plaintiff alleges is intrinsic rather than extrinsic. Art. IV, § 1 of the United States Constitution.

APPEAL by plaintiff from *Fowler, Earl J., Jr., Judge.* Order entered 30 March 1987 in District Court, BUNCOMBE County. Heard in the Court of Appeals 6 January 1988.

Marvin P. Pope, Jr., P.A., for plaintiff-appellant.

Westall, Gray, Kimel & Connolly, P.A., by Ronald L. Moore, for defendant-appellee.

JOHNSON, Judge.

This is a civil action in which plaintiff requests that the court set aside a separation agreement and a property settlement agreement, upon the basis that defendant allegedly fraudulently misrepresented his financial condition when said agreements were reached.

Plaintiff-appellant, Janice Lynn Hewett, and defendant-appellee, Ronald R. Zegarzewski, were married on 30 June 1978. There were no children born of this marriage. On 1 August 1986 the parties separated, and on 13 August 1986, they entered into a deed of separation in Haywood County, North Carolina. The agreement provided for a division of all the property which the parties owned, including both marital and separate property, as well as for an allocation of responsibility for their indebtedness. Paragraph 12 of the agreement specifically states that:

> It is the intent of the parties that this agreement constitutes final settlement of all rights and interest arising from the marriage of the parties[.] *[A] final settlement herein provided for is deemed to be an equitable settlement and distribution in lieu of the provisions of General Statute Section 50-20, and [each of the parties] expressly releases and waives any claims arising thereunder.* In addition thereto, each party releases the other from duties and obligations of support and maintenance, including attorneys fees, and understand that this [a]greement may be pleaded in bar of any right or claim arising from the marriage between the parties. (Emphasis supplied.)

On 10 September 1986, the parties entered another agreement in Haywood County, this one entitled "Stipulation and Property Settlement Agreement," "for the purposes of settling and determining in all respects and for all purposes their respective present and future property rights, alimony, obligations, claims, and demands, . . ." The agreement also specifically provided for the sale of the marital home at a mutually agreeable price, and equal division of the net proceeds derived from the sale between the two parties, an identical provision, in substance, as one contained within the aforementioned deed of separation.

The parties also made two other representations in the agreement, (1) that they had amicably divided between themselves all other jointly owned real property and their personal property (a direct reference to the deed of separation), and (2) that they both further agreed that they were each fully aware of the assets and financial conditions of the other party.

On 12 September 1986, plaintiff filed a petition for dissolution of marriage in the Circuit Court of the Fifth Judicial Circuit of Florida. In this petition, plaintiff requested the court to adopt and ratify the second agreement entitled "Stipulation and Property Settlement" into which the parties had previously entered in North Carolina.

The court entered its final judgment of divorce on 2 October 1986, and incorporated each and every provision of the stipulation and property settlement agreement, the second agreement, which had in turn incorporated the first agreement, the deed of separation. The court ordered strict compliance by the parties.

Nearly three months later, upon becoming aware that defendant had allegedly concealed the existence of a separate stock account, and had allegedly transferred funds from their joint account to this separate account during the course of their marriage, plaintiff commenced this action seeking relief from the agreements. She also requested that defendant be required to truthfully and accurately disclose all assets owned by him at the time of the parties' separation.

When this matter came on for hearing, the trial court granted defendant's motion to dismiss, determining that it was without subject matter jurisdiction to hear the issues, and that the Flor-

ida judgment was entitled to full faith and credit. From this order, plaintiff appeals.

On appeal, plaintiff requests that we consider one issue: to wit, whether the trial court erred in dismissing her complaint for lack of jurisdiction on the grounds that the Florida judgment was entitled to full faith and credit. We find no error and affirm the order entered by the trial court.

The provisions of Article IV, sec. 1 of the United States Constitution require one state to give full faith and credit to a judgment rendered in a court of another state. *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E. 2d 2 (1979). North Carolina may set aside another state's judgment, but only where it is shown that the court lacked jurisdiction, or that the judgment was procured through fraud. *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E. 2d 397 (1966). The type of fraud which must be alleged in order to attack a foreign judgment is extrinsic fraud. *Horn v. Edwards*, 215 N.C. 622, 3 S.E. 2d 1 (1939). The general rule is that

> [e]quity will not interfere in an independent action to relieve against a judgment on the ground of fraud unless the fraud complained of is extrinsic and collateral to the proceeding, *and not intrinsic merely—that is, arising within the proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits.*

Id. at 624, 3 S.E. 2d at 2. (Citations omitted.) (Emphasis added.)

Plaintiff argues that defendant procured the separation agreement by means of a fraudulent misrepresentation and therefore the judgment should be set aside. It is clear to us that the type of fraud which plaintiff alleges is not that which will support a challenge to a judgment rendered in a foreign court. Plaintiff's reliance upon *Crescent Hat Co. v. Chizik*, 223 N.C. 371, 26 S.E. 2d 871 (1943), is misplaced. In that case, where the defendant attempted to have a foreign judgment set aside on the grounds that the plaintiff had allegedly made false representations during the course of the trial, the court held that false testimony given at trial does not constitute extrinsic fraud and is therefore an improper basis to collaterally attack a foreign judgment. *Id.*

Our Courts are not required to accord full faith and credit to foreign judgments where the fraud was practiced in *obtaining the*

judgment as in *Donnell v. Howell*, 257 N.C. 175, 125 S.E. 2d 448 (1962), where both plaintiff and defendant stipulated that they perpetrated a fraud upon a foreign court by falsely representing plaintiff's true residence. Such fraud has been classified as extrinsic, which is collateral to the proceeding before the court.

It is clear to us that the fraud which plaintiff alleges is of the intrinsic nature and was *necessarily under the consideration of the court upon the merits. See Horn, supra.* The court noted the consideration in its final judgment of dissolution of marriage, and ordered that the "Stipulation and Property Settlement Agreement," which by its provisions incorporated the deed of separation, was freely entered into by the parties after a full disclosure and appeared from the evidence to be in the best interests of the parties. The court then incorporated each and every provision of the agreement into its final judgment.

The questions which plaintiff now raises, issues alleging intrinsic fraud, should be properly addressed to the Florida courts rather than to the North Carolina courts.

Affirmed.

Judges PHILLIPS and ORR concur.

TERRY L. PEELE, PLAINTIFF v. PROVIDENT MUTUAL LIFE INSURANCE COMPANY, WATAUGA COUNTY, NORTH CAROLINA, JAMES C. LYONS, INDIVIDUALLY AND AS SHERIFF OF WATAUGA COUNTY, NORTH CAROLINA, JAY L. TEAMS, DAVID TRIPLETT, CARL FIDLER, BEN STRICKLAND, AND LARRY STANBERY, ALL DULY ELECTED COMMISSIONERS OF WATAUGA COUNTY, NORTH CAROLINA, DEFENDANTS

No. 8724SC949

(Filed 7 June 1988)

1. Sheriffs and Constables § 1; Master and Servant § 10.2— sheriff's dispatcher—action for wrongful discharge—12(b)(6) dismissal as to county commissioners and county

The trial court did not err in a wrongful discharge action by granting defendant county and county commissioners' motions for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) where it was clear that plaintiff was an employee of the sheriff and not of the county and its board of commissioners.

The only authority vested in the board is in determining the number of employees the sheriff can hire and the ability to approve the appointment of a relative or a person convicted of a crime involving moral turpitude. N.C.G.S. § 153A-103.

2. **Sheriffs and Constables § 1; Master and Servant § 10.2— sheriff's dispatcher—wrongful discharge—summary judgment for sheriff**

The trial court did not err by granting defendant sheriff's motion for summary judgment in a wrongful discharge action by a dispatcher where there was nothing in the record to suggest that plaintiff had a contract for a definite term and plaintiff was thus terminable at will; the discharge did not violate plaintiff's constitutional rights because a person with a terminable at will contract has no property interest in employment; and the discharge was within the sheriff's scope of authority under N.C.G.S. § 153A-103.

APPEAL by plaintiff from *Griffin, Kenneth A., Judge.* Orders entered 13 June 1987. Heard in the Court of Appeals 2 March 1988.

Randal S. Marsh for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and James R. Morgan, Jr., for defendants-appellees.

JOHNSON, Judge.

On 28 May 1984, plaintiff Terry L. Peele was hired by the defendant, Sheriff James C. Lyons, as a dispatcher with the Watauga County Sheriff's Department.

On 14 January 1985, plaintiff received a performance evaluation completed by her supervisor, Sergeant Joe Moody, in which she was rated deficient in three of five categories. On 28 January 1985, plaintiff was fired by Sheriff Lyons without personally having been given prior notice that she was going to be fired.

On 20 January 1987, plaintiff filed summons and complaint, alleging that defendants Provident Mutual Life Insurance Company, Watauga County, Sheriff James C. Lyons, and County Commissioners James L. Teams, David Triplett, Carl Fidler, Ben Strickland, and Larry Stanbery were liable for damages arising out of plaintiff's discharge from employment. On 5 February 1987, defendant Lyons filed his answer. Also, defendant Watauga County and each County Commissioner made motions to dismiss the complaint per G.S. 1A-1, Rule 12(b)(6) for failure to state a claim for which relief may be granted. On or about 30 March 1987,

Provident filed its answer. Also, defendant Lyons filed a motion for summary judgment per G.S. 1A-1, Rule 56.

On 13 June 1987, Judge Griffin entered orders granting defendant Lyons' motion for summary judgment along with the individual County Commissioners' and Watauga County's motions to dismiss. Plaintiff appealed. On 14 September 1987, plaintiff gave notice of voluntary dismissal as to the remaining defendant Provident Mutual.

Plaintiff brings forth two Assignments of Error for this Court's review. For the following reasons, we affirm the orders of the trial court.

[1] In order to withstand a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must make allegations sufficient to satisfy the substantive elements of at least some recognized claim. *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983). In considering the motion, the allegations contained within the complaint must be treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). "[A] complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970) (emphasis in original).

Plaintiff argues that even though she was hired by the sheriff, she remained the employee of Watauga County and thus all the protections and privileges provided by the Board of Commissioners to other county employees should have been afforded her unless a health, safety, morals, or public welfare consideration existed necessitating their exclusion. Furthermore, she alleges that by exempting her from the provisions of the ordinance, defendants subjected her to invidious discrimination and denial of equal protection.

We cannot agree. Plaintiff's esoteric analysis of the issue is misplaced. It is clear to this Court that plaintiff was an employee of the sheriff and not Watauga County and its Board of Commissioners. N.C.G.S. sec. 153A-103(a) states:

> Subject to the limitations set forth below, the board of commissioners may fix the *number* of salaried employees in the offices of the sheriff. . . . In exercising the authority granted by this section, the board of commissioners is subject to the following limitations:
>
> (1) *Each sheriff . . . has the exclusive right to hire, discharge and supervise the employees in his office.* However, the board of commissioners must approve the appointment by such an officer of a relative by blood or marriage of nearer kinship than first cousin or of a person who has been convicted of a crime involving moral turpitude. (Emphasis added.)

This statute gives every indication that the control of the employees hired by the sheriff is vested exclusively in the sheriff. Furthermore, "under state law the sheriff has the exclusive right to fire any deputy [or employee] in his office." *Joyner v. Lancaster*, 553 F. Supp. 809, 816 (M.D.N.C. 1982). The only authority vested in the board is in determining the number of employees the sheriff can hire and the ability to approve the appointment of a relative or a person convicted of a crime involving moral turpitude. In all other aspects, the individual person is an employee of the sheriff, de facto or de jure. Thus, any claim that the County or Board of Commissioners is the employer of plaintiff is unsupported by the facts in the case *sub judice*. Consequently, since plaintiff was not an "employee" of Watauga County or its Board of Commissioners, the trial court properly dismissed plaintiff's complaint as to the parties for failure to state a claim upon which relief may be granted.

[2] In plaintiff's second Assignment of Error, she contends that the court erred in granting defendant Sheriff James C. Lyons' motion for summary judgment.

On motions for summary judgment, the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, must show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Stanley v. Walker*, 55 N.C. App. 377, 285 S.E. 2d 297 (1982). The moving party has the burden of establishing the absence of any triable issue of fact. *Brenner v. Little Red Schoolhouse, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981).

Plaintiff argues that defendant Lyons, in discharging her, denied her the protection of the provisions of Article I, sec. 1, and the equal protection and law of the land provisions in Article I, sec. 19 of the North Carolina Constitution. Again, we find this argument to be meritless.

There is nothing in the record which suggests that plaintiff had a contract for a definite term. It is well established in this State that a contract of employment for an indefinite term is terminable at the will of either party, irrespective of the quality of performance. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). Furthermore, G.S. 153A-103 gives the sheriff the exclusive right to fire his employees. Despite this, plaintiff asserts that her discharge violated her right to due process. A protected property interest arises when one has a legitimate claim of entitlement as decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed. 2d 684 (1976).

A person who has a contract which is terminable at will can have no property interest in employment. Such a contract does not give that person a legitimate claim of entitlement under the due process clause. Thus, we find that Sheriff Lyons' discharge of the plaintiff did not violate her constitutional rights, for it was within the scope of his authority pursuant to G.S. 153A-103 and furthermore, plaintiff's status as an employee at will also justified her discharge with or without cause for the reasons stated above.

Accordingly, for all the aforementioned reasons, the orders of the trial court are

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

TEEN CHALLENGE TRAINING CENTER, INC. v. BOARD OF ADJUSTMENT OF MOORE COUNTY

No. 8720SC537

(Filed 7 June 1988)

Municipal Corporations § 31— appeal from zoning compliance officer—reasonable time

The trial court did not err by reversing the Moore County Board of Adjustment's decision to rescind a zoning compliance permit where a zoning compliance officer granted a certificate of zoning compliance on 20 August 1985; assuming that adjoining landowners did not become aware of the proposed facility's exact nature until an article appeared in a local newspaper on 14 April 1986, they did not request a hearing until 85 days after the article appeared and after Teen Challenge had already expended $30,000 in improvements; and there was no evidence in the record justifying or attempting to explain the delay. The appeal from the zoning compliance officer to the Board of Adjustment was not taken within a reasonable time. N.C.G.S. § 153A-345(b).

APPEAL by respondent from *Washington (Edward K.), Judge.* Judgment entered 22 January 1987 in Superior Court, MOORE County. Heard in the Court of Appeals 7 December 1987.

Van Camp, Gill, Bryan & Webb, by Douglas R. Gill, for petitioner-appellee.

James E. Holshouser, Jr. for respondent-appellant.

GREENE, Judge.

This is an appeal from the Superior Court's reversal of the Moore County Board of Adjustment's decision to rescind a zoning compliance permit. The trial judge ruled the Board of Adjustment erred in its decision to rescind the certificate which had been issued to Teen Challenge Training Center, Inc. (hereinafter "Teen Challenge"). The Board of Adjustment appeals.

On 20 August 1985, a zoning compliance officer for Moore County granted a certificate of zoning compliance to Teen Challenge. The certificate was issued for a parcel of land consisting of approximately 30.9 acres on State Road 1832 in Moore County, an area zoned RA (Residential/Agricultural) under the Moore County Zoning Ordinance. Relying upon the certificate and a building permit, Teen Challenge then expended over $30,000 on improvements

to the property in addition to the cost of the land itself. Nearly eleven months later, on 8 July 1985, an adjacent landowner requested that the Board of Adjustment meet to inquire whether the Teen Challenge Program complied with applicable zoning ordinances. Before the Board, Teen Challenge argued that the "appeal" to the Board was not timely and that the zoning compliance officer had been correct in determining that the proposed facility was within the definition of a sanitarium, a use authorized in the RA zoning district.

After hearing evidence from both sides, the participating members of the Board of Adjustment voted unanimously in favor of a motion to rescind the certificate of zoning compliance previously issued for Teen Challenge. From this decision, Teen Challenge petitioned for certiorari to the Superior Court. The Superior Court granted the petition for certiorari, and ruled that the appeal to the Board from the zoning compliance officer had not been made within a reasonable time. Further, the court ruled that the officer was correct in determining the proposed facility was within the meaning of a sanitarium as used in the zoning ordinance.

This appeal presents the issue of whether the appeal from the zoning compliance officer was made within a reasonable time.

A decision of the Board of Adjustment is subject to review by writ of certiorari to the superior court. N.C.G.S. Sec. 153A-345(e) (1987). The inquiry on review upon writ of certiorari under N.C.G.S. Sec. 153A-345 is whether the Board committed an error of law or whether an order of the Board is arbitrary, oppressive or attended with manifest abuse of authority. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 55, 344 S.E. 2d 272, 274 (1986) (citing *In re Campsites Unlimited*, 287 N.C. 493, 498, 215 S.E. 2d 73, 76 (1975)).

Section 153A-345(b) provides that the Board of Adjustment shall hear and decide appeals from orders made by administrative officials charged with enforcing ordinances. That section further provides that "[a]ppeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof." N.C.G.S. Sec.

153A-345(b). However, the Board in this case failed to prescribe any time within which an appeal had to be taken from a zoning compliance officer. The "notice of appeal" consisted of a letter from an attorney representing adjacent landowners to the facility. The letter requested a meeting of the Board to inquire as to whether Teen Challenge's proposed use would comply with the zoning ordinance. The letter was dated 8 July 1986, some 322 days after the certificate of zoning compliance was initially issued.

In the absence of a statute or rule of court prescribing the time for taking and perfecting an appeal, an appeal must be taken and perfected within a reasonable time. 4A C.J.S. Appeal and Error Sec. 428 (1957). Appellant admits in its brief that since no rules or ordinances provided for time requirements for taking appeals, it "made its own determination that the timing was reasonable in this case."

"What is a reasonable time must, in all cases, depend upon the circumstances." *White Oak Properties, Inc. v. Town of Carrboro*, 313 N.C. 306, 311, 327 S.E. 2d 882, 886 (1985) (quoting *Mizell v. Burnett*, 49 N.C. 249, 255 (1857)). In *In re Green*, 29 N.C. App. 749, 225 S.E. 2d 647, *disc. rev. denied*, 290 N.C. 661, 228 S.E. 2d 451 (1976), a concrete plant applied for and received a building permit to modernize its facility. Fifteen months later, after the plant had spent over $50,000, nearby neighbors petitioned the board to revoke the permit. In affirming the board and the superior court, this Court held that the appeal was not taken within a reasonable time.

The evidence in the record indicates that Teen Challenge spent approximately $30,000 on improvements to the property following the issuance of the permit. Appellants do not contest this fact but rather maintain that what is a reasonable time is wholly within their discretion. However, where the facts are not in dispute, the question of what constitutes a reasonable time is one of law. *First Citizens Bank and Trust Co. v. Northwestern Ins. Co.*, 44 N.C. App. 414, 261 S.E. 2d 242 (1980). The record indicates that the adjoining landowners did not become aware of the proposed facility's exact nature until on or about 14 April 1986 when an article about the proposed facility appeared in a local newspaper. Even assuming this was the first notice to the landowners that

Teen Challenge was going to be located near them, they did not request the hearing until eighty-five days after the article appeared and after Teen Challenge had already expended $30,000 for improvements. There was no evidence in the record justifying or attempting to explain the delay.

Therefore, we hold the Superior Court was correct in determining the appeal from the zoning compliance officer was not taken within a reasonable time. In affirming that decision, we do not determine whether the proposed facility does come within the meaning of a sanitarium as it is used in the zoning ordinance. However, we do note that this Court has previously defined a sanitarium as "an establishment for the treatment of the sick esp. if suffering from chronic disease (as alcoholism, tuberculosis, nervous or mental disease) requiring protracted care." *Town of Southern Pines v. Mohr*, 30 N.C. App. 342, 345, 226 S.E. 2d 865, 867 (1976) (quoting Webster's Third New International Dictionary of the English Language Unabridged at 2008 (1968)).

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

STATE OF NORTH CAROLINA v. DOUGLAS MARK POCZONTEK

No. 872SC1031

(Filed 7 June 1988)

Searches and Seizures § 11— possession of marijuana and drug paraphernalia— search of vehicle unreasonable

The trial court erred in a prosecution for misdemeanor possession of marijuana and possession of drug paraphernalia by denying defendant's motion to suppress the marijuana and drug paraphernalia where an informant told a highway patrolman that defendant usually used marijuana while driving away from a grocery store after work; the trooper waited for defendant to leave work and stopped him after seeing defendant's car cross the highway center line twice; defendant got out of his car and walked to that of the trooper, who neither saw nor smelled anything to indicate that defendant had consumed any alcohol or used any marijuana or was impaired in any way; while defendant was getting his registration card from his car, the trooper saw an open beer can and a hammer on the floorboard near the driver's seat; the

trooper then opened the car door, bent over to get the open beer can, and saw a large ziplock bag of clear plastic under the driver's seat; he found inside the bag a ceramic pipe, rolling papers, and a small amount of marijuana; and he then searched the interior and trunk of the car and found some burned marijuana and roaches in the ashtray and some marijuana seeds and residue in the trunk. The trooper had no probable cause for searching defendant's vehicle because the informant had not told the trooper that defendant had marijuana and drug paraphernalia in the car, defendant had no odor of marijuana or alcohol about him and was not impaired, and, although there was an open beer can in the passenger portion of the car, there was no indication at all that defendant had consumed any beer that evening.

APPEAL by defendant from *Winberry, Judge.* Order entered 31 July 1987 in Superior Court, MARTIN County. Heard in the Court of Appeals 5 April 1988.

Attorney General Thornburg, by Assistant Attorney General Sueanna P. Peeler, for the State.

Gaskins & Gaskins, by Herman E. Gaskins, Jr. and Darrell B. Cayton, Jr., for defendant appellant.

PHILLIPS, Judge.

Reserving his right to maintain on appeal that the evidence used against him should have been suppressed because it was obtained through an unreasonable search and seizure, defendant pled guilty to misdemeanor possession of marijuana pursuant to G.S. 90-95(d)(4) and possession of drug paraphernalia pursuant to G.S. 90-113.22. The evidence with respect thereto was to the following effect:

About two weeks earlier State Highway Patrolman B. R. Owens was told by an informant that defendant, an assistant manager of a Williamston grocery store, usually used marijuana while driving away from the store after work. On the night involved Trooper Owens was waiting in his car for defendant to leave work and before then he had checked the license plate on defendant's car with the Department of Motor Vehicles and was told that the car was improperly registered. When defendant drove away from the store Trooper Owens followed and stopped him on U.S. Highway 17 near the town limits after seeing defendant's car cross the highway center line twice. Defendant got out of his car and walked to that of the trooper, who neither saw nor smelled

anything to indicate that defendant had consumed any alcohol or used any marijuana or was impaired in any way. The trooper examined defendant's driver's license, found it to be in order, and told him to get his registration card from the car. While defendant was in his car getting the card, which was also found to be in order, Trooper Owens saw an open beer can and a clawed hammer on the floorboard near the driver's seat. After defendant got out of the car he stood in back of it at the trooper's direction; the trooper then opened the car door, bent over to get the opened beer can, and saw a large ziplock bag of clear plastic under the driver's seat, and inside the bag he saw a small, clear plastic bag which in his opinion contained marijuana. He opened the bag and found, *inter alia*, a ceramic pipe, rolling papers, and a small amount of marijuana. He then searched the interior and trunk of the car and found some burned marijuana and roaches in the ashtray and some marijuana seeds and residue in the trunk.

An officer may search an automobile without a warrant if he has probable cause to believe the vehicle contains contraband, *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *State v. Isleib*, 319 N.C. 634, 356 S.E. 2d 573 (1987); and he has probable cause if based upon the totality of the circumstances known to him "he believes there is a 'fair probability that contraband or evidence of a crime will be found' therein." *State v. Ford*, 70 N.C. App. 244, 247, 318 S.E. 2d 914, 916 (1984), *quoting Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527, 103 S.Ct. 2317 (1983). In forming his belief the officer "may rely upon information received through an informant . . . so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Jones v. United States*, 362 U.S. 257, 269, 4 L.Ed. 2d 697, 707, 80 S.Ct. 725, 735 (1960), *cert. dismissed*, 368 U.S. 801, 7 L.Ed. 2d 15, 82 S.Ct. 20 (1961), *overruled on other grounds, United States v. Salvucci*, 448 U.S. 83, 65 L.Ed. 2d 619, 100 S.Ct. 2547 (1980). In this case, however, the trooper had no probable cause for searching defendant's vehicle; because while the informant had described defendant's vehicle and told the officer where defendant worked, the time he got off from work and that he used marijuana in the parking lot after work, he had not told him that defendant had marijuana and drug paraphernalia in the car. Nor was the officer's suspicion that defendant possessed a controlled substance corroborated by anything that he knew or observed af-

ter he stopped defendant; for, as he testified, defendant had no odor of marijuana or alcohol about him and was not impaired. Nor was the evidence legally seizable and admissible under "the plain view" doctrine, because the officer was not legitimately in the place where he viewed the items. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh'g denied*, 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971). Before the search was made the officer had no legitimate reason to look into defendant's car, as he was not in the process of arresting defendant and had no basis for suspecting him of being impaired, or of smoking marijuana or consuming alcohol while driving the car, or of violating any other law. Nor did the open beer can in the passenger portion of the car justify the search that was made, as it is the *consumption* of malt beverages in the passenger area of a vehicle *while driving it* that G.S. 18B-401(a) forbids, not possession or transportation, and there was no indication at all that defendant had consumed any beer that evening, either while driving his car under the officer's surveillance or earlier. If anything, since defendant had no odor of alcohol about him, the indication was that he had not consumed beer that evening. Thus, the officer's entry into defendant's car to get the can was unwarranted, the articles obtained from it were the result of an unreasonable search and seizure, *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970), and defendant's motion to suppress the evidence should have been granted. Defendant's conviction must be and is vacated.

Vacated.

Chief Judge HEDRICK and Judge EAGLES concur.

JAMES H. BEASLEY v. JOEL R. BANKS

No. 873DC855

(Filed 7 June 1988)

Contracts § 7— covenant not to compete—area excluded overbroad

A covenant not to compete between an optician and an optometrist who had formerly rented office space from the optician was overbroad and summary judgment should have been entered for defendant optometrist where the forecast of proof was sufficient to establish that plaintiff had no pool of

customers that he had a legal right to protect in many of the places covered by the agreement and that obligating defendant not to sell eyeglasses in those places was unnecessary for the protection of plaintiff's business.

APPEAL by defendant from *Aycock, Judge.* Judgment entered 13 May 1987, *nunc pro tunc* 8 May 1987, in District Court, CRAVEN County. Heard in the Court of Appeals 3 February 1988.

Beswick, Herring, Graham & Barnhill, by George W. Beswick, for plaintiff appellee.

Henderson, Baxter & Alford, by B. Hunt Baxter, Jr., for defendant appellant.

PHILLIPS, Judge.

For a number of years plaintiff, an optician, has made and sold eyeglasses in Havelock, a Craven County municipality, and in doing so used a building with adjoining offices that are arranged and equipped to serve his needs and those of an optometrist. Defendant, an optometrist who tests eyes and prescribes lenses for people with defective vision, started his practice in Havelock in June 1983; and from that time until 22 June 1986 he occupied and used plaintiff's optometry office space and equipment under a lease contract in which he agreed that for five years after vacating plaintiff's premises, except for certain parts of Jones and Pamlico Counties, he would not dispense eyeglasses within a radius of thirty air miles of Havelock. Immediately after vacating plaintiff's premises, however, defendant obtained other office space in Havelock and began dispensing eyeglasses incident to his optometry practice. Plaintiff sued upon the contract and following the motions of both parties for summary judgment and a hearing thereon judgment was entered enjoining defendant from dispensing eyeglasses within the area specified in the contract until 22 June 1991.

Covenants that restrict competition are enforced in this State only (1) when they are reasonably necessary to protect a legitimate business interest of the covenantee; (2) when they are reasonable as to both time and territory; (3) when they do not interfere with the public interest. *Jewel Box Stores Corporation v. Morrow*, 272 N.C. 659, 158 S.E. 2d 840 (1968). Whether plaintiff's covenant meets the other requisites need not be determined, as it

is obvious from the materials before the court when the motions for summary judgment were heard that plaintiff's judgment is invalid and the covenant involved is unenforceable because the territory excluded from competition is unreasonably extensive. In reaching this determination we are guided by the following principles of law: The territory excluded from competition by an agreement such as this one must be no greater than is reasonably necessary to protect the covenantee's business interest, *Welcome Wagon International, Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961), and if it is unreasonably extensive the entire covenant fails since equity will neither enforce nor reform an overreaching and unreasonable agreement. *Masterclean of North Carolina, Inc. v. Guy*, 82 N.C. App. 45, 345 S.E. 2d 692 (1986). The reasonableness of a noncompetition covenant is a matter of law for the court to decide. *Shute v. Heath*, 131 N.C. 281, 42 S.E. 704 (1902).

Between them the affidavits of the parties show that (1) the area excluded from competition by the covenant includes Jacksonville, Atlantic Beach, Atlantic, Oriental, Emerald Isle, Harker's Island, Vanceboro, Ocracoke, Aurora, Arapahoe, Marshallberg, and Cove City, and (2) plaintiff has no established pool of customers in any of those places. For plaintiff's affidavit states that during the three years the parties occupied adjoining offices he referred to defendant all his customers who needed to have their eyes tested and glasses prescribed; and defendant's affidavit states that of the hundreds of customers plaintiff referred to him not one resided in any of the places named above, all of which are in the area excluded from competition by the covenant and several of which are quite populous. These forecasts of proof, standing alone, are sufficient to establish that plaintiff had no pool of customers in any of the places listed that he had a legal right to protect and that obligating defendant not to sell eyeglasses in those places was unnecessary for the protection of plaintiff's business. *Maola Ice Cream Company of North Carolina, Inc. v. Maola Milk and Ice Cream Company*, 238 N.C. 317, 77 S.E. 2d 910 (1953). The forecasts do stand alone for all intents and purposes, because plaintiff's only response to the facts indicating that plaintiff has few if any customers in any of the specific places listed was that his "customers reside throughout" the thirty mile radius area and "beyond." Under the circumstances this was equivalent to no response at all. For in a hearing for summary judgment an

evidentiary forecast that contains facts sufficient to establish that a plaintiff's action is unenforceable must be met with specific facts to the contrary, not indefinite generalities. *Blackwell v. Massey*, 69 N.C. App. 240, 316 S.E. 2d 350 (1984). Since plaintiff failed to state any contradictory facts or otherwise undermine the effect of defendant's affidavit the materials before the court established without contradiction that the covenant was not reasonable as to the territory excluded from competition and summary judgment should have been entered for defendant. *Noe v. McDevitt*, 228 N.C. 242, 45 S.E. 2d 121 (1947).

Thus, we vacate the judgment appealed from and remand the case to the trial court for the entry of a judgment dismissing plaintiff's action.

Vacated and remanded.

Judges WELLS and COZORT concur.

PENNIE D. BLALOCK, ADMINISTRATRIX OF THE ESTATE OF JOSIE DANDELAKE, PLAINTIFF v. LUCEAL S. DANDELAKE, DEFENDANT

No. 8810DC23

(Filed 7 June 1988)

Gifts § 1— gold and diamond brooch—gift—evidence sufficient

In an action to determine ownership of a gold and diamond brooch, the evidence was sufficient to support the trial court's finding that the brooch was given to defendant's late husband and that the estate administered by plaintiff had no interest in the brooch.

APPEAL by plaintiff from *Hamilton, Judge*. Judgment entered 21 September 1987 in District Court, WAKE County. Heard in the Court of Appeals 5 May 1988.

David R. Cockman for plaintiff appellant.

Philip C. Shaw for defendant appellee.

PHILLIPS, Judge.

This dispute is over the ownership of a gold and diamond brooch, which at one time was the property of Josie Dandelake, who died 5 January 1963. Plaintiff administratrix, a stepdaughter of Josie Dandelake, brought this action on 28 August 1985 alleging that the brooch was the sole asset of Josie Dandelake's estate and that it was bequeathed to her and her sisters by Josie Dandelake's holographic will executed 17 August 1960. Defendant, the widow of plaintiff's deceased brother, Charles Dandelake, alleges that Josie Dandelake gave the brooch to her and her husband in 1962, that it has been in her or her husband's possession since 1960, and that in any event plaintiff's action is barred by the statute of limitations and laches. In the trial to Judge Hamilton without a jury plaintiff's testimony, assuming it is sufficient to identify the brooch, indicated that it was given to defendant's husband for safekeeping, while defendant's testimony was to the effect that the gift was unqualified. Plaintiff also testified that she had the purported will in her personal possession for twenty-one years following Josie Dandelake's death before offering it for probate in 1984. There was also evidence that though plaintiff filed a claim against the estate of Charles Dandelake for the brooch in 1984 and the claim was immediately denied, she did not pursue the claim further. Following the trial Judge Hamilton entered judgment for defendant upon findings and conclusions that Josie Dandelake gave the brooch to defendant's husband in 1960, the estate therefore has no interest in the brooch, and the claim is barred by laches and G.S. 28A-19-16.

Contrary to plaintiff's contention, the trial court's finding that Josie Dandelake gave the brooch to defendant's late husband is supported by competent evidence and we are bound thereby. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). Since this finding and the conclusion based upon it is dispositive of the appeal, we need not determine whether plaintiff's claim is barred by G.S. 28A-19-16 and laches, as Judge Hamilton also concluded.

Affirmed.

Judges JOHNSON and SMITH concur.

STATE OF NORTH CAROLINA v. WAYNE EDWARD BUTLER

No. 8716SC1183

(Filed 7 June 1988)

Assault and Battery § 13— assault with a deadly weapon with intent to kill inflicting serious injury—competence of evidence

There was no prejudicial error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury from the exclusion of photographs of two of the victims in happier times because those photographs were not even remotely relevant to any issue in the case; testimony of an investigating police officer that black specks on the neck, chin and chest of the two-year-old victim were the residue from a discharged gun was clearly competent; and there was no prejudice from the State's questioning of defendant concerning another murder about which defendant had testified on direct examination in light of the uncontradicted evidence against defendant, even though the questioning was clearly improper. N.C.G.S. § 8C-1, Rule 404(b).

APPEAL by defendant from *Williams, Judge.* Judgments entered 1 May 1987 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 12 April 1988.

Attorney General Thornburg, by Assistant Attorney General Randy Meares, for the State.

Appellate Defender Hunter, by Assistant Appellate Defender Teresa A. McHugh, for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of two counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of assault with a deadly weapon. The deadly weapon used was a pistol. Defendant's girlfriend, Patricia Casson, was shot in the hand and neck, her nine year old daughter was shot in the head, resulting in the partial paralysis of one side of her body, and her two year old granddaughter was shot at but missed. The State's evidence clearly shows that defendant's shooting rampage, which occurred in the victims' home at close range, was wilfully and maliciously conducted without any provocation at all, and his claim in extenuation or mitigation is only that he was drunk and did not know what he was doing.

In seeking a new trial defendant makes three contentions, none of which has merit and two are devoid of any semblance of basis. One contention concerns six photographs showing two of the victims in happier times; these photographs are not even remotely relevant to any issue in the case, and the court properly refused to receive them into evidence. Another contention concerns the clearly competent testimony of an investigating police officer, with many years of experience observing people who had been shot with firearms, that some black specks he saw on the neck, chin and chest of the two year old child shortly after the shootings were in his opinion the residue from a discharged gun. Defendant's other contention concerns the State asking him if in connection with the murder of Diane Brown in 1966, which he testified to on direct examination along with another murder conviction and the rest of his criminal record, he did not shoot her fourteen year old daughter while she was laying in the bed. Though this line of questioning was not pursued for any of the permissible purposes authorized by G.S. 8C, Rule 404(b), and was clearly improper, defendant could not have possibly been prejudiced thereby in light of the uncontradicted evidence recorded against him.

No error.

Judges JOHNSON and SMITH concur.

DOYLE BROWN AND COLEEN B. BROWN v. LUMBERMENS MUTUAL CASUALTY COMPANY AND GENERAL MOTORS CORPORATION

No. 8722SC426

(Filed 21 June 1988)

1. **Limitation of Actions § 4.2; Sales § 22— design defect claim—statute of repose**

Plaintiffs' claim against an automobile manufacturer for defective design of the brakes on plaintiffs' automobile was barred by the six-year statute of repose of N.C.G.S. § 1-50(6) (1983) where the complaint was filed in October 1986 and stated that the automobile was purchased in December 1979.

2. Fraud § 9— fraudulent concealment by automobile manufacturer—insufficiency of complaint

Plaintiffs' complaint was insufficient to state a claim against defendant automobile manufacturer for fraudulent concealment of defects in the braking system of plaintiffs' automobile where plaintiffs alleged facts showing that they knew the brakes did not work properly prior to a collision and the alleged misrepresentation by defendant thus did not actually deceive plaintiffs.

3. Fraud § 9— automobile manufacturer—false promise to provide counsel for plaintiffs—statement of claim for fraud

Plaintiffs' complaint was sufficient to state a claim against defendant automobile manufacturer for fraud in expressly misrepresenting to plaintiffs that it would provide counsel for plaintiffs to defend an action against them arising out of an automobile collision after plaintiffs' liability insurer paid the limits of its coverage and discharged counsel it had hired to defend plaintiffs.

4. Limitation of Actions § 8.3— false promise to provide counsel—claim against automobile manufacturer—statute of repose inapplicable

The statute of repose of N.C.G.S. § 1-50(6) was inapplicable to a claim against an automobile manufacturer for fraud in misrepresenting that it would provide counsel for plaintiffs in an action against them arising out of an automobile accident.

5. Attorneys at Law § 3; Insurance § 100; Principal and Agent § 9— counsel employed by liability insurer—independent contractor—counsel's negligence not imputed to insurer

A law firm employed by an automobile liability insurer to defend its insured in an action arising out of an automobile accident is an independent contractor so that alleged negligence by the law firm in defending the action is not imputable to the liability insurer.

6. Insurance § 100— automobile liability insurance—insurer's duty to defend after paying policy limits

A provision of an automobile liability policy stating that the insurer's duty to defend ends when its limit of liability for the coverage has been "exhausted" is ambiguous and will be interpreted to require the insurer to continue defending the insureds in a motor vehicle liability action until a settlement or judgment has been reached even though the insurer has paid its liability policy limits to the injured claimant pursuant to N.C.G.S. § 1-540.3(a).

APPEAL by plaintiffs from *DeRamus (J. D.), Judge.* Judgment entered 5 March 1987 in Superior Court, DAVIE County. Heard in the Court of Appeals 28 October 1987.

Franklin Smith for plaintiff-appellants.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Irvin W. Hankins, III, for defendant-appellee Lumbermens Mutual Casualty Company.

Petree Stockton & Robinson, by G. Gray Wilson, for defendant-appellee General Motors Corporation.

GREENE, Judge.

This appeal arises from the claims of plaintiffs Doyle Brown and wife Coleen ("plaintiffs" or the "Browns") alleging: (1) that General Motors Corporation ("GMC") negligently designed the brakes on plaintiffs' 1979 Cadillac, fraudulently concealed such defects and made certain other fraudulent misrepresentations; (2) that Lumbermens Mutual Casualty Company ("LMCC") was liable for the alleged negligence of attorneys it hired to defend the Browns after an accident involving their automobile; and (3) that LMCC violated the terms of its insurance policy by refusing to provide the Browns a defense after it paid the $25,000 limits of liability coverage.

LMCC moved for summary judgment and GMC moved to dismiss for failure to state a claim upon which relief could be granted. In response, the Browns amended their pleadings and introduced affidavits which tended to show Ms. Brown was driving a 1979 Cadillac owned by her husband when she collided with an automobile driven by Joan Hinson ("Hinson"). The collision injured both Hinson and her passenger. At the time of the collision, LMCC provided liability insurance coverage on the 1979 Cadillac in the amount of $25,000 per person with a total coverage of $50,000.

On 28 March 1984, Hinson sued the Browns for injuries she sustained in the collision. Pursuant to its insurance contract, LMCC employed Tuggle, Duggins, Meschan & Elrod ("Tuggle Duggins" or the "attorneys") to represent the Browns who claimed the collision was caused by GMC's defective design of the brakes on their Cadillac automobile. On 1 June 1984, Tuggle Duggins filed an answer for the Browns denying any negligence. Over the Browns' objection, the attorneys subsequently offered judgment in the amount of $25,000. Hinson refused the offer of judg-

ment and LMCC later secured a release of its own liability to Hinson in exchange for an advance payment of $25,000 pursuant to N.C.G.S. Sec. 1-540.3 (1983). After thus paying its $25,000 policy limit, LMCC elected to terminate the Browns' defense and therefore discharged Tuggle Duggins. The attorneys requested and received the permission of the court to withdraw as counsel for the Browns. A copy of the court order allowing the withdrawal was mailed to the Browns along with a letter from the attorneys informing the Browns they were no longer represented by counsel and should employ their own counsel. Although the court granted them a continuance, the Browns did not employ new counsel because they allegedly relied on GMC's representation that it would provide counsel. When the Hinson trial resumed, no counsel appeared for the Browns and a $45,000 judgment was rendered against them in May 1985. The judgment credited the Browns with the $25,000 LMCC had previously paid Hinson. Plaintiffs also allege the existence of a pending action by the other passenger injured in the Hinson collision.

The court dismissed all plaintiffs' claims as amended pursuant to a judgment which recited in part that the court granted GMC's motion to dismiss "pursuant to Rules 12 and 8 of the North Carolina Rules of Civil Procedure," and that it granted LMCC's summary judgment motion "having considered, for the purposes of ruling on the motion of [LMCC], affidavits filed in support of and in opposition to the motion . . . ." Plaintiffs appeal.

The issues presented are: I) whether plaintiffs' amended pleadings stated a claim for products liability or fraud against GMC; II) whether LMCC may be sued for the alleged negligence of the attorneys it employed to defend the Browns; and III) whether LMCC's liability policy obligated it to provide a defense for the Browns after it paid the limits of its liability coverage.

At the outset, we note plaintiffs' counsel has failed to comply with numerous rules of appellate procedure. In particular, counsel has failed to properly file exceptions under Appellate Rule 10 and instead brings forward only a "broadside" exception to the court's judgment. However, plaintiffs' notice of appeal is sufficient to raise the limited issues of law relevant to our review of Rule 12(b)(6) motions and summary judgments. *See Ellis v. Williams*,

319 N.C. 413, 355 S.E. 2d 479 (1987) (noncompliance with Appellate Rule 10(a) not fatal in summary judgment appeal). We will therefore disregard the admittedly rambling nature of counsel's brief and address plaintiffs' basic contention that the face of the record shows that neither LMCC nor GMC were entitled to judgment as a matter of law.

I

GMC moved to dismiss plaintiffs' original complaint under N.C.G.S. Sec. 1A-1, Rule 12(b)(6) on the grounds the claims alleged were barred by the applicable statute of repose, the complaint was too "prolix" under N.C.G.S. Sec. 1A-1, Rule 8 (1983) and the complaint in any event failed to state claims upon which relief could be granted. Dismissal under Rule 12(b)(6) is proper when: (1) on its face the complaint reveals no law supports plaintiff's claim; (2) on its face the complaint reveals the absence of a fact sufficient to make a good claim; and (3) some fact disclosed in the complaint necessarily defeats plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E. 2d 222, 224 (1985); *see generally Johnson v. Bollinger*, 86 N.C. App. 1, 3-4, 356 S.E. 2d 378, 380-81 (1987).

[1] Plaintiffs first claim against GMC arises from GMC's allegedly defective design of the brakes on plaintiffs' automobile. As the original complaint in this action was filed on 13 October 1986 and stated the automobile was originally purchased on 21 December 1979, it is apparent that plaintiffs' "design defect" claim against GMC was already barred by Section 1-50(6) which sets forth a six-year statute of repose for such actions. N.C.G.S. Sec. 1-50(6) (1983). Thus, the court properly dismissed this claim.

[2] Plaintiffs also claim that GMC knew the braking system of the 1979 Cadillac was defective but fraudulently concealed this fact from plaintiffs. Although plaintiffs' complaint alleges GMC's "fraud," a fraudulent concealment claim on these facts is arguably also barred by Section 1-50(6). *Cf. Davidson v. Volkswagenwerk, A.G.*, 78 N.C. App. 193, 195, 336 S.E. 2d 714, 716, *disc. rev. denied*, 316 N.C. 375, 342 S.E. 2d 892 (1986) (indicating claims, including "tortious concealment" of defect, would be barred). However, we need not decide this issue since plaintiffs also allege facts showing that, despite GMC's alleged concealment, plaintiffs knew the brakes did not work properly and were defective prior to the Hinson collision. Thus, the alleged misrepresentation of fact as to the

brakes' condition did not actually deceive plaintiffs and therefore cannot support an action for fraudulent concealment. *See Watts v. Cumberland County Hospital System, Inc.*, 317 N.C. 110, 117, 343 S.E. 2d 879, 884 (1986) (fraudulent concealment in malpractice action barred since plaintiff not deceived as to fact of which she was already aware); *Cox v. Johnson*, 227 N.C. 69, 70, 40 S.E. 2d 418, 419 (1946) (one cannot be deceived by representation which he knows to be false); *see also Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981).

[3] However, plaintiffs' amended complaint also states:

> That the Plaintiffs made requests upon [GMC], its agents and employees, to pay off the judgment acquired against them by either one of the ladies injured in the automobile accident . . . and was assured by [GMC] representatives . . . that they would look into the matter and that the plaintiffs' interest would be protected. The plaintiffs were eventually referred to the Assistant Zone Manager, A. J. Laird of the Cadillac division of General Motors Corporation and . . . [were] advised that their insurance carrier [was being informed]. That after the plaintiffs were in court . . . in January, 1985, and after the attorney [provided by LMCC] was allowed to withdraw . . . and pay the $25,000 policy limits into the court, *the plaintiffs again contacted A. J. Laird in Rockville, Maryland and told him what had happened in court. At this time Mr. Laird represented to the plaintiffs that the corporate defender would make good any defective products that they had and that they stood behind and guaranteed the products for seven years and told the plaintiffs that this also applied to their 1979 Cadillac. . . . [A]fter . . . talking with Mr. Laird, the plaintiffs were assured that General Motors Corporation would provide an attorney to represent the plaintiffs in the case in Surry County arising out of the accident* . . . [Plaintiffs] have incurred an exposure above and beyond their liability coverage in one lawsuit in the amount of $20,000 plus interest and attorneys' fees in an amount exceeding $10,000. [Emphasis added.]

Plaintiffs elsewhere allege that the above actions were taken by GMC "for the specific purpose to allow time for the running of

North Carolina General Statute 1-50 . . . and [were] made with the specific intent of deceiving the plaintiffs . . ." Plaintiffs claim that, but for this representation, plaintiffs would have secured their own counsel during the continuance granted in the Hinson proceeding.

The claim above properly alleges the elements of fraud which are: "(1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party." *Terry*, 302 N.C. at 83, 273 S.E. 2d at 677; *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 255, 266 S.E. 2d 610, 616 (1980) (promissory misrepresentation may constitute fraud if made with intent to deceive and promisor did not intend to comply at time made); *see also Payne v. N.C. Farm Bureau Mutual Ins. Co.*, 67 N.C. App. 692, 696, 313 S.E. 2d 912, 915 (1984) (approving statement of fraud claim where plaintiff failed to secure other insurance coverage based on insurer's misrepresentation). Furthermore, as plaintiffs' claim sets forth the time, place and content of the representation, as well as the identity of the GMC agent who made it, plaintiffs have pled their claim with sufficient "particularity" under Rule 9(b). *See Terry*, 302 N.C. at 85, 273 S.E. 2d at 678 (time, place, identity, and content allegations are sufficient for "particularity" requirement).

[4] The bar evidenced by Section 1-50(6) is inapplicable to this particular fraud claim since plaintiffs allege they were injured by GMC's intentionally deceptive express representation that GMC would provide counsel for them: the complaint reveals this representation was allegedly made irrespective of whether the GMC brakes in fact were defectively designed or manufactured. Thus, this claim is not "based upon or arising out of any alleged defect or any failure in relation to a product . . ." under Section 1-50(6). That statute was enacted to provide a period of repose for product liability actions under Section 99B. *Bernick v. Jurden*, 306 N.C. 435, 446, 293 S.E. 2d 405, 413 (1982); *cf.* N.C.G.S. Sec. 99B-1(3) (1985) (defining "products liability action" to include actions caused by "design . . . marketing, selling [or] advertising . . ." products). This is no more a "products liability" claim barred by Section 1-50(6) than would be a claim for assault arising out of a dispute over the proper maintenance of GMC brakes.

Plaintiffs' complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears plaintiff is entitled to no relief under any stated facts which could be presented in support of the claim. *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E. 2d 611, 613 (1979). The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim. Given these parameters of dismissal under Rule 12(b)(6), we hold the court erroneously dismissed plaintiffs' fraud claim arising from GMC's allegedly express representation that it would defend plaintiffs' interests. Consequently, we affirm the trial court's dismissal of plaintiffs' claims against GMC for "design defects" and fraudulent concealment of those defects; however, we reverse and remand the trial court's dismissal of the remaining fraud claim noted above.

II

[5] The bar of Section 1-50(6) had not occurred at the time Tuggle Duggins filed its 1 June 1984 answer for the Browns in the Hinson suit. Plaintiffs contend LMCC is liable for Tuggle Duggins' allegedly negligent failure either to join GMC in the Hinson lawsuit or otherwise assert a defense based on GMC's allegedly defective brakes before the statute of repose had run. Plaintiffs' correspondence with Tuggle Duggins indicates their belief that they could prove GMC's allegedly defective brakes constituted a defense to the Hinson action. Plaintiffs therefore urge that the attorneys' alleged negligence be imputed to LMCC.

However, based upon traditional agency principles and a recent decision of our Supreme Court, we hold Tuggle Duggins was an independent contractor whose negligence, if any, is not imputed to LMCC. The right to control the details of a person's work is primarily characteristic of an agency relationship rather than of that relationship between an employer and independent contractor:

> Agency has been defined by this Court as the relationship which arises from 'the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act.' Furthermore, 'a principal's vicarious liability for the torts of his agent depends on the degree of control retained by the principal *over the details of the work as it is being per-*

> *formed.* The controlling principle is that vicarious liability arises from the right of *supervision and control.*'

Hayman v. Ramada Inn, Inc., 86 N.C. App. 274, 277, 357 S.E. 2d 394, 397, *disc. rev. denied*, 320 N.C. 631, 360 S.E. 2d 87 (1987) (citations omitted) (emphasis in original). While LMCC selected Tuggle Duggins to defend the Browns and controlled the ultimate decision to settle or defend under the policy, there is nothing in the record to indicate LMCC had any control over the details of the litigation as it was being conducted by Tuggle Duggins.

Furthermore, in *Gardner v. The North Carolina State Bar*, 316 N.C. 285, 341 S.E. 2d 517 (1986), our Supreme Court considered the proposed defense of an insured by an insurer's "in-house" counsel rather than by outside counsel selected by the insurer. In holding the former practice constituted the unauthorized practice of law by the insurer while the latter did not, the Court stated:

> In petitioners' [approved] current practice, as described to this Court, it does not purport to defend or represent its insureds itself. It agrees to furnish the defense and carries out this obligation by paying an independent attorney, *assumed for the purpose of this opinion to be an independent contractor*, to represent its insureds. It also has certain contractual rights, supported by its pecuniary interest, to select this attorney and to have some control over this suit. Nevertheless, the independent attorney is the "actor" who provides legal representation for the insured.

316 N.C. at 292-93, 341 S.E. 2d at 522. (Emphasis added.) The record before us evidences only an independent "actor" relationship identical to that authorized in *Gardner*. While the *Gardner* Court was only required to assume arguendo an independent contractor relationship between that insurer and its local counsel, our own facts demonstrate no other relationship between LMCC and Tuggle Duggins that might refute such an assumption. Therefore, as Tuggle Duggins was the "independent actor" providing legal representation to the Browns, we conclude under these facts that Tuggle Duggins was also an independent contractor.

Other jurisdictions have reached conclusions different from that reached in *Gardner* and different from that reached in this

case. *E.g., In re Allstate Ins. Co.*, 722 S.W. 2d 947 (Mo. 1987) (declining to follow *Gardner*); *Boyd Bros. Transportation Co. v. Fireman's Fund Ins. Co.*, 729 F. 2d 1407, 1410 (11th Cir. 1984) (noting Georgia, Texas, Kansas, Alaska, and Iowa hold attorney is not independent contractor); *see also* Note, *The Unauthorized Practice of Law by Corporations: North Carolina Holds the Line*, 65 N.C.L. Rev. 1422, 1435 (1987) (noting some courts and ABA view insured, insurer, and attorney as "loose partnership"). Nevertheless, the *Gardner* Court's analysis that, under North Carolina law, an insurer can defend its insured only by retaining independent counsel leaves no theoretical justification in this state for imputing the retained counsel's negligence to the insurer *solely* because the insurer provides independent counsel under its policy as authorized in *Gardner*. *See* A. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds*, Sec. 4687 at 193 (1982) (better reasoning is that insurer not vicariously liable for negligence of attorneys who conduct insured's defense); *Merritt v. Reserve Ins. Co.*, 34 Cal. 3d 858, 110 Cal. Rptr. 511 (Cal. App. 1973) (oft-cited case for such traditional analysis).

Therefore, as these facts show only that the attorneys employed by LMCC were independent contractors, their negligence, if any, is not imputable to LMCC. *See Hendricks v. Leslie Faye, Inc.*, 273 N.C. 59, 62, 159 S.E. 2d 362, 365 (1968) (no vicarious liability for torts of independent contractors). We note in passing that plaintiffs have neither alleged nor offered evidence that LMCC was negligent in selecting Tuggle Duggins as the Browns' attorney. *Cf. Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E. 2d 813, 817, *aff'd*, 281 N.C. 697, 190 S.E. 2d 189 (1972) (employer must exercise care to secure competent independent contractor). Accordingly, the trial court properly entered summary judgment for LMCC as to those vicarious liability claims against LMCC arising from the alleged negligence of Tuggle Duggins.

III

[6] Plaintiffs finally contend LMCC breached its contract to defend the Browns because it failed to defend them after paying $25,000 to Hinson. An insurer's duty to defend its insured in a motor vehicle liability action arises from the language of the insurance contract since there exists no statutory obligation in

North Carolina to provide a defense for the insured. *Cf.* N.C.G.S. Sec. 20-279.21 (1983) (statute includes no obligation to defend insured); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E. 2d 374, 377 (1986) (extent of duty to defend requires resolution of scope of policy provisions); *see also Carrousel Concessions, Inc. v. Florida Ins. Guaranty Ass'n*, 483 So. 2d 513, 516 (Fla. App. 3rd Dist. 1986) (insurer's duty to defend arises solely from language of insurance contract). The LMCC policy provides in relevant part:

> We will settle or defend, as we consider appropriate, any claim or suit asking for [covered damages]. In addition to our limit of liability, we will pay all defense costs we incur. *Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.* [Emphasis added.]

Over the Browns' objections, LMCC paid Hinson an advance payment of $25,000 under Section 1-540.3(a) (1983) which provides in part:

> Such advance or partial payment or payments shall not constitute an admission of liability on the part of the person . . . on whose behalf the payment or payments are made or by the insurance carrier making the payments . . . The receipt of the advance partial payment or payments shall not in and of itself act as a bar, release, accord and satisfaction, or a discharge of any claims of the person or representative receiving the advance or partial payment or payments, unless by the terms of a properly executed settlement agreement it is specifically stated that the acceptance of said payment or payments constitutes full settlement of all claims . . .

N.C.G.S. Sec. 1-540.3(a) (1983). Although LMCC has not settled the Browns' liability to Hinson under the terms of Section 1-540.3, LMCC contends its $25,000 advance payment to Hinson "exhausted" the policy limits and therefore ended its contractual duty to defend the Browns. Conversely, the Browns vehemently reiterate their objection to LMCC's advance payment and contend that such payment over their objection did not discharge LMCC's duty to defend under the contract. As only the meaning of the policy provisions is in dispute, our review of the court's summary judgment requires only that we determine whether, given these provisions, LMCC was entitled to judgment as a matter of law.

See Weaver v. Home Security Life Ins. Co., 20 N.C. App. 135, 201 S.E. 2d 63 (1973).

Whether LMCC breached its contract to defend the Browns requires us to construe the disputed meaning of the policy provision noted above. We first note the policy provides defense coverage "in addition to" the policy's liability limits. It is a well recognized legal principle that an insurer's duty to defend its insured is separate from and broader than the insurer's duty to indemnify the insured. *See, e.g., Waste Management of Carolinas, Inc.*, 315 N.C. at 691, 340 S.E. 2d at 377; *see generally Windt*, Sec. 4.30 (1982 and 1987 Cum. Supp.) (collecting cases). As the duties to defend and indemnify arise by contract, LMCC could presumably contractually limit its duty to defend. *Cf. National Union Ins. Co. of Washington, D.C. v. Phoenix Assurance Co. of New York*, 301 A. 2d 222, 224-25 (D.C. 1973) (duty to defend terminated after payment of policy limits since policy stated duty ended when company "paid or deposited in court such part of such judgment as does not exceed the limit of the company's liability"). However, we reject LMCC's contention that the only reasonable interpretation of the disputed provision is that "the policy confines the insurer's duty to present a defense for the insured to those claims in which the limits of liability has [sic] not been *exhausted*." (Emphasis added.) This "interpretation" merely restates the essential inquiry which is the intended meaning and scope of "exhausted" as used in the policy.

"Exhaust" is a broad term meaning to use up, consume or deplete. *American Heritage Dictionary* at 475 (2d ed. 1982). Without further specifying how or by whom the coverage may be "exhausted," LMCC's application of this broad "limitation" would apparently allow LMCC to expend $25,000 in any manner whatsoever rather than defend the Browns. This demonstrates that the provision does not so much limit plaintiffs' contractual right to a defense as nullifies it since a multitude of conflicting, albeit reasonable, results are all perfectly consistent with this unqualified use of the word "exhausted." For example: 1) defense coverage would end after LMCC expended $25,000 by settlement or judgment with one (or several plaintiffs); 2) rather than reach a settlement or judgment, LMCC could choose to pay a plaintiff $25,000 in advance and never investigate the Browns' defense; 3) LMCC could choose to pay the policy limits and discharge its duty

to defend—but only after it had in good faith investigated the Browns' defense; or 4) while retaining the right to "settle or defend" the action, LMCC could terminate its duty to defend the Browns through "advance payments"—but only with the Browns' consent.

Other interpretations are possible. Each is perhaps reasonable but each gives the Browns a significantly different right to be defended under the policy. We note this ambiguity of intention is specifically addressed by the policy with respect to other coverages: uninsured motorist coverage is paid "only after the limits of liability . . . have been *exhausted by payment of judgments or settlements*" and LMCC's duty to pay interest on a judgment "ends when [LMCC] *offers* to pay that part of the judgment which does not exceed our limits of liability." (Emphasis added.) *Cf.* N.C.G.S. Sec. 20-279.2 (1983) (specifying when "exhaustion" of liability coverage occurs for purpose of underinsured coverage). Had LMCC specified more clearly how its duty to defend was limited by paying the policy limits, the Browns could have rationally and efficiently determined whether or by how much they needed to adjust their policy limits in order to receive the desired defense coverage. *Cf. Great American Ins. Co. v. Tate Construction Co.*, 303 N.C. 387, 395, 279 S.E. 2d 769, 774 (1981) (as insurance offered on "take it or leave it" basis, frequently only term over which insured has control is amount of coverage); *Cole's Restaurant, Inc. v. North River Ins. Co.*, 105 Misc. 754, 432 N.Y.S. 2d 844, 845 (Sup. Ct. 1980), *rev'd on other grounds*, 85 A.D. 2d 894, 446 N.Y.S. 2d 734 (N.Y. App. Div. 1981) (where payment of consideration is also for defense coverage, "liability insurance" is "litigation insurance" as well). Instead, LMCC's unqualified use of the word "exhausted," without more, renders the effect of the limitation uncertain or capable of several reasonable but conflicting interpretations: this ambiguity must thus be resolved against LMCC and in favor of the Browns. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E. 2d 773, 777 (1978).

Consequently, we agree with the Georgia Court of Appeals' construction of an identical provision in *Anderson v. United States Fidelity & Guaranty Co.*, 177 Ga. App. 520, 339 S.E. 2d 660, 661 (1986):

> [A]ppellee has tendered into court the remainder of its policy limits and withdrawn from the defense of the claims against appellant, without the consent of appellant and without a determination of the liability of appellant. 'Although courts are divided on the question, the general rule is that an insurer is not absolved of its duty to defend in the latter situation where the policy limits are tendered [into court], without the consent of the insured, prior to settlement or judgment.' . . . There is no intimation in the policy that its duty to defend may be satisfied by merely paying into court the applicable policy limits. To read the policy otherwise would render a near nullity a most significant protection afforded by the policy—that of defense. We do not agree with the appellee that the term "exhaust" encompasses the paying into court of the policy limits, but interpret that term to mean the payment either of a settlement or of a judgment wholly depleting the policy amount.

(Citations omitted.)

This analysis of the contractual provision was clearly that adopted by Mr. Brown who appeared without counsel in the Hinson action in order to challenge Tuggle Duggins' right to withdraw. We recognize that over the years the insurance industry has moved towards contractually limiting its duty to defend its insureds. *See generally Gross v. Lloyds of London Insurance Co.*, 121 Wis. 2d 78, 358 N.W. 2d 266, 268-270 (Wis. 1984) (tracing subsequent modifications of duty to defend and indemnify in standard form liability policy); *see also* E. Zulkey and M. Pollard, "Duty to Defend after Exhaustion of Policy Limits," *For the Defense*, 21-28 (June 1985). However, given the unnecessarily ambiguous use of the word "exhaust" in this particular policy, we adopt plaintiffs' interpretation which requires LMCC to continue defending the Browns until a settlement or judgment is reached despite having paid its policy limits under Section 1-540.3. Consequently, the trial court erroneously entered summary judgment for LMCC as to the claim that LMCC had breached its contract to defend plaintiffs.

To summarize: we affirm the court's dismissal under Rule 12(b)(6) of the "design defect" and "fraudulent concealment" claims against GMC; however, we reverse and remand the court's

dismissal of the fraud claim arising from those representations by GMC quoted earlier. We affirm the court's summary judgment for LMCC on the vicarious liability claims but reverse and remand the court's summary judgment as to the claim that LMCC breached its contract to defend.

Affirmed in part and reversed in part and remanded.

Judge BECTON concurs.

Judge PHILLIPS concurs in the result.

RICHARD DALE WALKER v. GOODSON FARMS, INC., AND J. MICHAEL GOODSON, AND EDWARD F. MOORE

No. 874SC1020

(Filed 21 June 1988)

1. **Master and Servant § 8— wrongful discharge action—creation of contract**

The jury in a wrongful discharge action was entitled to find the creation of a valid and enforceable contract where, although a letter setting out the terms of agreement was not signed by plaintiff and there was a subsequent letter which defendants alleged was a counteroffer, plaintiff worked two and a half years and received salary and benefits as set out in the original letter.

2. **Master and Servant § 8; Contracts § 2— wrongful discharge—existence of employment contract—failure to execute written contract**

The parties' failure to execute a written employment contract did not preclude the creation of an enforceable agreement or discharge defendants from their guarantor liability.

3. **Master and Servant § 10.1— wrongful discharge—drinking and advances of funds—not just cause for discharge**

The trial court did not err in a wrongful discharge action by denying defendants' motions to dismiss and for judgment n.o.v. where there was sufficient evidence for the jury to determine that plaintiff's use of alcohol did not interfere with his work so as to justify his discharge, and the jury was also entitled to have found that plaintiff's use of company funds did not constitute just cause for discharge because plaintiff made advances from company funds in the course and interest of operating the business and not for his own benefit.

4. Appeal and Error § 24— wrongful discharge action—alleged error in instructions—waived by failure to object

Defendants in a wrongful discharge action waived their right to assert on appeal errors in the court's instructions by failing to object before the jury retired. Rule 10(b)(2) of the North Carolina Rules of App. Procedure.

APPEAL by defendants from *Lake, I. Beverly, Jr., Judge.* Judgment entered on the verdict out of session, out of district and out of county 16 April 1987. Heard in the Court of Appeals 29 March 1988.

This appeal grows out of plaintiff's action commenced 24 January 1986 for breach of an employment contract. In his complaint, plaintiff alleged that defendant Goodson Farms, Inc. (GFI), through defendant J. Michael Goodson (Goodson), majority shareholder of GFI, breached plaintiff's five-year employment contract by terminating plaintiff's position as general farm manager prior to the expiration of the five-year term. Plaintiff also alleged in his complaint that defendants Goodson and Edward K. Moore (Moore) had breached their promises of guaranty on the employment contract. Moore owned part of the farmland leased to GFI.

The matter was tried before a jury at the 6 April 1987 civil session of Sampson County Superior Court. The evidence tended to show the following: In 1980-81, defendant Goodson, then president and principal shareholder of GFI, first contacted plaintiff at plaintiff's home in Louisiana regarding potential employment with the Goodson Farms in North Carolina. During 1982-83, Goodson repeatedly called on plaintiff to leave his then position as a farm general manager and come to work for Goodson. At one point during this recruiting period, Goodson told plaintiff that he would offer a five-year term employment contract. Plaintiff testified that because he held reservations about GFI's financial stability, he had bargained for a long-term contract for purposes of his own financial assurance. In addition, Goodson told plaintiff that the contract would be personally guaranteed by him and defendant Moore.

In late 1982 and early 1983, at Goodson's request, plaintiff met with Goodson, Moore and Moore's accountant at Goodson's New York City office. The parties again discussed a five-year employment contract and the corresponding guaranties of Goodson and Moore. By way of assuring plaintiff of the strength of

Moore's guaranty, Moore's accountant provided plaintiff with a full report of Moore's holdings, assets and liabilities, and tax return information. Moore also interviewed plaintiff for four hours at the meeting to learn more about plaintiff's experience as a farm manager. Moore told plaintiff that he would be willing to guarantee an employment contract for GFI.

Shortly after returning from New York, plaintiff received an unexecuted letter dated 31 January 1983 from Goodson, which provided in pertinent part:

> Dear Dale:
>
> This letter is to confirm our understanding covering your employment with Goodson Farms Inc. (GFI). You will be in charge of all phases of farming and farm related activities of GFI and/or its affiliates. Your title will be President of the corporation and you will serve as a director. I will remain as Chairman of the Board of GFI's Board of Directors.
>
> In addition to the above, our commitment to you and your commitment to GFI is as follows:
>
> 1. In the first year of employment ending December 31, 1983, you will be paid at the annual rate on a monthly basis of $60,000 per year ($5,000 per month) beginning February 1, 1983. In addition to your salary, which due to the date you are beginning employment will only be $55,000, you will receive an automatic bonus on December 31 of $20,000 regardless of the level of profitability of the farm operation. In addition, if the farm is profitable, you will receive an additional $20,000 bonus provided that the bonus will be no greater than the farm's profits if the pre-tax profits are less than $20,000.
> 2. In the years beginning January 1, 1984 and ending on December 31, 1987 you will be paid on a monthly basis on an annual rate of pay of $80,000 per year and will be entitled to a cash bonus of $20,000 in any year in which the operations of the farm show a pre-tax profit provided that the cash bonus not exceed the pre-tax profits for that year. . . .
>
> . . .

4. GFI will maintain term life insurance with your estate as the beneficiary equal to three times your base salary on an annual basis.

. . .

6. You will receive or be entitled to a paid vacation of two weeks per year and/or such additional time at your discretion as you may be able to take, provided that the farm is being properly supervised and maintained during that time. This vacation provision is noncumulative.

. . .

8. If Walker breaches the contract by terminating his employment prior to the expiration of the five year period, the liquidated damages for said breach will be $100,000 due and payable immediately to GFI.

9. At the end of Walker's contract, it is hereby stipulated and agreed that Walker will not compete in the strawberry plant business for three years with GFI by growing and offering for sale any variety of plants grown during the preceding five year period of time or contracting directly or indirectly any customers to whom plants were sold during said five year period of time. If Walker leaves GFI's employment prior to the expiration of the five year period, then the noncompete period will be for three full years beginning on January 1, of the first year after Walker leaves GFI's employment.

. . .

Whereas the above paragraphs correctly set forth the understanding of employment of Dale Walker with Goodson Farms Inc. for good and valuable consideration it is agreed between and among the parties:

_____

Richard D. Walker

_____

Goodson Farms Inc.

And the foregoing terms of employment and mutual covenants are hereby guaranteed by:

J. Michael Goodson
Individually

Edward F. Moore
Individually

On plaintiff's request for clarification of the letter, Goodson responded with a letter dated 19 February 1983. The relevant portions of that letter are as follows:

Dear Dale:

This letter is being written for the purpose of further defining the terms that were implicit in our January 31, 1983 agreement, as well as for the purpose of changing the effective date that you will begin employment.

. . .

Paragraph 8 of J-31 talks in terms of termination remedies available to GFI. Implicit in this contract, although not set forth in paragraph 8, is the right of either party to terminate this contract for cause, irrespective of the provisions set forth in the contract. Many factors come into play in determining what is cause, and I will not undertake to define cause in this agreement.

. . .

Although GFI has no written set of accounting policies, it has been GFI's practice not to incur any expenses in connection with my involvement or that of any related family member or corporate affiliate in connection with GFI. Accordingly, during the five year contract contemplated under J-31, there will be no such charges except and without your prior consent. If the above properly sets forth your understanding of our conversation today concerning our mutual understanding of the interpretation of the contract, with various factual modifications to bring the contract current,

kindly indicate same by signing the enclosed copy of this letter and return it to me.

. . .

After receiving the 19 February letter, plaintiff drafted another letter dated 25 February 1983 in which he purportedly accepted Goodson's 31 January letter with two exceptions. Plaintiff proposed the insertion of a clear statement setting out the contract's five-year term and a statement regarding plaintiff's title and duties. Secondly, plaintiff requested the deletion of Paragraph #8 in the 31 January letter which referred to liquidated damages and asked that the general principles of law relating to termination remedies be applied in the event a legal resolution should become necessary.

Plaintiff closed this letter with the following:

> . . . With these minor exceptions, and upon their approval, I agree to the contract provisions as set forth in the two (2) letters above described and I will execute my signature thereon upon the affixation of the signature of yourself, both individually and as President of GFI, as well as that of Mr. Edward F. Moore.

On the 26th or 27th of February, plaintiff met Goodson in Raleigh, North Carolina. While driving from Raleigh to Turkey, North Carolina, the location of the Goodson Farms, plaintiff gave Goodson the 25 February letter and Goodson gave plaintiff a copy of the 31 January letter, this time signed by both Goodson and Moore as guarantors. Goodson had also signed as president on behalf of GFI. Plaintiff never signed the 31 January letter. Following this exchange, with nothing further stated between the parties, plaintiff began work as president and general manager for GFI on 1 March 1983.

Goodson testified, however, that he and plaintiff never discussed the 25 February letter nor did Goodson ever agree to the proposed changes contained therein.

From March 1983 through November 1985, just before plaintiff's discharge from employment, plaintiff performed his job as farm manager and was paid a salary in the amount and manner described in the 31 January and 19 February letters; he was paid

the bonuses and the insurance benefits as provided for in the letters and utilized the vacation time mentioned in the letters.

Goodson testified that during plaintiff's first year of work, Goodson became concerned with plaintiff's "drinking problem." The evidence is undisputed that plaintiff drank alcohol while at work and on GFI property; however, the testimony of the parties' several witnesses is conflicting as to the effects of plaintiff's drinking on his work. Some witnesses testified that his use of alcohol adversely affected his work. Others, especially Thomas Stanley and Sam Mathis, who had worked closely with plaintiff throughout the two years indicated that plaintiff's work was unaffected. The witnesses generally testified that plaintiff tended to work long hours, worked well with others, and possessed good managerial skills.

In October 1985, Goodson called plaintiff and Assistant Manager Clayton Murphy to a meeting in his New York office. Plaintiff's evidence showed that Goodson informed him at the meeting that all GFI salaries were to be cut 50% to save the corporation money. Plaintiff testified that Goodson had never complained to him about his drinking or work performance. Goodson, however, claimed that he had confronted plaintiff about his drinking and was using the salary cut as a "motivational tool."

Plaintiff testified that when he later complained of the salary cut, he learned through his attorney that his employment had been terminated. In his testimony at trial, Goodson indicated that he thought plaintiff had resigned.

Goodson also testified to having given plaintiff full managerial power at GFI. Although specific guidelines or rules were not issued or in evidence, plaintiff was given essentially carte blanche to run the GFI operations, including control over its finances. Occasionally, in the course of the farm's operations, plaintiff was required to make certain cash advances from GFI funds. Several of these advances were not recovered. The evidence at trial showed that these advances were made on behalf of the business and not for plaintiff's personal gain.

Defendants moved for a directed verdict at the close of plaintiff's evidence and all the evidence. The trial court denied both motions and submitted the following issues to the jury:

1. Was there a contract of employment for a definite period of time between the plaintiff, Richard Dale Walker, and the defendant, Goodson Farms, Inc.?

ANSWER: Yes.

2. Was the plaintiff, Richard Dale Walker, discharged from his employment or terminated by the defendant, Goodson Farms, Inc.?

ANSWER: Yes.

3. Was the discharge of the plaintiff, Richard Dale Walker, without just cause?

ANSWER: Yes.

4. Did the defendant, Edward F. Moore, sign or enter into any contract or agreement of employment between the plaintiff, Richard Dale Walker, and the defendant, Goodson Farms, Inc., as a guaranty or guarantor on the plaintiff's behalf?

ANSWER: Yes.

5. What amount of damages, if any, is the plaintiff, Richard Dale Walker, entitled to recover?

ANSWER: $ Amount Equal To Full Coverage of Contract $176,000.00.

. . .

From the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict, defendants appeal.

Timothy W. Howard for plaintiff-appellee.

Ward and Smith, P.A., by Michael P. Flanagan and Douglas K. Barth, for defendants-appellants.

WELLS, Judge.

The threshold issue in this appeal is whether there existed sufficient evidence to support the jury's finding of an employment contract for a five-year term. Our review of the evidence leads us

to conclude that the jury was entitled to find the creation of a valid and enforceable contract based upon the terms of the 31 January letter.

[1] In their first argument, defendants contend that because plaintiff failed to show the legal formation of a contract of employment, the trial court erred in denying defendants' motions for directed verdict and judgment notwithstanding the verdict.

A motion for judgment notwithstanding the verdict under G.S. § 1A-1, Rule 50(b) of the North Carolina Rules of Civil Procedure constitutes a renewal of a motion for directed verdict and requires the trial court to view all the evidence and conflicts therein in the light most favorable to the nonmovant. *Penley v. Penley*, 314 N.C. 1, 332 S.E. 2d 51 (1985); *Northern National Life v. Lacy J. Miller Machine*, 311 N.C. 62, 316 S.E. 2d 256 (1984). Motions for directed verdict and judgment notwithstanding the verdict should be granted only when the evidence is insufficient to support a verdict in the nonmovant's favor. *Penley, supra.* The evidence in the present case, when viewed in the light most favorable to plaintiff, was sufficient to support the verdict.

Defendants rely on our Supreme Court's decision in *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 326 S.E. 2d 11 (1985) to support their argument that plaintiff failed to show that an employment contract had been formed. A valid contract may arise only where the parties assent and their minds meet as to all terms. *Goeckel v. Stokely*, 236 N.C. 604, 73 S.E. 2d 618 (1952). This meeting of the minds requires an offer and acceptance of the same terms. If, in his acceptance, the offeree attempts to change the terms of the offer, such constitutes a counter-proposal and thereby a rejection of the initial offer. *Normile, supra*; *Richardson v. Storage Co.*, 223 N.C. 344, 26 S.E. 2d 897 (1943). Defendants argue that because the 31 January letter was not signed and accepted by plaintiff and because the 25 February letter acted as a counteroffer to the January letter, a contract was never formed. However, the present case is distinguishable from *Normile*.

In the construction of a contract, the parties' intentions control, *Cordaro v. Singleton*, 31 N.C. App. 476, 229 S.E. 2d 707 (1976) and their intentions may be discerned from both their writings and actions. *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E. 2d 503 (1946); *Zinn v. Walker*, 87 N.C. App. 325, 361 S.E. 2d 314 (1987);

Heater v. Heater, 53 N.C. App. 101, 280 S.E. 2d 19 (1981). Unlike *Normile*, the parties in the present case affirmatively acted upon their negotiations which tended to show the formation of an agreement. Plaintiff worked for defendants for two and one-half years and defendants paid plaintiff according to the 31 January letter. In *Normile*, however, there was no subsequent conduct of the parties by which their intentions regarding the sales contracts might have been determined. Instead, the issue became one of determining which of the sales contracts had actually been accepted and incorporated into an enforceable contract. The *Normile* court therefore was never required to consider and construe the meaning of the parties' conduct which makes the decision there inapplicable to the present case.

Rather, the case before us presents facts not unlike those in our recent decision in *Zinn v. Walker, supra*, where this Court held as enforceable preliminary agreements to agree, the terms of which agreements apparently directed the parties' actions. The decisive factor in *Zinn*, and in the present case, was the parties' conduct and the interpretation they gave to their negotiations. That plaintiff in the case *sub judice* worked as a general manager for two and one-half years and received a salary and insurance benefits as set out in the 31 January letter was persuasive and convincing evidence of a contract based on that letter.

[2] Defendants also contend that because the parties had intended to place the terms of their negotiations in writing, their having failed to consummate such a written agreement precludes the finding of a contract. Likewise, they argue, if there was no contract for employment, defendants Goodson and Moore could not have been guarantors on the contract. We disagree.

We have earlier held in this case that a valid and enforceable employment contract was formed based on the terms of the 31 January letter. The parties' failure to have drafted a final written agreement, while perhaps relevant, is not determinative of the issue. *See Zinn v. Walker, supra.* We therefore hold that the parties' failure to execute a written contract does not preclude the creation of an enforceable agreement nor does it discharge defendants from their guarantor liability.

[3] In their second argument, defendants assign as error the trial court's denial of their motions to dismiss and for judgment

notwithstanding the verdict on the issue of plaintiff's discharge from employment. Defendants claim that even if a valid employment agreement were found, plaintiff's drinking on the job and making cash advances from GFI funds gave rise to just cause for terminating his employment.

Defendants urge us to hold as a matter of law that habitual drinking of alcohol on an employer's premises during working hours constitutes "just cause" for discharge. In support of their assertion, defendants rely on our decision in *Hester v. Hanes Knitwear*, 61 N.C. App. 730, 301 S.E. 2d 508 (1983), where we addressed the question of whether an employee's use of marijuana at work in violation of the employer's rules constituted ". . . misconduct connected with work" under G.S. § 96-14(2). Although we held that the employee's use of marijuana at work did constitute "misconduct," our holding there should not be interpreted to have addressed the question of "just cause" for terminating an employment contract, and that decision is therefore not controlling here.

We instead look to our Supreme Court's decision in *Wilson v. McClenny*, 262 N.C. 121, 136 S.E. 2d 569 (1964), where the Court held that an employee's use of alcohol ". . . to the extent that it interfere[s] with the proper discharge of his duties . . ." may constitute just cause for termination of the employment contract. The Court also made clear that determination of whether the employee's use of alcohol in fact interfered with his work was a question for the jury. *Id.*

In the present case, the jury having heard all the evidence determined that plaintiff's use of alcohol did not so interfere with his work as to justify his discharge. Given the testimony of several witnesses who observed no adverse effects in plaintiff's work, we find there existed sufficient competent evidence to support the jury's verdict.

The jury was also unpersuaded that plaintiff's cash advances from GFI funds gave rise to "just cause" for discharge. The evidence showed that plaintiff made such advances in the course and interest of operating GFI and not for his own benefit. The jury was therefore entitled to have found that plaintiff's use of GFI funds did not constitute "just cause" for discharge from his employment. Accordingly, we overrule defendants' second argument and first, second and third assignments of error.

[4] Finally, defendants make a complicated argument concerning errors contained in the trial court's instructions relating to offer, acceptance, and counteroffers; however, as defendants failed to object to the instruction before the jury retired and thereby properly preserve the exception for appeal as required by Rule 10(b)(2) of the Rules of Appellate Procedure, defendants have waived their right to assert this issue on appeal. *Donavant v. Hudspeth*, 318 N.C. 1, 347 S.E. 2d 797 (1986).

For the reasons stated, we find no error in the trial.

No error.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. HARVEY CLARK, JR., AND PAULINE CAMPBELL CRAIG

No. 8725SC1069

(Filed 21 June 1988)

1. **Criminal Law § 99.9— questioning of expert witness by court—no expression of opinion**

The trial court's questioning of defendant's expert witness did not constitute an opinion on the credibility of the witness where the questions comprised a part of the court's ascertainment of the witness's qualifications as an expert and were designed to clarify testimony regarding the various locations of his training. N.C.G.S. § 15A-1222.

2. **Arson § 4.1— burning of building used for trade—sufficient evidence of male defendant's guilt**

The State's evidence was sufficient for the jury to find that the male defendant unlawfully burned a building used for trade in violation of N.C.G.S. § 14-62 where it tended to show that a fire at a grocery store owned by defendant was deliberately set; defendant had been handling kerosene on the day of the fire and was the last person in the store before the fire; the fire was ignited by a petroleum product; defendant closed the store much earlier than usual on the day of the fire; unlike all other times defendant had closed the store, he failed to lock the front door which activated a burglar and fire alarm system; defendant hurriedly left the store after closing; and smoke was seen seeping out from under a soda machine just as the two defendants were leaving the store.

3. **Arson § 4.1— burning of building used for trade—proof of willfulness and wantonness**

The State presented sufficient evidence that the burning of a grocery store was willful and wanton so as to support defendant's conviction of a violation of N.C.G.S. § 14-62 where it tended to show that a highly flammable and volatile substance such as kerosene was used and that the store was in close proximity to other buildings.

4. **Criminal Law § 34.1— burning of grocery store—burning of another store where defendants employed—evidence irrelevant**

In a prosecution for unlawfully burning a grocery store, the trial court erred in permitting the State to elicit testimony on cross-examination of the female defendant that her employment at another grocery store owned by the male defendant had terminated when the store burned since the testimony was not admissible to show bias, was not admissible as evidence of other bad acts under N.C.G.S. § 8C-1, Rule 404(b) because there was no showing that defendants had any connection with the previous fire, and was irrelevant.

5. **Arson § 4.2— unlawful burning of grocery store—insufficient evidence of female defendant's guilt**

The State's evidence was insufficient to support the female defendant's conviction of unlawfully burning a grocery store where it showed only that the two defendants had known each other for 29 years, the female defendant worked for the male defendant, and the female defendant was seen exiting the store with the male defendant just before the fire.

APPEAL by defendants from *Seay, Thomas W., Jr., Judge.* Judgment and commitment entered 12 June 1987 in CALDWELL County Superior Court. Heard in the Court of Appeals 5 April 1988.

Defendants were indicted each on one count of burning a building used for trade in violation of G.S. § 14-62. The cases against each defendant were joined and came on for trial before a jury at the 8 June 1987 criminal session of Caldwell County Superior Court.

The State's evidence tended to show that defendant Clark owned and operated the Foodland Grocery Store (Foodland) located on North Main Street in Lenoir, North Carolina. On Sunday, 9 January 1985, just after 10:00 p.m., a fire erupted at the Foodland Store. Shortly before the fire began, several witnesses observed defendants Clark and Craig (who was employed by Clark as a cashier) emerge from the store's front door and walk to their respective vehicles in the parking lot. Defendant Clark stopped at his truck, turned and said, "I forgot something . . ." then turned

back to his truck. Neither defendant reentered the store. As the defendants stood in the parking lot, witnesses observed smoke seeping out from under a soft drink machine located next to the store's front door.

Witness Earl Efler, a cab driver, testified that he was driving a fare in the general direction of the Foodland when he saw smoke over the store's roof. Through one of the store's windows, he saw a fire at the ceiling top. Efler also stated that he had observed a streak of fire travel down an inner wall and almost simultaneously a window exploded and store lights blew out. Immediately after the explosion, the building was engulfed in flames. Witness Joe Osborne, co-owner of Northside Barbecue located 150 feet from Foodland, testified that he had seen defendant Clark leave the store in his truck "in kind of a hurry." Shortly thereafter he saw flames leaping from the Foodland. Osborne witnessed the fire from a small luncheonette (Joe's Ice Cream & Sandwiches) adjacent to the store.

The testimonies of Captain Bill Murray, Assistant Chief Robert Coffey and Kenneth Shaw of the Lenoir Fire Department presented the following facts: The fire was accompanied by heavy black smoke and unusually intense heat indicative of the presence of flammable liquids; there existed three separate and distinct burned areas within the store, significant because of the intensity with which they burned; the intensity of the fire's heat caused the glass front door to explode; a thick coating of oil found throughout the store coupled with a petroleum odor suggested the burning of a petroleum product; although all other doors in the store had been locked, the front door had been left unlocked.

David Campbell, Special Agent with the SBI, was accepted as an expert witness. He testified that following a thorough investigation of the fire aftermath, he found strong indications that the fire was of an incendiary origin by use of a flammable accelerant.

James Beane, Assistant Manager for Foodland, testified that only he, Clark and Craig had keys to the store. Beane alternated with Clark in opening and closing the store. He stated that the store's burglar and fire alarm system was activated by turning the lock in the front door. The alarm was programmed to dial Beane's and Clark's respective home telephone numbers. Beane testified that he was home the night of the fire and did not re-

ceive an alarm call. He also stated that the front door had always been locked when he had opened the store in the mornings.

Both defendants testified on their own behalf as follows: On 9 January 1985, Clark and Craig were closing early due to the cold weather. Clark went to his storeroom to fill up a kerosene heater to prevent the store pipes from freezing. While filling the heaters with kerosene, he was startled by someone entering the storeroom which caused him to spill kerosene over the floor. He removed the kerosene with paper towels.

Both defendants testified that the glass front door had been locked when they closed that Sunday night. Clark testified that they had activated the alarm system.

The State elicited from defendant Craig the following information: She had known defendant Clark for 29 years and had worked for him previously at a furniture store and another Foodland. Over defendants' objection, Ms. Craig was required to explain that her employment at the other Foodland had terminated when the store had burned. There was no evidence connecting either defendant with the previous fire.

Defendants' expert witness, James H. Edwards, testified that the fire was caused by an electrical shortage.

The jury returned verdicts finding both defendants guilty as charged.

The trial court imposed a nine-year prison sentence as to defendant Clark and an 18-month sentence as to defendant Craig. From the judgments entered by the trial court, both defendants appeal.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Joan H. Byers and Assistant Attorney General Doris J. Holton, for the State.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Joe K. Byrd, Sr. and Sam J. Ervin, IV, for defendant-appellant Clark.

Joe K. Byrd, Jr. for defendant-appellant Craig.

WELLS, Judge.

Defendant Clark's Appeal

[1] In his first argument and by assignments of error 75-79, defendant contends that the trial court erred by questioning defendants' witness Edwards in a manner which suggested the court's opinion as to the witness' credibility. We disagree.

While receiving testimony on Edwards' training and experience in the area of fire investigation, the following exchange occurred:

> COURT: Let me stop you there. I thought that I heard you say the Merchant Marines that you were in.
>
> A: Yes, the United States Navy Merchant Marine operated . . . .
>
> COURT: Is that not located in New York, Long Island and King Point, New York.
>
> A: Yes, King Point, New York in 1945 they had two. One at Pass Christian, Mississippi and the other one in California and they were operated under the United States Naval Reserve and we were sworn Officers of the United States Naval Reserve.
>
> COURT: You were in the United States Navy then?
>
> A: We were, yes, in the Navy Reserve but on active duty.
>
> COURT: This was in 1945 during the war?
>
> A: Yes.
>
> COURT: You were not in the Navy or were you in the Navy.
>
> A: We were in the Navy, sworn in the Naval Reserve.

Defendant argues that the trial court's manner of questioning cast doubt on the reliability of Edwards' background and training thereby impeaching his credibility. He contends that such amounts to an expression of opinion in violation of G.S. § 15A-1222 entitled "Expression of opinion prohibited." However, it is

well-settled that a trial court may question a witness for the purpose of clarifying the witness' testimony. *State v. Whittington*, 318 N.C. 114, 347 S.E. 2d 403 (1986); *State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982). Whether a judge's question or comments before the jury has the probable effect of being prejudicial should be weighed against the evidence produced and the conduct of the entire trial. *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980).

The determination of a witness' qualification as an expert is a question of fact to be decided by the trial court. *State v. King*, 287 N.C. 645, 215 S.E. 2d 540, *death sentence vacated*, 428 U.S. 903, 96 S.Ct. 3208, 49 L.Ed. 2d 1209 (1976). Judge Seay's questioning related to Edwards' expertise and comprised a part of the trial court's ascertainment of his qualifications as an expert witness. Moreover, Edwards' testimony generated some confusion regarding the various locations of his training. The trial court's questions were fairly designed to clarify this testimony. *Whittington, supra; Jackson, supra; Brady, supra.* These assignments of error are overruled.

Claiming insufficiency of the evidence, defendant contends by his third argument that the trial court erred in denying defendant Clark's motions to dismiss and in allowing the case to go to the jury. Specifically, defendant argues that the State failed to make its case under G.S. § 14-62 entitled "Burning of churches and certain other buildings."

On a motion to dismiss made pursuant to G.S. § 15-173 and G.S. § 15A-1227, the trial court is required to determine whether, when viewed in the light most favorable to the State, there exists substantial evidence of each element of the offense charged and of the defendant's being the perpetrator of the crime. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). When the State's case rests entirely upon circumstantial evidence, as it does here, the facts adduced must be so connected or related as to directly implicate the defendant and leave open no other reasonable hypothesis. *State v. Needham*, 235 N.C. 555, 70 S.E. 2d 505 (1952). "However, the rule for determining the sufficiency of the evidence is the same whether the evidence is completely circumstantial, completely direct or both." *State v. Wright*, 302 N.C. 122, 273 S.E. 2d 699

(1981). Our review of the evidence and all reasonable inferences there derived, in the light most favorable to the State, indicate that the State's evidence against defendant was sufficient to take the case to the jury.

G.S. § 14-62 requires a showing of four elements: "(1) the building was used for trade; (2) a fire occurred in it; (3) the fire was of incendiary origin; and (4) the defendant unlawfully and willfully started or [was] responsible for it." *State v. Tew*, 62 N.C. App. 190, 302 S.E. 2d 633, *rev. denied*, 309 N.C. 464, 307 S.E. 2d 370 (1983). Defendant primarily contends that the State failed to present substantial evidence that defendant actually perpetrated the crime and did so intentionally. We disagree.

[2] Defendant first argues that the evidence was insufficient to convince the trier of fact beyond a reasonable doubt that Clark burned the store. The evidence viewed in the light most favorable to the State tended to show the following: Clark had been handling and had access to kerosene the day of the fire; the fire was believed to have been ignited by a petroleum product and he was one of the last persons in the store before the fire; he closed the store much earlier than usual; unlike all other times Clark had closed, he failed to lock the front door which activated the alarm system; he hurriedly left the store after closing; smoke was seen seeping out under the soda machine just as defendants were leaving; and the fire was deliberately set.

While the evidence is entirely circumstantial, we believe it to be sufficiently substantial to connect defendant with the burning of the store. *Accord, State v. Caron*, 288 N.C. 467, 219 S.E. 2d 68 (1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2168, 48 L.Ed. 2d 794 (1976). [Sufficient evidence where fire was of incendiary origin; defendant was in shop shortly before fire; 30 minutes later defendant was seen with ashes and soot on his face and clothes for which defendant had no explanation]; *State v. Sheetz*, 46 N.C. App. 641, 265 S.E. 2d 914 (1980). [Evidence sufficient where defendant florist was sole owner of shop burned and stood to collect insurance proceeds; the fire occurred within five minutes after defendant closed his shop; defendant exited out back door after allowing employee out front door; the fire was not caused by an electrical malfunction; there existed evidence that defendant was heavily in debt]. Accordingly, defendant's argument is overruled.

[3] Defendant next contends that under our Supreme Court's decision in *State v. Brackett*, 306 N.C. 138, 291 S.E. 2d 660 (1982), the State failed to adduce sufficient evidence of defendant's wantonness and willfulness as required by G.S. § 14-62. We are unpersuaded.

The *Brackett* court's definition of wanton and willful provides that for a burning of a dwelling to be criminal the burning must have been done intentionally, ". . . without legal excuse or justification, and with the knowledge that the act will endanger the rights or safety of others or with reasonable grounds to believe that the rights or safety of others may be endangered."

In *Brackett*, the court held the evidence insufficient to show "wanton and willful" burning where the defendant's house was set back from other buildings; the defendant was home alone at the time of the fire and the defendant reported the fire herself.

In the case at bar, the use of a highly flammable and volatile substance such as kerosene coupled with the proximity of the other buildings (Joe's luncheonette) placed the interests and safety of others in jeopardy. That several witnesses testified to having been in the immediate area at the time of the fire confirms this point. We believe these facts meet the requirements of the *Brackett* test for "willful and wanton" under G.S. § 14-62 and hold that the State adduced sufficient evidence to make out its case against defendant.

[4] However, we agree with defendant's second argument that the trial court committed prejudicial error in allowing the State to elicit testimony from Ms. Craig regarding the previous Foodland fire. The State argues that the testimony relating to the prior fire was admissible to show bias; indeed, the trial court stated that the evidence was admissible for the purpose of showing bias. Because Craig's previous employment with Clark was terminated due to the other Foodland fire, the State argued that evidence thereof was admissible by way of illustrating the previous relationship between Clark and Craig thereby suggesting bias. We disagree.

The specific exchange of which defendant complains is as follows:

Q. Mrs. Craig, at the first Foodland Grocery where you worked for Mr. Harvey Clark in 1983, why was your employment terminated?

MR. ERVIN: Objection.

COURT: Overruled.

Q. You may answer?

COURT: Answer the question.

A. It burned.

MR. ERVIN: Request the instruction?

COURT: Denied.

MR. ERVIN: Move to strike the answer.

COURT: Denied.

MR. ERVIN: Request a limiting instruction?

COURT: Denied. Anything further for this witness.

Although evidence of a witness' bias has long been admissible, *see State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Turner*, 283 N.C. 53, 194 S.E. 2d 831 (1973) and the foregoing colloquy, by revealing their long-term relationship, may suggest bias as between the two defendants, to be admissible evidence must tend to prove or bear some logical relation to a fact in issue. N.C. Gen. Stat. § 8C-1, Rule 401 of the N.C. Rules of Evidence; *Brandis on North Carolina Evidence* §§ 77, 78 (1982). In the case before us, the "prior fire" testimony is completely irrelevant. It neither confirms nor suggests a relationship between Clark and Craig nor does it imply bias. The State's efforts to introduce the evidence served to prejudice the jury by connecting both defendants with a previous fire at their place of employment. As such, the admission of this evidence constituted prejudicial error.

We addressed a similar issue in *State v. Alley*, 54 N.C. App. 647, 284 S.E. 2d 215 (1981) where evidence of prior non-criminal, unrelated fires was held inadmissible because of its prejudicial character. Moreover, we pointed out that because the State had failed to show that defendant had had any connection with the previous fires, the exception for the admission of prior bad acts

set out by G.S. § 8C-1, Rule 404(b) was unavailable to the State. The same holds true in the present case and we accordingly award Clark a new trial.

Defendant Craig's Appeal

[5] By her third assignment of error, Ms. Craig contends that the trial court's denial of her motion(s) to dismiss constituted error. We agree.

To prevail against a motion to dismiss, the State was required to produce substantial evidence of each element of the offense charged and to show that defendant was involved in the crime. *Earnhardt, supra; Powell, supra.* The evidence in this case taken in the light most favorable to the State fails to show that Ms. Craig either perpetrated or assisted in the perpetration of the Foodland fire. There was no indication that Ms. Craig had any opportunity or motive to burn the store. At most, the evidence shows that Ms. Craig was implicated by her mere presence at the scene. The "mere presence" of Ms. Craig at the scene of the fire, taken alone, is insufficient to incriminate her as an aider and abettor in a crime. *State v. Scott*, 289 N.C. 712, 224 S.E. 2d 185 (1976). There was no evidence that defendant Craig intended to aid defendant Clark in burning the store and/or that she communicated such an intent. *See State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973). That Craig and Clark had known each other for 29 years, that Craig worked for Clark and that she was seen with him exiting the store just before the fire was insufficient evidence to connect her with the perpetration of the fire.

As to defendant Clark,

New trial.

As to defendant Craig,

Judgment vacated.

Judges PARKER and ORR concur.

RINA JANEY BISHOP v. RONALD LYNN BISHOP

No. 8718DC1140

(Filed 21 June 1988)

1. **Contempt of Court § 1.1— contempt order to enforce child support—distinction between civil and criminal contempt**

In determining whether contempt orders are civil or criminal or both, the "punitive" or "remedial and coercive" purposes of the orders should be drawn from an examination of the character of the actual relief ordered by the court, as classified by applying certain straightforward rules suggested by *Hicks ex rel. Feiock v. Feiock*, 485 U.S. ---.

2. **Contempt of Court §§ 6, 6.3— contempt for failure to pay child support—civil and criminal relief—findings and procedure**

Where both civil and criminal relief are imposed in a contempt order, the court must make all findings necessary to impose both classes of relief; however, the court must in that case afford defendant all procedural and evidentiary standards appropriate to criminal contempt proceedings, and the imposition of probationary or suspended sentences is deemed criminal relief so long as the court does not order the sanctions avoided or purged by specific acts.

3. **Contempt of Court § 1.1— contempt for failure to pay child support—civil in nature**

A contempt order was construed as adjudicating defendant in civil contempt where the court was attempting to coerce defendant's obedience and remedy plaintiff's lost child support; although the court ordered defendant confined in jail for a period of 29 days, it allowed defendant to avoid that punishment altogether by paying the entire arrearage.

4. **Contempt of Court § 6.3— child support arrearage—no finding of ability to pay**

There were inadequate findings to support an adjudication of civil contempt where the court made no findings of defendant's ability to pay the entire child support arrearage, and payment of the entire amount was necessary to avoid punishment.

APPEAL by defendant from *Bencini, Judge*. Order entered 22 June 1987 in District Court of GUILFORD County. Heard in the Court of Appeals 10 June 1988.

Hatfield and Hatfield, by Kathryn K. Hatfield, for plaintiff-appellee.

Neill A. Jennings Jr. for defendant-appellant.

GREENE, Judge.

Defendant appeals the contempt order arising from his alleged failure to pay plaintiff $350 per month as child support under a 1986 consent judgment. The record reveals that, upon plaintiff's motion, the court ordered defendant to "show cause why he should not be found in willful contempt . . . ." At the June 1987 hearing on that motion, defendant was not represented by counsel and was called as a witness by plaintiff. Defendant testified he had earned approximately $2,000 per month from August 1986 (the date child support commenced) until he became unemployed in October 1986. Defendant remained unemployed until March 1987 when he began working at the rate of $4.25 per hour. The record also contains evidence that defendant made the full $350 per month child support payments under the consent judgment in October 1986, December 1986, and January 1987. Defendant made a significantly smaller payment in September 1986 and only token payments in April and June 1987. Defendant admitted the total arrearage of his child support obligation was $2,230.

Based upon this evidence, the court entered the following written order:

> This matter coming on to be heard upon Plaintiff's motion to hold Defendant in contempt for being in arrears $2230 [;]
>
> AND IT APPEARING that since 1-30-87 the Defendant has paid $60 being $30 on 4-10-87 and $30 on 6-11-87, but that he has been employed at $4.25 an hour since 3-9-87; and further that Defendant lives with his girlfriend in a house where the total rent is $150 per month.
>
> AND IT FURTHER APPEARING that the Defendant has had the ability to pay child support & that his failure to do so is willful contempt.
>
> IT IS THEREFORE ORDERED ADJUDGED & DECREED THAT:
>
> (1) Defendant is found in willful contempt of the lawful orders of the court and confined to the Guilford County Jail for 29 days.

(2) Defendant may purge himself from contempt by paying into CSC the sum of $2230 upon payment of which sum he shall be released.

(3) Commencing 6-30-87 & thru 30th of each month thereafter Defendant shall make his child support payment of $350 per month thru the Clerk of Superior Court.

(4) Plaintiff is authorized to complete the paperwork to garnish Defendant's wages for child support.

Defendant appeals what both parties characterize as the court's judgment of *criminal* contempt. Defendant specifically contends (1) that the court erroneously concluded he had the past ability to comply with the child support provisions of the prior consent judgment and (2) that the court made inadequate findings to support its ordering his confinement in jail for 29 days. Defendant also complains the court made no findings that he had the "ability to pay the *arrearages* . . ." (emphasis added). Defendant does not dispute his notice of these proceedings.

These facts present the following issues: where defendant challenges the adequacy of the trial court's findings to demonstrate criminal and/or civil contempt, (A) what rules of construction determine whether a contempt order evidences an adjudication of criminal contempt, civil contempt, or both; and (B) once the criminal and/or civil character of relief is determined, whether the trial court made adequate findings and conclusions to justify the particular relief it ordered in response to defendant's alleged contempt.

At the outset, we note that both parties have apparently briefed this appeal on the assumption the court's order states a conviction for criminal contempt under Section 5A-11(a)(3). N.C.G.S. Sec. 5A-11(a)(3) (1986) (willful disobedience of court's lawful order). Defendant's primary objection to finding criminal contempt is that, given his long period of unemployment during 1986 and 1987, the court could not properly find that he had the ability during that period to pay the required child support under the 1986 consent judgment. We note defendant failed to make his full $350 child support payment during the months of March, April, May, and June 1987—a period *after* he regained employ-

ment and presumably regained the ability to make those monthly payments at the time they were required. *Cf. Lamm v. Lamm*, 229 N.C. 248, 250, 49 S.E. 2d 403, 404 (1948) (necessity for "willful" criminal contempt merely required finding defendant had means to comply with prior alimony order "at any time" after its entry). However, as defendant complains in his brief of his lack of legal counsel during what he characterizes as a criminal contempt proceeding, we also note the court apparently did not inquire whether defendant needed legal representation. *Compare O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E. 2d 370, 373 (1985) (criminal contempt is crime entitling accused to necessary constitutional safeguards) *with Jolly v. Wright*, 300 N.C. 83, 88, 265 S.E. 2d 135, 139 (1980) (rejecting right of civil contemnor to counsel under Section 7A-451(a)(1) since statute only applies in criminal cases). Furthermore, neither the record below nor defendant's brief reflects any awareness that defendant could not be compelled to testify against himself if this were a proceeding for criminal contempt. *Cf.* N.C.G.S. Sec. 5A-15(e) (1986) (alleged contemnor may not be compelled to testify at show cause hearing).

Although clearly challenging this order as one for criminal contempt, defendant also generally assigns error to the court's findings and complains in his brief that the court "makes no finding that [defendant] had the ability to pay the *arrearages* . . . ." (emphasis added). This contention represents an additional challenge to the court's findings to justify an adjudication of *civil* contempt. *Compare* N.C.G.S. Sec. 5A-21(a)(3) (1986) (contemnor must be able to comply with civil contempt order) *with Green v. Green*, 130 N.C. 578, 579, 41 S.E. 784, 786 (1902) (under prior statute, finding present ability to pay part of arrearage did not support jailing contemnor where release conditioned on paying total arrearage) *and Jones v. Jones*, 62 N.C. App. 748, 749, 303 S.E. 2d 582, 584 (1983) (despite trial court's finding current employment income, civil contempt order reversed where no evidence defendant had present ability to pay total $6,540 in arrearages as ordered). Since the instant order allows defendant to purge his contempt by paying the entire $2,230 arrearage, the trial court would under *Green* and *Jones* be required to conclude defendant had the ability in June 1987 to pay the entire $2,230 arrearage in order to hold him in civil contempt.

A

[1, 2] Thus, in order to determine the adequacy of the court's findings to support its contempt order, we must first determine whether the order evidences an adjudication of defendant's criminal contempt, civil contempt, or both. *Cf.* N.C.G.S. Sec. 5A-12(d) (1986) (court may find civil and criminal contempt based on same conduct). Our Supreme Court summarized the general differences between criminal and civil contempt in *O'Briant*:

> At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. A major factor in determining whether contempt is criminal or civil is the *purpose* for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. *The importance in distinguishing criminal and civil contempt lies in the difference in procedure, punishment and right of review.*

313 N.C. at 434, 329 S.E. 2d at 372 (citations omitted) (emphasis added); *see also Jolly*, 300 N.C. at 92, 265 S.E. 2d at 142 (civil contempt is not punishment but is coercion to comply with court order). Of the difference in "procedure, punishment, and right of review" noted in *O'Briant*, we conclude that the "punishment," i.e. the relief ordered by the court, most accurately reveals whether the court's purposes are "punitive" and/or "remedial and coercive" since "the purpose of the [criminal/civil] classification is simply to say that criminal type sentences should not be meted out where criminal type protections are not afforded and that coercive sentences shall not be meted out where there is nothing to coerce." D. Dobbs, *Law of Remedies* Sec. 2.9 at 97 (1973).

Indeed, the United States Supreme Court has recently held with respect to due process review that the remedial or punitive "character of relief" is the dispositive distinction between civil and criminal contempt. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. ---, 99 L.Ed. 2d 721, 108 S.Ct. --- (1988). The *Hicks* Court refined this "character of relief" test by stating certain "bright-line" rules:

> The character of the relief imposed is thus ascertainable by applying a few straightforward rules. If the relief provided is a sentence of imprisonment, it is remedial if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order,' and is punitive if 'the sentence is limited to imprisonment for a definite period.' If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

485 U.S. at ---, 99 L.Ed. 2d at 731 (citation omitted). The *Hicks* Court reasoned that the relief ordered is remedial and coercive (and thus civil in character) if the contemnor's compliance with the contempt order will avoid the effect of any determinate sentence or fine: the Court thus specifically noted that the addition of a "purge" clause would render even a determinate jail sentence civil in nature. 485 U.S. at ---, 99 L.Ed. 2d at 733. In justifying its use of such "bright-line" rules, the *Hicks* Court strongly questioned the efficacy of any attempt to "psychoanalyze" a trial court's contempt judgment in order to divine its underlying remedial and/or punitive purposes:

> The Court has eschewed any alternative formulation that would make the classification of the relief imposed in a State's proceedings turn simply on what their underlying purposes are perceived to be. . . . In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments upon a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of

> modifying the contemnor's behavior to conform to the terms required in the order. . . . 'But such indirect consequences will not change [relief] which is merely coercive and remedial into that which is solely punitive in character, or vice versus.'

485 U.S. at ---, 99 L.Ed. 2d at 734 (quoting *Gompers v. Buck's Stove Co.*, 221 U.S. 418, 443, 55 L.Ed. 797, 806 (1911)).

Given the overlapping effects of civil and criminal contempt orders and the difficulty in ascertaining the court's remedial and/or punitive aims, we believe the *Hicks* Court's objective focus on the actual relief ordered allows the proper balance between the court's inherent power to protect its authority and the defendant's need for adequate procedural and evidentiary standards and effective appellate review. Accordingly, while it is true that underlying "punitive" as opposed to "remedial and coercive" purposes distinguish criminal from civil contempt orders, those respective purposes should be drawn from an examination of the character of the actual relief ordered by the court.

The character of the relief ordered should be classified as civil or criminal by applying certain straightforward rules suggested by *Hicks:*

> *Civil Relief*: If the relief is imprisonment, it is coercive and thus civil if the contemnor may avoid or terminate his imprisonment by performing some act required by the court (such as agreeing to comply with the original order). If the relief is monetary, it is likewise civil if the monies are either paid to the complainant or defendant can avoid payment to the court by performing an act required by the court;
>
> *Criminal Relief*: If the relief is imprisonment, it is punitive and thus criminal if the sentence is limited to a definite period of time without possibility of avoidance by the contemnor's performance of an act required by the court. If the relief is monetary, it is punitive if payable to the court rather than to the complainant.

Where *both* civil and criminal relief as defined above are imposed, the court must make all findings necessary to impose *both* classes of relief; however, the court must in that case afford the defendant all procedural and evidentiary standards appropriate to *criminal* contempt proceedings since "the criminal feature of the order

is dominant and fixes its character" upon the proceeding. *Hicks*, 485 U.S. --- at --- n.10, 99 L.Ed. 2d at 736 n.10 (quoting *Nye v. United States*, 313 U.S. 33, 42-43 (1941)). Like other determinate sentences, the imposition of probationary or suspended sentences is deemed criminal relief so long as the court does not order the sanctions avoided or purged by specified acts of the contemnor. *See Hicks*, 485 U.S. at --- n.11, 99 L.Ed. 2d at 736 n.11 (determinate probationary or suspended sentence, even with conditions, is criminal punishment and "not equivalent to conditional sentence that would allow the contemnor to avoid or purge . . . sanctions"). Thus, the imposition of probationary conditions under Section 15A-1343 and the possibility of early termination under Section 15A-1342(b) do not transform probationary or suspended sentences into civil relief. *Cf.* N.C.G.S. Sec. 15A-1343 (1983) (setting forth permissible conditions of probation including child support and restitution); N.C.G.S. Sec. 15A-1342(b) (1983) (court "may" terminate probation early "if warranted by the conduct of the defendant and the ends of justice"). However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief.

B

[3] Examining the relief evidenced by the instant court's contempt order reveals the court was attempting to coerce defendant's obedience and remedy plaintiff's lost child support: although the court ordered defendant confined in jail for a period of 29 days, it allowed defendant to avoid that punishment altogether by paying the entire $2,230 in arrearages. This constitutes remedial relief under the guidelines set forth above and therefore requires that we construe the court's order as adjudicating defendant in civil contempt. As there is no other relief ordered which is punitive in character, we need not address whether the court's findings and procedures would support an order for criminal contempt.

[4] As the court made no findings of defendant's ability in June 1987 to pay the entire $2,230 arrearage, we must conclude there were inadequate findings to support the adjudication of civil contempt. *See Jones*, 62 N.C. App. at 749, 303 S.E. 2d at 584; *Green*, 130 N.C. at 579, 41 S.E. at 786.

Accordingly, we reverse the trial court's adjudication of defendant's civil contempt.

Reversed.

Judges PARKER and SMITH concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. MILDRED J. HILLIARD AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 8710SC1147

(Filed 21 June 1988)

Insurance § 92— automobile insurance—underinsurance policies—order of payment

In a declaratory judgment action between two insurance companies to determine the order of payment to an individual insured under two separate underinsurance policies, defendant Hilliard's insurer, Farm Bureau, must pay one-fourth of Hilliard's damages and State Farm must pay three-fourths of her damages even though Hilliard was a State Farm insured only as a third-party beneficiary based on her sister's policy. The court declined to discriminate between the two policies based upon the fact that the insured actually paid the premiums on one policy and a third party paid the premiums on the other because Hilliard fell within the same class of insureds, under both policies; the non-owned vehicle clauses were mutually repugnant and the policies were read as if those clauses were not present; the policies had identical other insurance clauses with language limiting payment to the proportion that the policy's limit of liability bears to the total of all applicable limits; and Farm Bureau was liable for a maximum of $25,000 and State Farm for a maximum of $75,000. N.C.G.S. § 20-279.21(b)(3).

APPEAL by plaintiff from *Preston, Judge*. Judgment entered 27 August 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 6 April 1988.

This is a declaratory judgment action in which North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) seeks a declaration of its obligations as well as the obligations of State Farm Mutual Automobile Insurance Company (State Farm) under their respective insurance policies arising from a settlement entered into by both companies with their insured, Mildred J. Hilliard.

On 8 July 1985, while a passenger in a car driven by Linda Skinner, Ms. Hilliard was injured when struck by a car driven by Debra Branch. Hilliard claimed damages of $75,000. Because Branch's negligence caused the accident, her insurance company, Allstate Insurance Company (Allstate), assumed responsibility for payment of damages to the injured.

Branch's liability policy had limits of $25,000 per person and $50,000 maximum per accident. Integon Insurance Company insured the Skinner vehicle but the policy did not include underinsurance coverage. At the time of the accident Hilliard had an automobile insurance policy with Farm Bureau which included underinsurance coverage up to $50,000 per person. Because Hilliard lived with her sister, her sister's automobile insurance policy with State Farm also provided insurance coverage for her at the time of the accident. The State Farm policy provided underinsurance coverage up to a maximum of $100,000.

Allstate paid the limits of its policy to those injured in the accident. Hilliard received $21,571.22 from Allstate in partial settlement of her claim. She then made demand for her remaining damages upon Farm Bureau and State Farm pursuant to their respective policies' underinsurance provisions. Hilliard subsequently waived recovery of $3,428.78 and accepted payment of $50,000 from Farm Bureau and State Farm in settlement of her claim.

At trial State Farm argued, and the trial court ordered, that "Mildred J. Hilliard should look first to her own insurer." The order obligated Farm Bureau and State Farm to pay $25,000 each toward the Hilliard settlement. Farm Bureau appeals.

Henson Henson Bayliss & Coates, by Paul D. Coates, for plaintiff-appellant.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by Douglas F. DeBank, for defendant-appellee.

EAGLES, Judge.

In this declaratory judgment action between two insurance companies to determine the order of payment to an individual insured under two separate underinsurance policies, the trial court ordered Hilliard's "own insurer," Farm Bureau, to pay first. We reverse and remand.

Since this accident occurred on 8 July 1985, the 1983 version of G.S. 20-279.21 applies. The General Assembly has amended the statute twice since. The only issues before us are the order of payment between the two insurers and the amount of each insurer's share of the settlement figure.

"Underinsurance" provides a type of insurance coverage that allows an insured to be indemnified by his own insurer, in whole or in part, for damages caused by a negligent motorist who is insured inadequately. 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* Section 32.1. G.S. 20-279.21(b)(4) defines an underinsured highway vehicle as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's policy.

Both insurance companies agree that Hilliard is an insured under their respective policies and that she is entitled to underinsurance coverage from both. State Farm argues, however, that there is a fundamental difference between the two policies which makes the State Farm policy excess to the Farm Bureau policy. State Farm points out that Hilliard had an explicit contractual relationship with Farm Bureau since she directly paid and contracted for her policy with Farm Bureau. Hilliard was a State Farm insured only as a third-party beneficiary based on her sister's purchase of an automobile liability policy with State Farm. State Farm argues that since Hilliard made no premium payments on the State Farm policy, she must look first to Farm Bureau for indemnification of her damages. We disagree.

State Farm's underinsurance provision provides that any family member is a covered person. In addition, our Supreme Court has ruled that the Motor Vehicle Safety-Responsibility Act (Act), G.S. 20-279.1 *et seq.*, becomes a part of every insurance liability policy written. *Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977).

For uninsurance and underinsurance coverage G.S. 20-279.21 (b)(3) establishes two separate classes of insureds. *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.

2d 127, 129, *disc. rev. denied*, 316 N.C. 731, 345 S.E. 2d 387 (1986). The statute's first class of "persons insured" are "the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise." G.S. 20-279.21(b)(3). Hilliard and her sister, State Farm's named insured, lived in the same household. Accordingly, Hilliard was a "person insured" under the State Farm policy. Further, she was in this first class of insureds under both policies.

In *Crowder* this Court explicitly "allow[ed] underinsured motorist coverage for insureds operating, or riding in, a *nonowned* vehicle." [Emphasis in original.] *Crowder* at 555, 340 S.E. 2d at 130. The insured there was the named insured's minor son. Implicit in the *Crowder* holding was the idea that who actually paid the premiums for insurance coverage was irrelevant to the issue of whether or not coverage applied. *See also Hunt v. State Farm Mut. Ins. Co.*, 349 So. 2d 642 (Fla. Dist. Ct. App. 1977). Similarly here, we reject the argument that these two policies should be treated differently as a matter of law. We decline to discriminate between these two insurance policies based upon the fact that the insured actually paid the premiums on one policy, and a third party paid the premiums on the other. So long as an insured falls within the same class of insureds established by G.S. 20-279.21 (b)(3) under both policies, we see no merit in making that distinction.

We have found no provision of the Act which expressly establishes a statutory priority of payment among different insurance policies. We note that G.S. 20-279.21(i) does allow an insurance liability policy to "provide for the prorating of the insurance thereunder with other valid and collectible insurance."

Insurance policies are contracts. "[T]he parties' intent must be examined in order to properly construe each policy." *Reliance Ins. Co. v. Lexington Ins. Co.*, 87 N.C. App. 428, 434, 361 S.E. 2d 403, 407 (1987). Where there are two policies, they must be construed separately, each according to its individual terms. *Allstate Insurance Co. v. Shelby Mutual Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967). The only evidence of the contracting parties' intent is the policies.

Here each policy's uninsured motorist provision contains the following identical "other insurance" paragraph.

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy. In addition, if there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

By making its policy "excess" each company attempted to limit the amount it must indemnify its insured when he is injured in a nonowned vehicle. *See Carrier Ins. Co. v. Policyholders' Ins. Co.*, 404 A. 2d 216 (Me. 1979). Excess insurance clauses generally provide "that if other valid and collectible insurance covers the occurrence in question, the 'excess' policy will provide coverage only for liability above the maximum coverage of the primary policy." *Horace Mann Insurance Co. v. Continental Casualty Co.*, 54 N.C. App. 551, 555, 284 S.E. 2d 211, 213 (1981). When "excess" clauses in several policies are identical and determination of which policy is primary is impossible, the clauses are deemed mutually repugnant and neither excess clause will be given effect. *Alliance Mutual Ins. Co. v. Central Ins. Co.*, 70 N.C. App. 140, 318 S.E. 2d 524 (1984).

When excess clauses are mutually repugnant, the majority rule in other jurisdictions requires the insured's claim to be prorated between the two insurers according to their respective policy limits. *E.g., Buckeye U. Ins. Co. v. State Auto. Mut. Ins. Co.*, 49 Ohio St. 2d 213, 361 N.E. 2d 1052 (1977). This rule "assures indemnification for the insured up to the maximum amount of coverage afforded by each policy." *Id.* at 1054.

On the other hand, a minority of jurisdictions have ruled that the two insurers should pay the damages equally up to the maximum limits of the smaller policy. *E.g., Carrier Ins. Co.*, 404 A. 2d at 221. The rationale for this rule is that the majority rule discriminates against larger policies and amounts to a subsidy from the large coverage policies in favor of small coverage

policies. Furthermore, proponents of this rule argue that the majority rule does society a disservice by discouraging large coverage policies. *Id.* at 222.

Here, the language of the respective insurance policies compels us to conclude that the two insurers must share the Hilliard settlement on a pro rata basis. Because the nonowned vehicle clauses are mutually repugnant, we read the policies as if those clauses were not present. Each policy also has language that "if there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits."

Within their respective uninsured motorist provisions each policy specifically defines "limit of liability." The definition, in each policy provides, in part:

> Any amounts otherwise payable for damages under this coverage shall be reduced by all sums:
>
> 1. Paid because of the bodily injury or *property damage* by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A; and
>
> 2. Paid or payable because of the bodily injury under any of the following or similar law:
>
> a. workers' compensation law; or
>
> b. disability benefits law.
>
> No payment will be made for loss paid or payable to the *covered person* under Part D or any policy of property insurance.
>
> Any payment to any person under this coverage will reduce any amount that person is entitled to recover for the same damages under Part A.

Each policy limits coverage to the damages not paid by the tortfeasor or his insurer. Here Hilliard received $21,571.22 from Allstate and waived payment of an additional $3,428.78 for a total of $25,000. The two insurance companies together have indemnified Hilliard for her remaining damages, $50,000. Based on the plain language of each insurer's respective "limit of liability"

clause, Farm Bureau was liable for a maximum of $25,000 and State Farm was liable for a maximum of $75,000. The maximum or "total of all applicable limits" that Hilliard could have collected from both underinsurance carriers was $100,000, one-fourth from Farm Bureau and three-fourths from State Farm. Accordingly, we hold that Farm Bureau must pay one-fourth ($12,500) and State Farm must pay three-fourths ($37,500) of Ms. Hilliard's damages. We reverse the judgment below and remand for entry of a judgment consistent with this opinion.

Reversed and remanded.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. WALTER EARL FERGUSON, JR.

No. 8726SC1132

(Filed 21 June 1988)

Automobiles and Other Vehicles § 125— driving while impaired—opportunity to have witness to breathalyzer test—witness denied access to defendant—no findings

Judgment on a conviction for driving while impaired was vacated and the case remanded for further findings where defendant presented evidence that he called his wife to witness the breathalyzer test, she arrived in time but was denied access to defendant, the breathalyzer test was not given, the only evidence against defendant was the personal observations of the authorities, and the trial judge did not make any findings or conclusions concerning the alleged statutory or constitutional violations. N.C. Constitution Art. I, § 23, N.C.G.S. § 15A-954(a).

APPEAL by defendant from *Lamar Gudger, Judge.* Judgment entered 4 September 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 April 1988.

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

John G. Plumides and Daniel J. Clifton for defendant-appellant and Plumides, Plumides and Caudle of Counsel for defendant-appellant.

BECTON, Judge.

Defendant, Walter Ferguson, was convicted of driving while impaired in violation of N.C. Gen. Stat. Sec. 20-138.1 (1983) and was sentenced to thirty days in jail which was to be suspended upon completion of the Alcohol and Drug Education Traffic School and upon payment of a $100 fine. Defendant appeals. We vacate the judgment and remand for findings of fact and conclusions of law consistent with this opinion.

I

The State presented evidence that on 2 November 1986, defendant's automobile was observed on highway U.S. 74 in Mecklenburg County at approximately 6:45 p.m. by State Trooper A. J. Fox. Trooper Fox testified that defendant was proceeding ahead of him at a speed of 35 m.p.h., although the maximum speed on the highway was 55 m.p.h. He observed that the car traveled left of the center line several times, then traveled off the road onto the right shoulder. Trooper Fox activated his blue light; defendant proceeded for another half mile, then stopped. Trooper Fox approached the vehicle and found defendant alone in the car behind the steering wheel, his eyes bloodshot, and his pupils dilated. When defendant spoke, he emitted a strong odor of alcohol, and his speech was slurred. Upon the trooper's request, and after some searching, defendant presented his driver's license and registration card. Also upon the Trooper's request, defendant performed two sobriety tests. The first test—known as the gaze test—required the defendant to follow the trooper's fountain pen with his eyes as the pen was moved in front of his face. The second test—known as the sway test—required defendant to stand with his feet together, hands to his side, eyes closed and head tilted back as the trooper observed his balance. Trooper Fox testified that defendant lost his balance and swayed from side to side. He then arrested defendant and transported him to the magistrate's office.

At the magistrate's office, defendant performed another sobriety test which required him to close his eyes and touch his nose with his index finger. When using his right hand, he touched underneath his nose. When using his left hand, he touched the right side of his right nostril with the second joint of his finger. In another test, he was asked to stand on one leg and count to 30.

He did so and proceeded to count to 44. In another test, he was asked to walk in a straight line by placing one foot directly in front of the other. Defendant crossed over his feet, stepped on the insteps of his feet, and swayed from side to side. The trooper then read defendant his Fifth Amendment rights and his rights under N.C. Gen. Stat. Sec. 20-16.2 regarding the breathalyzer test. Defendant telephoned his wife but, the trooper testified, she did not arrive within the required 30 minutes to witness the test. Trooper Fox stated that in his opinion, defendant was under the influence of an impairing substance.

Defendant testified that the trooper advised him of his right to have a witness to observe the breathalyzer test. After a delay, he reached his wife on the telephone, and the police told him that she must arrive within twenty minutes. He informed his wife of the time constraints. The police informed him when the 20 minutes expired, but he did not submit to the test because his wife was not present.

He testified further that he was driving normally before Trooper Fox stopped him. He admitted that he consumed five beers between 3:00 p.m. and 6:15 p.m. at the Charlotte Airport Motel. He testified that the only sobriety test conducted at the scene of his arrest was the gaze test. He stated that he performed correctly all of the tests administered at the jail. He saw his wife when he was released from jail later that evening. She told him she had been waiting for one and one-half hours.

Defendant's wife, Judy Ferguson, also testified on his behalf. She stated that her husband telephoned her after 8:00 p.m. on the night of his arrest. In her opinion, his speech was not slurred, consequently, she had trouble taking him seriously when he asked her to come to the jail. She and her daughter drove immediately to the county jail and arrived within 20 minutes. She told the law enforcement personnel at the desk that she came to witness her husband's breathalyzer test. One woman told her it was too late, that he had already refused the breathalyzer test. No one made any further inquiries. Mrs. Ferguson and her daughter sat in the waiting area for approximately one and one-half hours. Then defendant came out.

II

Defendant first contends that the trial judge erred by denying his motion to dismiss because he was denied his constitutional and statutory rights of access to a witness to observe the breathalyzer test. This argument by defendant is threefold. Defendant presented evidence that (1) his wife may have arrived within the time required for a witness to the breathalyzer test under Section 20-16.2, (2) his wife was implicitly denied access to him upon her arrival to the jail, and (3) he was denied the opportunity to take the breathalyzer test in the presence of his chosen witness and thereby to obtain evidence for his defense. N.C. Gen. Stat. Sec. 15A-954(a) provides in pertinent part that a trial court "must dismiss the charges stated in a criminal pleading *if it determines* that . . . . (4) [t]he defendant's constitutional rights have been flagrantly violated and there is irreparable prejudice to the defendant's preparation of his case. . . ." (emphasis added). In the instant case, the trial judge did not make any findings of fact or conclusions of law regarding these alleged statutory and constitutional violations. Rather, the following colloquy occurred.

> THE COURT: Ladies and gentlemen, I'm going to ask you to step out of your jury room for just a minute. We have to go through what's called a pre-charge conference at this point, and it will take me about five minutes to conclude that.
>
> (Thereupon, the jury exited the courtroom.)
>
> THE COURT: Let the record reflect at the conclusion of all of the evidence, the defendant moves for motions for dismissal and motion for non-verdict.
>
> MR. PLUMIDES: I want to call to the Court's attention—it has happened before, Judge, people being prevented from going into the jail to confront the defendant, and in this case the defendant's wife. The fact that he is denied the opportunity, not only to have a breatholyzer [sic] witness, to have a witness to testify on his behalf, and this becomes a very serious problem, almost to the point that I would make a motion to exclude all evidence in this case that took place in that jail, because we are denied a constitutional right of confrontation from our witnesses.

Now, because I tell you, there's a case on point, Judge, Kirby (phonetic) I think it was, I went through this argument on the question of whether or not to take a refusal of a breatholyzer [sic], my witness didn't get there in time, and the Judge went into another voir dire to determine—forget the breatholyzer [sic]. Let's assume we were late, but there's a confrontation of a defendant, he has as a matter of right, that somebody should be able to observe him and observe him in the jail, other than the police authorities, to give their views. Had she been allowed, in she could have witnessed the test that the officer gave him after the breatholyzer [sic]. She would—But refusal to permit her to enter, under these circumstances, I would say is almost tantamount to making all of the evidence of the State tainted, and creates a problem in my mind.

THE COURT: You would be able to argue that.

MR. PLUMIDES: There is a case like that, and I'll present it to Your Honor after the fact, if they convict my man. I have had that same identical fact situation. The judge overruled me on the fact she didn't get there in time for the breatholyzer [sic], but the Judge did not find as a fact there was a large lapse of time. But here's where she's denied a hour and a half confrontation as a potential witness for her husband.

THE COURT: Well—

MR. PLUMIDES: And it becomes such a constitutional right, I wish Your Honor would take that into consideration. I don't normally make that argument, but this is a flagrant violation of the rights of this gentleman.

THE COURT: Mr. Plumides, I'm confused as to the circumstances. I understand that Mrs. Ferguson went down to the entry into the area where the Magistrate's Office and the jail are located. I'm not familiar with this county, but I think I have an idea of what area she's talking about because it seems to me some years ago I went into that area once myself for what was then a client of mine. But I think it's regrettable that she did not go to the nearest telephone or pay booth and call and try to re-establish contact with the Magistrate or the jail personnel. I don't know why she didn't take other alternatives.

MR. PLUMIDES: I think we shift the burden to the citizen, Judge. We're making the criminal law—

THE COURT: I don't know.

MR. PLUMIDES: That's the problem.

THE COURT: I don't know what your jailing and administrative policies are. I'm sure there is some method whereby access can be gained to the jail and the Magistrates's Office. I've never heard of a Magistrate's Office not being accessible before in my life. The reason I say that is a Magistrate's Office is a place where persons may go to issue—secure the issuance of warrants, to make complaints, and to get bonds set and take care of a multitude of other things.

MR. PLUMIDES: We have a different system here, fortunately or unfortunately. She went to the right place. I think the District Attorney will agree. She drove down the ramp, went to the right place, because the Magistrate's Office is unconnected. It's on the other side. You don't go through the Magistrate's.

THE COURT: Why didn't she go there?

MR. PLUMIDES: Our Magistrates are concealed behind some windows. You have to knock on the window and hope someone will come answer. We don't have a Magistrate's accessible to us, where, like you do in Asheville, somebody is sitting behind a desk. The only Magistrate available in this court, you have to go here [sic] 9:00 to 5:00 and see about getting a warrant. A little different setup. I don't know if it's good or bad.

THE COURT: I'm not able to judge the whole setup, and that's largely a criminal justice problem.

MR. PLUMIDES: I bring that to your attention. I rest and renew my motions.

THE COURT: I found the evidence here distressing in that regard, because I can see how anyone's wife might confront this problem and be distraught with a child tugging at her skirt, but I don't know. I can't take issue with Mr. Fox on that account.

MR. PLUMIDES: It's not Mr. Fox's fault. It wasn't his fault at all. He had nothing to do with it.

THE COURT: It's regrettable. I would hope that the District Attorney's Office and the Public Defender's Office and the Bar would take care of this matter, open that thing up. You're going to have plenty to talk about. You're going to have an awful lot to talk about, in the absence of Mr. Myers, and I'm expecting to listen to a very good argument.

MR. PLUMIDES: I promise you you'll have one.

THE COURT: But I think insofar as my duty is concerned, might I have the duty to bring this case to a conclusion.

A trial judge's "distress" over the circumstances surrounding a defendant's arrest are of little comfort when not coupled with an application of the relevant law. Nor can the criminal justice system rely on the hope that the local Bar will take measures to ensure the rights of criminal defendants. We therefore remand this case for entry of required findings of fact and conclusions of law regarding the alleged constitutional and statutory violations.

If, on remand, the trial judge finds and concludes that none of defendant's statutory or constitutional rights have been violated then an appropriate judgment should be entered. If, on the other hand, the trial judge should find that Mrs. Ferguson's arrival to the jail was timely and she made reasonable efforts to gain access to defendant, then defendant was denied access to a potential witness. The denial of access to a witness in this case—when the State's sole evidence of the offense is the personal observations of the authorities—would constitute a flagrant violation of defendant's constitutional right to obtain witnesses under N.C. Const. Art. I Sec. 23 as a matter of law and would require that the charges be dismissed. *Cf. State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971) (defendant's attorney was denied access to defendant after posting bail and asking the jailer to see him. The Court held, because time is of the essence when one is taken into police custody for an offense of which intoxication is an essential element, defendant was unconstitutionally denied the opportunity to confront the State's witnesses with other testimony).

III

We have considered defendant's three remaining assignments of error and find them to be without merit.

We vacate the judgment and remand for further findings of fact consistent with this opinion.

Judges JOHNSON and GREENE concur.

WESTERN WORLD INSURANCE COMPANY, INC. v. RODNEY CARRINGTON, D/B/A CARRINGTON ENGINEERED WATERPROOFING SYSTEMS, AND D/B/A CARRINGTON ENGINEERING & WATERPROOFING, INC. AND CLANCY & THEYS CONSTRUCTION COMPANY

No. 8710SC1088

(Filed 21 June 1988)

1. **Declaratory Judgment Act § 4.3— construction dispute—insurance coverage—declaratory judgment action proper**

A declaratory judgment action to determine whether insurance coverage existed was proper where plaintiff's insured was being sued on a claim for which plaintiff denied coverage and for which, if coverage existed, plaintiff had a duty to defend. N.C.G.S. § 1-254.

2. **Insurance § 143— construction dispute—work product exclusion—no coverage**

A work product exclusionary clause in a liability insurance policy applied and the policy did not provide coverage for a claim by a general contractor against a subcontractor arising from a leaking parking deck where the damages sought were solely for bringing the quality of the insured's work up to the standard bargained for. The quality of the insured's work is a business risk which is solely within his own control, and liability insurance generally does not provide coverage for claims arising from the failure of the insured's product or work to meet the quality or specifications for which the insured may be liable as a matter of contract.

3. **Estoppel § 8— construction dispute—insurance company not estopped to deny coverage**

Summary judgment was properly granted for plaintiff insurance company in a declaratory judgment action arising from a construction dispute where the record clearly showed no genuine issue of material fact regarding whether plaintiff should be estopped to deny coverage and defendants' brief fails to provide supporting authority for their estoppel argument. N.C. Rule of App. Procedure 28(b)(5).

APPEAL by defendants from *Bailey, Judge.* Judgment entered 17 August 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 5 April 1988.

This is a declaratory judgment action. In late 1983, defendant Rodney Carrington (Carrington) performed waterproofing work as a subcontractor on a building and parking deck project. Defendant Clancy & Theys Construction Company (Clancy & Theys) was the project's general contractor. In 1984, after the parking deck was completed and in use, water was discovered leaking through part of the top level of the parking deck. The leaking damaged several cars parked in the lower deck and caused some cracking in parts of the deck's concrete slabs. Clancy & Theys hired an engineering firm to investigate the cause of the leaks and suggest possible solutions to the problem. The firm suggested two alternative methods of correcting the problem: (1) remove all the topping and stonework, restore the original waterproofing system, and replace the stonework and topping; or (2) install a new waterproofing system by applying a urethane based deck coating and sealant over the entire deck, without removing or tearing off the original waterproofing system Carrington had applied. The second and less expensive method was utilized at a total cost of approximately $130,000.

On 19 June 1985, Clancy & Theys brought suit against Carrington for the cost of performing the remedial work. At the time Carrington performed the original waterproofing, he carried a liability insurance policy issued by plaintiff, Western World Insurance Co., Inc. Carrington called upon plaintiff to defend the action. Plaintiff declined, denying that Clancy & Theys' claim was covered by the policy. On 20 November 1985, plaintiff instituted this action against Carrington for a declaration of the parties' rights under the policy. By a consent order filed 6 January 1987, Clancy & Theys was allowed to intervene as a defendant. On 9 April 1987, plaintiff moved for summary judgment. On 17 August 1987, after considering the pleadings, affidavits, discovery materials, and arguments of the parties, the trial court granted plaintiff's motion for summary judgment. Both defendants appeal.

Maupin, Taylor, Ellis & Adams, by Mark S. Thomas and Armistead J. Maupin, for the plaintiff-appellees.

John E. Bugg and William L. London, III, for the defendant-appellant Clancy & Theys Construction Company.

Merriman, Nicholls, Crampton, Dombalis & Aldridge, by W. Sidney Aldridge, for the defendant-appellant Carrington.

EAGLES, Judge.

[1] A declaratory judgment action may be brought to determine whether coverage exists under an insurance policy. *Hobson Construction Co. v. Great American Ins. 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); G.S. 1-254. The complaint and the record must show that an actual controversy exists. *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 316 S.E. 2d 59 (1984). The complaint and the record here show that plaintiff's insured is being sued on a claim for which it denies coverage and for which, if coverage exists, it has a duty to defend. Accordingly, a declaratory judgment action may be brought. *Cf. N.C. Farm Bureau Mut. Ins. Co. v. Warren*, 89 N.C. App. 148, 365 S.E. 2d 216 (1988). Our Supreme Court has held, under facts similar to the instant case, that the insurer's declaratory judgment action to determine whether coverage existed was proper. *See Insurance Co. v. Simmons, Inc.*, 258 N.C. 69, 128 S.E. 2d 19 (1962).

[2] The sole issue here is whether plaintiff's policy provides Carrington with coverage against Clancy & Theys' claim. The policy states that plaintiff will pay all claims which the insured becomes legally obligated to pay as damages because of bodily injury or property damage. For purposes of this action there is no dispute that there is "property damage" as defined in the policy. The policy, however, contains certain "exclusions" from coverage which plaintiff argues exempt it from the obligation to defend and pay.

Exclusion (o) of the policy provides that the insurance does not apply:

> (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

The record does not contain a copy of the complaint in Clancy & Theys' action against Carrington. However, the record clearly indicates that Clancy & Theys' claim consists solely of costs incurred in replacing the allegedly defective waterproofing work done by Carrington with a new waterproofing system. We hold that "exclusion (o)" operates to exclude those costs from the policy's coverage.

Exclusionary clauses are not favored and must be narrowly construed. *Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 314 S.E. 2d 552, *disc. rev. denied*, 311 N.C. 761, 321 S.E. 2d 42 (1984). The court, however, must interpret the policy as written and may not disregard the plain meaning of the policy's language. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 348 S.E. 2d 794 (1986). Although there are no North Carolina cases construing the language of "exclusion (o)," numerous decisions from other jurisdictions have held that identical or similar exclusionary clauses are unambiguous and operate to exclude from coverage the type of damages which Clancy & Theys is claiming here.

Exclusion (o) is one of several "work product" exclusions found in standardized liability insurance policies. *See Gulf Mississippi Marine Corp. v. George Engine Co.*, 697 F. 2d 668 (5th Cir. 1983). Since the quality of the insured's work is a "business risk" which is solely within his own control, liability insurance generally does not provide coverage for claims arising out of the failure of the insured's product or work to meet the quality or specifications for which the insured may be liable as a matter of contract. *See Western World Ins. v. H. D. Eng. Design*, 419 N.W. 2d 630 (Minn. 1988); Henderson, "Insurance for Products Liability and Completed Operations—What Every Lawyer Should Know," 50 Neb. L. Rev. 415, 441 (1971). The cases interpreting this kind of exclusion recognize, as we do, that liability insurance policies are not intended to be performance bonds. *See Breaux v. St. Paul Fire & Marine Ins. Co.*, 345 So. 2d 204 (La. App. 1977). Consequently, courts have uniformly held that the language of exclusion (o) excludes damages sought for the cost of repairing or replacing the insured's own work or product. *See Gulf Mississippi Marine Corp. v. George Engine Co., supra; Biebel Bros., Inc. v. United States Fidelity & G. Co.*, 522 F. 2d 1207 (8th Cir. 1975); *Carboline Company v. Home Indemnity Company*, 522 F. 2d 363 (7th Cir. 1975); *Simmons v. Great Southwest Fire Ins. Co.*, 569 F. Supp.

1429 (E.D. Mo. 1983), *aff'd*, 734 F. 2d 1318 (8th Cir. 1984); *G. L. Shaw Bldrs. v. State Auto Ins. Co.*, 182 Ga. App. 220, 355 S.E. 2d 130 (1987); *Hartford Accident & Ind. Co. v. Case Foundation Co.*, 10 Ill. App. 3d 115, 294 N.E. 2d 7 (1973); *Breaux v. St. Paul Fire & Marine Ins. Co., supra; Taylor-McDonnell v. Commercial Union Ins.*, 744 P. 2d 892 (Mont. 1987); *Weedo v. Stone-E-Bricks, Inc.*, 81 N.J. 233, 405 A. 2d 788 (1979); *Travelers Ins. Co. v. Volentine*, 578 S.W. 2d 501 (Tx. App. 1979). Here, the record shows that the damages sought against Carrington are those costs incurred in replacing his allegedly defective waterproofing system with an effective waterproofing system. Therefore, the claim is excluded from the policy's coverage.

Defendants contend that exclusion (o) does not apply and cite several cases, including *Bundy Tubing Company v. Royal Indemnity Company*, 298 F. 2d 151 (6th Cir. 1962), in support of their argument. All of the cases cited by defendants, however, are readily distinguishable since they involve claims for damages other than costs for repairing or replacing the insured's defective work or product. In *Bundy, supra*, the insured manufactured some defective tubing, which was installed beneath concrete flooring. The court held that an exclusion similar to the one here did not exclude the cost of removing and replacing the concrete flooring in which the defective tubing had been installed. Similarly, in *St. Paul Fire and Marine Ins. v. Sears, Roebuck & Co.*, 603 F. 2d 780 (9th Cir. 1979), where the insured had improperly installed a urethane foam roofing material, and replacing it involved damage to property other than that of the insured, the court held that the cost of the "repair operation" would not be excluded. *Id.* at 784. The exclusion has also been held inapplicable where the damages sought are for diminution in value of the property or product of which the insured's work or product is merely a part. *See Mizzouri Terrazzo Co. v. Iowa Nat. Mut. Ins. Co.*, 740 F. 2d 647 (8th Cir. 1984); *Ohio Cas. Ins. Co. v. Terrace Enterprises, Inc.*, 260 N.W. 2d 450 (Minn. 1977).

In all of those cases, the damages claimed were for damage to property other than that of the insured, which was caused either by the defective work or product, or the need to repair or replace that work or product. In this case, from the record before us it is clear that Clancy & Theys is not seeking damages for diminution in the structure's value, or costs for repairing the

cracking in the concrete, or costs for any damage to its own property caused by the allegedly defective waterproofing. Clancy & Theys' only claim is for costs incurred in substituting or replacing the protective functions which Carrington's original waterproofing work should have provided. The damages sought are solely for bringing the quality of the insured's work up to the standard bargained for. Consequently, the policy provides no coverage for the claim.

[3] Defendants also argue that plaintiff should be estopped to deny coverage. They contend that had they used the more expensive method, most of their costs in repairing the work would have been covered. Since plaintiff knew of the damage before the method of repairing it was chosen, and because plaintiff stated to Clancy & Theys that it would deny coverage under either method, defendants contend that plaintiff is now estopped to deny coverage. We disagree.

The elements of equitable estoppel are: a false representation of a material fact; made with the intention that the representation be acted upon; where some action is taken by the party asserting estoppel in reliance on the representation, which results in prejudice to him; and where the injured party was not misled by his own lack of care. *See Moore v. Upchurch Realty Co.*, 62 N.C. App. 314, 302 S.E. 2d 654 (1983). The record here clearly shows no genuine issue of material fact regarding whether plaintiff should be estopped to deny coverage. In addition, defendants' brief fails to provide supporting authority for their estoppel argument, as required by N.C.R. App. P. 28(b)(5). Defendants' argument is without merit.

Affirmed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. RICKY CHISHOLM

No. 8726SC1002

(Filed 21 June 1988)

1. **Narcotics § 3.3— vice officer—opinion that marijuana packaged for private use**

In a prosecution for attempted robbery in which defendant contended that the incident was a drug deal gone bad and not an attempted robbery, the trial court properly permitted a vice officer to state his opinion that marijuana found on the victim was packaged in a manner for private use since (1) the evidence supported the trial court's finding that the officer was qualified to testify as an expert in the recognition of narcotics and the use and packaging of marijuana, and (2) the testimony did not invade the province of the jury to pass upon the credibility of witnesses and the guilt or innocence of the defendant but was admissible to corroborate the victim's testimony on the collateral issue that the marijuana was for private use.

2. **Impersonating an Officer § 1— erroneous instruction on acting upon false representation—no plain error**

In a prosecution of defendant for falsely representing to another that he was a sworn law enforcement officer in violation of N.C.G.S. § 14-277(a), the trial court's erroneous instructions on acting in accordance with the authority of a law enforcement officer as set forth in N.C.G.S. § 14-277(b) did not constitute plain error since the jury was required to find that defendant represented himself as a sworn law enforcement officer to another to convict defendant under either subsection (a) or (b), the evidence supported defendant's conviction as charged under subsection (a), and defendant was sentenced for a conviction under subsection (a).

APPEAL by defendant from *Owens, Judge*. Judgment entered 20 May 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 March 1988.

Attorney General Lacy H. Thornburg, by Associate Attorney General Melissa L. Trippe, for the State.

Appellate Defender Malcolm R. Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

JOHNSON, Judge.

Defendant was charged with the attempted robbery of Danny R. Miller with a dangerous weapon, representing himself as a sworn law-enforcement officer to Danny R. Miller, and the breaking and entering of a motor vehicle belonging to Ralph C. Brewer. To the charge of breaking and entering a motor vehicle, defend-

ant tendered a plea of guilty and to the remaining two charges he pled not guilty. From the return of jury verdicts of guilty to the charges of attempted robbery with a dangerous weapon and impersonation of a sworn law-enforcement officer, and the imposition of an active sentence, defendant appeals.

The State presented evidence which tended to show the following. At or about 2:30 a.m., on 21 December 1986, Ralph C. Brewer was awakened by loud knocking at his front door. Mr. Brewer went to the door, looked through the window and asked who was there. Defendant was standing at the door and identified himself as a law-enforcement officer with a warrant for Mr. Brewer's arrest. Defendant demanded to be admitted. However, Mr. Brewer refused to open the door and requested defendant to show some identification before he admitted him. When defendant failed to show any identification, Mr. Brewer called the police who arrived within sixty seconds. However, defendant had left the premises when the police arrived. Within thirty seconds of their arrival at Mr. Brewer's house, the police heard two gunshot sounds coming from within the next block. The officers immediately went to the next block where they observed Danny R. Miller standing in the street and the defendant running in the opposite direction. Both Miller and defendant were taken into custody.[1]

Danny R. Miller testified that on 21 December 1986, at or about 2:30 a.m., he had taken his girlfriend home from a date and had just gotten into his car to leave when defendant approached the driver's window of the car. Defendant had a blackjack which he held against the window. He then identified himself as a Charlotte police vice officer. Defendant told him that he was under arrest and to place his hands on the steering wheel. He complied and defendant went to the passenger's side of the car and got in. Upon getting into the car, defendant threatened him with the blackjack and demanded his money. Defendant took his wallet but threw it into the back seat when he found no money in it. When defendant asked him for his money a second time, he told defendant that the money was in the trunk of the car. Defendant got out on the passenger's side of the car, and Miller got

1. This appeal does not involve charges of defendant representing himself as a sworn law-enforcement officer to Ralph C. Brewer.

out on the driver's side. While exiting, Miller reached underneath the driver's seat and got his pistol which he fired into the air twice. Defendant started to run down the street at which time the police arrived and arrested both defendant and him.

The State's evidence tended to further show that at the time of defendant's arrest, defendant had in his possession the registration card to Mr. Brewer's car. It was later discovered that Mr. Brewer's car had been broken into and the registration card taken therefrom. Defendant also had some marijuana rolled up in the registration card. When Mr. Miller was taken into custody he had seven to nine grams of marijuana in his possession.

Defendant did not present evidence. However, he defended the case on the theory, which he attempted to show the jury through cross-examination, that the incident between himself and Miller was a "drug deal gone bad," not an attempted robbery; and that Miller was not the victim, but rather the aggressor.

Defendant brings forward two assignments of error. Those assignments of error not brought forward in his brief are deemed abandoned. Rule 10, N.C.R. App. P.

[1] By his first Assignment of Error defendant contends that the trial court erred in allowing Officer Couch to testify as to how marijuana is generally packaged. He testified that in his opinion, based upon the manner in which the marijuana found in Miller's possession was packaged, it was for private use. Defendant argues that this opinion testimony was outside the scope of the witness' expertise, that it amounted to an opinion vouching for the veracity of the prosecuting witness Miller, that the opinion was based upon an inaccurate hypothetical question, and that the testimony was unduly prejudicial. We find no merit to defendant's contentions.

Although Miller testified that the marijuana found in his possession was for his private use, defendant, through cross-examination, raised an issue that the incident between Miller and defendant was a possible drug deal that did not materialize, not an attempted robbery, and that the marijuana found in Miller's possession was for sale in the drug deal and not for his private use. Thereafter, the State qualified Officer Couch as an expert in the field of the recognition of narcotic drugs, and the use and

packaging of marijuana. He was then allowed to give, over defendant's objection, the opinion testimony.

It is well-settled that expert testimony is properly admissible when such testimony can assist the trier of fact to understand the evidence and to determine a fact in issue because the expert is better qualified. G.S. 8C-1, Rule 702. The evidence of record in the case *sub judice* clearly supports the trial court's findings that Officer Couch, through and including his length of employment as a vice officer, his training, knowledge, and the number of drug purchases he had participated in as a vice officer, provided him with the requisite expertise to testify as to the recognition of narcotic drugs and the use and packaging of marijuana. Officer Couch's opinion testimony did not invade the province of the jury to pass upon the credibility of the witnesses and to decide the guilt or innocence of the defendant. The import of Officer Couch's testimony simply corroborated Miller's testimony on the *collateral* issue that the marijuana was for private use. Any bearing it might have had on the issue of Miller's credibility was purely incidental. Also, although the hypothetical question asked of Officer Couch did not include each and every fact available, it did not present a state of facts so incomplete that his testimony would have been unreliable, and therefore, excluded. Neither do we find that the testimony was unduly prejudicial. Defendant's first assignment of error is without merit.

[2] Next, defendant contends that the trial court erred in its charge to the jury regarding the offense of impersonating a sworn law-enforcement officer. Defendant argues that the instructions provided alternate theories which were not alleged upon which defendant could have been convicted.

Defendant, although given ample opportunity before the giving of the jury instructions and at the conclusion of the instructions, failed to raise any objection to the jury charge. Defendant's failure to raise objection constitutes a waiver and defendant is not permitted to raise the alleged error on appeal. Rule 10(b)(2), N.C.R. App. P. Nonetheless, defendant argues that the alleged error constitutes "plain error."

In *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), the Court held that if the instruction given is shown to be "plain error," the defendant would be entitled to a new trial although

defendant made no objection at trial. Plain error is defined as follows:

> a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 660, 300 S.E. 2d at 378 (1983), *quoting United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982).

G.S. 14-277(a) makes it a criminal offense for an individual to make a false representation to another person that he is a sworn law-enforcement officer. G.S. 14-277(b) makes it a criminal offense for an individual, *while falsely representing to another that he is a sworn law-enforcement officer*, to carry out any act in accordance with the authority granted to a law-enforcement officer. For purposes of (b), an act in accordance with the authority granted to a law-enforcement officer includes:

> (1) Ordering any person to remain at or leave from a particular place or area;
>
> (2) Detaining or arresting any person;
>
> (3) Searching any vehicle, building, or premises, whether public or private, with or without a search warrant or administrative inspection warrant;
>
> (4) Unlawfully operating a vehicle on a public street or highway or public vehicular area equipped with an operating red or blue light or siren in such a manner as to cause a reasonable person to yield the right-of-way or to stop his vehicle in obedience to such red or blue light or siren.

G.S. 14-277(b).

While G.S. 14-277(d) provides in pertinent part that a violation of both (a) and (b) is a misdemeanor, it also provides that a

violation of (a) is punishable under G.S. 14-3(a) and a violation of (b) is punishable under G.S. 14-277(d). The punishment provisions of G.S. 14-3(a) and G.S. 14-277(d) vary.

In the case *sub judice*, defendant was charged with a violation of G.S. 14-277(a) and not G.S. 14-277(b). The trial judge instructed the jury as follows:

> So I charge you that if you find from the evidence, beyond a reasonable doubt, that on or about December 21, 1986, the plaintiff [sic], Ricky Chisholm, falsely represented to another person that he, Ricky Chisholm, was a duly authorized peace officer and that the defendant acted upon such representation, by ordering another person to remain at or leave from a particular place or area, or detaining or arresting any person, or by searching any vehicle, building or premises, whether public or private, with or without a search warrant or an administrative inspection warrant, it would be your duty to return a verdict of guilty to this charge, with respect to the charge of impersonating a peace officer.

That part of the instructions giving the list of acts of authority granted to a law-enforcement officer clearly was error. Defendant was not charged under G.S. 14-277(b). Nonetheless, we do not find that the error rises to the level of "plain error." To have convicted defendant at all under G.S. 14-277 the jury was required to find that defendant represented himself as a sworn law-enforcement officer to another. Clearly the evidence was sufficient for the jury to convict him of violating G.S. 14-277(a), as representing himself as a sworn law-enforcement officer to Danny R. Miller, the only theory alleged in the indictment. We cannot say that "the instructional mistake had a probable impact on the jury's findings that the defendant was guilty." We also note that the sentence imposed was pursuant to G.S. 14-3(a) as required for a conviction under G.S. 14-277(a). This assignment of error is also without merit.

Defendant received a trial free of prejudicial error.

No error.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. BILL DAVID WALTON

No. 8718SC1036

(Filed 21 June 1988)

Rape and Allied Offenses § 5; Burglary and Unlawful Breakings § 5.11— felonious breaking and entering—attempted second degree rape—evidence sufficient

There was sufficient evidence of defendant's intent to engage in vaginal intercourse by force and against the will of the victim to submit charges of felonious breaking and entering and attempted second degree rape to the jury where the State's evidence tended to show that defendant broke into and entered the victim's home twice; made verbal references to an intent to engage in sexual activity; on one occasion got into the victim's bed, kissed her, and held her down; and on another occasion put his hand into her panties. N.C. G.S. § 14-27.3, N.C.G.S. § 14-27.6, N.C.G.S. § 14-54(a).

APPEAL by defendant from *DeRamus, Judson D., Jr., Judge.* Judgment entered 26 June 1987 in GUILFORD County Superior Court. Heard in the Court of Appeals 2 May 1988.

Defendant was indicted 2 March 1987 for the offenses of felonious breaking and entering and attempted second-degree rape pursuant to G.S. §§ 14-54(a) and 27.3. Defendant was convicted of both offenses and sentenced to a total of 20 years imprisonment.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane T. Friedensen, for the State.

Public Defender's Office, by Assistant Public Defender Frederick G. Lind, for defendant-appellant.

WELLS, Judge.

This appeal presents the sole question of whether the State presented sufficient evidence of defendant's intent to commit rape in order to have submitted the charges of felonious breaking and entering and attempted second-degree rape to the jury. Having thoroughly reviewed the evidence, we conclude that the trial court did not err in denying defendant's motion to dismiss.

A trial court properly denies a defendant's motion to dismiss made at the close of all the evidence where the State has adduced substantial evidence of each element of the offense and has shown that defendant actually perpetrated the crime. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). When ruling on a mo-

tion to dismiss, the trial court must view all of the evidence and reasonable inferences derived therefrom in the light most favorable to the State. *State v. Griffin*, 319 N.C. 429, 355 S.E. 2d 474 (1987). In the present case, the evidence viewed in the light most favorable to the State tends to show that:

On the afternoon of 25 December 1985, defendant broke into and entered the home of the complaining witness while she was alone and sleeping in her bedroom. Defendant shook her awake and said, "I think I'll just get in your bed." She then told defendant to "get out" and defendant left through the back door. The complaining witness left the back door unlocked to allow her children access to the house and because having heard defendant leave the house, she believed he bore her no further threat. Defendant again returned later that afternoon and woke the victim by getting on top of her and trying to kiss her. The defendant kept pulling at the victim's robe and saying, "I've been wanting you, and now I'm going to have you." At one point, defendant put his hand in her panties and said, "Here it is, I'm going to eat it." The complaining witness then tried to throw herself off the bed and began screaming. When she told defendant that she could not breathe, defendant allowed her to sit up on the bedside. Defendant did not thereafter attempt to further assault her. Shortly after, the complaining witness led defendant to the back door where she told him to "get out of this house." Defendant replied, "Don't call the police. If you call the police I will have to go to jail. So I might as well just [go] ahead and rape you anyway. . . ." Defendant then left.

To support a conviction for felonious breaking and entering under G.S. § 14-54(a), there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein. *State v. White*, 84 N.C. App. 299, 352 S.E. 2d 261 (1987); *State v. Litchford*, 78 N.C. App. 722, 338 S.E. 2d 575 (1986). Moreover, there must be a showing that a breaking or entering occurred in a building "with intent to commit a felony or other infamous crime therein" to satisfy the felony requirement of this statute. *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965), and the intent proven must be that which was alleged by the State. *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984).

In its indictment, the State alleged that defendant herein broke into and entered the victim's dwelling "with the intent to commit a felony therein, to wit: Rape"; therefore, the State was required to present substantial evidence that defendant intended to commit rape.

On its second charge of attempted second-degree rape, pursuant to G.S. §§ 14-27.3 and 27.6, the State was required to show the existence of an intent on the part of defendant to engage in vaginal intercourse by force and against the will of the victim. *State v. Whitaker*, 316 N.C. 515, 342 S.E. 2d 514 (1986); *State v. Hosey*, 79 N.C. App. 196, 339 S.E. 2d 414 (1986). Citing to our decision in *In re Howett*, 76 N.C. App. 142, 331 S.E. 2d 701 (1985), defendant argues that the State's evidence was not sufficiently substantial on the element of intent to have allowed both charges to prevail over defendant's motion to dismiss. We disagree.

In *Howett*, this Court held that the State had failed to produce sufficient evidence of intent to commit rape required by G.S. §§ 14-27.3 and 27.6 where defendant made no verbal references to sexual activity; the victim's only resistance consisted of struggling and spreading her legs to keep defendant from pulling her shorts down; and when the victim told the defendant to leave, he did so with no objection. However, the decision in *Howett* is inapposite to the present case.

In the case before us, the State's evidence tended to show that defendant broke into and entered the victim's home twice. At first defendant stated, "I think I'll just get into your bed." When defendant next entered the house, he got into the victim's bed, kissed her and held her down while repeating: "I've been wanting you, and now I'm going to have you." Later, defendant put his hand into the victim's panties and said, "Here it is, I'm going to eat it." Finally, defendant admitted to having intended rape when he stated he "might as well [go] ahead and rape you anyway."

The foregoing facts constitute sufficient evidence of defendant's intent to engage in vaginal intercourse by force and against the will of the victim to have allowed the case to go to the jury. Our holding today is supported by decisions in previous cases where defendant's verbal expression of an intent to engage in a sexual activity or references thereto were held to be significant

in finding an intent to commit rape. *See State v. Whitaker, supra; State v. Allen*, 297 N.C. 429, 255 S.E. 2d 362 (1979); *State v. Bradshaw*, 27 N.C. App. 485, 219 S.E. 2d 561 (1975), *disc. rev. denied*, 289 N.C. 299, 222 S.E. 2d 699 (1976); *Cf. State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *affirmed*, 308 N.C. 804, 303 S.E. 2d 822 (1983). Accordingly, defendant's first and only briefed assignment of error is overruled and we find

No error.

Chief Judge HEDRICK and Judge COZORT concur.

NORMAN K. STANLEY AND EVELYN B. STANLEY v. ELIZA HARVEY

No. 8710DC703

(Filed 21 June 1988)

1. **Landlord and Tenant § 13.1; Ejectment § 4— summary ejectment—notice to vacate—insufficient to terminate lease**

The trial court should have denied lessors' claim for summary ejectment where the lessors' letter requesting lessee to vacate was insufficient to comply with the terms of the lease allowing lessors to terminate lessee's estate, and no statutory forfeiture under N.C.G.S. § 42-3 was otherwise implied. N.C.G.S. § 42-26.

2. **Landlord and Tenant § 14— summary ejectment—appeal—amount of rent increase paid to clerk—return to lessee**

Lessors were not entitled to all rent paid to the court in excess of the original rent as a condition of appeal in a summary ejectment action where, at the time lessors allegedly notified lessee of a rent increase, the lease had automatically converted to a month-to-month tenancy with the same terms and conditions as during the original lease terms; the lessee never agreed to any rent increase; the lease expressly provided that its terms and conditions, including rent, would continue during the extension period; the lease did not permit lessors' unilateral modification of any provision of the lease; and lessors' only recourse was to terminate the lease, which was not done.

APPEAL by defendant from *Creech (William A.), Judge.* Order entered 19 March 1987 in District Court, WAKE County. Heard in the Court of Appeals 5 January 1988.

Lawrence F. Mazer for plaintiff-appellees.

East Central Community Legal Services, by Augustus S. Anderson Jr., for defendant-appellant.

GREENE, Judge.

Defendant-lessee appeals from an order ejecting her from properties she leased from plaintiff-lessors and awarding lessors certain bond monies. The evidence tends to show lessors and lessee executed a written lease agreement on 25 January 1980. Although the original term of the lease expired on 24 January 1981, the lease provided that the terms and conditions of the lease would "automatically" continue after the original term on a month-to-month basis. Other than allowing lessors to modify the rent or other provisions should lessee offer to renew the lease for a longer term, the lease did not provide for any unilateral modification of the lease during the automatic extension period. The lease did provide that either party could terminate the lease during the extension period upon thirty days' notice. Furthermore, if lessee breached the lease during this period, lessors could terminate the lease upon one day's notice.

After the original term ended, lessors notified lessee in July 1981 that the rent would increase from the original $239.00 per month to $282.00; however, lessee continued to pay, and lessors accepted, the original rental amount for almost one year thereafter. On 12 January 1982, lessors also notified lessee that she had violated the lease since she allegedly had more occupants living with her on the premises than were permitted under the lease. Lessee denied any default as she contended that the occupancy provision had been expressly waived by lessors. Despite the 12 January 1982 letter, lessors continued to accept the original rental amount provided by the original lease until 16 July 1982 when lessors notified lessee in writing that:

> Due to your default and failure to abide by the terms of your lease [the lessors] have elected to request that you vacate the premises by the 24th day of July 1982. Please take this as formal notice that [lessors] desire to take possession of the premises on July 25, 1982.

Lessee refused to vacate the premises and lessors filed a summary ejectment complaint requesting possession of the leased

properties and past due rent. The magistrate granted judgment for lessors and lessee appealed to the district court. As allowed under N.C.G.S. Sec. 42-34(b) (1984), the Clerk permitted lessee to stay execution so long as she paid into court the disputed rental amount of $282.00 each month the matter was pending. In district court, lessors again requested past due rent and ejectment of lessee from the premises based on nonpayment of the increased rent and violation of the provision limiting the number of occupants. Lessee again alleged lessors had waived any default under the lease and asserted lessors were in any event estopped because the lessors' attempted eviction was retaliatory in nature. Lessee also contended lessors' 16 July 1982 notice to "vacate" did not terminate the lease as required before lessors could retake possession under the lease.

The trial court granted lessors possession of the property and ordered the clerk to pay lessors all rent monies collected while the action was pending. However, the court denied lessors' claim for any other past due rent arising from lessors' July 1981 demand for increased rent. Lessee appeals.

The issues presented are: I) as the relevant provisions of the summary ejectment statute allow ejectment only when the lessee's estate has first "ceased," whether lessors' 16 July 1982 letter requesting lessee to "vacate" terminated lessee's leasehold estate; and II) whether lessee is entitled to a refund of rent paid into court in excess of the rent required under the original lease.

I

[1] Section 42-26 allows the remedy of summary ejectment in only the following cases: "(1) When a tenant in possession of real estate holds over after his term has expired; (2) when the tenant . . . 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 [who owes rent or has granted a lien on his crop] deserts the demised premises . . ." N.C.G.S. Sec. 42-26 (1984). Under Subsection (2), a breach of the lease cannot be made the basis of summary ejectment unless the lease itself provides for termination by such breach or reserves a right of reentry for such breach. *Morris v. Austraw*, 269 N.C. 218, 222, 152 S.E. 2d 155, 159 (1967). Conversely, statutory forfeitures under Section

42-3 are not implied where the lease itself provides for termination upon nonpayment of rent. *Compare* N.C.G.S. Sec. 42-3 (1984) (implying forfeiture upon failure to pay rent within ten days after demand) *with Morris*, 269 N.C. at 222, 152 S.E. 2d at 158-59 (Section 42-3 implies forfeiture only where lease is "silent" on forfeiture for nonpayment of rent). Furthermore, the parties' lease may require a notice of termination that differs both in type and extent from that allowed under Section 42-14. *Compare* N.C.G.S. Sec. 42-14 (1984) (month-to-month tenancy may be terminated by seven days' "notice to quit") *with Cherry v. Whitehurst*, 216 N.C. 340, 343, 4 S.E. 2d 900, 902 (1939) (Section 42-14 does not prevent agreement for different notice since provisions are permissive).

The instant lessee was not holding over after the expiration of her term but instead remained in possession under the automatic extension provisions of the original lease; furthermore, this is not an agricultural lease. Thus, this is not a case for summary ejectment under either subsections (1) or (3) of Section 42-26. Instead, lessors could bring this action for summary ejectment only if lessee's estate had "ceased" under Section 42-26(2). The dispositive provision of the lease reads:

> If the Lessee shall fail to pay any installment of rent when due and payable or to perform any of the other conditions as herein provided, such failure shall *at the option of the Lessor, terminate this lease* and upon one days notice to the Lessee the Lessor may *without further notice or demand* reenter upon and take possession of said premises without prejudice to other remedies, the Lessee hereby expressly waiving all the legal formalities. *If Lessee defaults* on lease conditions herein or is evicted for non-payment of rent, *this action shall not void this lease* and Lessee shall be held liable and agrees to pay any lost rent, late payment charges, bad check charges, damages, and cost of advertising house or apartment at one dollar ($1.00) per day. [Emphasis added.]

Lessee argues the exercise of lessors' "option" to terminate required lessors to notify lessee that the lease had terminated before lessors could "without further notice or demand" re-take possession. Lessee contends the 16 July 1982 notice did not terminate the lease as required but merely requested lessee to

"vacate" the premises. As lessee's leasehold interest did not automatically terminate upon lessee's breach and as lessors allegedly did not properly terminate the lease, lessee contends there is no basis for summary ejectment under Section 42-26(2).

We agree. Our courts do not look with favor on lease forfeitures. *Couch v. ADC Realty Corp.*, 48 N.C. App. 108, 114, 268 S.E. 2d 237, 242 (1980). When termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents. *See* 49 Am. Jur. 2d *Landlord and Tenant* Sec. 1048 (1970) (where lessor must exercise option to terminate, lessor's declaration of forfeiture must be unequivocal and decisive). The lease here provided that lessee's breach would not automatically "void" the lease: lessee's breach would instead give lessors the option to "terminate" the lease. However, lessors' written notice merely stated lessors "elected to request that [lessee] vacate the premises" on 24 July 1982. While Section 42-17 permits termination of month-to-month tenancies upon a seven-day "notice to quit," lessors and lessee agreed to a different type of notice and a different period of notice. Aside from the arguably less-than-unequivocal "request" that lessee vacate, nowhere does the notice state that lessors have elected to "terminate" the lease as required under the contract. This was not a clear and unequivocal notice that the lease was terminated since lessee could reasonably believe lessors were requesting that she vacate without terminating the lease. Lessee could have arguably refused such a request since the lease did not provide for any automatic right of re-entry.

Accordingly, lessors' letter requesting lessee to vacate was insufficient to comply with the terms of the lease allowing lessors to terminate lessee's estate. As no statutory forfeiture under Section 42-3 was otherwise implied under these circumstances, we conclude lessors had not terminated lessee's estate before commencing this summary ejectment action. As the summary ejectment remedy is restricted to those cases expressly covered by Section 42-26, *Morris*, 269 N.C. at 223, 152 S.E. 2d at 159, we hold the court should have denied lessors' claim for summary ejectment.

As we have determined that lessors had no authority under the lease to proceed with this summary ejectment action, we find it unnecessary to address any other assignment of error raised by lessee other than that stated below.

II

[2] Lessee next argues that the court should have ordered the Clerk to refund to her all rent paid to the court in excess of the original rent of $239.00 per month. At the time lessors allegedly notified lessee the rent was being increased to $282.00 per month, the lease had automatically converted to a month-to-month tenancy with the same terms and conditions as during the original lease term. Neither before or after the institution of the summary ejectment action did lessee agree to any rent increase. Instead, she merely paid the increased rent as a condition of her appeal. Since the lease expressly provided that its terms and conditions —including rent—would automatically continue during the extension period and as lessee had not offered to renew the lease for a longer period, the lease did not permit lessors' unilateral modification of any provision of the lease during the automatic extension period. Accordingly, lessee was not liable for any increased rent demanded by lessors. If lessee would not agree to a modification of the rent provisions of the lease agreement, lessors' only recourse was to terminate the lease. As we have noted, they did not do this.

Therefore, as respects the bond posted by lessee with the clerk during the pendency of this action, lessors were only entitled to receive from that fund outstanding rent based on the original rental rate. The balance of lessee's bond in excess of that amount was due and payable to lessee. Thus, we vacate the court's judgment insofar as it awarded lessors possession of the leased premises and the entire bond fund posted by lessee. We remand the case for further proceedings consistent with this opinion.

Vacated and remanded.

Judges PARKER and COZORT concur.

MONTY AND MARSELLA MATTHEWS v. DONALD M. PRINCE

No. 875DC881

(Filed 21 June 1988)

1. **Appeal and Error § 45.1— no arguments or citations—assignment of error overruled**

Four of plaintiffs' assignments of error in an appeal from an order that plaintiffs' contract and promissory note were null and void were overruled where plaintiffs failed to include any argument or cite any authorities.

2. **Fraud § 12— defense to contract and promissory note action—reliance on misrepresentation—evidence sufficient**

In an action to enforce a promissory note and contract arising from the sale of plaintiffs' business, Water Distillers, tried without a jury, there was sufficient evidence to support the court's finding that defendant relied on plaintiff Monty Matthews' representation that Water Distillers had a distributionship agreement with Durastill of the Carolinas, Inc. and that such a representation was a prime consideration for entering into the contracted agreement.

3. **Fraud § 12— action on contract and promissory note—defense of fraud—evidence sufficient to support finding of fraud**

In an action on a promissory note and a contract arising from the sale of plaintiffs' business, tried without a jury, there was sufficient evidence to support the court's conclusion that plaintiffs defrauded defendant where defendant relied on fraud as a defense to contract enforceability and there was competent testimonial evidence which showed that plaintiff Monty Matthews represented to defendant that Water Distillers, Inc., the company whose stock defendant was attempting to purchase, had a distributorship agreement with Durastill of the Carolinas; that Monty Matthews knew at the time he made this representation that the distributionship agreement was held individually and not by the corporation; that Monty Matthews knew that the distributionship agreement was a prime consideration for defendant entering into the contract and thus intended and expected him to rely on the representation; and finally, that defendant did in fact rely upon the representation and the contract was rendered worthless to him as a result.

APPEAL by plaintiffs from *Tucker, Elton G., Judge*. Judgment entered 15 April 1987 in District Court, NEW HANOVER County. Heard in the Court of Appeals 29 February 1988.

David F. Tamer for plaintiffs-appellants.

Johnson & Lambeth, by Carter T. Lambeth, for defendant-appellee.

JOHNSON, Judge.

Plaintiffs commenced this civil action on 25 May 1984 to enforce collection of sums due under a promissory note.

On or about 31 October 1983, defendant executed and had delivered to plaintiffs a promissory note in the amount of twenty-thousand dollars ($20,000.00) with interest thereon at the rate of ten percent (10%) per annum. The note was executed pursuant to a written contract for the sale of all plaintiffs' stock in a business known as Water Distillers, Inc., as well as an exclusive franchise agreement and distributorship rights.

Water Distillers, Inc., was engaged in the business of selling water distillers, water softeners, and other related chemicals. Monty Matthews originally held a distributorship from Durastill of the Carolinas, Inc., in his individual capacity, which gave him the exclusive right to sell Durastill products in forty-one (41) eastern North Carolina counties.

After the execution of the stock purchase agreement and delivery of the promissory note, defendant learned that the distributorship agreement and exclusive franchise agreement were not the property of Water Distillers, Inc. Despite efforts by defendant to have the distributorship and franchise agreement transferred to Water Distillers, Inc., Monty Matthews failed to provide, or transfer the distributorship agreement to the corporation. Defendant subsequently stopped payment on the check and refused to honor the agreement, contending that his refusal to pay the sums due under the contract was due to Matthews' alleged breach of contract.

When the matter came on for hearing, the trial court determined that the contract and promissory note dated 31 October 1983 were procured by a fraudulent misrepresentation. Monty Matthews had represented to defendant that Water Distillers, Inc. had a distributorship agreement with Durastill of the Carolinas, Inc. for the exclusive distribution and sale of Durastill products in eastern North Carolina. The court concluded that due to the misrepresentation, upon which defendant relied as a prime consideration for having entered into the contract, the contract as well as the promissory note were both null and void, and the plaintiffs were to have and recover nothing of defendant.

From this order, plaintiffs appeal.

On appeal, plaintiffs present seven questions for review which can be basically summarized in one issue: whether the trial court erred in decreeing that both the contract and the promissory note executed thereto were null and void because they were procured by Monty Matthews' fraudulent misrepresentation, upon which defendant relied, that Water Distillers, Inc. had a distribution agreement with Durastill of the Carolinas, Inc. We find no error.

[1] We note at the outset that plaintiffs have failed to include any argument or cite any authorities with respect to assignments of error one, four, five and six. Rule 28(b)(5) of the N.C.R. App. P., states that an appellant's brief shall contain, "[a]n argument, to contain the contention of the appellant with respect to each question presented," and that "[t]he body of the argument shall contain citations of the authorities upon which the appellant relies." In the assignments of error noted, plaintiffs have merely restated the questions presented along with the pertinent exceptions. This is insufficient to constitute an argument on the questions, and we therefore overrule the aforementioned assignments of error. *State v. Jones*, 63 N.C. App. 411, 420, 305 S.E. 2d 221, 226 (1983).

[2] By their second assignment of error plaintiffs contend that the trial court erred in finding as a fact that defendant relied upon Monty Matthews' representation that Water Distillers, Inc. had a distributionship agreement with Durastill of the Carolinas, Inc. and that such a representation was a prime consideration for entering into the contractual agreement.

Findings of fact are conclusive on appeal where they are supported by competent evidence in the record, *Poole v. Gentry*, 229 N.C. 266, 49 S.E. 2d 464 (1948); although evidence which could have supported a finding to the contrary may exist. *Knutton v. Colfield*, 273 N.C. 355, 160 S.E. 2d 29 (1968).

The examination of the record reveals that competent evidence exists to support the contested finding of fact.

On direct examination by Mr. Fred Rogers, defendant testified as follows:

> Q. What representations did he [Monty Matthews] make to you concerning ownership and distribution agreements?
>
> A. He just told me that all the paperwork had been done; all the paperwork had been done from Durastill of the Carolinas.

And I trusted him. I took him at his word. And I found out that had not been done.

Q. Was that your major consideration on your part in buying the stock?

MR. EUBANKS: OBJECTION. It calls for a conclusion.

THE COURT: OVERRULED.

A. Yes, it was. Because that was probably the only thing they had that could compete in the marketplace, the distillers. And I was very concerned about the distributorship agreement that would protect us in this area. And he had assured me that the paperwork had been done. And as soon as I found out that the paperwork hadn't been done transferring from him, as an individual to the corporation, that is when I stopped payment on the check.

. . .

Q. With reference to the portion of the business that was related to the sale of the distillers, did he [Monty Matthews] describe that and make representation to you about it?

A. Yes. I discussed with the stockholder Bill Parham, and also discussed this with Monty, and that was about 75 or 80% of the business, because the other equipment was not competitive in the marketplace. The other equipment being water softeners. It was very apparent to me that we could not compete with Culligan. And without that distributorship agreement permitting the corporation to sell distillers, we really didn't have a whole lot.

. . .

Q. Mr. Prince, exactly what representations were made by Mr. Matthews to you [that] turned out not to be as stated and untrue?

A. I was told the paperwork had been done, transferring the distributorship from Monty Matthew (sic) as a sole proprietor to Water Distillers as a corporation. I took him at his word. There were no stock certificates issued at the time of the contract. I took him at his word even though I never found

the stock certificates, just like I never found the distributorship agreements.

We find that this testimonial evidence was ample to sustain the trial court's finding of fact. "When trial by jury is waived and issues of fact are tried by the court, . . . [t]he trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. . . . He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected." *Knutton, supra* at 359, 160 S.E. 2d at 33 (citations omitted).

[3] In assignment of error number three, plaintiffs contend that the trial court erred in concluding as a matter of law that plaintiff Monty W. Matthews, defrauded the defendant. They essentially argue that defendant simply did not establish each of the requisite elements of fraud. Again, we find no error and in so doing, restate this Court's scope of review; to sustain the conclusions of law and findings of fact if they are supported by competent evidence. *Id.*

A case of actionable fraud requires the party to allege and prove that a representation relating to some material past or present fact was made; that the person who made the representation knew of its falsity at the time of its making, or recklessly made the representation without knowledge of its truth or falsity; that the party made the representation with the intent that it would be relied upon; and that the complaining party reasonably relied upon the representation to his detriment. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

There was competent testimonial evidence adduced at trial which showed that Monty Matthews represented to Donald Prince that Water Distillers, Inc., the company whose stock defendant was attempting to purchase, had a distributorship agreement with Durastill of the Carolinas; that Monty Matthews knew at the time he made this representation that the distributorship agreement was held individually and not by the corporation; that Monty Matthews knew that the distributorship agreement was a prime consideration for defendant entering into the contract, and

thus intended and expected him to rely upon the representation; and finally, that defendant did in fact rely upon the representation and the contract was rendered worthless to him as a result.

It is important to note here that defendant did not bring an independent action based upon fraud, but did rely upon fraud as a defense to contract enforceability. It is well-settled that a contract or any other instrument is vitiated by a proven allegation that the instrument in question was procured through fraud. *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E. 2d 382 (1962).

We therefore find that there is plenary evidence in the record to support the conclusion of law that Monty Matthews defrauded defendant, and do not accept his suggestion that defendant's allegation of fraud fails because he was not reasonably diligent in ascertaining the truth or falsity of the representation by conducting an investigation. It has been held that, "[w]e are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries which would have disclosed the falsehood." *Johnson v. Owens*, 263 N.C. 754, 757, 140 S.E. 2d 311, 313 (1965), *quoting White Sewing Machine Co. v. Bullock*, 161 N.C. 1, 9, 76 S.E. 634, 637 (1912). In *Johnson, supra*, as in the case *sub judice*, the prospective purchaser's diligent and specific inquiries were met with convincing falsehoods.

In light of our previous discussion on plaintiffs' assignments of error numbered two and three, we are convinced that we have amply treated the question raised by assignment of error number seven.

It is for these reasons that we affirm the decision rendered by the trial court.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. WILLIAM GLENN BRUCE

No. 8827SC51

(Filed 21 June 1988)

1. **Rape and Allied Offenses § 5— sexual act by substitute parent—fatal variance between indictment and evidence**

Defendant's conviction for engaging in a sexual act by a substitute parent was reversed where defendant was charged with engaging in vaginal intercourse with a minor over whom he had assumed the position of a parent in the home, and, while the evidence presented would have supported engaging in the sexual act of fellatio, the evidence failed to show vaginal intercourse. N.C.G.S. § 14-27.7.

2. **Rape and Allied Offenses § 19— taking indecent liberties—purpose of arousing or gratifying sexual desire—evidence sufficient**

The trial court did not err in a prosecution for taking indecent liberties with a minor by denying defendant's motion to dismiss where the jury could properly infer that defendant's action in rubbing the victim's breasts was for the purpose of arousing or gratifying his sexual desire.

3. **Rape and Allied Offenses § 19— taking indecent liberties—instructions—no plain error**

There was no plain error in a prosecution for taking indecent liberties with a minor from the court's alleged failure to specify to the jury which of defendant's alleged acts was to support the indecent liberties conviction and the date the act occurred where the court indicated that the date of the alleged taking of indecent liberties with a minor child was the date shown on the indictment; the indictment clearly stated that 12 February 1986 was the date of the alleged offense; defendant failed to object at trial; and the asserted error would not have had a probable impact on the jury's finding of guilt.

4. **Criminal Law § 92.2— consolidation of rape and sexual offense charges on one date with taking indecent liberties charge on another date—proper**

The trial court did not err in a prosecution for sexual activity by a substitute parent, first degree sexual offense, first degree rape, and taking indecent liberties with a child by denying defendant's motion to sever the indecent liberties charge, even though it was based upon acts that allegedly occurred more than six months after the alleged acts underlying the other charges, where all four charges involved acts of sexual abuse by defendant upon the same victim in the same location, each of the alleged acts occurred when defendant was alone with the victim in the mobile home, and public policy favors consolidation of cases involving child witnesses testifying about sexual abuse.

APPEAL by defendant from *Gaines (Robert E.), Judge.* Judgments entered 12 August 1987 in Superior Court, GASTON County. Heard in the Court of Appeals 31 May 1988.

Defendant was charged by indictment with sexual activity, vaginal intercourse, by a substitute parent in violation of G.S. 14-27.7, first degree sexual offense in violation of G.S. 14-27.4(a)(1), first degree rape in violation of G.S. 14-27.2(a)(1), and taking indecent liberties with a child in violation of G.S. 14-202.1. All of the offenses were alleged to have occurred on 21 June 1985 except for the indecent liberties offense, which was alleged to have occurred on 12 February 1986. Prior to trial, defendant moved for a severance of the indecent liberties offense; this motion was denied by the trial court. Defendant also requested a bill of particulars as to the exact acts alleged to be the basis of the indecent liberties offense and the first degree sexual offense. The State informed defendant that the allegation as to acts occurring on 21 June 1985 was that defendant performed acts of fellatio, sodomy, first-degree rape, and vaginal intercourse on the victim. The State informed defendant that the basis for the indecent liberties offense was the allegation that on 12 February 1986 defendant fondled the victim's breasts.

At the close of the State's evidence, defendant moved to dismiss each of the charges against him. The court allowed the motion as to the charge of first degree rape, but agreed that the State was entitled to an instruction on attempted first degree rape based on the evidence. The court denied defendant's motions as to the other charges. Defendant renewed his motions at the close of all the evidence, and the court again denied the motions.

In the charge to the jury, the trial judge instructed that the sexual act on which the first degree sexual offense was based was fellatio and that fellatio was the sexual act underlying the charge of sexual activity by a substitute parent. The court also instructed the jury on attempted rape and indecent liberties.

After deliberation, the jury found defendant guilty of sexual activity by a substitute parent, first degree sexual offense, attempted first degree rape, and taking indecent liberties with a child. After finding the applicable aggravating and mitigating factors, the court sentenced defendant to life imprisonment for the first degree sexual offense and to lesser concurrent sentences for the other offenses. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel C. Oakley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

PARKER, Judge.

On appeal, defendant raises three questions for review by this Court: (i) whether the trial judge erred in denying defendant's motion to dismiss the charge of felonious sexual activity by a substitute parent; (ii) whether the trial judge erred in denying defendant's motion to dismiss the charge of taking indecent liberties with a child; and (iii) whether the trial judge erred in denying defendant's motion to sever for trial the indecent liberties offense. We shall address these issues seriatim.

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of sexual acts by a substitute parent because there was a fatal variance between the underlying offense specified in the indictment and the sexual activity proved at trial. We agree with this contention.

General Statute 14-27.7 provides the following in relevant part:

> If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home . . . the defendant is guilty of a Class G felony.

The indictment charging defendant with violation of G.S. 14-27.7 indicated that the charge was based on defendant's having engaged in vaginal intercourse with the victim. At trial, the State's evidence tended to show attempted rape, attempted anal intercourse, and fellatio; the State failed to present any evidence of vaginal penetration. As a result, the trial judge granted defendant's motion to dismiss the first degree rape charge at the close of the State's evidence. The judge refused, however, to dismiss the charge based on G.S. 14-27.7, and, in his charge to the jury, the judge instructed that the offense of engaging in a sexual act by a substitute parent in this case was based on the sexual act of fellatio.

While a conviction for the offense defined by G.S. 14-27.7 may be based upon either vaginal intercourse or a sexual act, and while fellatio is a "sexual act" within the definition of that term in G.S. 14-27.1(4), the rule is that a defendant must be convicted, if he is convicted at all, of the particular offense with which he has been charged in the bill of indictment. *State v. Muskelly*, 6 N.C. App. 174, 176, 169 S.E. 2d 530, 532 (1969). Where the evidence tends to show the commission of an offense not charged in the indictment, the defendant's conviction thereof cannot stand. *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981).

This Court addressed similar facts in *State v. Loudner*, 77 N.C. App. 453, 335 S.E. 2d 78 (1985). In *Loudner*, the indictment charging defendant with a violation of G.S. 14-27.7 specifically stated that the sexual act was " 'performing oral sex.' " *Id.* at 453, 335 S.E. 2d at 79. In its answer to defendant's request for a bill of particulars, the State specified that the sexual acts allegedly committed by defendant were " 'physical touching and oral sex.' " *Id.* at 454, 335 S.E. 2d at 79. At trial, the State's evidence tended to show that defendant placed his finger in the victim's vagina. *Id.* at 453, 335 S.E. 2d at 79. Because there was no evidence presented showing that defendant performed oral sex with the victim as charged and because "physical touching" is not a prohibited sexual act within the definition of G.S. 14-27.1(4), this Court held that the trial court erred in denying defendant's motion for a directed verdict. *Id.*

In the case before us, defendant was charged with engaging in vaginal intercourse with a minor over whom he had assumed the position of a parent in the home. The State's evidence failed to show an essential element of that offense, vaginal intercourse. While the evidence presented would support the trial court's charge of engaging in the sexual act of fellatio with a minor over whom defendant had assumed the position of a parent in the home, defendant was never charged with that offense. For these reasons, we reverse defendant's conviction for engaging in a sexual act by a substitute parent.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss the indecent liberties charge. Specifically, defendant argues that the State failed to show that defendant acted " 'for the purpose of arousing or gratifying sexual desire' "

as required by G.S. 14-202.1(a)(1). Defendant also argues that the court below erred in failing to specify to the jury which of defendant's alleged acts was to support the indecent liberties conviction and the date the act occurred. We disagree with these contentions.

General Statute 14-202.1(a)(1) provides the following:

> (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 . . . .

At trial, the victim testified that she and defendant were alone in the family's mobile home on the afternoon of 12 February 1986 when she and defendant "started picking at each other . . . just playing." The victim stated, "[defendant] went up and under my blouse and he was—he started rubbing me." The victim also testified that before she and defendant went into the bedroom, defendant went into the kitchen and locked the back screen door. She stated that defendant stopped rubbing her when her brother attempted to enter the locked back door.

From this evidence, the jury could properly infer that defendant's action in rubbing the victim's breasts was for the purpose of arousing or gratifying his sexual desire. *See State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987); *State v. Strickland*, 77 N.C. App. 454, 335 S.E. 2d 74 (1985).

[3] As to defendant's second argument, we first note that defendant failed to object to that which he now assigns as error. As such, in the absence of plain error, which is not argued in defendant's brief, defendant may not now assign error to an error or omission in the jury charge. N.C. Rule App. Proc. 10(b)(2). *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). In his instruction to the jury, the trial judge indicated that the date of the alleged taking of indecent liberties with a minor child was the date shown on the indictment; the indictment clearly stated that 12 February 1986 was the date of the alleged offense. Considering the entire record, we are of the opinion the asserted error in the

instruction would not have had a probable impact on the jury's finding of guilt. *See id.* at 661, 300 S.E. 2d at 378-79.

[4] Defendant's final contention is that the trial court erred in denying his motion to sever for separate trial the charge of indecent liberties based on events that allegedly took place on 12 February 1986. This contention is without merit.

General Statute 15A-926(a) provides the following in part:

> Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

A trial court's ruling on consolidation or severance of cases is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Hayes*, 314 N.C. 460, 471, 334 S.E. 2d 741, 747 (1985). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In the present case, all four charges involve acts of sexual abuse by defendant upon the same victim in the same location, the bedroom of the mobile home shared by defendant and the victim's mother. Each of the alleged acts occurred when defendant was alone with the victim in the mobile home. Under these facts, we cannot say that the trial judge abused his discretion in refusing to sever for separate trial the indecent liberties case, even though it was based upon acts that allegedly occurred more than six months after the alleged acts underlying the remaining three charges. Moreover, where trials involve child witnesses testifying about sexual abuse, public policy favors consolidation of cases because it avoids the necessity of having the child testify more than once. *State v. Jenkins*, 83 N.C. App. 616, 618, 351 S.E. 2d 299, 301 (1986), *cert. denied*, 319 N.C. 675, 356 S.E. 2d 791 (1987).

Therefore, for the reasons stated, we reverse the trial court's judgment as to the crime of engaging in a sexual act by a substitute parent; as to the remainder of the convictions, we find no error.

86CRS27515, no error.

86CRS27516, no error.

87CRS6459, reversed.

87CRS6460, no error.

Judges JOHNSON and COZORT concur.

DELORES WHITE v. ANTHONY J. WHITE

No. 8712DC1013

(Filed 21 June 1988)

Divorce and Alimony § 25.9— child custody—change of circumstances—evidence sufficient

The trial court did not err by concluding that there had been a substantial change in circumstances which affected the welfare of the child and which warranted a modification of custody where the evidence before the court was uncontested, plaintiff admitted that she had had two illegitimate children since her divorce from defendant and that she had insufficient income to provide for herself and three children, and there was evidence that the minor child was becoming difficult to control and was not receiving adequate supervision from plaintiff.

APPEAL by plaintiff from *Hair, Judge*. Order signed 19 August 1987 in District Court, CUMBERLAND County. Heard in the Court of Appeals 9 March 1988.

On 19 February 1987, defendant filed a motion in the cause for a modification of a custody order pursuant to N.C.G.S. § 50-13.7 requesting that custody of his minor child be transferred from plaintiff to defendant and alleging changed circumstances. This matter was heard on 7 July 1987. The court entered an order modifying the previous order of 11 December 1984. Primary custody of the minor child was given to defendant with reasonable visitation to plaintiff.

A petition for writ of supersedeas was filed 9 July 1987, and a motion for temporary stay was allowed on 13 July 1987. That order was dissolved on 29 July 1987.

The evidence presented on 7 July 1987 consisted largely of testimony from plaintiff and defendant and showed the following:

Plaintiff and defendant were married on 20 June 1981. One child was born to the marriage on 30 November 1981. The parties separated on 8 June 1983 and were divorced on 11 December 1984. Plaintiff took physical custody of the minor child at the time of separation from defendant pursuant to a separation agreement which was incorporated into the divorce judgment.

Since the parties' separation in 1983, defendant has been stationed in England with the United States Air Force. He visited the minor child in 1984 for two weeks and in 1986 for two weeks. Defendant remarried in 1985. He and his present wife have a baby and live near London. Defendant will be stationed in England two more years. Defendant pays $200 a month child support to plaintiff and has done so since 1984. From May 1983 to April 1984, defendant did not pay regular support.

Plaintiff currently resides in a duplex apartment in Cumberland County with the minor child and two younger children, ages eighteen months and four months. The two younger children were born to plaintiff and her boyfriend, Robert L. Wright. Mr. Wright does not live with plaintiff but pays $133 a month child support for his two children.

Plaintiff acknowledged that she was laid off from her job at Len-Hal where she worked for two years. Two of plaintiff's neighbors testified to her fitness as a mother.

At the close of the evidence, the trial court made the following findings of fact and conclusions of law:

> VII. That Plaintiff and the minor child reside in an apartment off of Cliffdale Road, in Cumberland County, North Carolina and near the Mini Ranch trailer park; that prior to moving into the apartment the Plaintiff occupied a mobilehome [sic] in said mobilehome [sic] park.
>
> VIII. That Plaintiff has had a frequent visitor in her home, one Robert Lee Wright, a married man with whom the Plaintiff has been cohabiting; that as a result of said cohabitation, the Plaintiff, since the separation of the Plaintiff and Defendant, has had two children out of wedlock, one now be-

ing eighteen months old and one now being four months old; that the Plaintiff continues to see and cohabit with the said Robert Lee Wright in Plaintiff's home.

IX. That Plaintiff was formerly employed at Len Hal a sewing factory, but lost her job in January of 1987; Plaintiff has been unemployed since that time, although she has been receiving the sum of $200.00 per month as child support from the Defendant, and the sum of approximately $130.00 per month from the said Robert Lee Wright for the support of the two children born out of wedlock; that Plaintiff has been supporting herself and the minor children, apparently on a total, of $330.00 per month; that Plaintiff's electrical utilities and rent payment total $270.00 per month; that Plaintiff has no phone in her residence, and provides for food, clothing, transportation and other expenses for herself and her minor children from the remaining $60.00 a month income.

X. That the Defendant is an E-6 in the United States Air Force and continues to be stationed in England; that since the entry of the previous Order the Defendant has remarried and his present wife has a college degree in special education; that she is employed with the United States Defense Department in England as a school teacher; that Defendant has a child by his new wife; that since 1983 the minor child has spent approximately 3 months with Defendant's parents on another occasion; that during a portion of these times the Defendant had the opportunity to visit with and maintain his relationship with the minor child; that on another occasion when Plaintiff's father died, and she was in England, Defendant had the opportunity of having said child visit with him in his home for a period of time.

XI. That Defendant is purchasing a home in a community approximately 55 miles west of London and has ample room for his wife and children; that he lives in close proximity to medical facilities, both American and English. That the minor child would attend the same school where Defendant's wife is employed; that Defendant has presented to the court a child care plan that is proper and beneficial to the minor child at the present time.

XII. That as an E-6 in the United States Air Force the Defendant has an income in excess of $1,500.00 per month, and has the financial capability of providing a home and proper facilities for the minor child; that Defendant, and his present wife have expressed their desire to assume custody of said child and assume the responsibility for her care and maintenance.

XIII. That Defendant is fit and proper person to have the care and custody of the minor child, and it is in the best interest of said minor child at this time, that custody be placed with Defendant, and that Plaintiff be allowed reasonable visitation privileges.

CONCLUSIONS OF LAW

(1) That this Court has the right, under the provisions of G.S. 50A and G.S. 50-13.7, to exercise jurisdiction in the determination of the custody and support of the minor child, and this Court should assume jurisdiction to make a determination.

(2) That there has been a substantial and material change of circumstances of the parties since the entry of the previous order of this Court.

(3) That as a result in the change of circumstances, the welfare of the child will be adversely affected unless the custody provisions are modified.

(4) That the award of the custody of the minor child to the Defendant at this time will best promote the interest and welfare of the said child.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED AS FOLLOWS:

1. That the previous order of this Court, dated the 11th day of December, 1984, is hereby modified as follows:

a. That the custody of the minor child born of the marriage is hereby awarded to the Defendant.

b. That the Plaintiff is hereby granted reasonable visitation privileges with the minor child.

c. That the previous order of the court directing the payment of child support by the Defendant is hereby modified and said provision for payment of child support is terminated.

From this order, plaintiff appeals.

Hedahl & Radtke, by Debra J. Radtke, attorney for plaintiff-appellant.

No brief for defendant-appellee.

ORR, Judge.

Plaintiff contends that the trial court erred by concluding that there had been a substantial change in circumstances which affected the welfare of the child which warranted a modification of custody. The basis of plaintiff's contention is that the findings of fact do not support that conclusion, and thus the trial court erred by ordering custody transferred to defendant.

Under N.C.G.S. § 50-13.7(a) "an order of a court of this State for custody 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."

It is well established law in this state that a substantial change in circumstances affecting the welfare of a child must be supported by findings of fact based on competent evidence. *See e.g. Tucker v. Tucker*, 288 N.C. 81, 216 S.E. 2d 1 (1975); *Kelly v. Kelly*, 77 N.C. App. 632, 335 S.E. 2d 780 (1985). The "trial judge's findings of fact in custody Orders are binding on the appellate courts *if supported by competent evidence.*" *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974) (emphasis supplied and citations omitted).

The trial court is in the best position to determine what is in the best interests of the child. *Wehlau v. Witek*, 75 N.C. App. 596, 599, 331 S.E. 2d 223, 225 (1985) (citations omitted). It is a difficult determination and one made by observing the witnesses and weighing the evidence.

We believe that the trial court had sufficient evidence to support its findings of fact and that those findings supported the trial court's conclusion of law. The evidence before the court was

uncontested. Plaintiff admitted that she has had two illegitimate children since her divorce from defendant (Finding of Fact No. VIII) and that she currently has insufficient income to provide for herself and three children (Finding of Fact No. IX).

We hold that these findings are sufficient for the trial court to conclude that there was a substantial change in circumstances under N.C.G.S. § 50-13.7 and that the trial court did not err in transferring custody of the minor child to defendant.

The birth of two additional children within two years to an unmarried woman clearly constitutes a substantial change of circumstances. In addition, plaintiff's loss of her job and the resulting financial strain further supports such a finding. Plaintiff testified that she can provide for the children. However, the trial court found that the weight of the evidence was otherwise, and no additional proof of financial or other resources other than child support was introduced by plaintiff.

From the evidence before us, the trial court properly concluded that the welfare of the minor child in question would be "adversely affected unless the custody provision is modified . . . ." *Daniels v. Hatcher*, 46 N.C. App. 481, 483, 265 S.E. 2d 429, 431 (1980) (citation omitted).

There was evidence that the minor child was becoming difficult to control and was not receiving adequate supervision from plaintiff. Further, the evidence established that plaintiff could not meet the financial needs of herself and three children on $333 a month.

Plaintiff argues that she is being denied custody of her child because defendant has a greater income. We disagree. Defendant's income and stable home environment simply provide part of the basis for determining that the child's best interests and welfare will be promoted by awarding custody to defendant.

Collectively, the evidence supports the findings and the findings support the conclusions of law. *Woncik v. Woncik*, 82 N.C. App. 244, 346 S.E. 2d 277 (1986).

Affirmed.

Chief Judge HEDRICK and Judge JOHNSON concur.

SANDRA KAY PETTY v. THE HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, NORTH CAROLINA

No. 8726SC1060

(Filed 21 June 1988)

1. **Judgments § 55— prejudgment interest modified—no abuse of discretion**

There was no abuse of discretion in a trial court's order modifying a judgment as to an award of prejudgment interest where, when the verdict was rendered for $1,200,000, the total amount was covered by the City of Charlotte's liability insurance; the City of Charlotte reached a settlement with plaintiff for $600,000 plus costs while its appeal was pending and was relieved of all liability; and the Housing Authority, the remaining defendant, only held liability insurance in the amount of $500,000. To subject the Housing Authority to liability for prejudgment interest on the entire amount of the verdict when the Housing Authority was insured for less than half that amount would run counter to the policy reasons surrounding the enactment of N.C.G.S. § 24-5 (1981). N.C.G.S. § 24-5(b) (1986).

2. **Rules of Civil Procedure § 60.4— Rule 60 motion to reduce prejudgment interest—not used as substitute for appeal**

A motion under N.C.G.S. § 1A-1, Rule 60 to reduce prejudgment interest was not improperly used as a substitute for appellate review where an issue as to prejudgment interest materialized only when plaintiff settled her claim with a codefendant which was insured to the full extent of the verdict.

APPEAL by plaintiff from *Burroughs, Judge.* Order entered 14 July 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 March 1988.

Gerdes, Mason, Wilson, Tolbert & Simpson, by C. Michael Wilson and J. David Tolbert, for plaintiff-appellant.

Golding, Crews, Meekins & Gordon, by James P. Crews and Emily E. Shore, for defendant-appellee.

JOHNSON, Judge.

Plaintiff brought this action to recover from the City of Charlotte and The Housing Authority of the City of Charlotte for massive injuries to her head and body suffered as a result of an automobile accident. She was awarded a jury verdict in the amount of $1,200,000.00 against both defendants jointly and severally. The judgment was subsequently reduced to $1,120,000.00 after credit for a previously settled uninsured motorist claim was given.

Both defendants appealed the judgment, but the City of Charlotte settled plaintiff's claim on 7 May 1986 for $600,000.00 plus court costs. The Housing Authority, however, pursued its appeal and filed a motion pursuant to G.S. 1A-1, Rule 60 on 4 December 1986 requesting that this Court modify the judgment with respect to the amount of prejudgment interest it would owe if the judgment were affirmed.

This Court affirmed the judgment; *Petty v. The City of Charlotte*, 85 N.C. App. 391, 355 S.E. 2d 210, *cert. denied*, 320 N.C. 170, 358 S.E. 2d 54 (1987), but remanded the Rule 60 motion to the Superior Court of Mecklenburg County, *id.* at 400, 355 S.E. 2d at 215-16, which granted The Housing Authority's motion and modified the judgment pursuant to G.S. 1A-1, Rule 60(b)(6). From this order plaintiff appeals.

Plaintiff presents one, four-part issue for this Court's determination. She asks whether an award of prejudgment interest in a final judgment may be modified pursuant to G.S. 1A-1, Rule 60(b)(6) where: (a) the final judgment awarded prejudgment interest on the entire judgment amount pursuant to the former G.S. 24-5 (1981) (current version at G.S. 24-5(b) (1986)); (b) neither defendant appealed the award of prejudgment interest; (c) plaintiff subsequently settled with defendant number one, The City of Charlotte, which had maintained liability insurance in excess of the entire judgment amount; and (d) defendant number two, The Housing Authority, maintained liability insurance in an amount less than the full judgment amount.

[1] We find no error in the court's order which modified the original judgment as to the award of prejudgment interest.

This action was instituted by the filing of complaint on 28 October 1983, therefore the statute which governs the payment of interest is the former G.S. 24-5 (1981) and not G.S. 24-5(b) (1986) which became effective on 1 October 1985. *See* 1985 N.C. Session Laws Ch. 214 sec. 2. G.S. 24-5 (1981) (current version at G.S. 24-5(b) (1986)) provides in pertinent part that:

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment

and decree of the court shall be rendered accordingly. *The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied,* and the judgment and decree of the court shall be rendered accordingly.

(Emphasis added.)

Upon careful reading of the statute in question, we are convinced that the trial court ruled correctly, pursuant to G.S. 1A-1, Rule 60(b)(6), in modifying the award of prejudgment interest on the original verdict of $1,120,000.00.

G.S. 1A-1, Rule 60(b)(6) provides that, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [a]ny other reason justifying relief from the operation of the judgment." It is well-settled that "[t]his provision is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought." *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E. 2d 497, 499-500, *cert. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983). With both the provision and the principle in mind we shall analyze the court's ruling.

When the verdict was rendered in the case *sub judice*, the total amount was covered by liability insurance since The City of Charlotte held liability insurance in an amount at least equal to the amount of the total verdict. Therefore, as long as defendant number one, The City of Charlotte, remained a party to the action the award of prejudgment interest (commencing at the institution of the action) was proper. Once this defendant reached a settlement with plaintiff on 7 May 1986, while its appeal was pending, in an amount of $600,000.00 plus the costs of court, and was subsequently relieved of all liability, the total amount of the verdict was no longer "covered by liability insurance." Defendant number two, The Housing Authority, only held liability insurance in an amount of $500,000.00.

This Court has held, in a cause of action governed by G.S. 24-5 (1981) (current version at G.S. 24-5(b) (1986)), that an award of

prejudgment interest on $275,000.00, the principal amount of the judgment, was improper where defendant's liability insurance policy provided coverage for bodily injury only up to $50,000.00 per person. *Wagner v. Barbee and Seiler v. Barbee*, 82 N.C. App. 640, 347 S.E. 2d 844 (1986), *cert. denied*, 318 N.C. 702, 351 S.E. 2d 761-62 (1987). *See also, Leary v. Nantahala Power and Light Co.*, 76 N.C. App. 165, 332 S.E. 2d 703 (1985), where defendant was considered a self-insurer for the amount of his $200,000.00 deductible, and therefore not subject to liability for prejudgment interest on that amount.

We see no reason to subject defendant to liability for prejudgment interest on the entire amount of the verdict, when defendant, The Housing Authority, was only insured for less than half that amount. To do so would run counter to the policy reasons surrounding the enactment of G.S. 24-5 (1981); to provide an incentive for liability insurance companies to resolve claims with "all deliberate speed" rather than to delay resolution in order to maximize the return of investment on loss reserves. *Leary, supra, citing, Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984).

In granting The Housing Authority's motion on remand, the trial court concluded that:

> [2] [t]he Housing Authority is entitled to relief under Rule 60(b)(6) . . ., which allows the [c]ourt to relieve a party from the provisions of a judgment upon motion and upon such terms as are just for "any other reason justifying relief from the operation of the judgment."
>
> [5] In these extraordinary circumstances justice demands that The Housing Authority not be required to pay prejudgment interest on the amount of the judgment of $1,200,000.00, since it was the City of Charlotte not the Housing Authority, that had liability insurance covering the entire judgment.

The court then ordered that:

> the judgment in this case be modified so as to obligate The Housing Authority to pay interest on only $500,000.00 [the total amount of its liability insurance coverage] for the period of time from the date of the filing of the Complaint (October 28, 1983) until the date of the return of the jury's verdict (January 15, 1986); on $1,120,000.00 from January 16, 1986 un-

til the plaintiff settled with and released the City of Charlotte (May 7, 1986); and on only $520,000.00 [the remaining amount of the verdict after plaintiff's settlement with defendant number one] from May 8, 1986 until the judgment is paid and satisfied [.]

We find that the court acted well within its discretion in ruling as it did.

[2] Within the body of plaintiff's argument, she contends that The Housing Authority's Rule 60 motion was improper as it was used as a substitute for appellate review which is prohibited. *Young v. State Farm Mutual Auto. Ins. Co.*, 267 N.C. 339, 148 S.E. 2d 226 (1966); *In re Snipes*, 45 N.C. App. 79, 262 S.E. 2d 292 (1980); *O'Neill v. Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979). She also argues that a motion pursuant to G.S. 1A-1, Rule 59(e), a motion to alter or amend judgment, would have been proper. We find this reasoning unsound at best, for in presenting this argument plaintiff places an unreasonable burden upon The Housing Authority; i.e., to have asserted a basis for appeal which did not exist. At the time when the verdict was rendered, The Housing Authority had no appealable issue insofar as an award of prejudgment interest was concerned. The issue only materialized after plaintiff settled her claim with the City of Charlotte which was insured to the full extent of the verdict.

We also find the case *sub judice*, and *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E. 2d 115, *disc. rev. denied*, 303 N.C. 319, 281 S.E. 2d 659 (1981), clearly distinguishable. In *Sylva*, the issue which defendant sought to have resolved through a Rule 60 motion, concerning the amount of attorney's fees awarded to the plaintiff as a part of the costs, was clearly in existence and ripe for appeal at the time when the verdict was rendered. Relief pursuant to Rule 60 was therefore unavailable. Defendant, in the case *sub judice*, had no similar opportunity to raise the issue by appeal, and relied upon the only weapon within his arsenal.

We find that the trial court properly modified the judgment as allowed by G.S. 1A-1, Rule 60(b)(6), and therefore affirm its ruling.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. JOHNNY EDWARD GRAHAM

No. 8726SC1121

(Filed 21 June 1988)

1. **Searches and Seizures § 23— narcotics—search warrant—probable cause**

The trial court did not err in a prosecution for trafficking in drugs by possessing more than 28 grams but less than 200 grams of cocaine by denying defendant's motion to suppress evidence seized under a search warrant on the grounds that there was no probable cause to search the premises as to defendant and that the warrant was fatally defective where the officers who applied for the warrant had received information from an informant who admitted past use of cocaine and who had previously given information that led to the arrest of at least six people, and the information provided a substantial basis for the probability that cocaine was present in the described residence and had been sold there within the preceding 48 hours. Even assuming that the warrant did not authorize a search of any occupants of the house, neither defendant nor his mother were searched under the authority of the warrant. N.C.G.S. § 15A-244.

2. **Narcotics § 4.3— trafficking in cocaine—constructive possession—evidence sufficient**

The trial court in a prosecution for trafficking in cocaine properly denied defendant's motion to dismiss where police officers found over 28 grams of cocaine and a letter addressed to defendant in a bedroom in the house; defendant's mother and father testified that defendant kept his clothes in the bedroom and used the room when he occasionally stayed there; and defendant admitted that he had moved the bags of cocaine from a closet to the box under the dresser. This evidence clearly raised an inference of constructive possession sufficient to be submitted to the jury.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 23 June 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 May 1988.

Defendant was charged in a proper bill of indictment with trafficking in drugs by possessing more than 28 grams but less than 200 grams of cocaine in violation of G.S. 90-95(h)(3). Evidence presented at trial tended to show the following facts.

On 20 October 1986, Charlotte police officers T. L. Sult and M. S. Faulkenberry obtained a search warrant authorizing a search of

> 2044 "B" Ave. Charlotte, N. C., Meck. Co., USA, & white 1960 Olds, tag NC APC9248 & approx. 1968 white stationwagon with woodgrain, parked in drive, & a b/m approx. 55 YOA, 160 lbs., 6'1" w/mustache, name of Farmer, & a b/f approx. 56 YOA, 180 lbs., about 5'4", and any occupants.

In their application for the search warrant, officers Sult and Faulkenberry set out the following to establish probable cause for the search warrant.

> We . . . had been informed by a reliable confidential informant that he has been inside the above address within the past 48 hours and has seen cocaine inside the residence and cocaine is being sold at this time by the above occupants. The informant is familiar with how cocaine is packaged and sold on the streets and that he has used cocaine in the past. We have known this informant for three weeks and information provided by this informant has resulted in the seizure of controlled substances included in the N.C. Controlled Substance Act and led to the arrest of at least six individuals for violations of the N.C. Controlled Substance Act.

Officers Sult, Faulkenberry, Young and Price executed the search warrant on 20 October 1986 at approximately 7:30 p.m. The officers knocked at the door and when no one answered, they entered the house. In one of the bedrooms the officers found 57 cellophane packets of cocaine in a box underneath a dresser. On top of the same dresser, the officers found a letter from the Charlotte Police Department addressed to defendant at 2044 "B" Avenue. The letter contained a photocopy of an officer's report of a house breaking at 2044 "B" Avenue which had occurred on 9 October 1986.

As the officers continued the search, Bertha Graham, defendant's mother, returned home and denied knowing about the cocaine. Shortly thereafter, defendant arrived and he was read his *Miranda* rights and taken to the police station. Defendant made a statement in which he said that he used 2044 "B" Avenue as his address and sometimes stayed there. He also stated that he knew

about the cocaine in the box in the bedroom and that it belonged to his father who was called "Farmer." He further stated that he moved the cocaine from a closet to the box to keep it away from his daughter.

Defendant's father, James Graham, also made a statement to police officers on 20 October 1986. James Graham was arrested for possessing four additional bags of cocaine, and he stated that the cocaine seized at the house belonged to him and that neither his wife nor defendant had anything to do with the cocaine. At trial, however, James Graham stated that he made the statement to protect his wife and that the cocaine seized at the house did not belong to him.

Bertha Graham testified at trial that the bedroom where the cocaine was found was defendant's room when he was there and contained defendant's clothes.

The jury found defendant guilty of trafficking in cocaine and he was sentenced to a fifteen-year term of imprisonment. From the judgment of the trial court, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

Assistant Public Defender Robert L. Ward for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that "the trial court erred in denying defendant's motion to suppress on the grounds that there was no probable cause to search the premises as to the defendant and that the warrant was fatally defective, and that any subsequent evidence obtained as a result was tainted and should have been excluded." Defendant's argument is not persuasive.

North Carolina law requires applications for search warrants to contain:

(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

G.S. 15A-244. "The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E. 2d 254, 256 (1984).

In *Arrington*, our Supreme Court adopted the "totality of circumstances" test set out in *Illinois v. Gates*, 462 U.S. 213, *reh'g denied*, 463 U.S. 1237 (1983), for determining the constitutionality of a magistrate's finding of probable cause. Under this test, the question is whether the evidence as a whole provides a substantial basis for concluding that probable cause exists. *State v. Williams*, 319 N.C. 73, 352 S.E. 2d 428 (1987). In applying the "totality of circumstances" test, "great deference should be paid a magistrate's determination of probable cause and . . . 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.

The facts in the present case were sufficient under the "totality of circumstances" test to support a finding of probable cause. Officers Sult and Faulkenberry received information from an informant who admitted past use of cocaine and who had previously given information that led to the arrest of at least six people. The information provided a substantial basis for the probability that cocaine was present in the described residence and had been sold there within the preceding 48 hours. The search warrant was supported by probable cause and authorized the search of the house. Even assuming *arguendo* that the warrant did not authorize a search of any occupants in the house, the record indicates that neither defendant nor his mother were searched under the authority of the warrant. Thus, the trial court

properly denied defendant's motion to suppress the evidence seized from the house.

[2] Defendant also contends that the trial court erred in denying his motion to dismiss because the evidence was insufficient. There was no error in denial of the motion.

In order to prove the offense of trafficking in cocaine, the State is required to present evidence that defendant possessed at least 28 grams of cocaine. G.S. 90-95(h)(3). Possession of a controlled substance may be actual or constructive. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). "Constructive possession exists when a person, while not having actual possession, has the intent and capability to maintain control and dominion over a controlled substance." *State v. Williams*, 307 N.C. 452, 455, 298 S.E. 2d 372, 374 (1983). As the terms "intent" and "capability" suggest, constructive possession depends on the totality of circumstances in each case. *State v. James*, 81 N.C. App. 91, 93, 344 S.E. 2d 77, 79 (1986). No single factor controls, but ordinarily the question will be for the jury. *Id.*

In the case *sub judice*, police officers found over 28 grams of cocaine and a letter addressed to defendant in a bedroom in the house. Defendant's mother and father testified that defendant kept his clothes in the bedroom and used the room when he occasionally stayed there. Defendant admitted that he had moved the bags of cocaine from a closet to the box under the dresser. This evidence clearly raised an inference of constructive possession sufficient to be submitted to the jury. The trial court did not err in denying defendant's motion to dismiss.

No error.

Judges ORR and GREENE concur.

JANE DRISCOLL v. UNITED STATES LIABILITY INSURANCE COMPANY

No. 8726SC1162

(Filed 21 June 1988)

Insurance § 69.3— underinsured motorists coverage—covered person

Summary judgment was properly granted for defendant in a declaratory judgment action to determine whether plaintiff was covered under an underinsured motorists provision of her daughter's policy with defendant. Neither N.C.G.S. § 20-279.1 nor the daughter's policy provided underinsured motorists coverage for plaintiff for injuries sustained while riding in a household-owned vehicle not named in the policy.

APPEAL by plaintiff from *Frank W. Snepp, Judge.* Order entered 21 September 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 April 1988.

James H. Carter for plaintiff-appellant.

Mark C. Kurdys for defendant-appellee.

BECTON, Judge.

Plaintiff, Jane Driscoll, brought this declaratory judgment action to determine whether she was covered under the underinsured motorist provision of her daughter's insurance policy with defendant, United States Liability Insurance Company (USLIC). From the grant of defendant's motion for summary judgment, plaintiff appeals. We affirm.

I

The following facts are not in dispute. On 13 March 1986, Jane Driscoll was injured when the automobile in which she was traveling—a 1985 Dodge, owned and driven by her husband—was struck by James Devine's vehicle—a 1972 Plymouth automobile—after Devine's vehicle crossed the center line on the highway. James Devine's liability insurance coverage on his automobile was limited to $25,000 per claimant. Driscoll's damages exceeded that amount; however, she settled with Devine for the full amount of his coverage.

Driscoll, her husband, and their adult daughter, Marion Driscoll, shared the same household. Marion Driscoll owned a 1981 AMC Concord automobile which was insured by USLIC. Her

insurance policy contained underinsured motorist coverage limited to $100,000 per claimant.

II

Driscoll's sole contention on appeal is that the trial judge erred by granting USLIC's motion for summary judgment. The trial judge determined, as a matter of law, that Driscoll's injuries were not covered under her daughter's policy.

Typically, automobile insurance flows with the named vehicle. However, by enacting N.C. Gen. Stat. Sec. 20-279.21(b)(3) (Cum. Supp. 1987), the legislature established a class of persons with whom coverage flowed, although the named vehicle was not involved in the accident. Subsection (b)(3) provides in pertinent part:

. . .

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise. . . .

This Court first examined the extent of subsection (b)(3)'s coverage expansion in *Crowder v. N.C. Farm Bureau Mutual Ins. Co.*, 79 N.C. App. 551, 340 S.E. 2d 127, *disc. rev. denied*, 316 N.C. 731, 345 S.E. 2d 387 (1986). In *Crowder*, the plaintiff sought to recover damages under his father's uninsured/underinsured motorist policy. The plaintiff sustained the injuries while riding as a passenger in a friend's jeep when the jeep swerved off the road. This Court held that the plaintiff, who claimed coverage under a similarly worded policy, *was* insured against damages sustained in a non-owned vehicle. The plaintiff argued successfully that subsection (b)(3) mandated coverage for persons insured even when the insured vehicle was not involved in the insured's injuries. However, the Court expressly reserved the question "whether an insured operating or riding in an *owned* but underinsured vehicle would be covered by the underinsured motorist provision in an owner's policy issued on another vehicle owned by the insured." *Id.* at 555, 340 S.E. 2d at 130.

Driscoll argues that the instant case does not raise the issue left open in *Crowder* because, for purposes of interpreting the USLIC policy, the relevant underinsured motorist is James Devine (the driver who struck Driscoll) and the "covered person"

referred to in Marion's policy is Jane Driscoll. Consequently, she argues, the policy provides coverage for her accident, and ownership of the car she occupied is irrelevant. We disagree. In our view, the instant case presents the precise issue left open in *Crowder* because (1) Jane Driscoll seeks underinsured motorist coverage for injuries sustained while occupying a vehicle owned by a member of her household; (2) Marion Driscoll's policy does not expressly provide coverage for this situation; and (3) the policy, like the one in *Crowder*, is modeled after N.C. Gen. Stat. Sec. 20-279.21. Thus, we turn our attention to the question whether Section 20-279.21 and Marion Driscoll's insurance policy provide underinsured motorist coverage for a covered person for injuries sustained in a household-owned vehicle not named in the policy.

III

"The avowed purpose of the Financial Responsibility Act, of which Sec. 279.21 is a part, is to compensate the innocent victims of financially irresponsible motorists." *American Tours v. Liberty Mutual Insurance Company*, 315 N.C. 341, 346, 338 S.E. 2d 92, 96 (1986). "When a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in it." *Id.* at 344, 338 S.E. 2d at 95.

The provisions of subsection (b)(3) and Marion Driscoll's policy are broad, and, at first glance, both seem to extend coverage to the insured and his family members while traveling in *any* vehicle. Like subsection (b)(3), Marion Driscoll's policy defines a "covered person" as the named insured or any "family member." A "family member" is defined further as a person related to the named insured by blood, marriage, or adoption who is a resident of the same household. To further complicate matters, the policy contains few provisions that relate specifically to underinsured motorist coverage. However, the policy's intent to limit such coverage becomes apparent when one examines the specific provisions regarding all coverages and exclusions in light of the relevant statutory provisions.

Section 20-279.21(b)(4) (Cum. Supp. 1987), which relates specifically to underinsured motorist coverage, provides that such coverage "[is] to be used only with policies that are written at limits

that exceed [the statutory minimum coverage] and that afford uninsured motorist coverage as provided by subdivision (3) . . ., in an amount equal to the policy limits for automobile bodily injury *liability* as specified in the owner's policy." (Emphasis added.) Historically underinsured motorist coverage and increased liability coverage are coterminous in North Carolina.[1] Consequently, subsection (b)(4) does not mandate underinsured motorist coverage in the absence of bodily injury liability coverage. In the instant case, Jane Driscoll would have no bodily injury liability coverage under her daughter's policy because the policy excludes medical payments coverage for damages sustained by a "family member" while occupying or struck by any vehicle (other than the insured's covered auto) owned by any "family member." Logically then, she should not receive underinsured motorist coverage.

General policy concerns support this result as well. As one insurance scholar notes, "[i]t is scarcely the purpose of any insurer to write a single UM [underinsured/uninsured motorist] coverage upon one of a number of vehicles owned by an insured, or by others in the household, and extend the benefits of such coverage gratis upon all other vehicles—any more than it would write liability, collision or comprehensive coverages upon one such vehicle and indemnify for such losses as to any other vehicle involved. Nor would any reasonable person so expect." 8C J. Appleman, *Insurance Law and Practice*, Section 5078.15 at 179.

We, therefore, hold that neither section 20-279.21 nor Marion Driscoll's USLIC policy provide underinsured motorist coverage for Jane Driscoll for injuries sustained while riding in a household-owned vehicle not named in the policy.

Judgment is affirmed.

Judges JOHNSON and GREENE concur.

1. The 1979 version and all amendments of the underinsured motorist insurance provisions have made underinsured motorist coverage available only when the policy-holder has purchased liability limits in excess of the statutory minimum, and only up to an amount equal to the liability limits. N.C. Session Laws 1979, Chapter 675; N.C. Session Laws 1983, Chapter 777; N.C. Session Laws 1985, Chapter 666, Section 74.

MARSH REALTY COMPANY, PLAINTIFF v. 2420 ROSWELL AVENUE, DEFENDANT

No. 8726SC1244

(Filed 21 June 1988)

Landlord and Tenant § 19— rent adjustment provision—interpretation—summary judgment improper

The trial court erred by granting summary judgment in an action to recover rental payments due under a lease where the lease was executed in 1965, there was a cost of living index adjustment to be applied to the base rental period in order to determine rent for years 20 to 30 of the lease, the lease failed to define base rental period, and there was a question as to whether the amount of rent for the base rental period was the rent from 1965 to 1975 ($5,000), or the rent from 1975 to 1985 ($6,000).

APPEAL by defendant from *Burroughs, Judge*. Order and Judgment entered 10 August 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 May 1988.

Plaintiff-lessor, Marsh Realty Company, instituted this action against defendant-lessee, 2420 Roswell Avenue, to recover rental payments due under a lease. The lease was executed in 1965 between Realty Syndicate, Inc., the predecessor in interest to Marsh Realty Company and Albright and Albright Investments, Inc., the predecessor in interest to 2420 Roswell Avenue. The lease was drafted by an attorney for Realty Syndicate, Inc., the original lessor. The term of the lease is 75 years and rental payments are to be determined under the lease as follows:

> 2. RENTAL: All rental payments shall be payable in advance on or before the first day of each month during the term of this Lease. The Lessee shall pay to the Lessor for the first ten (10) years of the lease term an annual rental of . . . FIVE THOUSAND DOLLARS ($5,000.00) . . ., which rental shall be paid in equal monthly installments as follows: The sum of Four Hundred Sixteen and 66/100 Dollars ($416.66) for one hundred nineteen (119) months and a final installment of Four Hundred Seventeen and 46/100 Dollars ($417.46) on the first day of the one hundred twentieth month. The Lessee shall pay to the Lessor for the second ten (10) years of the lease term an annual rental of . . . SIX THOUSAND DOLLARS ($6,000.00) . . ., which rental shall be paid in equal monthly installments of Five Hundred and

No/100 Dollars ($500.00). Beginning with the two hundred forty-first month, the annual rental and monthly installments thereof, through the three hundred sixtieth month, and for each subsequent ten (10) year period during the life of the lease, shall be determined as follows:

The Cost-of-Living Index specified by the United States Bureau of Labor Statistics, or its successor agency, shall be used at the end of each ten-year rental period after the two hundred fortieth month of the Lease term. In the event that said Cost-of-Living Index reflects an increase from *the base rental period, as hereinafter defined,* through the last day of the two hundred fortieth month of the lease term, the annual rent for the next ensuing ten-year period shall be increased by the percentage cost-of-living increase from the beginning of the base period through the said two hundred fortieth month. In the event the said Cost-of-Living Index reflects an increase from the beginning of the two hundred forty-first month of the lease term through the three hundred sixtieth month of said lease term, the annual rent for the next ensuing ten-year period shall be increased by the percentage cost-of-living increase during the said ten-year period (the two hundred forty-first month through the three hundred sixtieth month) and said percentage increase shall be applied to the effective rental in the ten-year period in which the increase took place. This same procedure of adjusting the annual rent shall be followed throughout the life of the lease at the end of each ten-year period thereafter. The annual rent for each ten-year period and the final five-year period requiring adjustment shall in no event be less than that of the preceding rental period.

For the purpose of this lease the base period cost-of-living index figure shall be the last annual percentage figure as determined and published by the Bureau of Labor Statistics prior to the signing of this Lease Agreement.

Rentals during the first year of each ten-year adjustment period are to be adjusted to reflect the increase, if any, back to the first month of the first year of said adjustment period, and said increase shall be paid in monthly install-

ments throughout the entire ten-year period in which the increase is applicable.

In the event the Bureau of Labor Statistics ceases its determination of Cost-of-Living Indexes and no successor governmental agency is appointed to make said determinations, the parties agree that another agency, private or otherwise, shall be used to make said determinations, and said agency shall be chosen by mutual agreement of the parties; if the parties cannot agree on said agency, it is understood and agreed that the agency will be selected by the Resident Judge of Superior Court for the Judicial District in which the City of Charlotte, North Carolina is located. (Emphasis added.)

Both plaintiff and defendant moved for summary judgment concerning the amount of rent due under the lease. The trial court granted plaintiff's motion and denied defendant's motion. The trial court's Order and Judgment states in pertinent part:

1. The plaintiff's motion for summary judgment be and hereby is granted. The Court hereby declares that the terms of the existing Lease signed on March 5, 1965, under which the plaintiff is lessor by assignment and the defendant is lessee by assignment, are correctly construed as a matter of law as providing that rental payments under the Lease were to begin on June 1, 1965; that the Lease was to be for a term of seventy-five years; that the defendant was to pay an annual rental in the initial amount of $5,000.00 in equal monthly installments for the first ten year period, which ended in May, 1975, and an annual rental of $6,000.00 in equal monthly installments for the second ten year period, which ended in May, 1985; that the annual rental was to be adjusted beginning June 1, 1985; that the defendant was to pay an adjusted annual rental in equal monthly installments for the third ten year period, which began on June 1, 1985; that the amount of the adjusted annual rental to be paid during the third ten year period is based on the $6,000.00 annual rental figure and is correctly calculated by determining the percentage increase in the Cost-of-Living Index from the annual figure for 1964 to the figure for May, 1985 and applying that percentage increase to the $6,000.00 annual rental figure; and that

the amount of the adjusted rental to be paid by the defendant under the Lease during the third ten year period, when correctly calculated, is $20,751.60, payable in equal monthly installments of $1,729.30.

From the Order and Judgment of the trial court, defendant appeals and plaintiff cross-assigns error.

Smith, Helms, Mulliss & Moore, by Rolly L. Chambers, for plaintiff appellee.

Ruff, Bond, Cobb, Wade & McNair, by Moses Luski, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court improperly interpreted the lease and erred in granting plaintiff's motion for summary judgment. We agree.

The provision of the lease governing rental payments attempts to provide a formula for determining rent for years twenty through seventy-five of the lease. Under the formula, the percentage increase in the Cost-of-Living Index is to be applied to the "base rental period" in order to determine rent for years twenty to thirty of the lease. The lease states that the "base rental period" is "hereinafter defined" but the definition is never given. Accordingly, there is a question whether the amount of rent for the "base rental period" is $5,000.00 (the rent from 1965 to 1975) or $6,000.00 (the rent from 1975 to 1985).

Plaintiff asserts that the "base rental period" figure is $6,000.00 while defendant argues that the "base rental period" figure is $5,000.00. Under plaintiff's calculations, it would be entitled to $20,751.60 per year from 1985 to 1995. Under defendant's calculations, plaintiff would receive only $17,293.00 per year from 1985 to 1995.

When the language of a contract is plain and unambiguous, its construction is a matter of law for the court. *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 353 S.E. 2d 269 (1987). If the language used in a contract is ambiguous and the parties' intention is unclear, the interpretation of the contract is for the jury. *Parker Mktg. Sys., Inc. v. Diagraph-Bradley Indus., Inc.*, 80 N.C. App.

177, 341 S.E. 2d 92, *disc. rev. denied*, 317 N.C. 336, 346 S.E. 2d 502 (1986).

The formula set out in the lease to determine annual rent from 1985 to 1995 is ambiguous. The lease fails to define "base rental period" which is crucial to the application of the formula. While the fairest result may have been reached, the trial court erred in granting summary judgment because an issue of fact remains concerning the amount of annual rent for 1985 to 1995.

Plaintiff cross-assigns error to the trial court's failure to consider affidavits of persons involved in negotiating the terms of the lease. We need not address plaintiff's argument because the affidavits are not properly before this Court as a part of the record on appeal.

Vacated and remanded.

Judges ORR and GREENE concur.

BURLINGTON INDUSTRIES, INC. v. RICHMOND COUNTY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, SMITH-ROWE INCORPORATED, AND JAMES W. RAYFORD COMPANY

No. 8820SC56

(Filed 21 June 1988)

Appeal and Error § 6.2— denial of motion to dismiss cross-claims—appeal interlocutory—dismissed

An appeal from the denial of a motion to dismiss defendant Richmond County's cross-claims was interlocutory and was dismissed. Under *Love v. Moore*, 305 N.C. 575, the right of immediate appeal of an adverse ruling as to jurisdiction over the person under N.C.G.S. § 1-277(b) is limited to rulings on minimum contact questions and the question here does not involve minimum contacts.

APPEAL by defendant North Carolina Department of Transportation from *John, Judge*. Order entered 19 October 1987 in Superior Court, RICHMOND County. Heard in the Court of Appeals 1 June 1988.

Burlington Industries, Inc. v. Richmond County

Richmond County (County) contracted with Burlington Industries (Burlington) to provide water services for a Burlington plant located in Richmond County. They agreed that these services would meet certain requirements specified by Burlington. The water line serving Burlington's plant was located within a North Carolina Department of Transportation (DOT) right-of-way.

On 7 January 1985 the County entered into a contract with DOT for relocation of the DOT right-of-way. Subsequently, DOT contracted with Smith-Rowe Incorporated to be general contractor for the project. The DOT and Smith-Rowe contract required that water service to the Burlington plant be interrupted only for the week of 4 July 1985. This week coincided with an anticipated shutdown of the Burlington plant so that less water service would be needed that week. Smith-Rowe subcontracted the pipe line relocation to the James W. Rayford Company.

Burlington alleged that the defendants did not relocate the water line in a timely manner and the resulting water service provided by the County did not meet its contractual requirements. Burlington claimed damages of approximately $175,000 and sued the County, DOT, Smith-Rowe, and Rayford under separate theories of breach of contract and negligent performance of contract.

In response, DOT moved to have Burlington's claim against it dismissed according to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Before the trial court ruled on DOT's motion, the County answered and filed cross-claims against DOT and the other co-defendants. The County's cross-claims against DOT requested indemnification in the event that it was found liable to Burlington. DOT then moved to dismiss the County's cross-claims pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6). Thereafter Burlington gave notice of voluntary dismissal without prejudice according to Rule 41(a) as to their claim against DOT. The trial court then denied DOT's motion to dismiss the County's cross-claims. DOT appeals.

Attorney General Thornburg, by Assistant Attorney General John F. Maddrey, for defendant-appellant North Carolina Department of Transportation.

Page, Page & Webb, by John T. Page, Jr., for defendant-appellee Richmond County.

EAGLES, Judge.

The issue here is whether the trial court properly denied DOT's motion to dismiss the County's cross-claims. For the reasons stated below we find that the trial court's order is interlocutory and, therefore, this appeal must be dismissed.

The threshold question is whether this case is properly before us. *In re Watson*, 70 N.C. App. 120, 318 S.E. 2d 544 (1984), *disc. rev. denied*, 313 N.C. 330, 327 S.E. 2d 900 (1985). An order which does not entirely dispose of the case as to all parties and issues is interlocutory. *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). Our courts will not hear appeals from interlocutory orders unless the orders affect a substantial right, *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978), which may be lost or prejudiced by exception to the order's entry. *See Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E. 2d 593 (1982). This rule promotes judicial economy by eliminating fragmentary appeals and preserves the entire case for determination in a single appeal. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E. 2d 728 (1961). Avoidance of a trial is not a substantial right. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983). G.S. 1-277(b), however, provides an exception to the general rule by allowing an "immediate appeal from an adverse ruling as to the jurisdiction of the court over the person."

DOT's motion presented three grounds for dismissal. Denial of a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is interlocutory, *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982), as is the denial of a Rule 12(b)(6) motion for failure to state a claim for which relief can be granted. *O'Neill v. Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979). Neither affects a substantial right and neither is immediately appealable. In its brief DOT correctly argues that a state agency may be sued only with the explicit or implicit consent of the State. DOT contends that the State has not authorized a tort suit to be brought against it or one of its agencies in this specific procedural manner. Therefore, DOT claims that the State's sovereign immunity precludes the County's cross-claims.

In *Teachy* our Supreme Court declined to address whether sovereign immunity was an issue of subject matter jurisdiction or personal jurisdiction. This Court has stated on several occasions

that sovereign immunity was a matter of personal jurisdiction. *Zimmer v. N.C. Dept. of Transportation*, 87 N.C. App. 132, 360 S.E. 2d 115 (1987); *Stahl-Rider v. State*, 48 N.C. App. 380, 269 S.E. 2d 217 (1980); *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E. 2d 784 (1974), *modified and affirmed*, 287 N.C. 14, 213 S.E. 2d 297 (1975). Relying on those cases, DOT argues that by operation of G.S. 1-277(b) this case is properly before us now.

We note, however, that our Supreme Court in *Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141 (1982), narrowly construed G.S. 1-277(b). The court stated that the statute "applie[d] to the state's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint." *Id.* at 580, 291 S.E. 2d at 145. The court held "that the right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [G.S. 1-277(b)], is limited to rulings on 'minimum contacts' questions." *Id.* at 581, 291 S.E. 2d at 146. The court reasoned that a narrow construction of G.S. 1-277(b) not only promoted judicial economy, but protected the rights of foreign defendants as well.

Here the question does not involve "minimum contacts." Indeed, DOT concedes that if Burlington had not brought DOT into the action as an original defendant, the County could have properly impleaded DOT as a third-party defendant pursuant to Rule 14(c). We understand DOT's position to be that DOT was brought into the case in a procedurally incorrect manner and not that the court has no authority to bring DOT into the suit at all, *Poret v. State Personnel Comm.*, 74 N.C. App. 536, 328 S.E. 2d 880, *disc. rev. denied*, 314 N.C. 117, 332 S.E. 2d 491 (1985).

The Supreme Court's narrow construction of G.S. 1-277(b) in *Love* convinces us that this is the type of procedural technicality that can be better resolved after a full and complete adjudication of the case. Moreover, Rule 21 of the North Carolina Rules of Civil Procedure reinforces this belief. In part, Rule 21 provides that

> [n]either 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.

[Emphasis added.] Given the pleadings facing it, the County had no choice but to denominate its indemnification claim against DOT as a cross-claim.

Based upon our longstanding precedent against fragmentary appeals and the narrow construction of G.S. 1-277(b) mandated by *Love*, we hold that this appeal is interlocutory and must be dismissed.

Dismissed.

Judges ORR and SMITH concur.

DEBORAH BRADLEY, AND HUSBAND BOBBY BRADLEY v. WACHOVIA BANK & TRUST COMPANY, N.A., EXECUTOR OF THE ESTATE OF DAN W. FOSTER

No. 8728SC1033

(Filed 21 June 1988)

Landlord and Tenant § 8; Negligence § 50.1— fire in rental property—liability of landlord for loss of personal property

The trial court properly granted summary judgment for defendant in an action for money damages for loss of personal property resulting from the burning of the house which plaintiffs rented from defendant where the forecast of evidence showed that wooden beams extending into the chimney had been in place since the construction of the house in 1900; the beams were neither readily detectable from inside the house nor when looking up through the chimney; and there had been no previous indications of problems with the chimney despite years of use of woodstoves by plaintiffs and the previous lessees. The lessor was required only to use reasonable care in the inspection and maintenance of the leased property and was not required to tear down walls for the purposes of inspection without notice or any suggestion of a defective condition. N.C.G.S. § 42-42.

APPEAL by plaintiffs from *Lewis, Robert D., Judge.* Judgment entered 22 September 1987 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 11 April 1988.

Plaintiff lessees brought this action for negligent failure to repair seeking money damages for the loss of personal property resulting from the 21 December 1985 fire which occurred in the house rented by plaintiffs from defendant. Plaintiffs alleged the

fire was caused by the burning of wooden beams which extended into the chimney flue.

In their complaint, filed 4 May 1987, plaintiffs named as defendant Wachovia Bank & Trust Company, N.A., executor of the Dan W. Foster estate which owned and leased the house to plaintiffs. Defendant Bank timely filed an answer and moved for summary judgment on 21 August 1987. Having before it the parties' pleadings, affidavits and depositions, the trial court granted defendant's summary judgment motion by order dated 22 September 1987. In its order, the trial court stated that plaintiffs' evidence failed to show negligence on the part of defendant and "affirmatively show[ed] contributory negligence on the part of the plaintiff."

Plaintiffs appealed from the trial court's grant of summary judgment.

Reynolds & Stewart, by G. Crawford Rippy, III, for plaintiffs-appellants.

Roberts Stevens & Cogburn, P.A., by Frank P. Graham and Glenn S. Gentry, for defendant-appellee.

WELLS, Judge.

By their first assignment of error, plaintiffs contend that the trial court erred in granting summary judgment because the forecast of evidence showed there existed a genuine issue of material fact as to the cause of the house fire and because defendant was not entitled to judgment as a matter of law. We disagree.

On appeal from an order granting summary judgment, we must review the pleadings, affidavits and all other materials produced by the parties at the summary judgment hearing to determine whether there existed any genuine issue of fact and whether one party was entitled to judgment as a matter of law. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). "The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. The materials offered to support his motion are meticulously scrutinized and all inferences are resolved against him." *Boyce v. Meade*, 71 N.C. App. 592, 322 S.E. 2d 605 (1984). The materials of the nonmovant are indulgently regarded. *Town of West Jefferson v. Edwards*, 74 N.C. App. 377, 329 S.E.

2d 407 (1985). Having reviewed the record and briefs, we conclude that although the cause of the fire is not altogether clear, there are sufficient material facts not in dispute to determine that defendant Bank as lessor was entitled to judgment as a matter of law.

The forecast of the evidence tended to show the following:

On 15 October 1985, plaintiff Deborah Bradley signed a month-to-month residential rental lease with defendant Bank through its rental agent Booth-Barfield. Plaintiffs took possession of the leased premises on 20 October 1985. The house, owned by the Dan W. Foster estate for which defendant Bank was executor, was an 85-year-old wood frame house with two chimneys.

The lessees, who occupied the house immediately before plaintiffs, had heated the house by means of a woodstove connected to one of the chimney flues. Plaintiffs had likewise connected to the same chimney a wood-burning Buck stove with a metal exhaust pipe extending into the flue. Plaintiffs did not inspect the flue before installing the stovepipe. Despite several years of use by the previous tenants and the plaintiffs, there had never been any indication of an unsafe condition with respect to the chimney or the flue.

On or about 1 April 1985, defendant's agents inspected the house but did not do so again before the fire. Defendant's agents did not then inspect the chimney or the flue.

The chimney in which the woodstove was installed was covered on the interior of the house so that the wooden beams could not be readily detected. Plaintiff Bobby Bradley stated in his deposition with respect to the wooden beams: "You'd have never been able to see it [the beam], . . . If there hadn't have been light [light provided after fire burned down all but the chimney], if there hadn't have been the holes in the flue, I don't believe you could have seen them."

On the evening before the fire, plaintiffs prepared a fire in the woodstove as usual and left town. The family Christmas tree had been left standing in front of the stove. The next morning, 21 December 1985, the house burned. Plaintiffs lost all of their furnishings and an automobile.

An inspection of the burned debris both by plaintiffs and the West Buncombe Fire Department suggested that the fire had been caused by the ignition of wooden beams which had been installed in the chimney when the house was built in 1900. The ends of the beams were charred from fire damage.

Plaintiffs contend that N.C. Gen. Stat. § 42-42 of the "Residential Rental Agreements Act" imposes upon defendant as lessor a duty to maintain the flue and the chimney in a safe condition. Citing our decisions in *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 284 S.E. 2d 702 (1981) and *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982), plaintiffs argue that defendant lessor was required to maintain the premises in a fit and habitable condition which includes the duty to make safe any defective conditions on the premises. Failure to so maintain the premises or correct defective conditions, claim plaintiffs, constitutes a violation of G.S. § 42-42 thereby giving rise to evidence of negligence on the part of defendant. *Brooks v. Francis, supra.* Plaintiffs, however, have misapplied the law set forth in those decisions.

In both *Lenz* and *Brooks*, we held the defendant landlords liable for failing to repair or make safe defective conditions *of which they were aware or should have been aware.* In *Lenz*, defendant lessor was held liable for failing to clear an icy sidewalk on which plaintiff lessee fell suffering injuries. The liability we recognized in *Brooks* was defendant lessor's failure to repair rotting wood in the back porch of the demised premises, of which plaintiff lessee had previously complained several times.

Moreover, it is well settled that a landlord has a duty to warn of or repair latent defects only when he knows or should by reasonable inspection know of their existence. *See Robinson v. Thomas*, 244 N.C. 732, 94 S.E. 2d 911 (1956). G.S. § 42-42, in requiring the provision of a fit and habitable premises, does not abrogate this rule.

As we have made clear in *Brooks* and *Lenz*, a violation of G.S. § 42-42 amounts to evidence of negligence, not negligence *per se*, and as such requires the application of common law principles of negligence to determine a landlord's liability. In the present case, the forecast of evidence showed that the wooden beams which extended into the chimney had been in place since the con-

struction of the house in 1900. The beams were neither readily detectable from inside the house nor on inspection when looking up through the chimney. Further, there had been no previous indications of problems with the chimney despite years of use with woodstoves by plaintiffs and the previous lessees. Under general principles of negligence, the lessor is required only to use reasonable care in the inspection and maintenance of leased property. *Robinson, supra.* This standard did not impose upon defendant the duty to tear down walls for purposes of inspection without notice or any suggestion of a defective condition. We therefore hold that defendant was entitled to judgment as a matter of law and affirm the trial court's grant of summary judgment. Having decided the case on the basis of plaintiff's first assignment of error, we need not reach their second assignment of error regarding the trial court's finding plaintiffs contributorily negligent.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

TEDDY GLENN POLLARD v. EUGENE PADEN SMITH, AND EUGENE PADEN SMITH, ADMINISTRATOR OF THE ESTATE OF MARGARET ELIZABETH SMITH

No. 873SC788

(Filed 21 June 1988)

Subrogation § 1; Master and Servant § 89.4— injury to highway patrolman—settlement with third party—distribution of settlement proceeds

In an action in which a highway patrolman was injured and received $17,000 from the Department of Crime Control and Public Safety for lost time and medical expenses, the trial court did not err by disbursing the entire $25,000 settlement between the patrolman and defendant to the patrolman and giving the Department nothing on its subrogation interest. N.C.G.S. § 97-10.2(j) clearly provides for a different standard of disbursement for cases before the Superior Court than for cases before the Industrial Commission and gives the trial judge unbridled discretion to order the distribution of settlement proceeds as he deems equitable, notwithstanding the provisions of N.C.G.S. § 97-10.2(f). Furthermore, N.C.G.S. § 97-10.2(j) makes no provision for notice to the employer or the insurance carrier, and there was no error in conducting the hearing on disbursement of proceeds without giving notice and an opportunity to be heard to the Department.

Pollard v. Smith

APPEAL by North Carolina Department of Crime Control and Public Safety from *Phillips, Judge*. Order entered 18 May 1987 in Superior Court, CARTERET County. Heard in the Court of Appeals 7 January 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for appellant.

Marvin Blount, Jr., and Albert Charles Ellis for plaintiff appellee.

COZORT, Judge.

In March of 1985, the plaintiff, a highway patrolman employed by the North Carolina Department of Crime Control and Public Safety (the Department), was injured in an automobile accident in which Margaret Elizabeth Smith was killed. The Department paid approximately $17,000.00 for lost time and medical expenses.

In April of 1985, plaintiff sued the defendant administrator of the estate of Margaret Smith, alleging that the negligence of Margaret Smith was the proximate cause of the injuries suffered by plaintiff in the collision. In his answer, defendant denied negligence and counterclaimed. In September of 1986, the Department notified plaintiff's counsel of the Department's subrogation interest for the $17,000.00 paid in benefits. In May of 1987, plaintiff's case was calendared for trial and counsel for plaintiff and defendant executed an Order on Pre-Trial Conference. Shortly thereafter, on or about 18 May 1987, plaintiff petitioned the court for disbursement of settlement funds pursuant to N.C. Gen. Stat. § 97-10.2(j), notifying the court in said petition that plaintiff and defendant had agreed to settle plaintiff's action by defendant's paying to plaintiff $25,000.00. On 18 May 1987, after a hearing, the trial court entered an order disbursing the entire $25,000.00 to plaintiff, giving the Department nothing on its subrogation interest. The Department did not receive notice of the hearing and was not present. The Department appealed.

This case is controlled by N.C. Gen. Stat. § 97-10.2, the section of the Workers' Compensation Act which sets forth the rights and interests of the employee, the employer, and the employer's insurance carrier, if any, when there is a cause of action

for damages against a third party. The Department contends that distribution of the settlement proceeds in the case below is governed by § 97-10.2(f) which sets the order of priority for disbursement by the *Industrial Commission* under certain conditions:

> (f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> a. First to the payment of actual court costs taxed by judgment.
>
> b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of § 90 of this Chapter [G.S. 97-90] but shall not exceed one third of the amount obtained or recovered of the third party.
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.
>
> d. Fourth to the payment of any amount remaining to the employee or his personal representative.

If the trial court below had followed the order of priority set forth in § 97-10.2(f), the Department would have been compensated for the benefits it paid to plaintiff.

Plaintiff contends that the trial court was correct in not following the priority order in subsection (f). Plaintiff contends the controlling statute is § 97-10.2(j), which reads:

> (j) 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.

Plaintiff contends in his brief that subsection (j) gives the trial judge "unbridled discretion to order the distribution of settlement proceeds as he deems equitable, notwithstanding the provisions of subsection (f)." If subsection (j) is not read that way, plaintiff argues, then it would serve absolutely no purpose. We agree with plaintiff's contention and affirm the trial court's order.

Subsection (j) is clear and unambiguous, and must be given effect. Judicial interpretation of a statute is inappropriate when the Legislature has made clear its intent. *Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 226, 166 S.E. 2d 671, 679 (1969). The section clearly provides for a different standard for disbursement when the case is before the Superior Court than that for cases before the Industrial Commission. When the General Assembly added subsection (j), it made no reference to subsection (f).

When the General Assembly amends an existing statute, as opposed to merely clarifying existing law, a presumption arises that the Legislature intended to change existing law by creating or taking away rights or duties. *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E. 2d 481, 483 (1968).

We realize that subsection (j) allows plaintiff a double recovery at the expense of the employer or carrier, in the discretion of the Superior Court judge. Nonetheless, since the language is clear and unambiguous, we must hold that the Legislature intended this possible result.

The Department also contends that it was error for the trial court to conduct the hearing without giving notice and an opportunity to be heard to the Department. We find no merit to this argument.

Subsection (j) makes no provision for notice to the employer or the insurance carrier. If the General Assembly had intended for the employer to receive notice of the hearing, it could have made provisions for it. For example, in subsection (c), the Legislature preserved the right of the employer to proceed against the third party when the employee has not done so. Subsection (d) preserves the right of the employer to pursue the action when the employee is uncooperative. Subsection (e) gives the employer the right to appear fully in the cause if the third party alleges joint and concurrent negligence of the employer. Subsection (j) makes no such provision, and we must read the omission as being intentional.

The order of the trial court is

Affirmed.

Judges PARKER and GREENE concur.

JOYCE SMITH, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF EURA STYRON MEADS, PLAINTIFF v. MICHAEL W. SCHRAFFENBERGER, DEFENDANT

No. 873SC1085

(Filed 21 June 1988)

Process §§ 16.1; 3.1— automobile accident—nonresident defendant—service of process

The trial court properly denied defendant's motion to dismiss a wrongful death action arising from an automobile accident for lack of jurisdiction over the person, insufficiency of service of process and insufficiency of process where plaintiff and plaintiff's intestate were residents of Virginia and defendant was a resident of Florida; a summons was issued to the Commissioner of Motor Vehicles pursuant to N.C.G.S. § 1-105; plaintiff's attorney subsequently learned that defendant was in Carteret County visiting his sister; and defendant was personally served with an alias and pluries summons and a copy of the complaint. The initial summons was not fatally defective in that it was directed to the Commissioner of Motor Vehicles and not to defendant because defendant's name and address appeared both in the caption of the case and in the accompanying complaint, so that there was no possibility of misunderstanding as to the true defendant, and the alias and pluries summons related back to the date of the original summons and was therefore timely filed since the original summons was properly issued to defendant. N.C.G.S. § 1A-1, Rule 4(b). N.C.G.S. § 1-75.4(1)(a).

APPEAL by defendant from *Phillips (Herbert O.), Judge.* Order entered 4 September 1987 in Superior Court, CARTERET County. Heard in the Court of Appeals 2 May 1988.

Wheatly, Wheatly, Nobles & Weeks by Stevenson L. Weeks for plaintiff appellee.

Stith and Stith by F. Blackwell Stith and Susan H. McIntyre for defendant appellant.

COZORT, Judge.

Defendant appeals the denial of his motions to dismiss for lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process pursuant to Rules 12(b)(2), (4), and (5), respectively, of the North Carolina Rules of Civil Procedure. We affirm.

On 20 July 1985, plaintiff and plaintiff's intestate were traveling on Highway 70 in Carteret County when they were involved in an accident with an automobile which was owned and operated by defendant. On 26 June 1987, plaintiff instituted a wrongful death action against defendant by filing a complaint in Carteret County. The complaint alleged that plaintiff and plaintiff's intestate were residents of Virginia and that defendant was a resident of Florida. At the time the complaint was filed, a summons was issued upon the Commissioner of Motor Vehicles pursuant to N.C. Gen. Stat. § 1-105 [service upon nonresident drivers of motor vehicles].

On 7 July 1987, plaintiff's attorney learned that defendant was in Carteret County visiting his sister. The next day defendant was personally served with an alias and pluries summons and a copy of the complaint by a Deputy Sheriff of Carteret County.

Defendant's answer denied the allegations of the complaint and included motions to dismiss for lack of jurisdiction over the person, for insufficiency of process, and for insufficiency of service of process, pursuant to Rules 12(b)(2), (4), and (5) of the North Carolina Rules of Civil Procedure. From the trial court's denial of these motions, defendant appeals.

The defendant's sole assignment of error on appeal is that the trial court erred in denying his motions to dismiss. We disagree.

"In order for the court to exercise personal jurisdiction over a defendant, the grounds for same must exist in accordance with G.S. 1-75.4 and the defendant must be given notice by service of process in accordance with the provisions of Rule 4(j)." W. Shuford, N.C. Civil Practice and Procedure § 4-9 (1981).

N.C. Gen. Stat. § 1-75.4 provides in part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> * * * *
>
> (3) Local Act or Omission.—In an action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

N.C. Gen. Stat. § 1A-1, Rule 4(j) provides in part:

> (j) *Process—Manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> (1) Natural Person.—Except as provided in subsection (2) below, upon a natural person:
>
> 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 . . . .

However, in suits involving nonresident drivers of motor vehicles, service upon the nonresident driver may be accomplished by personal service pursuant to Rule 4(j) or by service upon the Commissioner of Motor Vehicles under N.C. Gen. Stat. § 1-105.

This statute provides that in any action for damages against a nonresident which arises from his operation of a motor vehicle upon the public highways of this State, summons may be served upon the nonresident by leaving a copy thereof with the Commissioner of Motor Vehicles and transmitting a copy to the defendant by registered mail.

In the case at bar, defendant was initially served with process pursuant to N.C. Gen. Stat. § 1-105. On 26 June 1987, a complaint was filed and a summons was issued directed to the Commissioner of Motor Vehicles. Defendant contends that because the summons was directed to the Commissioner of Motor Vehicles and not to him that it was fatally defective, as N.C. Gen. Stat. § 1A-1, Rule 4(b) requires that the summons "be directed to the defendant or defendants." This Court rejected that same argument in *Humphrey v. Sinnott*, 84 N.C. App. 263, 352 S.E. 2d 443 (1987). The court stated that, "[a]lthough the summons was directed to the Commissioner of Motor Vehicles, it was clearly done so in his representative capacity as process agent for defendant." *Id.* at 266, 352 S.E. 2d at 446. The court also stated that there was no possibility of confusion as to whom the true defendant was in that case because (1) the defendant's name and address were listed immediately below the name of the Commissioner of Motor Vehicles, (2) the defendant's name clearly appeared in the caption of the case, and (3) the defendant was clearly referred to in the accompanying complaint. The court then stated that, "[w]hile G.S. 1-105 must be strictly construed because it is in derogation of the common law, where, as here, the possibility of confusion among people of ordinary intelligence is virtually impossible, . . . the summons should not be found invalid simply because of technical mistakes or poor wording." *Id.* at 267, 352 S.E. 2d at 446.

In the case below, defendant's name and address were listed directly under the Commissioner of Motor Vehicles. In addition, the defendant's name appeared both in the caption of the case and in the accompanying complaint. We hold that there was no possibility of misunderstanding as to who the true defendant was and that the defendant was properly brought within the trial court's jurisdiction.

After service of process had been sought under N.C. Gen. Stat. § 1-105, defendant was discovered visiting his sister in

Carteret County. On 8 July 1985, defendant was personally served with an alias and pluries summons and a copy of the complaint by a Carteret County Deputy Sheriff, pursuant to N.C. Gen. Stat. § 1-75.4(1)(a). This statute allows a court of this State to exercise *in personam* jurisdiction over a person served pursuant to Rule 4(j) or Rule 4(j1) of the North Carolina Rules of Civil Procedure:

> [i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> a. Is a natural person present within this State . . . .

N.C. Gen. Stat. § 1-75.4(1)(a) (1983). Defendant contends that this summons was not timely issued because it was not issued within five days of the filing of the complaint as required by N.C. Gen. Stat. § 1A-1, Rule 4(a); and it could not relate back to the original summons because it was issued on a different person. Defendant contends that, because the original summons was directed to the Commissioner of Motor Vehicles and the alias and pluries summons was directed to him, it was issued against a different person. Having already determined that the original summons was properly issued to defendant, we hold that the alias and pluries summons related back to the date the original summons was issued and therefore was timely filed.

We hold that the trial court's denial of defendant's motions to dismiss should be affirmed.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

Hageman v. Twin City Chrysler-Plymouth

BRUCE G. HAGEMAN, PLAINTIFF v. TWIN CITY CHRYSLER-PLYMOUTH, INC., DEFENDANT

No. 8721SC1239

(Filed 21 June 1988)

Consumer Credit § 1— violation of Fair Credit Reporting Act—directed verdict for defendant proper

The trial court did not err in an action for violation of the Fair Credit Reporting Act by granting a directed verdict for defendant automobile dealer where plaintiff's wife signed an automobile lease agreement with defendant; defendant's fleet manager prepared a credit application to be submitted to Chrysler Credit Corporation; the fleet manager asked plaintiff's wife for information about plaintiff and plaintiff's wife gave plaintiff's name but advised the fleet manager that plaintiff had nothing to do with the lease agreement or the credit application; the fleet manager telephoned a call-in application to Chrysler Credit Corporation, which ran a credit investigation on plaintiff's wife; a Chrysler Credit Corporation employee telephoned the fleet manager to advise him that plaintiff's wife's credit application had been denied; the fleet manager and the Chrysler Credit Corporation employee agreed to determine if credit could be established for plaintiff; Chrysler Credit Corporation did a credit investigation of plaintiff, including obtaining a consumer credit report from the Credit Bureau of Winston-Salem; and the Chrysler Credit Corporation rejected plaintiff's credit and advised defendant of the rejection. The FCRA requires that users of consumer information refrain from obtaining consumer credit information from credit reporting agencies under false pretense; however, defendant makes no credit determination, does not use or even see the consumer credit information gathered, and is not a user of consumer information within the meaning of the FCRA.

APPEAL by plaintiff from *Washington, Edward K., Judge.* Order entered 29 July 1987 in FORSYTH County Superior Court. Heard in the Court of Appeals 4 May 1988.

Plaintiff brought this suit pursuant to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*,[1] claiming that defendant Twin City Chrysler-Plymouth, Inc. (Twin City) (1) obtained credit information on him under false pretenses in violation of § 1681q, and (2) invaded his right of privacy. Before trial the trial court allowed defendant's motion for summary judgment as to the action for invasion of privacy, but denied summary judgment on the FCRA claim. Plaintiff does not appeal the dismissal of his invasion of privacy claim.

1. Concurrent jurisdictional authority is granted to state courts per § 1681p.

The evidence presented at trial established the following facts: On the morning of 30 November 1984, plaintiff's wife, Bonnie Hageman, signed (1) an automobile lease agreement with defendant for a new Chrysler LeBaron convertible, and (2) a credit application to be submitted to Chrysler Credit Corporation (CCC) for the purpose of having the lease financed. Jim Leonard, defendant's fleet manager, prepared the credit application. Mr. Leonard asked Mrs. Hageman for information about her husband, plaintiff herein. Mrs. Hageman gave her husband's name but advised Mr. Leonard that Mr. Hageman had nothing to do with the lease agreement or the credit application. Mr. Leonard telephoned a "call-in" credit application to CCC, which ran a credit investigation on Mrs. Hageman. At 11:15 a.m. on 30 November, Faye Trammell, an employee of CCC, telephoned Mr. Leonard and advised him that Mrs. Hageman's credit application had been denied. Mr. Leonard and Mrs. Trammell then agreed to determine if credit could be established based on Mr. Hageman. CCC did a credit investigation of plaintiff, including obtaining a consumer credit report from the Credit Bureau of Winston-Salem. Based on the information obtained, CCC also rejected plaintiff's credit, advised defendant of the rejection, and forwarded to plaintiff and his wife a Chrysler Credit Notice of Adverse Action letter dated 30 November 1984.

At trial plaintiff sought to establish that he had not been an applicant for credit with defendant or CCC, had not authorized a credit application on his behalf, and that the credit inquiry was unlawfully initiated by defendant, causing him humiliation, embarrassment, and emotional distress. At the close of plaintiff's evidence, the trial court allowed defendant's motion for a directed verdict.

Badgett, Calaway, Phillips, Davis, Stephens & Peed, by Herman L. Stephens, for plaintiff-appellant.

Petree Stockton & Robinson, by Steve M. Pharr and G. Gray Wilson, for defendant-appellee.

WELLS, Judge.

A motion for a directed verdict presents the question of whether the evidence, considered in the light most favorable to plaintiff, will justify a verdict in defendant's favor. *Snow v.*

Power Co., 297 N.C. 591, 256 S.E. 2d 227 (1979). Defendant argued at the close of trial, and contends now in his brief, that plaintiff's evidence failed to establish any actionable claim or violation of the FCRA as a matter of law. We agree.

The main bulk of FCRA requirements are imposed on consumer reporting agencies, and only four sections of the Act place requirements on persons who are not consumer reporting agencies: §§ 1681d, 1681m, 1681q and 1681r. *Rice v. Montgomery Ward & Co., Inc.*, 450 F. Supp. 668 (M.D.N.C. 1978). Plaintiff in the present case alleges a violation of § 1681q, which provides as follows:

> Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both.[2]

It has been held that § 1681q requires that "users of consumer information" refrain from obtaining consumer credit information from credit reporting agencies under false pretense. *Hansen v. Morgan*, 582 F. 2d 1214 (9th Cir. 1978). A violation of § 1681q forms a basis of liability under either § 1681n or § 1681o. *Id.* Thus, § 1681q makes "users of consumer information" amenable to civil suit. Plaintiff in the present case contends that defendant is a "user" within the meaning of the FCRA because, by taking and transmitting to CCC a credit application, it caused CCC to obtain a consumer credit report to use for the purpose of making a credit determination that benefitted defendant by financing the latter's customers. However, we hold that defendant was not a "user" within the meaning of the FCRA.

A "user" is one who obtains consumer credit information from a consumer reporting agency for the purpose of making some determination, typically in order to decide whether to advance credit. In the present case, the Credit Bureau of Winston-Salem was the consumer reporting agency, and CCC was the "user." It was CCC who solicited and obtained information for the purpose of determining whether to extend credit to plaintiff. De-

2. Under § 1681a, a "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

fendant Twin City sells and leases cars. As a service to its customers and in order to assist them in securing financing, defendant frequently forwards credit applications to entities such as CCC. However, defendant Twin City makes no credit determination. It does not use, or even see, the consumer credit information gathered. Since defendant is not a "user" of consumer information within the meaning of the FCRA, it is not liable as a "user" under § 1681q of the Act.

We find support for our decision in *Rush v. Macy's New York, Inc.*, 775 F. 2d 1554 (11th Cir. 1985). In that case, Macy's furnished information to Credit Bureau, Inc., a consumer reporting agency. On the basis of the information supplied, Credit Bureau gave plaintiff the lowest possible credit rating, and plaintiff sued both Macy's and Credit Bureau. The court held that a department store which did no more than furnish information to a credit reporting agency is not a "user" of credit information within the meaning of the FCRA. *Id.* By analogy, an automobile dealer that merely transmits credit applications to a third party is also not a "user" under the Act.

No error.

Chief Judge HEDRICK and Judge COZORT concur.

MARY ANN EPPS, PLAINTIFF-APPELLEE v. FLOYD DALE EWERS, DEFENDANT-APPELLANT

No. 887SC90

(Filed 21 June 1988)

1. Attorneys at Law § 7.5— settlement close to defendant's original proposal—award of attorney's fees—no abuse of discretion

The trial court did not abuse its discretion in an action arising from an automobile accident by awarding attorney's fees to plaintiff where plaintiff's counsel had made an initial demand for $15,000, rejected an offer of $4,630.55, filed this action, and settled for $6,501. The amount of the final settlement is irrelevant, and there is nothing in the record to suggest that plaintiff or her counsel were guilty of bad faith in conducting the settlement negotiations.

2. Attorneys at Law §§ 7.1, 7.5— attorney's fees as costs—contingent fee contract—findings insufficient

The trial court's findings were not sufficient to support an award of attorney's fees under N.C.G.S. § 6-21.1 where the court found that plaintiff's attorney provided good and valuable services, that the reasonable value of the services was $2,000, and that plaintiff's fee contract with her attorney provided for a contingent fee of one-third the damage award. The amount of the award must be supported by some finding as to the quality and quantity of services rendered by plaintiff's counsel with the amount of the fee based upon the actual work performed by the attorney. A contingent fee contract does not control the court's determination.

APPEAL by defendant from *Phillips (Herbert O., III), Judge.* Order entered 31 August 1987 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 2 June 1988.

Plaintiff instituted this action to recover for personal injuries she suffered in an automobile accident. Plaintiff's complaint alleged damages in excess of $10,000.00. After defendant filed an answer, plaintiff accepted defendant's offer of judgment in the amount of $6,501.00, but plaintiff's motion for attorney's fees pursuant to G.S. 6-21.1 was reserved for hearing at a later date. After a hearing on the matter, the trial court entered an order awarding plaintiff attorney's fees in the amount of $2,000.00. From this order, defendant appeals.

Moore, Diedrick, Carlisle and Hester, by Sam Q. Carlisle, II, for plaintiff-appellee.

Battle, Winslow, Scott and Wiley, P.A., by J. Brian Scott and M. Greg Crumpler, for defendant-appellant.

PARKER, Judge.

Defendant brings forward two assignments of error regarding the trial court's award of attorney's fees to plaintiff. First, defendant contends that the trial court abused its discretion in awarding attorney's fees under the facts of this case. Second, defendant contends that the trial court's findings of fact are not sufficient to support the award.

By statute, the trial court has the discretion to award reasonable attorney's fees in any personal injury suit where damages are recovered in an amount of $10,000.00 or less. G.S. 6-21.1. Attorney's fees may be awarded pursuant to G.S. 6-21.1 even when

the damages are recovered by settlement prior to trial. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973). The award will not be overturned absent a showing that the trial court abused its discretion. *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E. 2d 302, 309 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E. 2d 221 (1983).

[1] Defendant contends that plaintiff's conduct in this case required the trial court to deny her motion for attorney's fees. In opposition to plaintiff's motion, defendant submitted the uncontradicted affidavit of the claims supervisor for defendant's insurance carrier. The claims supervisor averred that, before this action was filed, plaintiff's counsel made a written demand on defendant's insurer for $15,000.00, the claims supervisor then made a counterproposal of $4,630.55, and plaintiff's counsel rejected the counterproposal and filed this action. Defendant argues that, because the final settlement amount of $6,501.00 was reasonably close to the amount of the counterproposal, plaintiff's rejection of the counterproposal was unreasonable and precludes her from obtaining an award of attorney's fees.

Defendant's argument is without merit. There is nothing in the record to indicate that plaintiff or her counsel were guilty of bad faith in conducting the settlement negotiations. The amount of the final settlement is irrelevant. This Court has affirmed an award of attorney's fees under G.S. 6-21.1 where the accepted offer of judgment was for an amount less than the insurer's original offer. *Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 343-44, 276 S.E. 2d 496, 498-99, *disc. rev. denied*, 303 N.C. 320, 281 S.E. 2d 660 (1981). Defendant's reliance on *Harrison v. Herbin*, 35 N.C. App. 259, 241 S.E. 2d 108, *cert. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978) is misplaced. In *Harrison*, the Court merely held that the trial court had discretion to deny a motion for attorney's fees where it appeared that the plaintiff had rejected a reasonable settlement offer and forced the defendant to go to trial. *Id.* Defendant here has failed to show that the trial court abused its discretion, and the assignment of error is overruled.

[2] Defendant next contends that the trial court's findings of fact were insufficient to support the award. Because G.S. 6-21.1 defines the circumstances under which attorney's fees may be awarded, the trial court is not required to make specific findings

as to the plaintiff's entitlement to such an award. *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E. 2d 168, 170, *cert. denied*, 288 N.C. 240, 217 S.E. 2d 664 (1975). At a minimum, however, the amount of the award must be supported by some findings as to the quality and quantity of services rendered by plaintiff's counsel. *Id.; see also Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E. 2d 120, 125-26 (1987) (attorney's fees pursuant to G.S. 75-16.1).

In this case, the only findings of fact in support of the amount of the award are that plaintiff's attorney "provided good and valuable services"; that the reasonable value of the services provided by plaintiff's attorney is $2,000.00; and that plaintiff's fee contract with her attorney provided for a contingent fee of one-third of the damage award. We agree with defendant that these findings are not sufficient to support the award.

Except for the finding as to the fee contract, the trial court's findings are conclusory and clearly inadequate to support the award. The trial court may properly consider the customary fee for similar work and whether the fee is fixed or contingent when determining the amount of a statutory award of attorney's fees. *Redevelopment Comm. v. Hyder*, 20 N.C. App. 241, 245-46, 201 S.E. 2d 236, 239 (1973). This Court has twice held, however, that a contingent fee contract does not control the trial court's determination and, when a statute provides for a "reasonable" fee, the amount of the fee should be based upon the actual work performed by the attorney. *Bandy v. City of Charlotte*, 72 N.C. App. 604, 608-09, 325 S.E. 2d 17, 20-21, *disc. rev. denied*, 313 N.C. 596, 330 S.E. 2d 605 (1985); *Redevelopment Comm. v. Hyder, supra.*

The trial court in this case made no findings regarding the actual work performed by plaintiff's attorney. Accordingly, the award of attorney's fees is vacated and the case remanded for findings of fact to determine reasonable attorney's fees.

Vacated and remanded.

Judges JOHNSON and COZORT concur.

TRADEWINDS CAMPGROUND, INC. v. TOWN OF ATLANTIC BEACH

No. 883SC101

(Filed 21 June 1988)

Eminent Domain § 1— action for injunctive relief to prevent condemnation—adequate remedy at law—judgment on the pleadings

Judgment on the pleadings was properly granted for defendant in an action in which plaintiff sought injunctive relief to prevent condemnation of its property where plaintiff had an adequate remedy at law. N.C.G.S. § 40A-45, N.C.G.S. § 40A-42(a).

APPEAL by plaintiff from *Freeman, Judge*. Judgment entered 10 September 1987 in Superior Court, CARTERET County. Heard in the Court of Appeals 2 June 1988.

Bobby J. Stricklin for plaintiff appellant.

L. Patten Mason for defendant appellee.

COZORT, Judge.

Plaintiff initiated this action to enjoin defendant's condemnation of plaintiff's property. From a judgment on the pleadings in defendant's favor, plaintiff appeals. We affirm.

On 13 July 1987, defendant informed plaintiff by letter that it intended to condemn plaintiff's ownership interest in New Bern Way, a street located within the Town of Atlantic Beach. On 17 August 1987, defendant filed its complaint in the condemnation action against plaintiff. On 3 September 1987, before it answered defendant's complaint, plaintiff filed the present action for injunctive relief to prevent defendant from condemning its property. Defendant never filed an answer to this complaint but filed a motion to dismiss under Rule 12(b)(6), or, in the alternative, a motion for judgment on the pleadings under Rule 12(c).

After reviewing the file and hearing the arguments of counsel, the trial court granted judgment on the pleadings on the grounds that the relief sought by plaintiff could be raised in an answer to defendant's condemnation suit. The trial court then dismissed the action with prejudice and plaintiff appealed.

Plaintiff's sole assignment of error on appeal is that the trial court erred in granting defendant's motion for judgment on the pleadings and in dismissing its claim with prejudice. We disagree.

A motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) should only be granted when " 'the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. In considering a motion for judgment on the pleadings, the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.' " *Trust Co. v. Elzey*, 26 N.C. App. 29, 32, 214 S.E. 2d 800, 802 (citation omitted), *cert. denied*, 288 N.C. 252, 217 S.E. 2d 662 (1975).

N.C. Gen. Stat. § 40A-42(a) provides in part:

> Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41.

Plaintiff argues that this section grants it a statutory right to bring an action for injunctive relief to bar the condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant. In *Yandle v. Mecklenburg Co. and Mecklenburg Co. v. Town of Matthews*, 85 N.C. App. 382, 355 S.E. 2d 216, *disc. rev. denied*, 320 N.C. 798, 361 S.E. 2d 91 (1987), this Court held that a landowner cannot invoke the aid of a court of equity to enjoin a public condemnor from condemning their land for a public purpose if the landowner has an adequate remedy at law. *Id.* at 389-90, 355 S.E. 2d at 221.

In the case below plaintiff has an adequate remedy at law pursuant to N.C. Gen. Stat. § 40A-45 which provides in part:

> (a) Any person whose property has been taken by the condemnor by the filing of a complaint containing a declaration of taking, may . . . file an answer to the complaint. . . . Said answer shall contain the following:
>
> * * * *

(3) Such affirmative defenses or matters as are pertinent to the action . . . .

On 14 December 1987, plaintiff filed an answer to defendant's complaint for condemnation in which it asserted every claim and defense it made against defendant in the present action. Since plaintiff had an adequate remedy at law, it was not entitled to injunctive relief; and judgment on the pleadings was appropriately entered for defendant.

The judgment of the trial court is

Affirmed.

Judges JOHNSON and PARKER concur.

JACK BEHAR AND RITA BEHAR v. TOYOTA OF FAYETTEVILLE, INC. AND SANDTANA INDUSTRIES, INC.

No. 8812SC42

(Filed 21 June 1988)

Appeal and Error § 14; Rules of Civil Procedure § 58— timeliness of notice of appeal—time of entry of judgment—remand for determination

A breach of warranty action is remanded for a determination as to when judgment was entered and whether defendants gave notice of appeal within 10 days after entry of the judgment where the record shows that the jury returned a verdict on 8 May awarding plaintiffs $22,900 and requiring plaintiffs to return a motor home to defendant, the clerk marked the judgment in her minutes, a judgment was signed on 26 June, and defendant gave notice of appeal on 1 July, but it cannot be ascertained from the record whether the clerk's writings constituted a notation of the entry of judgment, when the notation was made, and whether it was directed by the trial judge. N.C.G.S. § 1A-1, Rule 58.

APPEAL by defendant, Toyota of Fayetteville (Toyota), from *Herring, Judge*. Judgment entered 26 October 1987 *nunc pro tunc* 31 August 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 June 1988.

Plaintiffs instituted this action in contract for breach of warranty. Toyota answered plaintiffs' complaint denying the material

allegations and filed a cross-claim against Sandtana Industries for indemnity or contribution. Following Sandtana Industries' failure to answer, the claims against defendant Sandtana Industries by plaintiffs and Toyota were severed from the trial by jury to be ruled on by the judge. The jury returned a verdict 8 May 1987 against Toyota wherein defendant was to pay plaintiffs $22,900.00 and plaintiffs were to return a 1984 Toyota motor home to Toyota. A judgment against Toyota with indemnification by Sandtana Industries was signed on 26 June 1987 and Toyota gave notice of appeal on 1 July 1987. On 21 August 1987, plaintiffs filed a motion to dismiss the appeal for failure to appeal the judgment entered 8 May 1987 within the ten-day period. From the order entered dismissing its appeal, Toyota appeals.

Hedahl & Radtke, by Joan E. Hedahl, for plaintiffs-appellees.

Rodney A. Guthrie for defendant-appellant.

SMITH, Judge.

The sole issue on appeal is whether the trial court erred in dismissing Toyota's appeal for failure to give timely notice of appeal. For reasons set out herein, we vacate the order and remand for further proceedings.

The trial court determined that the entry of judgment was 8 May 1987 when the jury returned a verdict requiring Toyota to pay plaintiffs $22,900.00 and requiring plaintiffs to return the 1984 Toyota motor home to Toyota. Toyota contends that the judgment was entered when the 26 June 1987 judgment was filed.

G.S. 1A-1, Rule 58 provides as follows:

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

> judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

The first paragraph of Rule 58 did not apply to the jury's verdict requiring Toyota to pay plaintiffs $22,900.00 since the verdict also required plaintiffs to return the 1984 Toyota motor home to Toyota. The entry of judgment depended therefore on the direction of the trial court as set out in the second paragraph.

The purpose of Rule 58 is to make the time of entry of judgment identifiable so that all parties are given notice of the entry of judgment. *Landlin Ltd. v. Sharon Luggage Ltd.*, 78 N.C. App. 558, 337 S.E. 2d 685 (1985). *See State v. Boone*, 310 N.C. 284, 311 S.E. 2d 552 (1984). In the present case, the court failed to make any findings as to whether the trial judge directed entry of judgment or if and when the clerk noted entry of judgment. The record before us reveals that the clerk marked the judgment in her minutes but we cannot ascertain from the record whether the writings constituted a notation of the entry of judgment, when the notation was made, or whether it was directed by the trial judge. We therefore hold that the order dismissing the appeal be vacated and the case remanded to the trial court for further proceedings.

Upon remand, if the trial court, based on findings of fact and conclusions of law, determines that Toyota made a timely appeal, Toyota shall cause the record on appeal to be settled and certified as provided in Rule 11 of the Rules of Appellate Procedure. The appeal shall be considered as taken on the date of the trial court's entry upon remand.

Vacated and remanded.

Judges PARKER and GREENE concur.

STATE OF NORTH CAROLINA v. MARY JEAN SOLES, DEFENDANT

No. 8713SC1164

(Filed 21 June 1988)

Criminal Law § 138.28— prior conviction—prayer for judgment continued—improper aggravating factor

The trial court erred in finding as an aggravating factor that defendant was twice convicted of communicating threats where one of those convictions resulted in a prayer for judgment continued which cannot support a finding of prior conviction as an aggravating factor.

APPEAL by defendant from *Hight, Judge.* Judgment entered 2 July 1987 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 10 May 1988.

Defendant was charged in a proper bill of indictment with assault with a deadly weapon inflicting serious injury. At trial, the evidence tended to show that defendant threw hot grease on her ex-husband, Lewis Soles. The jury found defendant guilty and the trial court conducted a sentencing hearing.

At the sentencing hearing, the prosecutor introduced certified copies of two warrants for arrest against defendant for communicating threats and the judgments in those cases. One of the two convictions for communicating threats resulted in a prayer for judgment continued.

The trial court found as an aggravating factor that defendant had two prior convictions for communicating threats punishable by more than 60 days' confinement. The trial court found as a mitigating factor that the relationship between the defendant and the victim was an extenuating circumstance. The trial court imposed a ten-year term of imprisonment after finding that the aggravating factors outweighed the mitigating factors. The ten-year term exceeded the three-year presumptive term for the offense. From the judgment of the trial court, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General David N. Kirkman, for the State.

Musselwhite, Musselwhite & McIntyre, by David F. Branch, Jr., for defendant appellant.

ARNOLD, Judge.

The trial court erred in sentencing defendant by considering as an aggravating factor a prior conviction for communicating threats where prayer for judgment was continued. When an accused is convicted with prayer for judgment continued, no judgment is entered. *State v. Southern*, 71 N.C. App. 563, 322 S.E. 2d 617 (1984), *aff'd per curiam*, 314 N.C. 110, 331 S.E. 2d 688 (1985). A conviction with prayer for judgment continued cannot support a finding of prior conviction as an aggravating factor. *Id.*

In the case *sub judice*, the trial court erred in finding that defendant was twice convicted of communicating threats since one of those convictions resulted in the direction of a prayer for judgment continued. Although the weight given to any particular aggravating factor is within the discretion of the trial judge, a case must be remanded for a new sentencing hearing if the trial judge errs in finding an aggravating factor and imposes a sentence beyond the presumptive term. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). Accordingly, defendant is entitled to a new sentencing hearing.

Remanded for resentencing.

Judges ORR and GREENE concur.

RONALD D. BECTON v. ALICE M. GEORGE

No. 873DC1083

(Filed 21 June 1988)

Parent and Child § 7— action for child support—properly dismissed

The trial court properly dismissed an action under N.C.G.S. § 50-13.4 for child support where plaintiff alleged that he is the father of the child but did not allege that he has custody. N.C.G.S. § 49-14, N.C.G.S. § 1A-1, Rule 12(b)(6).

PLAINTIFF appeals from *Ragan, James E., III, Judge*. Order entered 19 June 1987 in CRAVEN County District Court. Heard in the Court of Appeals 2 May 1988.

Plaintiff filed his complaint on 15 May 1987 alleging a cause of action under N.C. Gen. Stat. § 49-14 (1985) claiming *inter alia* that on 18 May 1969 defendant had given birth to Shelly Denise George; that plaintiff was the child's biological father; and that said child was entitled to support from defendant under N.C. Gen. Stat. § 50-13.4. Defendant was served with the summons and complaint on 18 May 1987.

On defendant's motion, the district court dismissed plaintiff's action pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure. From the trial court's order of dismissal, plaintiff appeals.

John H. Harmon for plaintiff-appellant.

Beamon, Kellum & Hollows, P.A., by Norman B. Kellum, Jr. and Robert P. Holmes, IV, for defendant-appellee.

WELLS, Judge.

In its order granting defendant's N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss, the trial court found and concluded that an action to establish paternity pursuant to N.C. Gen. Stat. § 49-14 may not be maintained after a child's eighteenth birthday. In his sole argument, plaintiff contends this was error. For the reasons stated below, we do not reach this question, but affirm the trial court's order on other grounds.

This Court has held that the legislative purpose underlying G.S. § 49-14 paternity actions is to provide the basis or means of establishing the identity of the putative father in order to allow the courts to impose an obligation of support. *See Smith v. Price*, 74 N.C. App. 413, 328 S.E. 2d 811 (1985); *Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E. 2d 816 (1980).

Under the provisions of N.C. Gen. Stat. § 50-13.4, only a parent who has custody of a minor child may bring an action for its support. Although plaintiff has alleged that he is the father of Shelly Denise, he has not alleged that he has custody.

Where a complaint pleads facts that will necessarily defeat the claim or request relief not authorized by law, the claim must be dismissed. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

As plaintiff has failed to state a claim on which he is entitled to any relief, the order of the trial court must be and is

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 JUNE 1988

GRAHAM v. GRAHAM No. 8820DC57	Moore (83CVD75)	Appeal Dismissed
GRAHAM v. GRAHAM No. 8820DC58	Moore (84CVD254)	Affirmed
JONES v. FLETCHER No. 8710SC685	Wake (86CVS3486)	Affirmed in part, reversed in part and remanded
ROBERTS v. FOGLEMAN No. 8715DC824	Alamance (85CVD1022)	No Error
STATE v. ELLIOTT No. 8810SC41	Wake (85CRS43507)	Affirmed in part; vacated and remanded in part
STATE v. FORT No. 883SC18	Craven (87CRS2963)	Affirmed in part; vacated in part
STATE v. JONES No. 8710SC1006	Wake (86CRS82166) (86CRS82167)	No Error
STATE v. KEEVER No. 8819SC50	Rowan (87CRS5030)	No Error
STATE v. KEZIAH No. 8830SC48	Haywood (87CRS1903)	No Error
STATE v. LEWIS No. 8812SC85	Cumberland (86CRS10670) (86CRS29679)	Affirmed
STATE v. PORTER No. 8819SC17	Randolph (86CRS8106)	Affirmed
TOWN OF ATLANTIC BEACH v. TRADEWINDS CAMPGROUND, INC. No. 873SC698	Carteret (85CVS298)	Affirmed

FILED 21 JUNE 1988

BOYETTE v. CITY OF KINSTON No. 878SC1097	Lenoir (87CVS195)	Affirmed
BRADLEY v. MODERN STEP No. 8810IC189	Ind. Comm. (IC009236)	Affirmed
CHADWICK-KARLBERG v. KARLBERG No. 8812DC122	Cumberland (87CVD2573)	Affirmed

CRIST v. ROYAL No. 874SC1052	Onslow (87CVS1030)	Appeal Dismissed
ELITE CONSTRUCTION CO. v. CENTRAL BUILDERS, INC. No. 8818SC75	Guilford (83CVS5511)	Affirmed
GRIGGS v. HARRIS-REID-CARPENTER No. 871SC1024	Currituck (87CVS50)	Reversed and Remanded
GRIMES v. GRIMES No. 8825DC89	Caldwell (84CVD961)	Affirmed
IN RE BEYER No. 8824DC224	Watauga (85J42)	Dismissed
IN RE CHAAR No. 889DC201	Vance (86CVD499)	Dismissed
IN RE DAVIS No. 8730SC748	Swain (86CVS2)	Affirmed
IN RE GOODE No. 8729DC1181	Rutherford (87J56)	Affirmed
JETSTREAM AERO SERVICES, INC. v. NEW HANOVER COUNTY No. 885SC10	New Hanover (87CVS2911)	Appeal Dismissed
MERRELL v. CASH FLOW No. 8729SC1073	Henderson (86CVS911)	Affirmed
NANCE v. NEASHAM No. 8730SC1190	Macon (84CVS211)	Affirmed
NCNB NATIONAL BANK v. RICE No. 8821SC15	Forsyth (86CVS2634)	Affirmed; Certiorari denied
ROTHROCK v. TOWN OF CAROLINA BEACH No. 885SC169	New Hanover (87CVS2940)	Affirmed
STATE v. ADAMS No. 8818SC171	Guilford (87CRS38666)	New Trial
STATE v. CALL No. 8722SC1047	Iredell (86CRS14001) (86CRS14002) (86CRS14003) (86CRS14004) (86CRS14005) (86CRS14006) (86CRS14007) (86CRS14008) (86CRS14009) (86CRS14010)	No Error

STATE v. CANTY No. 885SC95	New Hanover (87CRS12932) (87CRS12933)	No error in conviction. Sentence vacated and remanded. No Error
STATE v. CLARK No. 8830SC44	Haywood (87CRS1059)	No Error
STATE v. DAVIS No. 8826SC128	Mecklenburg (87CRS9728)	No Error
STATE v. FORMEY No. 8713SC1072	Brunswick (86CRS7005) (86CRS7006)	No Error
STATE v. HILDRETH No. 888SC55	Lenoir (86CRS10769)	Affirmed
STATE v. MONK No. 883SC206	Pitt (86CRS23545) (86CRS23546)	No Error
STATE v. PHILLIPS No. 883SC33	Pitt (87CRS8816)	No Error
STATE v. ROBINSON No. 8816SC150	Robeson (87CRS6381)	Arrested
STATE v. SLADE No. 882SC180	Washington (86CRS1780)	No Error
STATE v. SOUTHERLAND No. 888SC125	Lenoir (87CRS4283)	No Error
STATE v. TAYLOR No. 8826SC114	Mecklenburg (86CRS96429)	No Error
STATE v. UPRIGHT No. 8819SC228	Cabarrus (87CRS3862)	No Error
STATE v. WALDROP No. 8828SC86	Buncombe (86CRS26513)	No Error
STATE v. WILSON No. 887SC254	Edgecombe (81CRS410) (81CRS411) (81CRS412) (81CRS413) (81CRS414)	Vacated
STATE v. WISEMAN No. 8812SC61	Cumberland (87CRS7095)	No Error
TREXLER v. TREXLER No. 8719DC1256	Randolph (87CVD7)	Affirmed

VILLAGE SQUARE v. JONES No. 8818SC40	Guilford (86CVS4544)	Dismissed
WAMPLER v. WAMPLER No. 8721DC1219	Forsyth (87CVD2831)	Vacated and Remanded

STATE OF NORTH CAROLINA v. ALFONZA WILLIAMS

No. 879SC1012

(Filed 5 July 1988)

1. **Criminal Law § 35— involuntary manslaughter while driving under the influence—evidence that another committed the crime—evidence properly excluded**

In a prosecution of defendant for involuntary manslaughter while driving under the influence of alcohol, the trial court did not err in excluding testimony by the officer who investigated the accident that he originally charged another person with the offense, since the excluded evidence merely tended to show that the officer assumed and included within the police report that another person was the driver and defendant was a passenger; this evidence did not point unerringly to the other person or anyone else as the driver; the fact that the other person was originally charged and the charges were subsequently dropped had no probative value as to whether that person was the driver at the time in question; and the excluded testimony did not corroborate defendant's version but instead was inconsistent with defendant's testimony.

2. **Automobiles § 114— involuntary manslaughter while driving under the influence—failure to submit lesser offense of misdemeanor death by vehicle—error**

In a prosecution of defendant for involuntary manslaughter while driving under the influence of alcohol, the trial court erred in failing to submit misdemeanor death by vehicle as a lesser included offense where the State presented evidence to the effect that at the time of the collision defendant was intoxicated, was the operator of the vehicle, lost control of the vehicle immediately before the accident and ran onto the shoulder of the highway, attempted to snatch the vehicle back, veered across the highway into the other lane of travel, and collided head-on with the oncoming vehicle, while defendant presented evidence that at the time of the accident he was neither intoxicated nor was he the operator of the vehicle.

3. **Automobiles § 113— involuntary manslaughter while driving under the influence—felony death by vehicle not lesser offense**

Felony death by vehicle, N.C.G.S. § 20-141.4(a1), is not a lesser included offense of involuntary manslaughter while driving under the influence of alcohol, and the trial court therefore did not err in refusing to instruct the jury on that offense.

APPEAL by defendant from *Bowen, Wiley F., Judge.* Judgment entered 10 June 1987, in Superior Court, VANCE County. Heard in the Court of Appeals 29 March 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

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

JOHNSON, Judge.

Defendant was tried upon indictments charging him with two counts of involuntary manslaughter while driving under the influence of alcohol, one count of driving while impaired and one count of driving while license in state of revocation. The jury returned verdicts of guilty as charged to each count. The trial judge arrested judgment on the driving while impaired conviction, and from the imposition of an active prison sentence, defendant appeals.

I

The State presented evidence which tended to show the following. On Friday, 11 July 1986, approximately 8:40 p.m., Officer Lonnie Holt of the North Carolina Highway Patrol was dispatched to the scene of a two car motor vehicle collision on U.S. Highway 158 in Vance County, North Carolina. The scene of the accident was approximately 3.6 miles west of the Henderson city limits. At the scene of the accident, U.S. 158 is a two lane highway running east and west, one lane for eastbound traffic and one lane for westbound traffic. Upon arriving at the scene, Officer Holt observed a brown 1974 two door Oldsmobile stopped in the westbound lane of the highway and a 1985 Renault sitting on the shoulder of the westbound lane of the highway. The Oldsmobile was pointed in an easterly direction and the Renault in a westerly direction. The fronts of both cars were badly damaged. Various skid and gouge marks on the highway led Officer Holt to conclude that the vehicles had collided head-on in the westbound lane. Defendant was found lying unconscious on the ground in front of the Oldsmobile. Irvin Hawley was wedged between the Oldsmobile's front seat and the steering wheel with his feet on the passenger's side of the car. Hawley had a head injury, was highly intoxicated and was attempting to exit the vehicle through its front left door. The Oldsmobile belonged to defendant. The bodies of Rosa and Franklin Reavis were found in the front seats of the Renault.

Both Rosa and Franklin Reavis died as a result of injuries sustained in the accident.

Officer Holt's investigation revealed that a Benjamin Dickey had also been an occupant of the Oldsmobile but that Dickey had left the scene after the collision. Dickey testified that on 11 July 1986, defendant came by Dickey's brother's house in his 1974 Oldsmobile and picked up Dickey and drove him to Bobby Johnson's house. Defendant was thought to be "high" at the time. Shortly thereafter they returned to Dickey's brother's house where Hawley was waiting for them. Hawley requested defendant to take him to the store and defendant agreed to do so. Hawley got into the front passenger seat; Dickey got into the rear seat and defendant got into the driver's seat. Shortly after pulling out onto the highway, defendant and Hawley began "fussing" at each other and the tires of the Oldsmobile ran off onto the shoulder of the road. Defendant "tried to snatch the car back. When he got it back straight, that's when he hit the [Renault] head-on." The Renault was on the left side of the highway traveling in a westerly direction. After impact, Dickey exited the car through the front passenger door and left the scene.

Irvin Hawley testified that he, Dickey and defendant spent the afternoon drinking; that defendant was operating the vehicle at the time of the accident and defendant was "high" at the time; that the Oldsmobile hit the shoulder of the highway, veered left across the highway and struck the Renault. Bobby Johnson testified that shortly after dinner on 11 July 1986, defendant stopped by his house driving the Oldsmobile and that defendant had been drinking. Renshal Moore testified that he saw defendant approximately thirty to forty-five minutes prior to the accident and defendant appeared to be intoxicated at that time. Dr. Homer Petrou, a general surgeon who treated defendant in the hospital emergency room after the accident, testified that in his opinion defendant was intoxicated at the time when he examined him.

Defendant presented evidence which tended to show the following. Defendant testified that on 11 July 1986, he drove his 1974 Oldsmobile to David Dickey's house to visit Benjamin Dickey. Around 1:30 p.m., defendant and Benjamin Dickey went to visit Bobby Johnson from whom Benjamin obtained a pint of liquor. Defendant and Benjamin thereafter returned to David Dickey's

house. Defendant felt the onset of a seizure about the time they arrived. Between 2:30 p.m. and 7:30 p.m., defendant, Benjamin Dickey and Irvin Hawley drank the pint of liquor Benjamin got from Bobby Johnson. Defendant and Hawley drank the majority of the liquor. Thereafter, Hawley asked defendant to drive him to a nearby store. Defendant refused because he was afraid that he might have a seizure while driving and might "black out." Defendant denied that he was intoxicated. Defendant also testified that Benjamin Dickey offered to drive the car and he consented because he felt the onset of a seizure and not because he was intoxicated. The three of them got into the vehicle, Dickey got into the driver's seat, Hawley got into the front passenger's seat, and defendant got into the back seat. Defendant fell asleep in the back seat and was awakened by the collision. Defendant heard Dickey cursing and expressing remorse for having wrecked the car. Defendant exited the car, walked around to the front of it, collapsed and lost consciousness.

Frank Wrenn testified that he arrived at the scene of the accident shortly after it occurred. He observed someone behind the steering wheel, but was not sure who it was. However, it was not defendant or Benjamin Dickey. Marie Hargrove, defendant's sister, testified that defendant often lent his car to others and that defendant had a history of suffering with seizures.

In this appeal defendant presents three issues for review: (1) whether the trial court erred in granting the State's motion *in limine* and sustaining the State's objection at trial to exclude the admission of any evidence that Irvin Hawley had been originally identified as the driver of the car and charged with the offenses for which defendant was being tried; (2) whether the trial court erred in failing to submit misdemeanor death by vehicle as a lesser included offense of involuntary manslaughter while driving under the influence of alcohol; and (3) whether the trial court erred in failing to submit felony death by vehicle as a lesser included offense of involuntary manslaughter while driving under the influence of alcohol.

II

[1] Prior to jury selection, the State moved that defendant be prevented from bringing to the jury's attention the fact that some other individual may have originally been charged with the of-

fenses in question. The trial court tentatively granted the motion with the understanding that the court would rule upon the admission of such evidence at such time as it might be presented during the course of trial.

During defense counsel's cross-examination of Lonnie W. Holt, the investigating officer, regarding the accident report the officer filed, the trial court sustained the State's objection to the following exchange, but allowed defendant, on voir dire, to include the evidence in the record as defendant's proffer of proof.

> Q. Mr. Holt, would you tell the Court what (sic) you have down as being (sic) the driver of the vehicle in the accident report; the driver of the 1974 Oldsmobile Cutlass owned by Alfonza Williams?
>
> A. Irvin no middle name Hawley.
>
> Q. Irvin Hawley. And where in the vehicle did you place Mr. Alfonza Williams in your accident report?
>
> A. As being a passenger in the vehicle in the front.
>
> Q. Did you say the front of the car?
>
> A. Yes, sir.

Defendant argues that this excluded evidence was both relevant and admissible to show that Hawley or someone other than defendant was driving at the time of the accident.

The admissibility of evidence that someone other than the defendant committed the crime for which defendant is being tried, "depend[s] upon its relevancy in the case in which it is offered—whether it logically tends to prove or disprove some material fact at issue in the particular case." *State v. Britt*, 42 N.C. App. 637, 641, 257 S.E. 2d 468, 471 (1979). *See also State v. Gains*, 283 N.C. 33, 194 S.E. 2d 839 (1973), and *State v. Makerson*, 52 N.C. App. 149, 277 S.E. 2d 869 (1981). In order to be competent, evidence that the crime was committed by another person must point unerringly to the other person's guilt. *State v. Shinn*, 238 N.C. 535, 78 S.E. 2d 388 (1953). *See also State v. Britt, supra* and *State v. Jones*, 32 N.C. App. 408, 232 S.E. 2d 475, *cert. denied*, 292 N.C. 643, 235 S.E. 2d 63 (1977). Evidence which tends to show nothing more than conjecture or suspicion that someone other than the

defendant had an opportunity to commit the crime, without tending to show that the other person actually did commit the crime and that therefore the defendant did not do so, is too remote to be relevant and should be excluded. *State v. Britt, supra.*

In the case *sub judice*, the excluded evidence merely tends to show that Officer Holt *assumed*, and included within the police report, that Irvin Hawley was the driver and that defendant was a passenger. This evidence does not point unerringly to Hawley or anyone else as the driver. Also, the fact that Hawley was originally charged and the charges were subsequently dropped has no probative value as to whether Hawley was the driver at the time in question. Nor does the excluded evidence corroborate defendant's version. In fact, it is inconsistent with defendant's testimony. Defendant testified that Benjamin Dickey was the driver and that Hawley was a passenger. Defendant's contention is without merit.

Further, defendant's argument that the police report containing the questioned evidence was admissible under the provisions of G.S. Sec. 8C-1, Rule 803(8), is also without merit. As stated above, the evidence had no probative value and was therefore properly excluded.

III

[2] Defendant contends that the trial court erred in failing to submit misdemeanor death by vehicle as a lesser included offense.

It is well-established in this jurisdiction that the trial court is required to submit to the jury a lesser included offense of the crime charged in the bill of indictment where there is evidence of defendant's guilt of the lesser crime. *State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196 (1980). Misdemeanor death by vehicle is a lesser included offense of involuntary manslaughter. *State v. Lackey*, 71 N.C. App. 581, 323 S.E. 2d 32 (1984); *State v. Baum*, 33 N.C. App. 633, 236 S.E. 2d 31, *rev. denied*, 293 N.C. 253, 237 S.E. 2d 536 (1977); *State v. Freeman*, 31 N.C. App. 93, 228 S.E. 2d 516, *rev. denied*, 291 N.C. 449, 230 S.E. 2d 766 (1976).

In the case *sub judice*, the evidence presented supports the contention that defendant operated his vehicle while impaired and that his operation of the vehicle while impaired contributed to the collision and ensuing deaths. However, there also was evidence

presented from which the jury could have found that the only act of defendant which proximately contributed to the collision and ensuing deaths was some other violation of the traffic law, such as failure to maintain a proper lookout, failure to keep his vehicle under proper control, or operating his vehicle on the left-hand side of the highway, contrary to the laws provided therefor. The evidence presented in the case was conflicting. The State presented evidence to the effect that at the time of the collision defendant was intoxicated and was the operator of the vehicle; that immediately before the accident, defendant lost control of the vehicle and ran onto the shoulder of the highway; that defendant attempted to "snatch" the vehicle back and veered across the highway into the left-hand lane and collided head-on with the other vehicle. Defendant presented evidence that at the time of the accident he was neither intoxicated nor was he the operator of the vehicle. It is within the province of the jury to believe all of the evidence presented or to disbelieve all of the evidence presented or to believe some and to disbelieve the other. We, therefore, hold that under the evidence presented in this case the court was required to instruct the jury on the lesser included offense of misdemeanor death by vehicle. *Compare State v. Lackey, supra.*

IV

[3] Defendant contends that felony death by vehicle is a lesser included offense of involuntary manslaughter while driving under the influence of alcohol and that the court erred in failing to instruct the jury on that offense.

G.S. 20-141.4(a1) defines the offense of felony death by vehicle.

> A person commits the offense of felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving under G.S. 20-138.1 and commission of that offense is the proximate cause of the death.

In *State v. McGill*, 314 N.C. 633, 336 S.E. 2d 90 (1985), the Court stated,

> [W]hen a death is caused by one who was driving under the influence of alcohol, only two elements must exist for the successful prosecution of manslaughter: a willful violation of

> N.C.G.S. 20-138 and the causal link between that violation and the death. (Citation omitted.)

Id. at 637, 336 S.E. 2d at 93. We hold that the offense of felony death by vehicle requires the identical essential elements to those required for a conviction of involuntary manslaughter predicated on a violation of G.S. 20-138.1; to wit: a willful violation of G.S. 20-138.1, and a causal link between that violation and the death. Defendant asserts that involuntary manslaughter is different because it requires a *willful* violation of G.S. 20-138.1, also enunciated in *McGill*, and that there is no mention of *willfulness* in the offense of death by vehicle as defined in G.S. 20-141.4. Defendant contends, therefore, that the legislature, in failing to use the term "willful" in G.S. 20-141.4(a1), must have intended to create felony death by vehicle as a lesser included offense of involuntary manslaughter, upon which a conviction could be obtained solely upon proof that a driver was, in fact, impaired and that impairment was a proximate cause of death. Although defendant presents a novel argument, we find it to be without persuasion.

While it is true that the word "willful" is not used in G.S. 20-141.4(a1), we believe that the language "unintentionally causes the death of another person while engaged in the offense of impaired driving under G.S. 20-138.1" as used within G.S. 20-141.4 (a1) refers to the fact that the *act* which resulted in death is *intentionally* committed and is an act of impaired driving under G.S. 20-138.1. It is well understood that an act done intentionally may be described as one done willfully. In *McGill, supra*, the Court stated in footnote number 3 that "one who drives under the influence cannot be said to do so inadvertently. The act (and the violation) is willful by its very nature." [sic] 314 N.C. at 636, 336 S.E. 2d at 89. We hold that felony death by vehicle is not a lesser included offense of involuntary manslaughter while driving under the influence of alcohol. The court properly refused to submit this issue to the jury.

Because the trial court failed to instruct the jury on the lesser included offense of misdemeanor death by vehicle, defendant is entitled to a new trial.

New trial.

Judges BECTON and GREENE concur.

STATE OF NORTH CAROLINA v. ERVIN JUNIOR DUNSTON

No. 8710SC1076

(Filed 5 July 1988)

1. **Rape and Allied Offenses § 5— attempted second degree rape—sufficiency of evidence**

Evidence that defendant was playing with his pants zipper prior to an attack and that during the attack he fumbled with the victim's shorts and then began rubbing her crotch was sufficient evidence of overt sexual behavior from which the jury could properly infer, notwithstanding the possibility of other inferences, that defendant intended to engage in vaginal intercourse with his victim, and evidence that defendant grabbed the victim from behind, dragged her several feet, forced her to the ground, covered her mouth with his hand, proceeded to fondle her without her consent, and stopped only when she kicked him in the groin was ample to support an inference that defendant, at some point during the attack, intended forcibly to rape the victim despite her resistance; therefore, the trial court properly denied defendant's motion to dismiss the charge of attempted second degree rape made on the ground that the evidence was insufficient as a matter of law.

2. **Criminal Law § 66.9— photographic lineup—no suggestive procedure**

Pretrial identification procedures were not unnecessarily suggestive where defendant was the only person in a photographic lineup portrayed wearing khaki slacks thereby matching the description given by the victim of her assailant, since the seven individuals depicted were of reasonably similar appearance; the victim was not improperly induced to choose one subject over another; and the victim was unable positively to identify defendant from the photographic lineup. Moreover, her identification of defendant's car was not improper where she selected the car from a large array of automobiles without prompting or other inducement by police officers, and she recognized the car from her observations on the day of the incident.

3. ***Criminal Law § 66.16— in-court identification of defendant—independent origin***

An attempted rape victim's in-court identification of defendant was admissible, regardless of the validity of a pretrial identification, where the victim testified that the attack occurred in bright daylight; she observed defendant attentively face-to-face, without obstruction, as he leaned over her within sixteen inches of her face; she accurately described defendant immediately after the attack and at trial; she testified that her identification was based on her memory of the incident; and the identification was thus of independent origin and untainted by any pretrial events.

APPEAL by defendant from *B. Craig Ellis, Judge.* Judgments entered 1 May 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 31 March 1988.

Attorney General Lacy H. Thornburg, by Associate Attorney General Kim L. Cramer and Assistant Attorney General Doris J. Holton, for the State.

John T. Hall for defendant-appellant.

BECTON, Judge.

Defendant, Ervin Junior Dunston, was convicted of attempted second degree rape and taking indecent liberties with a minor. From judgments sentencing him to two consecutive three-year prison terms, defendant appeals, seeking reversal of the attempted rape conviction for insufficiency of the evidence and a new trial on the indecent liberties charge for alleged errors in the admission of evidence. We find no error.

I

The State's evidence at trial showed that, at approximately 8:30 a.m. on 5 August 1986, Jaymie Atkins, age 14, was walking from her home in Raleigh to summer soccer camp at Ravenscroft School. She was wearing a tee-shirt with soccer shorts which fastened with snaps, a zipper, and tie strings. As she travelled along the right side of Newton Road toward the back entrance of the school, a loud mustard-colored car passed her and turned into the entrance. When Jaymie reached the entrance, she walked past the car which was parked just inside the gate with the hood raised. A rather tall, bearded black man of medium build, dressed in khaki pants and plaid shirt, stood by the car playing with his pants zipper.

The car started up, passed Jaymie going toward the school, and disappeared from sight around a curve. Soon the car drove by again, headed out of the school, but reversed and backed up alongside Jaymie as she was walking. The man she previously had seen standing by the car was driving. Then the man drove on toward the entrance.

In a few moments, Jaymie heard the car again. Then suddenly someone grabbed her around the neck from behind, dragged her a few feet to the edge of the woods, and pushed her down on her back. She was screaming, and her assailant leaned over her and placed one hand over her mouth. With his other hand, he fumbled with her pants for a second, then moved his hand down and

began rubbing her crotch. Jaymie kicked the man in the groin area, and he suddenly jumped up and ran to his car. As he drove away, his victim memorized the license plate number as HAX 721 or HAX 727.

By tracing the license plate number, the police located a vehicle matching Jaymie's description at a residence in Franklinton where they photographed the car and the defendant. On the afternoon of the attack, Jaymie viewed a photographic line-up but could not identify the man who attacked her. Later the same day, she viewed a second photographic line-up, this one containing the picture of the defendant. She eliminated six of the seven pictures, and stated that picture number six (the defendant) "could be him" but she was not sure. The following day, Jaymie accompanied police officers to a parking lot containing 250-300 cars where she identified a vehicle as the one driven by her assailant. The car was registered to defendant and bore the license number HAX 721.

Jaymie first positively identified defendant at the preliminary hearing, where she recognized him among a group of prisoners coming into the courtroom and pointed him out to her mother and stepfather. She also identified defendant at trial as her attacker.

II

[1] Defendant first contends that the trial court erred by denying his motion to dismiss the charge of attempted second degree rape because the evidence was insufficient as a matter of law to establish his intent to commit rape. We disagree. In ruling upon a motion to dismiss in a criminal prosecution, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *E.g., State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). If there is substantial evidence of each element of the offense charged and that the defendant is the perpetrator, the motion is properly denied. *E.g., State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

In order to convict a defendant of attempted rape under N.C. Gen. Stat. Sec. 14-27.6 (1986), the State must prove two essential elements beyond a reasonable doubt—that the accused had the

specific intent to commit rape and that he committed an overt act for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Bell*, 311 N.C. 131, 140, 316 S.E. 2d 611, 616 (1984); *State v. Boone*, 307 N.C. 198, 210, 297 S.E. 2d 585, 592 (1982). The element of intent is established if the evidence shows that the defendant, at any time during the incident, had an intent to gratify his passion upon the victim notwithstanding any resistance on her part. *E.g., State v. Moser*, 74 N.C. App. 216, 328 S.E. 2d 315 (1985). The State need not show that the defendant made an actual physical attempt to have intercourse or that he retained the intent to rape his victim throughout the incident. *State v. Hudson*, 280 N.C. 74, 77, 185 S.E. 2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 39 L.Ed. 2d 112 (1974).

Defendant maintains the State failed to prove a specific intent to have vaginal intercourse with the victim because the evidence presented is equally consistent with an intent to merely look at the victim or commit some other sexual offense. However, there is substantial precedent from our courts establishing that some overt act manifesting a sexual purpose or motivation on the part of the defendant is adequate evidence of an intent to commit rape. *See, e.g., State v. Whitaker*, 316 N.C. 515, 342 S.E. 2d 514 (1986) (defendant verbally expressed desire to perform cunnilingus with his victim and told her to pull down her pants); *State v. Bell* (defendant discussed with his brother "getting some sex," took their two victims to a secluded area, and ordered them to remove their clothes); *State v. Schultz*, 88 N.C. App. 197, 362 S.E. 2d 853 (1987) (defendant touched victim's breast); *State v. Hall*, 85 N.C. App. 447, 355 S.E. 2d 250, *disc. rev. denied*, 320 N.C. 515, 358 S.E. 2d 525 (1987) (defendant pulled the victim's shirt down and touched her breasts); *State v. Wortham*, 80 N.C. App. 54, 341 S.E. 2d 76 (1986), *rev'd in part on other grounds*, 318 N.C. 669, 351 S.E. 2d 294 (1987) (defendant slit open the crotch of his sleeping victim's panties); *State v. Powell*, 74 N.C. App. 584, 328 S.E. 2d 613 (1985) (defendant entered victim's bedroom at night, undressed, and began fondling his genitalia). Moreover, both our Supreme Court and this court have specifically rejected arguments similar to that made by defendant, holding that evidence an attack is sexually motivated will support a reasonable inference of an intent to engage in vaginal intercourse with the vic-

tim even though other inferences are also possible. *See State v. Whitaker; State v. Hudson; State v. Schultz; State v. Hall.*

In the present case, there is evidence the defendant was playing with his pants zipper prior to the attack and that during the attack he fumbled with the victim's shorts and then began rubbing her crotch. In light of the foregoing precedent, we hold that this constitutes sufficient evidence of overt sexual behavior from which the jury could properly infer, notwithstanding the possibility of other inferences, that defendant intended to engage in vaginal intercourse with his victim.

Defendant further contends, without discussion, that the evidence failed to show he intended or threatened to use force sufficient to overcome any resistance his victim might assert. This argument is also without merit. The evidence shows that defendant grabbed the victim from behind; dragged her several feet; forced her to the ground, covering her mouth with his hand; and proceeded to fondle her without her consent, desisting only after she kicked his groin area. In our view, this is ample evidence to support an inference that defendant, at some point during the attack, intended to forcibly rape the victim despite her resistance.

This assignment of error is overruled.

III

Defendant next argues that the trial court erred by admitting Jaymie Atkins' in-court identification of defendant and evidence of her pretrial identification of him and that he is entitled to a new trial at which this evidence is excluded.

Identification evidence must be suppressed on due process grounds only whenever, under all the circumstances of the case, the pretrial identification procedure was so impermissibly suggestive as to create a very substantial likelihood of irreparable misidentification. *E.g., State v. Wilson*, 313 N.C. 516, 528-29, 330 S.E. 2d 450, 459 (1985). Even when a pretrial procedure is impermissibly suggestive, an in-court identification is admissible if found to be of independent origin and, thus, not tainted by the previous invalid procedure. *E.g., State v. Clark*, 301 N.C. 176, 183, 270 S.E. 2d 425, 429 (1980).

Before the trial court admitted the identification evidence in the present case, an extensive *voir dire* was conducted concerning both the in-court and out-of-court identification of defendant. After hearing testimony of the victim, her stepfather, and the investigating officer, and observing the seven photographs composing the photographic line-up, the court made numerous findings of fact and concluded that the pretrial identification procedures were not impermissibly suggestive. He further ruled that the in-court identification was of independent origin based upon the victim's direct observations during the attack. Our review of the record convinces us that the court's findings and conclusions are supported by substantial competent evidence and are thus binding on appeal. *See, e.g., State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982).

[2] We first consider the validity of the pretrial identification procedure. Defendant specifically challenges each step of the pretrial identification and maintains that the combination of events gives rise to a substantial likelihood of irreparable misidentification. He first contends that the photographic line-up containing his picture was impermissibly suggestive because he was the only person portrayed wearing khaki slacks and thereby matching the description given by the victim of her assailant. However, a photographic line-up is not impermissibly suggestive merely because the defendant is the only individual photographed wearing a particular item of clothing matching a witness's description. *See, e.g., State v. Ricks*, 308 N.C. 522, 302 S.E. 2d 770 (1983); *State v. White; State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981). All that is required is that the line-up be fair and that the officers conducting it do nothing to induce the witness to select one picture rather than another. *State v. Grimes*, 309 N.C. 606, 610, 308 S.E. 2d 293, 295 (1983). Although we do not have the photographs before us on appeal, the *voir dire* testimony and the trial court's findings indicate that the seven individuals depicted were of reasonably similar appearance and that the victim was not improperly induced to choose one subject over another. Moreover, the very fact that the victim was unable to positively identify defendant from the photographic line-up belies his assertion that the procedure was impermissibly suggestive. *See State v. Ricks*, 308 N.C. at 526-27, 302 S.E. 2d at 772.

Defendant also attacks the validity of the identification of his vehicle and then argues that the combination of the photographic line-up and the vehicle identification procedure somehow impermissibly predisposed the victim to identify him at the preliminary hearing. These contentions are without merit. The evidence shows that the victim selected the defendant's car from a large array of automobiles without prompting or other inducement by police officers and that she recognized the car from her observations on the day of the incident. Similarly, the *voir dire* evidence concerning her first positive identification of defendant at the preliminary hearing indicates she recognized and identified him spontaneously and without improper suggestion or inducement.

We find no evidence in the record of any additional circumstances regarding defendant's pretrial identification which are conducive to an irreparable mistaken identification. For the foregoing reasons, we hold that the pretrial procedures were not unnecessarily suggestive and that, consequently, evidence concerning the pretrial identification of defendant was properly admitted.

[3] We also find adequate support for the trial court's determination that the in-court identification was admissible, regardless of the validity of the pretrial identification, because it was of independent origin based upon the victim's observations at the time of the incident. Jaymie's testimony on *voir dire* and at trial indicates that during the attack, which occurred in bright daylight, she observed defendant attentively face-to-face, without obstruction, as he leaned over her within sixteen inches of her face. She accurately described the defendant immediately after the attack and at trial. Further, she testified that her identification was based on her memory of the incident. From this evidence, we conclude the in-court identification was fair and untainted by any pretrial events. *See State v. Osborne*, 83 N.C. App. 498, 350 S.E. 2d 909 (1986).

In addition to the foregoing arguments, defendant also challenges the admission of the identification evidence on the basis of alleged errors in the conduct of the *voir dire* hearing. These contentions merit no discussion and are overruled.

IV

Defendant's remaining arguments relate to other alleged errors of the trial court in the admission of evidence. Having carefully reviewed these contentions, we conclude that they are without merit.

Defendant received a fair trial, free of prejudicial error.

No error.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. LARRY DONNELL HARRISON

No. 876SC1160

(Filed 5 July 1988)

1. **Criminal Law § 86.3— prior convictions of defendant—cross-examination proper**

Cross-examination of defendant concerning his prior convictions and his behavior upon which those convictions were based was proper and did not exceed the boundaries established by *State v. Murray*, 310 N.C. 541.

2. **Criminal Law § 86.1— prior misconduct inadmissible on issue of defendant's truthfulness—error not prejudicial**

The trial court erred in admitting testimony of defendant's prior misconduct in evading, resisting, and assaulting a police officer as probative of defendant's character for truthfulness, but such error was not reversible since defendant's testimony was properly impeached with evidence of prior convictions for breaking and entering, larceny, false pretense, shoplifting, disorderly conduct, creating a public disturbance, assault on a female, and resisting, delaying, and obstructing a police officer, and the improper testimony could not have appreciably undermined defendant's credibility and influenced the jury's verdict. N.C.G.S. § 8C-1, Rule 608(b).

3. **Criminal Law § 102.6— closing argument—reading of case law not allowed—error not prejudicial**

Though the trial court erred in refusing to allow defense counsel to read appropriate case law regarding circumstantial evidence during the closing argument, such error was not prejudicial where defense counsel did thoroughly argue the law pertaining to circumstantial evidence in his closing *argument, and there was no reasonable possibility* that the court's error affected the jury's verdict. N.C.G.S. § 84-14; N.C.G.S. § 15A-1443(a).

State v. Harrison

APPEAL by defendant from *Fountain, Judge*. Judgments entered 15 May 1987 in Superior Court, HALIFAX County. Heard in the Court of Appeals 12 April 1988.

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

Hux, Livermon & Armstrong, by James S. Livermon, for defendant-appellant.

ORR, Judge.

Defendant was arrested and tried for felonious larceny, in violation of N.C.G.S. §§ 14-70 and 14-72(a), and assault with a deadly weapon with intent to kill inflicting serious injury, in violation of N.C.G.S. § 14-32(a). After a jury trial, defendant was found guilty of the crimes charged and sentenced to terms of five years for the larceny conviction and ten years for the assault conviction.

From the trial court's judgments, defendant appeals.

Facts relevant to the discussion of the issues on appeal are set forth below.

I.

[1] On appeal, defendant first contends the State exceeded the scope of permissible cross-examination, when questioning him about his prior convictions.

The cross-examination challenged by defendant consisted of the following:

> Q. Your lawyer asked you what you had been convicted of. You said you had been convicted of breaking and entering and larceny; is that correct?
>
> A. Yes, sir.
>
> Q. That was a breaking and entering and larceny of a store in Enfield?
>
> . . .
>
> Q. Is that correct?
>
> A. Yes, sir.

Q. Stealing from that store, groceries, wine and beer?

. . .

A. Yes, sir.

Q. Is that what you did?

A. Yes, sir.

Q. And, the obtaining property by false pretense, I'll ask you in that case, did you not steal a man's checks and forge his checks?

. . .

Q. Is that not what that consisted of?

A. That's what they meant to be.

Q. Excsue [sic] me. Would you speak loud enough—

A. That's what it was meant to be, yeah.

Q. That what who meant that to be?

. . .

A. Well, that's what they charged me with, yes.

Q. Is that not what you did—

. . .

Q. —take the checks of another person and forge those checks?

A. No, sir.

Q. What did you do?

. . .

A. I cashed the check. That belonged to someone else.

Q. That belonged to somebody else?

A. Yes.

Q. Did you forge that check?

. . .

A. No, sir.

Q. You didn't do that? You just cashed it?

A. Yes, sir.

Q. Is that all you did?

A. Yes, sir.

Q. Was cash somebody else's check?

A. Yes, sir.

Q. You knew the check wasn't yours?

. . .

A. Yes, sir. At the time I did.

. . .

Q. You also been convicted, have you not, of carrying a concealed weapon?

A. Yes, sir.

Q. Would you please kindly tell the members of the Jury what that weapon was?

. . .

A. It was a knife.

Q. A knife?

A. Yes, sir.

In *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977), the Supreme Court held that once a conviction was established, a limited inquiry on cross-examination, as to the time and place of conviction and the punishment imposed, was permissible. Our Court further said that cross-examination exceeding the *Finch* limitations was reversible error. *State v. Greenhill*, 66 N.C. App. 719, 311 S.E. 2d 641 (1984); *State v. Bryant*, 56 N.C. App. 734, 289 S.E. 2d 630 (1982).

In *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984), the Supreme Court implicitly expanded the scope of cross-examination for prior convictions by holding "that, rather than phrasing

questions only in terms of convictions, the prosecutor may ask about the circumstances of a prior conviction in the same way he would ask about any specific prior misconduct." 310 N.C. at 551, 313 S.E. 2d at 530.

Based upon the standard enunciated in *Murray*, the Supreme Court found the following cross-examination concerning prior convictions was proper:

> Q. And on the same day, the 26th of April, 1976, were you convicted of assaulting Nathanial Mosely, by hitting him with your fists?
>
> A. Yes, I was.
>
> . . .
>
> Q. On the 18th of April, 1978, were you convicted of communicating threats by threatening to kill Wayne Watkins, and blow up his store?
>
> A. No, sir. I got charged with it, but I didn't do that. I got probation on that, but I didn't do that.
>
> Q. Well, were you convicted of that?
>
> A. I was with some friends, I guess yeah.
>
> Q. You were with some friends so you got convicted with them?
>
> A. Yes, sir.
>
> . . .
>
> Q. On the 22nd of July, 1981, July a year ago, were you convicted of assault with a deadly weapon inflicting serious injury by beating Charles Elbert Corbett on the head with a pistol on April the 11th, 1981?
>
> A. Yes, sir.
>
> Q. And you were sentenced to prison for that, is that correct?
>
> A. Two year sentence.

Q. And did you, in fact, hit Charles Elbert Corbett on the head with that pistol?

A. No, sir.

State v. Murray, 310 N.C. at 549-550, 313 S.E. 2d at 529-530.

After comparing the cross-examination in *Murray* with defendant's, we conclude that while the cross-examination in this instance was not as concise and succinct as the one in *Murray*, its scope did not exceed the boundaries established by *Murray*.

For this reason, we find no error in the admission of this cross-examination at trial, and we overrule this assignment of error.

II.

[2] Defendant next assigns error to testimony elicited on his cross-examination pertaining to his prior acts of misconduct.

N.C.G.S. § 8C-1, Rule 608(b) permits specific instances of conduct to be inquired into on cross-examination, at the trial court's discretion, if probative of the witness's character for truthfulness or untruthfulness.

The types of conduct most widely accepted as indicative of a defendant's character for truthfulness are " 'use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.' . . . On the other hand, 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.*' " *State v. Morgan*, 315 N.C. 626, 635, 340 S.E. 2d 84, 90 (1986) (citations omitted and emphasis supplied).

In the present case, the challenged testimony concerned defendant's prior misconduct of evading, resisting, and assaulting a police officer.

These acts do not involve fraud, trickery, or deceit. Therefore, we find the trial court erroneously admitted testimony of

this misconduct as probative of defendant's character for truthfulness.

Admission of this testimony is not, however, reversible error. To obtain a new trial, defendant is required to show a reasonable possibility that but for this error he would have been found innocent of the crimes charged. N.C.G.S. § 15A-1443(a) (1983). This, defendant has failed to do.

The record discloses that defendant's testimony was properly impeached with evidence of prior convictions for breaking and entering, larceny, false pretense, shoplifting, disorderly conduct, creating a public disturbance, assault on a female, and resisting, delaying and obstructing a police officer. In light of the properly admitted prior convictions, we conclude the cross-examination complained of could not have appreciably undermined defendant's credibility and influenced the jury's verdict. We overrule this assignment of error.

III.

[3] Finally, defendant contends the trial court erred in preventing his counsel from reading certain case law in the closing argument.

N.C.G.S. § 84-14 governs a trial court's control over oral argument and provides, in pertinent part: "In jury trials the whole case as well of law as of fact may be argued to the jury." This statute grants counsel the right to read and comment on reported case law, relevant to the issues before the jury. *State v. Gardner*, 316 N.C. 605, 342 S.E. 2d 872 (1986).

Here, defense counsel sought to read the following sentence, stated in *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960), in his closing argument. "This full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion *that some other unknown person may be the guilty party . . . .*" *Id.* at 324, 116 S.E. 2d at 776 (emphasis added). The trial court stopped defendant's counsel from reading the last ten words of the sentence after ruling the legal principles in the case were inappropriate for oral argument, because the case citing these principles had found insufficient evidence existed for submission of the case to a jury.

The statement of law in *Bass* specifically addressed the State's use of circumstantial evidence to obtain a conviction, had not been reversed on appeal, and was relevant to the issue of circumstantial evidence before the jury in the present case. Therefore, we find the trial court improperly excluded the case law at trial. *State v. Gardner*, 316 N.C. 605, 342 S.E. 2d 872.

However, as discussed in the previous issue, defendant bears the burden of proving this error was prejudicial. *Id.*; N.C.G.S. § 15A-1443(a) (1983).

On appeal defendant presents no evidence of prejudice attributable to the trial court's error. Furthermore, the record shows defendant's counsel thoroughly argued the law pertaining to circumstantial evidence in his closing argument.

Based on these facts, we conclude there is no reasonable possibility the trial court's act, preventing defense counsel from quoting the statement in *Bass*, effected the verdict returned by the jury. 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 ARNOLD and GREENE concur.

RUSSELL WALTER v. VANCE COUNTY, BY AND THROUGH ITS AGENTS JERRY L. AYSCUE IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS COUNTY MANAGER OF VANCE COUNTY, WILLIAM H. HUGHES, DANNY W. WRIGHT, WILLIAM L. FLEMING, JR., J. TIMOTHY PEGRAM, AND RAY AYSCUE IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY AS MEMBERS OF THE VANCE COUNTY BOARD OF COMMISSIONERS

No. 889SC65

(Filed 5 July 1988)

1. Master and Servant § 10.2— maintenance employee—refusal to paint restroom—discharge for just cause

Painting of a courthouse restroom was reasonably incidental to the general work for which plaintiff had been employed where plaintiff was hired

as a "buildings and grounds maintenance man," and his job description specifically required that plaintiff perform "related work as required"; therefore, plaintiff's refusal to perform the requested chore was unwarranted and plaintiff's discharge was for just cause.

2. Municipal Corporations § 11.1— grievance procedure for all local government employees not required

There was no merit to plaintiff's contention that N.C.G.S. Chap. 126 established a public policy that all local government employees have the protection of a grievance procedure, since Chapter 126 applied to county employees only as the "boards of county commissioners may from time to time determine," N.C.G.S. § 126-5(a), and Vance County has not made Chap. 126 applicable to its employees.

APPEAL by plaintiff from *Clark (Giles R.), Judge*. Judgment entered 27 August 1987 in Superior Court, VANCE County. Heard in the Court of Appeals 1 June 1988.

Plaintiff instituted this action alleging that on 25 March 1977 Vance County hired him as a housekeeper/janitor for a six-month probationary period and thereafter as a permanent employee on a year-to-year basis. Plaintiff's primary responsibility was providing cleaning and minor maintenance services for the Vance County Courthouse. Plaintiff further alleges that during April and May of 1986 defendant Jerry L. Ayscue, the county manager and finance officer for Vance County, discussed with plaintiff the painting of a courthouse restroom. Plaintiff stated that he would not paint because painting was not a part of his job description but that he would do so if his job description was changed. The county manager informed plaintiff that he considered small paint jobs to be minor repair and maintenance and thus included within plaintiff's job description. On 21 May 1986, when plaintiff refused to carry out the painting as instructed, his employment was terminated. Plaintiff seeks to recover for breach of an express or implied employment contract. Plaintiff also seeks to allege claims for violation of public policy and for defendants' negligence and wilful and wanton conduct in failing to establish a grievance procedure. Plaintiff seeks to recover actual and punitive damages for his alleged unjust dismissal.

In their answer defendants denied the material allegations of plaintiff's complaint. Defendants filed a motion for summary judgment. Both plaintiff and defendants submitted affidavits and oth-

er documentation relating to the motion. From an order granting defendants' motion for summary judgment, plaintiff appeals.

Willie S. Darby for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Guy F. Driver, Jr., M. Ann Anderson, and William McBlief, for defendant-appellees.

SMITH, Judge.

Plaintiff's sole assignment of error is directed at the trial court's order granting defendants' motion for summary judgment. Plaintiff contends the trial court erred in granting defendants' motion in that (1) the contract of employment was for a definite period of time (from year to year) and could not be unilaterally terminated before the end of the term; (2) plaintiff's job description did not include painting as one of plaintiff's duties, and therefore plaintiff could not be fired for refusing to paint unless his job description was formally changed; and (3) termination of plaintiff's employment without providing a grievance procedure violated public policy. Plaintiff's brief does not discuss or cite any authority with regard to the granting of summary judgment on an additional alleged claim for relief for defendants' negligence and wilful and wanton conduct in failing to establish a grievance procedure. Therefore, any contention that the court erred with regard to this claim is deemed abandoned. App. R. 28(a).

Defendants would be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . 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 claim for relief exists, summary judgment is proper. *Coleman v. Cooper*, 88 N.C. App. 188, 366 S.E. 2d 2 (1988). In ruling on a motion for summary judgment, the court must consider any 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), while also giving to the non-movant all favorable inferences which may reasonably be drawn from the facts proffered. *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974).

[1] In the case *sub judice* plaintiff's affidavit is to the effect that he was told at the time of his hiring he would be a probationary employee for a period of six months and thereafter would be employed on a year-to-year basis. Defendants' affidavits indicate that plaintiff was never told his employment would be from year to year. Assuming *arguendo* that plaintiff's affidavit sets forth the correct facts and that he was employed on an annual basis, plaintiff could still be discharged during the term of his employment for just cause. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). When an employee is hired for a "fixed term, the contract cannot be terminated at an earlier period except for cause or by mutual consent." *Id.* at 259, 182 S.E. 2d at 406-07.

The job description applicable to plaintiff's position provides:

BUILDINGS AND GROUNDS MAINTENANCE MAN

DESCRIPTION OF WORK

This is responsible cleaning and minor maintenance work.

An employee in this class is responsible for the cleaning and minor repair of the Vance County Courthouse building. Duties include the heavy cleaning of offices, rest rooms, and hallways, and the minor repair of the heating, plumbing, and air conditioning systems. Work is performed under the direction of the Tax Supervisor-Collector; however, the employee is expected to use independent judgment in scheduling recurring duties.

EXAMPLES OF DUTIES PERFORMED

Scrubs, mops, waxes, and polishes floors in offices, hallways and closets.

Washes windows, woodwork, walls and ceilings.

Scrubs and cleans bathroom fixtures, replenishes tissue, towels, and soap; replaces light bulbs, empties waste baskets and other containers.

Mowes [sic] grass, trims shrubbery, sweeps sidewalks, rakes leaves and trash around buildings and generally maintains the exterior appearance of the Courthouse building.

Moves office equipment and supplies as directed.

Checks boiler and heating plant for proper operation and makes minor adjustments when necessary.

Makes minor plumbing, electrical, and carpentry repairs.

Performs related work as required.

RECRUITMENT STANDARDS

Knowledge, Skills, and Abilities:

General knowledge of the various phases of janitorial work.

General knowledge of the janitorial supplies used in floor finishings, window washing and house cleaning.

General knowledge of the Courthouse plumbing, heating and electrical systems.

Ability to make minor repairs and determine when to ask for assistance.

Ability to follow oral and written instructions.

When a person is employed for general work of a particular kind, he must be ready to perform any kind of work reasonably incidental to that work though he is not obligated to accept employment of an entirely different kind. 56 C.J.S. Master and Servant, Section 63, p. 478. Plaintiff's job description specifically required that plaintiff perform "related work as required." We hold that the painting contemplated in this case was reasonably incidental to the general work for which plaintiff had been employed. We also hold that it was "related work" as that term is used in plaintiff's job description. Defendant county's personnel resolution specifically states: "If a permanent employee . . . willfully fails to perform assigned duties, he may be dismissed by his department head." When plaintiff accepted employment, the law implied a promise by plaintiff to render efficient service in good faith to his employer. *Hagan v. Jenkins*, 234 N.C. 425, 67 S.E. 2d 380 (1951). "There is said to be always on the part of the servant an implied obligation to enter the master's service and serve him diligently and faithfully, and to conduct himself properly, and generally to perform all the duties incident to his em-

ployment honestly and with ordinary care." *Ivey v. Cotton Mills*, 143 N.C. 189, 195, 55 S.E. 613, 615 (1906). Plaintiff's refusal to perform the requested chore was unwarranted and plaintiff's discharge was for just cause.

Plaintiff also argues that his job description was a part of his employment contract and that since painting was not specifically listed therein, he could not be discharged for refusing to perform the painting assignment without a change in his job description. Having held the painting assignment was "related work" within plaintiff's job description, it is unnecessary for us to discuss this contention.

[2] Lastly, plaintiff argues that his termination was improper in that Vance County violated public policy by failing to adopt a grievance procedure for employees. Plaintiff contends that G.S., Chap. 126 establishes a public policy that all local government employees have the protection of a grievance procedure. We disagree. With certain exceptions not here applicable, Chapter 126 applies to county employees only as the "boards of county commissioners may from time to time determine." G.S. 126-5(a). Vance County has not made G.S., Chap. 126 applicable to its employees. It might very well be advisable for all employees of local government to be protected by a grievance procedure and have the resulting job security. However, it is the function of the General Assembly to establish the public policy of this State. *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E. 2d 665 (1970). If the Legislature desired to establish a public policy entitling county employees to the protection of G.S., Chap. 126, it could have done so. In that event, the Legislature would not have given the individual boards of county commissioners the absolute discretion to decide whether Chapter 126 would be applicable to county employees. The ruling of the trial court is

Affirmed.

Judges EAGLES and ORR concur.

JERRY McCURRY v. REID WILSON AND WIFE, CAROLYN WILSON

No. 8724SC1054

(Filed 5 July 1988)

Negligence § 59.3— injured person as licensee—handrail in disrepair—no violation of homeowner's duty of care owed to licensee

Plaintiff, brother and brother-in-law to defendants, was a social guest in their home and therefore a licensee where plaintiff, who was experienced in home construction and remodeling, went to defendants' home at their invitation to see two new rooms they had added to their house, answered questions concerning the value of the work done, and stayed no more than five minutes; furthermore, defendants' conduct in failing to repair a handrail which gave way when plaintiff grabbed it to stop his fall did not amount to willful or wanton negligence, there was no evidence that defendants desired or intended to hurt plaintiff, and there was therefore no showing that defendants violated the duty of care owed to a licensee.

APPEAL by plaintiff from *Lamm, Judge*. Order entered 7 July 1987 in Superior Court, YANCEY County. Heard in the Court of Appeals 10 March 1988.

Dennis L. Howell for plaintiff appellant.

Morris, Phillips & Cloninger, by William C. Morris, III, for defendant appellees.

COZORT, Judge.

Plaintiff sued defendants for injuries plaintiff sustained when he slipped and fell off a stairway in defendants' home. Plaintiff appeals from entry of summary judgment for defendants, claiming there are genuine issues of fact for the jury to consider. We affirm.

Plaintiff is defendant Carolyn Wilson's brother and defendant Reid Wilson's brother-in-law. He lived next door to defendants at the time of the accident in October 1984. Plaintiff saw the defendants every day and would often visit with them in their home.

In October 1984, defendant Reid Wilson asked if plaintiff would like to see two new rooms defendant added to his house. Plaintiff agreed and toured the new rooms with defendant, staying in the house for approximately three to five minutes. At his

deposition, plaintiff made the following statement concerning the purpose of the visit:

Q. All right. But this wasn't a business meeting?

A. No.

Q. It was a social meeting?

A. Well, I don't know what you'd call it. He just asked me to go up there, and I went up there.

Q. But the purpose of your going up there was to see what he'd done to his house; is that right?

A. Uh-huh. (Affirmative)

Q. Did you do anything up there before your fall, on the day of this fall, other than go look at what he'd done to his house?

A. Huh-uh. (Negative)

Q. "No"?

A. No.

Walking down the stairs of defendants' deck, plaintiff slipped and fell on a step. As he fell, plaintiff reached for the handrail or banister to regain his balance. The handrail gave way when plaintiff grabbed it and plaintiff fell to the ground, hitting steps as he fell. Defendant Reid Wilson was in front of plaintiff as they headed down the stairs and did not see plaintiff fall.

Plaintiff alleged in his complaint that defendants were negligent and reckless because they failed to maintain the steps and handrail and failed to warn plaintiff that the handrail was rotten and worn. Defendant Reid Wilson testified by deposition that he knew that where the handrail was attached to the bottom step the wood was rotten and needed to be replaced. Defendants filed a motion for summary judgment which was granted by the trial court. Plaintiff appeals.

Summary judgment is proper where there is no genuine issue of material fact and where one party is entitled to judgment as a matter of law. Rule 56(c), N.C. Rules of Civ. Proc. In a case where the "plaintiff will not at trial be able to make out at least a *prima*

facie case, defendant is entitled to summary judgment." *Mims v. Mims*, 305 N.C. 41, 56, 286 S.E. 2d 779, 789 (1982) (citation omitted). The evidence is viewed in the light most favorable to the plaintiff. *Brisson v. Williams*, 82 N.C. App. 53, 55, 345 S.E. 2d 432, 434, *disc. rev. denied*, 318 N.C. 691, 350 S.E. 2d 857 (1986). Nevertheless, there is ample authority for this Court to determine plaintiff's status as a matter of law and to affirm summary judgment where there is no evidence of negligence. *See Martin v. City of Asheville*, 87 N.C. App. 272, 360 S.E. 2d 467 (1987).

To determine whether the trial court erred in granting summary judgment for defendants, we must determine whether there is any factual dispute as to the status of the plaintiff as an invitee or a licensee. If there is not, we must determine whether there is any factual dispute concerning the defendants' conduct relative to the appropriate standard of care.

A licensee is one who goes on another's property with the owner's consent "who is permitted, expressly or impliedly, to go thereon merely for his own interest, convenience or gratification." *Pafford v. Construction Co.*, 217 N.C. 730, 735, 9 S.E. 2d 408, 411 (1940). A social guest in a person's home is a licensee. *Murrell v. Handley*, 245 N.C. 559, 562, 96 S.E. 2d 717, 720 (1957). One's status does not change from licensee to invitee simply because he renders some minor or incidental service for his host. *Id.*, 96 S.E. 2d at 720. This Court has held, for example, that one's status as a social guest was not changed simply because the plaintiff was injured while unloading a truckload of food into defendant's house. *Beaver v. Lefler*, 8 N.C. App. 574, 576, 174 S.E. 2d 806, 807 (1970). This Court reasoned that, as friends and neighbors for seven years, plaintiff and defendant had helped each other many times with household chores. Helping unload food was merely one neighbor reciprocating to the other neighbor for help he had received. *Id.*, 174 S.E. 2d at 807.

An invitee has been defined as one who, by express invitation, renders a service of direct and substantial benefit to his host. *Mazzacco v. Purcell*, 303 N.C. 493, 497, 279 S.E. 2d 583, 587 (1981). In *Mazzacco*, plaintiff, a former part-time professional tree remover in New Jersey, was asked by his sister to travel to North Carolina to help her and her husband remove trees from their rental property. *Id.* at 494, 279 S.E. 2d at 585. Plaintiff

helped remove two large pine trees and was injured while he was attempting to remove a large oak tree which would likely damage the roof of the house if not removed. *Id.*, 279 S.E. 2d at 585. The Supreme Court held that plaintiff was an invitee of defendants because "[t]his service was of direct and substantial benefit to defendants in maintaining and improving their rental property." *Id.* at 498, 279 S.E. 2d at 587. Plaintiff contends that defendant Reid Wilson knew of plaintiff's vast experience in home construction and remodeling. Plaintiff argues that defendant Wilson called plaintiff over to his house to ask plaintiff's opinion on the quality of workmanship defendant received and to find out whether defendants got "a good deal" for what they paid. Plaintiff alleges that he conveyed a direct and substantial benefit to defendants and because of that benefit, plaintiff should be considered an invitee. We disagree.

All the evidence below shows that plaintiff was a licensee. The forecast of evidence tends to show that plaintiff was a social guest in defendants' home. Any services performed by plaintiff were minor and incidental to his status as a social guest. Plaintiff, defendant Carolyn Wilson's brother, lived next door to defendants and saw defendants socially many times. On this particular occasion, defendant Reid Wilson asked if plaintiff would like to see the renovations done on defendants' home. Plaintiff looked over the two new rooms, answered questions concerning the value of the work done and left to return home. Plaintiff stayed no more than five minutes. Plaintiff testified at deposition that he did not go to defendants' house for a business meeting. Other than looking over the remodeling and making a few comments, plaintiff said he did nothing else. Unlike the *Mazzacco* case, plaintiff here did nothing tending to increase the value of defendants' home. Therefore, we conclude that the nature of business that brought plaintiff to defendants' home was social. *Pafford*, 217 N.C. at 735, 9 S.E. 2d at 411. Any benefit conferred to defendants by plaintiff giving his opinion on the value of the remodeling was incidental to plaintiff's status as a social guest.

We next determine whether defendants followed the duty of care owed to a licensee. The duty of care to a licensee is simply stated: "The duty imposed is to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger." *Pafford*, 217 N.C. at 736, 9 S.E. 2d at 412 (1940). The

terms "wanton and willful" have been described as one knowing the probable consequences of his actions but acting indifferently to the outcome of his actions. *Wagoner v. N.C. Railroad Co.*, 238 N.C. 162, 168, 77 S.E. 2d 701, 705-06 (1953).

We find no evidence that defendants' conduct amounted to willful or wanton negligence. There is no evidence that defendant Reid Wilson desired or intended to hurt plaintiff. There was evidence that defendant knew the wood was rotten where the handrail was attached to the bottom step. Knowledge of this condition does not rise to recklessness. It may have been unreasonable for defendant either to fail to repair the handrail or to warn people of its poor condition. Reasonableness is a standard of ordinary negligence. *Watson v. Stallings*, 270 N.C. 187, 193, 154 S.E. 2d 308, 312 (1967). Finding no evidence of willful or wanton negligence, we hold the trial court correctly granted summary judgment for defendants. The trial court's order is

Affirmed.

Judges EAGLES and SMITH concur.

DONNA B. PARRISH v. GRAIN DEALERS MUTUAL INSURANCE COMPANY

No. 8710SC422

(Filed 5 July 1988)

Insurance § 69— automobile underinsurance claim—injured party's settlement with tort feasor—claim not barred

Plaintiff's underinsurance claim was not barred because she was no longer legally entitled to recover damages of the tort feasor and was barred by the settlement made without defendant insurer's consent only to the extent, if any, that defendant's subrogation rights were prejudiced.

Judge GREENE concurring.

APPEAL by plaintiff from *Hight, Judge*. Orders entered 2 April and 10 April 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 28 October 1987.

Plaintiff, who was seriously injured by and settled with an underinsured motorist, brought this action for underinsurance benefits under the provisions of the liability insurance policy defendant issued for the car she was riding in. Defendant denied coverage and following a hearing in which affidavits, the policy and other documents were submitted by the parties, an order of summary judgment was entered dismissing plaintiff's action pursuant to the provisions of Rule 56, N.C. Rules of Civil Procedure. The materials presented to the court established the following uncontradicted facts:

On 17 August 1985, while a passenger in the vehicle covered by defendant's policy, which had liability limits of $100,000 per person for each accident and underinsurance coverage tied to those limits, plaintiff was seriously injured when a speeding vehicle operated by Reginald L. Ligon on the wrong side of the road struck her vehicle. After her attorney's investigation indicated that Ligon had no personal assets that could be levied on, on 25 August 1986 the claim against him was settled with his auto carrier, American Mutual Fire Insurance Company, for his policy limits of $25,000 per person for each accident. Incident thereto plaintiff signed a release on a standard insurance form styled "RELEASE OF ALL CLAIMS," which contained the following provisions:

> That the Undersigned, being of lawful age, for the sole consideration of . . . $25,000.00 . . . does hereby . . . release, acquit and forever discharge Reginald Ligon . . . of and from any and all claims . . . whatsoever, which the undersigned now has . . . or which may hereafter accrue on account of . . . the accident . . . which occurred on or about the 17 day of August 1985 at or near Raleigh NC.

Before the settlement there was no contact between plaintiff and defendant, but on the same day settlement was made plaintiff's attorney wrote defendant and informed it of the collision, plaintiff's injuries, the $25,000 settlement, and of her claim against the underinsured motorist coverage of its policy. In responding to the letter defendant denied coverage for the reasons later stated in its answer.

The policy involved, subject to its limits and other conditions, requires defendant to pay "all sums the insured is legally entitled

to recover as damages from the owner or driver" of the other vehicle after all applicable liability bonds or policies "have been exhausted by judgment or payments"; and it states that the underinsurance "does not apply to . . . [a]ny claim settled without our consent." The policy further provides that:

> If we make any payment, we are entitled to recover what we paid from other parties. Any person to or for whom we make payment must transfer to us his or her rights of recovery against any other party. This person must do everything necessary to secure these rights and must do nothing that would jeopardize them.
>
> . . . .
>
> No legal action may be brought against us until there has been full compliance with all the terms of this policy.

Johnny S. Gaskins for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Patricia L. Holland, for defendant appellee.

PHILLIPS, Judge.

The facts in this case are not materially different from those recorded in *Silvers v. Horace Mann Insurance Company*, 90 N.C. App. 1, 367 S.E. 2d 372 (1988), where this same panel held that the summary judgment dismissing the plaintiff's claim for underinsurance benefits was erroneous. For the reasons stated therein we hold that plaintiff's underinsurance coverage claim is not barred because she is no longer legally entitled to recover damages of the tort feasor and is barred by the settlement made without defendant's consent only to the extent, if any, that defendant's subrogation rights were prejudiced. Thus, the order of summary judgment dismissing plaintiff's claim is vacated and the case is remanded to the Superior Court for trial consistent with the provisions of the foregoing opinion. Defendant, of course, is not bound by any acknowledgment that the tort feasor may have made and in the trial, unless defendant agrees otherwise, plaintiff will have the burden of proving, along with the other matters alleged in the complaint, that the tort feasor was legally liable for her damages before the settlement was made.

Vacated and remanded.

Judges BECTON and GREENE concur.

Judge GREENE concurring.

I disagree with the majority's holding that the facts of this case are not materially different from the facts in *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 367 S.E. 2d 372 (1988). First, I note that unlike *Silvers*, in the present case the release given by the insured to the underinsured tortfeasor contained no reservation of a right of action against the insurer. However, as the insurer does not raise on appeal the lack of a reservation as a bar to the insured's action, the issue of whether such a reservation was required need not be addressed.

Second, unlike *Silvers*, in the present case Grain Dealers had a right to be subrogated to the insured's right of action once it made payment to the insured. *See Milwaukee Ins. Co. v. McLean Trucking Co.*, 256 N.C. 721, 726, 125 S.E. 2d 25, 29 (1962). In *Silvers*, the insurer specifically waived this right to be subrogated in the policy. In the present case, the insured destroyed Grain Dealers' right to be subrogated by settling with the tortfeasor and executing a release.

However, I do agree with the majority that the insurer's loss of its right to be subrogated does not itself bar the insured's claim for underinsurance benefits. In many instances, pursuit of a subrogation claim against an underinsured tortfeasor is futile because of the financial status of the tortfeasor. 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* Sec. 43.5 at 122 (2d ed. 1987). A technical and illusory "loss" of subrogation rights should not result in the forfeiture of underinsurance benefits. *See Southeastern Fidelity Ins. Co. v. Earnest*, 395 So. 2d 230, 231 (Fla. 3d Dist. Ct. App. 1981); *see also Prudential Property and Cas. Ins. Co. v. Nayerahamadi*, 593 F. Supp. 216 (E.D. Pa. 1984).

Therefore, the inquiry becomes whether the destruction of the insurer's right to be subrogated prejudiced the insurer to the extent that it may avoid partial or complete payment on the policy. Insurance contract provisions should be construed in accord with their purposes and with the reasonable expectations of the parties. *See Great American Ins. Co. v. Tate Const. Co.*, 303

N.C. 387, 390, 279 S.E. 2d 769, 771 (1981). The *Great American* Court held that an insured's breach of a policy provision requiring notice of an accident did not relieve the insurer of its obligations under the policy unless violation of the notice provision operated to materially prejudice the insurer. *Id.* at 390, 279 S.E. 2d at 771.

Accordingly, in keeping with the Supreme Court's opinion in *Great American*, I would remand this case and place the burden on the insurer to prove that it has been materially prejudiced by the loss of its subrogation rights. *See id.* at 398, 279 S.E. 2d at 775. Among the relevant factors that may be considered in deciding whether the insurer has been materially prejudiced are the assets of the underinsured tortfeasor, the potential for the underinsured tortfeasor to obtain assets in the future, and the present and future earning capacity of the tortfeasor. *Compare Southeastern Fidelity*, 395 So. 2d at 330-31 (insurer not prejudiced by release of tortfeasor where she was completely judgment proof) *with General Accident Ins. Co. v. Taplis*, 493 So. 2d 32 (Fla. 5th Dist. Ct. App. 1986) (insurer prejudiced by release of tortfeasor who was healthy twenty-three-year-old man earning $32,000 per year with unrestricted future earning capability).

FIRST UNION NATIONAL BANK v. LATTY G. RICHARDS AND PEGGY RICHARDS

No. 8825DC151

(Filed 5 July 1988)

1. **Judgments § 37; Rules of Civil Procedure § 41— appeal from magistrate to district court for trial de novo—voluntary dismissal taken—magistrate's order not res judicata**

Plaintiff's appeal from a magistrate's judgment for a trial *de novo* in district court completely annulled the judgment appealed from, and it was as if the case had been brought there originally so that plaintiff's voluntary dismissal of the action without prejudice in district court pursuant to N.C.G.S. § 1A-1, Rule 41(a) did not cause the magistrate's order to remain in effect and to become *res judicata*. Therefore, the trial court erred in granting defendants' motion for relief from a default judgment where they pled *res judicata* as a meritorious defense.

2. Rules of Civil Procedure § 41— appeal de novo from magistrate's judgment—voluntary dismissal in district court

There was no merit to defendants' contention that N.C.G.S. § 1A-1, Rule 41(a)(1) is not available in actions in the district court on appeal *de novo* from a magistrate's judgment because N.C.G.S. § 7A-228, a specific statute governing the appeal from a magistrate, prevents Rule 41(a)(1) from applying, since the requirements of N.C.G.S. § 7A-228 are not inconsistent with those of the Rule.

3. Judgments § 37; Rules of Civil Procedure § 41— magistrate's judgment not final judgment—appeal to district court—voluntary dismissal

There was no merit to defendants' contention that a magistrate's judgment was a final judgment pursuant to N.C.G.S. §§ 7A-225 and 7A-226, since those statutes merely established priority of liens, do not address the effect of a voluntary dismissal in district court, and do not alter plaintiff's right to voluntarily dismiss the action without prejudice.

APPEAL by plaintiff from *Cloer (Stewart), Judge.* Order entered 23 September 1987 and filed 13 November 1987 in District Court, CALDWELL County. Heard in the Court of Appeals 2 June 1988.

On 22 April 1977, defendants executed an installment note under seal to First National Bank of Catawba County. That bank later merged with plaintiff. On 14 November 1985, plaintiff filed a complaint against defendants in Caldwell County Small Claims Court seeking the amount due under the note. On 26 November 1985, the magistrate dismissed plaintiff's claim with prejudice for "fail[ure] to prove [its] case by the greater weight of the evidence" and "due to statutes of limitations." Plaintiff gave notice of appeal to Caldwell County District Court on 4 December 1985. On 10 March 1986, plaintiff took a voluntary dismissal without prejudice.

On 18 July 1986, plaintiff initiated this action in Caldwell County District Court seeking the balance due under the installment note. Defendants did not file a responsive pleading, and on 12 September 1986 the clerk signed a default judgment against defendants. On 22 October 1986, defendants filed a motion pursuant to G.S. 1A-1, Rule 60(b) to set aside the judgment as void.

Through several amended orders, Judge Cloer allowed defendants' motion to set aside the judgment and gave defendants time to answer the complaint. Defendants' answer included a motion to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(b)(6).

Plaintiff filed a motion for summary judgment. Again through several amended orders, Judge Cloer denied plaintiff's motion for summary judgment and granted defendants' motion to dismiss on the basis that the magistrate's judgment was reinstated by plaintiff's voluntary dismissal of the original action. The trial judge also concluded that the magistrate's judgment was *res judicata* to the present action. The trial court denied plaintiff's motion for attorneys' fees and reserved ruling on defendants' request for attorneys' fees until final disposition of this appeal. Plaintiff appeals.

Clontz and Clontz, by Ralph C. Clontz III, for plaintiff-appellant.

Todd, Vanderbloemen, Respess and Brady, P.A., by William W. Respess, Jr., for defendants-appellees.

SMITH, Judge.

Plaintiff brings forward several assignments of error. First, it contends the trial court erred in granting defendants' motion for relief from the default judgment. In its second assignment of error, plaintiff contends the court erred by granting defendants' motion to dismiss. Third, plaintiff assigns error to the trial court's denial of plaintiff's motion for summary judgment. In its final assignments of error, plaintiff contends the trial court erred by failing to grant its motions for attorneys' fees. We hold the trial court erred in setting aside the default judgment. In light of our holding, we need not address plaintiff's other assignments of error with the exception of the assignments of error regarding attorneys' fees.

[1] In its first assignment of error, plaintiff contends the trial court erred by granting defendants' motion for relief from the default judgment. To be entitled to relief under G.S. 1A-1, Rule 60(b), the moving party "must show both the existence of one of the stated grounds for relief, and a 'meritorious defense'." *In re Hall*, 89 N.C. App. 685, 686, 366 S.E. 2d 882, 884 (1988). In their brief, defendants contend the judgment was properly set aside under Rule 60(b)(1) for "excusable neglect." Whether such neglect exists, defendants have failed to show a meritorious defense. The setting aside of the default judgment was thus error.

In support of the motion to set aside the default judgment, defendants alleged the defense of *res judicata.* Under this doctrine, a final judgment on the merits is conclusive as to rights, questions and facts in issue in subsequent actions involving the same parties or their privies. *King v. Grindstaff,* 284 N.C. 348, 200 S.E. 2d 799 (1973). "Basic to the doctrine of res judicata is the premise that a plea of res judicata must be founded on an adjudication—a judgment on the merits." *Taylor v. Electric Membership Corp.,* 17 N.C. App. 143, 145, 193 S.E. 2d 402, 403 (1972). There was no final judgment in the first action, so the doctrine of *res judicata* does not apply. Defendants' contention that the magistrate's judgment became a final judgment when plaintiff took a voluntary dismissal of the first action is without merit. After the magistrate's judgment was entered, plaintiff exercised its right to appeal for trial *de novo* in the district court pursuant to G.S. 7A-228(a). If plaintiff had failed to appear at that trial and prosecute its appeal, the appeal would have been dismissed and the magistrate's judgment affirmed. G.S. 7A-228(c). The same result would have occurred had plaintiff withdrawn or dismissed its appeal. However, plaintiff did not abandon, dismiss or withdraw its appeal but rather took a voluntary dismissal of the action pursuant to G.S. 1A-1, Rule 41(a).

We find no cases construing the nature of the district court *de novo* trial under G.S. 7A-228. However, we are guided by cases construing the nature of the *de novo* trial in superior court following an adjudication in district court. "When an appeal as of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose." *State v. Sparrow,* 276 N.C. 499, 507, 173 S.E. 2d 897, 902 (1970). The only exception, not applicable here, is a defendant's right to withdraw an appeal pursuant to G.S. 15A-1431(g). When plaintiff gave notice of appeal for trial *de novo* in district court, it was as if the case had been brought there originally.

[2] Defendants contend that Rule 41(a)(1) is not available in actions in the district court on appeal *de novo* from a magistrate's judgment. By its express terms, the rule applies "[s]ubject to the provisions of . . . any statute of this State." G.S. 1A-1, Rule 41(a)(1). Defendants contend G.S. 7A-228, a specific statute govern-

ing the appeal from a magistrate, prevents Rule 41(a)(1) from applying. According to defendants, if the trial *de novo* is voluntarily dismissed, the appeal itself is dismissed and the original magistrate's order remains in effect; otherwise, Rule 41(a)(1) would allow plaintiff "three trials" to secure a satisfactory judgment. We do not agree with defendants' analysis.

The requirements of G.S. 7A-228 are not inconsistent with those of Rule 41(a)(1). G.S. 7A-228 sets forth the right to appeal for trial *de novo* in district court and the procedures to perfect the appeal. Rule 41(a)(1) sets forth the right to a voluntary dismissal and the procedures to effect the dismissal. G.S. 7A-228 does not address the same phase of the action as Rule 41(a)(1); the rule is therefore not "subject to" the provisions of the statute. Plaintiff was entitled to dismiss the district court action "by filing a notice of dismissal at any time before the plaintiff rest[ed] [its] case." Rule 41(a)(1)(i). The rule applies "in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." G.S. 1A-1, Rule 1. Plaintiff is not deprived of its right to voluntary dismissal simply because the action was originally before the magistrate, an officer of the district court pursuant to G.S. 7A-170.

[3] Defendants also contend the magistrate's judgment was a final judgment pursuant to G.S. 7A-225 and G.S. 7A-226. Under these statutes, the magistrate's judgment became a lien when docketed and the priority of a subsequent lien from a trial *de novo* in district court dates from the time of the magistrate's judgment. According to defendants, when the district court action was voluntarily dismissed, the original judgment did not merge into a subsequent district court judgment but remained as a lien and thus as a final determination on the merits. Again we disagree with defendants' analysis. G.S. 7A-225 and 7A-226 merely establish priority of liens; the statutes do not address the effect of a voluntary dismissal in the district court. Rule 41(a)(1) allows plaintiff to voluntarily dismiss the action without prejudice and G.S. 7A-225 and 7A-226 do not alter this right. Defendants' argument to the contrary is without merit.

We now address plaintiff's assignment of error relating to the trial court's failure to award plaintiff attorneys' fees. The

note in the instant case provides in part for the recovery of a "reasonable attorney's fee" as allowed by law if an attorney is employed to collect the note. G.S. 6-21.2 specifically authorizes an award of attorneys' fees in the event of recovery on the note. In light of our holding that the trial court erred in setting aside the default judgment, we reverse the trial court's denial of attorneys' fees and remand to the trial court for a determination of the amount to be awarded.

The district court's order setting aside the default judgment was error. Defendants have shown no meritorious defense and are not entitled to relief from the default judgment. In light of our holding that the trial court erred in setting aside the default judgment, it is not necessary to address plaintiff's assignments of error regarding the failure of the trial judge to grant plaintiff's motion for summary judgment and the trial court's granting of defendant's motion to dismiss. The order granting relief from the default judgment and the order dismissing plaintiff's action are reversed.

Reversed and remanded.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. JAMES LEE ELLIS

No. 8810SC21

(Filed 5 July 1988)

1. Kidnapping § 1— kidnapping to facilitate escape charged—indictment insufficient to charge first degree kidnapping

An indictment which charged that defendant kidnapped a named person "who had attained the age of 16 years, by unlawfully removing him from one place to another without his consent, and for the purpose of facilitating the commission of a felony, to wit: escape" was insufficient to support a first degree kidnapping conviction, since there was no allegation that the victim was not released in a safe place, was seriously injured, or was sexually assaulted. N.C.G.S. § 14-39(b).

2. Kidnapping § 1.3— kidnapping to facilitate escape charged—instruction on kidnapping to use person as a shield—instruction plain error

The trial court committed plain error in instructing the jury that they could find defendant guilty of second degree kidnapping if they found that his purpose was to use the person named "as a shield," but the indictments alleged that defendant's purpose was to facilitate the commission of the felony of escape.

APPEAL by defendant from *Bowen, Wiley F., Judge.* Judgments entered 20 August 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 10 May 1988.

Attorney General Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Hensley and Overby, by Robert J. Hensley, Jr., for defendant appellant.

PHILLIPS, Judge.

Though defendant was convicted of first degree kidnapping of Donald Joyner, second degree kidnapping of Diane Miller Narducci, felonious larceny of an auto (later reduced to a misdemeanor), common law robbery, assault with a deadly weapon inflicting serious injury, and possession of a handgun by a felon, his appeal challenges only the two kidnapping convictions.

The evidence is not disputed. Defendant, a prisoner at Central Prison, was taken by two prison security guards to Rex Hospital for medical treatment and the convictions arose out of his attempt to escape while there. During the dinner hour while one of the guards was away from his room defendant jumped the other guard, Terry Brisson, and obtained his weapon following a struggle in which Brisson was shot in the hand. Defendant ran out of the hospital room and into a stairwell where he stuck the gun against Donald Joyner, an unarmed hospital security officer, and demanded his car keys. When Joyner was unable to produce car keys defendant pressed the gun against his spine and forced him to lead the way out of the hospital to the doctors' parking lot, where they saw Diane Narducci walking toward them. Defendant removed the gun from Joyner, who escaped down an embankment, and pointed it at Ms. Narducci, who at his insistence led him to her car and gave him the keys, after which defendant drove off in the car and Ms. Narducci ducked behind another vehi-

cle. Defendant testified, in substance, that his main purpose was to escape and that the gun accidentally went off and hit Brisson.

Of the defendant's several contentions two—that the indictment does not support the first degree kidnapping conviction and the court committed plain error in charging the jury on both kidnappings—have merit and both convictions are vacated.

[1] Though under G.S. 14-39(b) an essential element of first degree kidnapping is either that the victim was not released in a safe place or was seriously injured or sexually assaulted, the indictment for first degree kidnapping in this case (87CRS11772) did not allege either of these essential elements. It charged only that defendant "unlawfully, willfully and feloniously did kidnap Donald Joyner, a person who had attained the age of 16 years, by unlawfully removing him from one place to another without his consent, and for the purpose of facilitating the commission of a felony, to wit: escape." Thus, despite its misnomer the indictment alleges only the crime of second degree kidnapping, *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983), and if defendant was not entitled to a new trial because the court erred in charging the jury we would treat his conviction as being for that lesser offense. *State v. Baldwin*, 61 N.C. App. 688, 301 S.E. 2d 725 (1983).

[2] As to the jury instruction complained of G.S. 14-39(a) defines kidnapping as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

Thus, the unlawful confinement, restraint, or removal of a person is kidnapping only when it is done for one of the purposes stated in this statute. In this case both kidnapping indictments allege that defendant's purpose was to facilitate "the commission of a felony, to wit: escape," and his trial was on that theory. Nevertheless, the court charged the jury that they could find defendant guilty of second degree kidnapping if they found that his purpose was to use the person named "*as a shield.*" (Emphasis supplied.) This error by the court permitted the jury to convict defendant upon a theory not supported by the bill of indictment, and though defendant failed to object to it the error is nevertheless reviewable under the "plain error" rule laid down in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Permitting the jury to convict upon a theory not charged in the indictment is usually prejudicial error, *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980), and our Supreme Court has held that it is plain error to charge on a theory of kidnapping not supported by the indictment. *State v. Tucker*, 317 N.C. 532, 346 S.E. 2d 417 (1986); *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984). Thus, we vacate both kidnapping convictions and remand each case to the Superior Court for a new trial on the charge of second degree kidnapping.

No. 87CRS11771—vacated and remanded for a new trial.

No. 87CRS11772—vacated and remanded for a new trial.

Judges JOHNSON and SMITH concur.

ARTIE BARNES, PLAINTIFF v. THE SINGER COMPANY AND THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, DEFENDANTS

No. 8723SC848

(Filed 5 July 1988)

Master and Servant § 108— unemployment compensation—plant closed—job at more distant plant offered—employee's voluntary leaving of job

Petitioner voluntarily quit her job without good cause attributable to the employer and was therefore not entitled to unemployment compensation where the employer closed its plant at which petitioner, a non-driver, had worked; that plant was 22 miles from petitioner's home; petitioner caught a ride to that plant with her brother-in-law who worked in the same city; employer offered petitioner a job in another plant located 11 miles farther from her home; petitioner had no means of transportation to the new job; and petitioner therefore declined the offer of the new job. N.C.G.S. § 96-14.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 27 April 1987 in Superior Court, WILKES County. Heard in the Court of Appeals 3 February 1988.

Legal Services of the Blue Ridge by Louise Ashmore; and Richard Tarrier for petitioner appellant.

Chief Counsel T. S. Whitaker and Staff Attorney James A. Haney, for respondent appellee, Employment Security Commission.

COZORT, Judge.

Claimant refused to accept a job offered her by her employer after the employer moved the plant eleven miles farther from claimant's home. Claimant, who does not drive, argues that she was "forced" to quit because she was unable to arrange transportation to the new plant location. Claimant was denied unemployment compensation by the Full Commission. The Commission's decision was affirmed by the Superior Court of Wilkes County. We affirm.

Claimant Artie Barnes was employed by the Singer Company, hereinafter "employer," in Lenoir as a furniture cleaner. Claimant lives in Moravian Falls, twenty-two miles from her employer's Lenoir plant. For thirteen years claimant, who does not

drive, caught a ride to and from work with her brother-in-law, who also lived in Moravian Falls and worked in Lenoir. In the summer of 1986 employer permanently closed the Lenoir plant. The work that had been done in Lenoir was transferred to a plant location eleven miles farther from claimant's home. Since claimant had a good work record, employer offered her a job at the new location doing the same work she had done in Lenoir.

Claimant was unable to secure a ride to the new plant with her brother-in-law because he still worked in Lenoir. Claimant testified that she checked for rides to work and could not find any. Claimant declined the employer's offer to continue working at the new plant.

Claimant applied for unemployment compensation on the theory that her employer's move "forced" her to quit because she was unable to arrange transportation to work. She claims that when an employer's relocation requires employees to drive thirty-three miles one way, that is "good cause" to quit your job under N.C. Gen. Stat. § 96-14(1). We disagree.

The pertinent facts, as recited above, are not in dispute. The issue before this Court is whether the Commission erred in concluding that claimant voluntarily quit her job without good cause attributable to the employer.

N.C. Gen. Stat. § 96-14(1) provides that a claimant is disqualified for unemployment compensation benefits "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 courts have interpreted that statute to require evidence that claimant quit voluntarily *and* that she quit without good cause attributable to her employer. In other words, the test to be disqualified for unemployment benefits has two prongs: a "voluntary" prong and a "good cause" prong. *In re Poteat v. Employment Security Comm.*, 319 N.C. 201, 203, 353 S.E. 2d 219, 221 (1987).

Leaving work voluntarily for the purposes of § 96-14 means making the choice to leave free of coercion by the employer or by events beyond the employee's control. *In re Poteat*, 319 N.C. at 205, 353 S.E. 2d at 222. Our focus should be "the external factors motivating the employee's quit[ting]." *Id.* We have held that em-

ployees who quit after being asked by their employers to leave do not quit "voluntarily" for the purposes of § 96-14. *In re Werner*, 44 N.C. App. 723, 727, 263 S.E. 2d 4, 7 (1980). A pregnant woman's acceptance of a leave of absence is not "voluntarily" quitting, but her failure to take the necessary steps to preserve her employment status was "voluntary" under § 96-14. *Sellers v. National Spinning Co.*, 64 N.C. App. 567, 570, 307 S.E. 2d 774, 776 (1983).

The second prong of the test under N.C. Gen. Stat. § 96-14, the good cause determination, is applied if the claimant's quitting is found to be voluntary. *Poteat*, 319 N.C. at 205, 353 S.E. 2d at 222. "Good cause" is a reason for leaving a job "deemed by reasonable men and women [as] valid and not indicative of an unwillingness to work." *In re Watson*, 273 N.C. 629, 635, 161 S.E. 2d 1, 7 (1968). The cause is "attributable to the employer" when the reason for quitting is "produced, caused, or created as a result of actions by the employer." *In re Huggins v. Precision Concrete Forming*, 70 N.C. App. 571, 573, 320 S.E. 2d 416, 417 (1984).

Applying these principles to this case, we are not convinced that claimant has produced sufficient evidence that external factors attributable to her employer forced her to quit. It is an economic reality that businesses must from time to time relocate or consolidate. We do not believe we are compelled by this case to establish a "Bright-Line test" in terms of miles traveled or burden to the employee. We do not believe an employer's move requiring claimant to commute an additional eleven miles is unreasonable. It is generally the employee's responsibility to commute to work absent some agreement between employer and employee. While employer's move increased claimant's burden for finding transportation, we do not believe the employer's move forced claimant to quit. Therefore, the decision of the trial court affirming the order of the Commission disqualifying claimant for benefits is

Affirmed.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my view the majority opinion is based upon semantics rather than reality. For the reality is, I think, according to all the evidence and findings, that the claimant did not quit her job either voluntarily or without good cause but quit because the plant she was assigned to was thirty-three miles away from her home; the relative who drove her to the other plant could not drive her there; and, as a practical matter, it was impossible for her to get there every day since she does not drive a car, could not find anybody to ride with, and no public transportation was available. Voluntariness requires a free choice, and choosing not to do that which is economically and physically impossible is not voluntary. In my opinion she is entitled to unemployment benefits, and I would vacate the judgment of the Superior Court and remand the matter to the Employment Security Commission for a determination of the amount due her.

BRENDA JAFFE AND PAUL JAFFE, PLAINTIFFS v. DIANE VASILAKOS, A/K/A DIANE C. FILLER, DEFENDANT

No. 8710DC1202

(Filed 5 July 1988)

Constitutional Law § 26.1— full faith and credit—insufficiency of process in New York—action on default judgment barred in North Carolina

Plaintiffs' action upon a default judgment obtained against defendant in New York was properly dismissed on the ground that the default judgment was invalid as a matter of law and not entitled to full faith and credit where a New York process server who tried to serve defendant on three occasions during the Christmas-New Year season did not make a due diligent effort to serve defendant personally before resorting to the "nail and mail" substitute service allowed by New York law.

APPEAL by plaintiffs from *Hamilton, Judge*. Order entered 17 September 1987 in District Court, WAKE County. Heard in the Court of Appeals 14 April 1988.

Paul Carruth for plaintiff appellants.

East Central Community Legal Services, by Gregory C. Malhoit, for defendant appellee.

PHILLIPS, Judge.

This action upon a default judgment obtained against defendant in New York was dismissed on the ground that the judgment was invalid as a matter of law because defendant was not properly served with process or otherwise notified of the proceeding as New York law requires. Under the Full Faith and Credit Clause of the United States Constitution the judgment of one state must be given the same credit in other states that it has in the state of entry; but the clause applies only to valid judgments, of course, and a judgment obtained without lawful notice to the defendant is not valid anywhere. *Boyles v. Boyles*, 308 N.C. 488, 492, 302 S.E. 2d 790, 793 (1983). The record does not suggest that defendant had actual notice of the proceeding, either by service of process or otherwise, but shows that if she received valid notice it was by a substitute form of process which the trial court concluded was not authorized by the law of New York under the circumstances recorded. The correctness of this determination is the only issue before us.

The record indicates that: When the action was brought in December, 1984 defendant was a resident of Westchester County, New York; a process server tried to serve defendant at her residence, which was also her place of business, on three different occasions—on 22 December 1984 at 10:05 a.m., on 31 December 1984 at 6:05 p.m., and on 2 January 1985 at 3:40 p.m.—but no one was there and he then posted a copy of the summons and complaint on the residence door and mailed duplicates to the residence address, which were not returned to him undelivered; several months later the court mailed a notice of default to defendant's address and it was not returned undelivered; defendant was out of the state from 25 December 1984 until mid-January, 1985, and when she returned home the suit papers were not on her door and she did not receive either the mailing by the process server or by the court; defendant moved to North Carolina in August, 1985 and did not learn about the proceeding until March, 1987 when plaintiffs' counsel contacted her about paying the judgment.

The law of New York applicable to the foregoing facts is plain. It authorizes the substitute process which the process server employed, but only after a due diligent effort is made to serve the defendant personally. With respect to this process,

known by the profession as "nail and mail," New York Civil Practice Law and Rule 308(4) provides, in substance, that: When in the exercise of "due diligence" personal service upon a natural person cannot be made in that State, either by delivering the summons to the person or by delivering it to a person of suitable age and discretion at the defendant's actual place of business or usual place of abode, service can be accomplished "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by mailing the summons to such person at his last known residence." In many cases involving such service the New York courts have held that the "due diligence" requirement must be met before the substitute service is undertaken, and if it is not the substitute service is invalid in the absence of actual notice by some other means. *Smith v. Wilson*, 515 N.Y.S. 2d 146 (A.D. 3 Dept. 1987). Thus, the court's ruling as a matter of law—that the process server did not make a due diligent effort to personally serve defendant in one of the two ways authorized before resorting to the "nail and mail" substitute—is correct and we affirm it. For though the process server tried to serve defendant personally on three different occasions, all were during the Christmas-New Year's season when people are not usually at their businesses and homes, and he resorted to the "nail and mail" substitute without attempting to ascertain either where defendant was or when she would return, which he perhaps could have done either by telephoning defendant's business or residence at times when someone was likely to be there or by questioning her neighbors. In a similar case the New York court reached the same result, saying that "[s]uch a flawed effort to effect personal service constitutes a lack of due diligence as a matter of law." *Pacamor Bearings, Inc. v. Foley*, 460 N.Y.S. 2d 662, 664 (A.D. 1983).

Affirmed.

Judges JOHNSON and SMITH concur.

EDDIE LEE COOPER, JR., PLAINTIFF v. GLENDA COOPER, DEFENDANT

No. 8726DC1064

(Filed 5 July 1988)

Divorce and Alimony § 30— South Carolina divorce—right to equitable distribution of property in North Carolina not destroyed

Since neither party requested an adjudication of their property rights in a South Carolina divorce action, it necessarily followed under Sec. 20-7-420 of the South Carolina Code that the court never acquired jurisdiction over their marital property, and the divorce judgment entered therein did not destroy plaintiff's right to an equitable distribution of their marital property under N.C.G.S. § 50-11(f).

APPEAL by plaintiff from *Jones, William G., Judge.* Order entered 22 June 1987 and amendment to order entered 28 July 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 30 March 1988.

Ray Rankin and Merryman, Dickinson, Ledford & Rawls, by Charles B. Merryman, Jr., for plaintiff appellant.

Wishart, Norris, Henninger & Pittman, by Alan R. Krusch, for defendant appellee.

PHILLIPS, Judge.

The parties, formerly husband and wife, lived for many years in Mecklenburg County where they separated for the last time in 1984, after which defendant moved to South Carolina and obtained a divorce on 18 February 1986. Within six months thereafter this action for the equitable distribution of three parcels of Mecklenburg County real estate that the parties acquired during the marriage was brought. Following defendant's motion to dismiss and a hearing thereon at which depositions, pleadings and other materials were considered the court dismissed the action by order of summary judgment on the ground that it is barred by the South Carolina divorce judgment under G.S. 50-11(f) which provides as follows:

> An absolute divorce by a court that lacked personal jurisdiction over the absent spouse *or lacked jurisdiction to dispose of the property* shall not destroy the right of a

> spouse to an equitable distribution of marital property under G.S. 50-20 if an action or motion in the cause is filed within six months after the judgment of divorce is entered. (Emphasis supplied.)

The decision that plaintiff's right to an equitable distribution of their Mecklenburg County real estate was destroyed by the divorce judgment is based upon findings of fact and conclusions of law that the South Carolina court had personal jurisdiction over the absent plaintiff and had jurisdiction to dispose of their property. Though both these determinations are challenged by plaintiff, the determination that the South Carolina court had personal jurisdiction of plaintiff is invulnerable under the principles laid down in *International Shoe Company v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945) and *Miller v. Kite*, 313 N.C. 474, 329 S.E. 2d 663 (1985) because it is supported by evidence and findings that plaintiff had had many substantial contacts with the State of South Carolina over a period of several years and plaintiff was served with process in accord with that State's long arm statute. But the determination that the South Carolina court had jurisdiction to dispose of the marital property is not similarly supported, as the following record facts and applicable provisions of South Carolina law plainly show:

Following a series of separations and reconciliations beginning in 1978 when the parties were domiciled in Mecklenburg County, defendant moved to South Carolina in 1984 and in September, 1985 she sued for divorce in the Family Court of Horry County, South Carolina and plaintiff was served in North Carolina, where he continued to be domiciled, by certified mail. In the petition or complaint defendant alleged in substance only that she was entitled to an absolute divorce because of plaintiff's adultery and her only reference to their property was the statement "[t]hat the parties desire to maintain the assets presently held by each of them." Plaintiff neither appeared in nor filed a pleading in the action and in due course a default judgment for absolute divorce was entered, which did not mention the parties' property. When the divorce proceeding was heard South Carolina had no equitable distribution statute and the Family Court had only such jurisdiction over the property of marital litigants as Sec. 20-7-420 of the South Carolina Code granted. Under that statute the Fami-

ly Court had the exclusive jurisdiction to hear and determine actions—

> [f]or divorce *a vinculo matrimonii*, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in such actions in and to the real and personal property of the marriage and attorneys' fees, *if requested by either party in the pleadings.* (Emphasis supplied.)

Thus, the Family Court's jurisdiction over the property of the parties did not automatically attach upon the filing of defendant's suit, but depended upon a request in a pleading by one of the parties. The complaint, the only pleading in the action, neither alleged the existence of marital property nor requested an adjudication with respect to it; and the statement therein that "[t]he parties desire to maintain the assets presently held by each of them" instead of being a request for the court to adjudicate their property rights was a declaration that such an adjudication was not desired. Since neither party requested an adjudication of their property rights it necessarily follows that under the foregoing statute the court never acquired jurisdiction over their marital property and that the divorce judgment entered therein did not destroy plaintiff's right to an equitable distribution of their marital property under G.S. 50-11(f), as the court erroneously ruled. Our holding that the Family Court had no authority over the property of the parties is in accord with several South Carolina decisions, including *Harris v. Harris*, 279 S.C. 148, 303 S.E. 2d 97 (1983).

The order appealed from is vacated and the matter remanded to the District Court for an equitable distribution of the parties' marital property as requested in the complaint.

Vacated and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

SYLVESTER HALL AND KENNETH FOWLER, PLAINTIFFS v. GEORGE HAMMOND CARTER, JR., ENERGY TECHNOLOGY AND DEVELOPMENT, STACY NEWKIRK, JR., AND STACY NEWKIRK, SR., DEFENDANTS

No. 8814SC124

(Filed 5 July 1988)

Costs § 3; Rules of Civil Procedure § 37— failure to make discovery—expenses assessed—time for payment

It is within the trial court's discretion to require that expenses of obtaining an order compelling discovery assessed pursuant to N.C.G.S. § 1A-1, Rule 37(a)(4) be paid at any time after entry of an order pursuant to the rule, and the better practice is for all such orders to include a provision as to when payment of such expenses shall be made. Since the trial court's order in this case did not set a time certain for payment of the expenses assessed against plaintiff, the drastic remedy of dismissal granted by the trial court was improper.

APPEAL by plaintiff from *Barnette, Henry V., Jr., Judge*. Order entered 14 July 1987 in DURHAM County Superior Court. Heard in the Court of Appeals 8 June 1988.

This action arose out of an automobile accident that occurred on 2 September 1983 in Durham County. Plaintiffs Sylvester Hall and Kenneth Fowler were passengers in an automobile owned by defendant Stacy Newkirk, Sr. and being driven by defendant Stacy Newkirk, Jr. when it collided with a truck which was owned by defendant Energy Technology and Development, Inc. and was being operated by defendant George H. Carter, Jr. The plaintiffs alleged in their complaint that the accident was caused by the willful and wanton negligence of Stacy Newkirk, Jr. or Carter, or both of them, and that their injuries and damages were proximately caused by defendants' conduct. The defendants answered in apt time and presented cross-claims.

On 8 December 1986 defendants Newkirk (defendants) served plaintiff Fowler (plaintiff) with interrogatories. On 13 April 1987 Judge Anthony M. Brannon, upon motion of defendants to compel discovery, ordered plaintiff to answer the interrogatories served on 8 December within 15 days and further ordered that plaintiff be taxed $200 "for the costs of obtaining this order." Plaintiff served completed answers to the interrogatories on 16 April. However, he did not pay the $200 "costs," and on 23 June the defendants moved to dismiss plaintiff's claim for relief for failure to

pay the $200 assessed. On 14 July Judge Henry V. Barnette, Jr. entered an order (1) concluding that plaintiff had willfully failed to comply with the 13 April discovery order and (2) dismissing plaintiff's claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 37 of the Rules of Civil Procedure. Plaintiff appealed.

Albert L. Willis for plaintiffs.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by James H. Johnson, III, Sherry R. Dawson and Robert W. Oast, Jr., for defendants.

WELLS, Judge.

Rule 37(a)(4) of the North Carolina Rules of Civil Procedure provides that if a motion for an order compelling discovery is granted,

> the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the 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.

Plaintiff in the present case does not challenge the trial court's authority to require him to pay the "reasonable expenses incurred" by defendants in obtaining the 13 April order compelling discovery. Moreover, plaintiff concedes that the $200 taxed against him has not been paid. But he contends that his failure to pay is excused because the 13 April order does not set a definite and clearly ascertainable time within which payment is to be made. The last paragraph of the 13 April order provides as follows:

> NOW, THEREFORE, and pursuant to the provisions of Rule 37 of the Rules of Civil Procedure, IT IS ORDERED that plaintiff Kenneth Fowler within 15 days from the date of entry of this order serve upon defendants Newkirk full and complete written answers to the interrogatories of said defendants of date December 8, 1986. IT IS FURTHER ORDERED that the sum

of $200—shall be taxed to said plaintiff for the costs of obtaining this order.

Plaintiff contends that in the absence of an unambiguous order clearly setting a time certain for payment, costs taxed pursuant to Rule 37(a)(4) are not due and owing until after final judgment.

We cannot agree with plaintiff that expenses assessed pursuant to Rule 37(a)(4) are not due and payable until final judgment, but rather hold that it is within the trial court's discretion to require that such expenses be paid at any time after entry of an order pursuant to the rule. Accordingly, the better practice would be for all such orders to include a provision as to when payment of such expenses shall be made. Since the order entered by Judge Brannon in this case did not set a time certain for the payment of the expenses assessed against plaintiff, we hold that the drastic remedy of dismissal granted by Judge Barnette was improper and reverse. We remand for an appropriate order setting a time certain for plaintiff's compliance with Judge Brannon's order.

Reversed and remanded.

Judges BECTON and PHILLIPS concur.

ROBERT C. GARRISON v. RAMONA GARRISON

No. 8722SC1247

(Filed 5 July 1988)

Divorce and Alimony § 30; Partition § 3.1— authority of district court invoked for equitable distribution—no authority of superior court to partition marital property

The superior court had no authority to partition marital property pursuant to the provisions of N.C.G.S. § 46-1 *et seq.* after divorce of the parties where the jurisdiction of the district court had been properly invoked in the divorce proceeding to equitably distribute such marital property.

APPEAL by respondent from *Walker (Russell G., Jr.), Judge.* Judgment entered 21 October 1987 in Superior Court, IREDELL County. Heard in the Court of Appeals 4 May 1988.

This is a special proceeding wherein petitioner seeks to have property allegedly owned as tenants in common partitioned pursuant to the provisions of G.S. 46-1 *et seq.* The record before us discloses the following uncontroverted facts: Petitioner and respondent were married on 22 December 1979. On 15 June 1981, they were conveyed as tenants by the entirety the property in question, where they lived as husband and wife until they separated on 22 July 1985. On 23 July 1986, petitioner as plaintiff brought an action in district court for absolute divorce and equitable distribution. Respondent as defendant filed an answer admitting the essential allegations in the complaint and joined in the prayer for absolute divorce and equitable distribution of the marital property. On 19 January 1987, a judgment of absolute divorce was entered, but no judgment of equitable distribution was entered. On 29 July 1987, petitioner filed a special proceeding pursuant to the provisions of G.S. 46-1 *et seq.* in the office of the clerk of superior court. In this special proceeding, petitioner sought partition of the real property that "petitioner and respondent [had] purchased" as tenants by the entirety on 15 June 1981 and "occupied . . . as their home." Respondent filed a motion to dismiss this special proceeding pursuant to the provisions of Rule 12(b)(1) of the Rules of Civil Procedure for "lack of jurisdiction over the subject matter." The clerk of superior court dismissed the special proceeding, and petitioner appealed to the judge of the superior court who, on 21 October 1987, reversed the decision of the clerk and directed the clerk "to issue an order appointing commissioners and to proceed in an orderly fashion with the partitioning of the property described in the Petition." Respondent appealed to this Court.

Harris, Pressly & Thomas, by Edwin A. Pressly, for plaintiff, appellee.

Ronald Williams for defendant, appellant.

HEDRICK, Chief Judge.

The only question before us is whether the superior court erred in ordering the property described in the special proceeding partitioned pursuant to the provisions of G.S. 46-1 *et seq.* We hold it did err; therefore, we vacate the order of the superior

court and remand the proceeding to the superior court for entry of an order dismissing the special proceeding.

G.S. 7A-244 states:

> The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, *equitable distribution of property*, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof. (Emphasis added.)

G.S. 50-11(e), in pertinent part, provides:

> An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case. . . .

The parties in the present case invoked the jurisdiction of the district court to equitably distribute their marital property in the action for absolute divorce and equitable distribution of their marital property. The district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. The superior court has no authority to partition marital property pursuant to the provisions of G.S. 46-1 *et seq.* where, as here, the jurisdiction of the district court has been properly invoked to equitably distribute such marital property. Had the parties not asserted their right to have the property equitably distributed pursuant to G.S. 50-20, either tenant in common could have filed a special proceeding to have the property partitioned as provided by G.S. 46-1 *et seq.*

For the reasons set out above, the order of the superior court dated 21 October 1987 is vacated, and the proceeding is remanded to the superior court for the entry of an order dismissing the

special proceeding to have the property in question partitioned pursuant to G.S. 46-1 *et seq.*

Vacated and remanded.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. OTIS EARL PULLEY

No. 8710SC973

(Filed 5 July 1988)

Homicide § 30.3— involuntary manslaughter—instruction not required

The trial court did not err in failing to charge the jury on involuntary manslaughter where the only possible evidence to support such a verdict was defendant's statement to the police to the effect that he did not stab the victim but she twice ran onto his knife, and defendant did not rely upon the statement at trial but instead repudiated it as a lie.

APPEAL by defendant from *Hight, Judge.* Judgment entered 22 May 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 28 March 1988.

Attorney General Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Appellate Defender Hunter, by Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant.

PHILLIPS, Judge.

Tried for first degree murder in the stabbing death of Donna Clark Allen defendant was convicted of voluntary manslaughter. In pertinent part the *State's evidence* tended to show that: The victim and two men accompanied Kathy Lunsford to the Raleigh apartment she formerly shared with Angela Rowland, where a party was going on; when Angela opened the door, Kathy threw a jar of household bleach in her face; a free-for-all immediately ensued, during the course of which defendant rushed from the apartment with a knife in hand and stabbed the victim twice before he was eliminated from the fray by a blow on the head

with an iron pipe; when first questioned by the police defendant denied stabbing anyone, but later told them the victim had rushed toward him with a knife and he pulled his own knife from his pocket, held it in front of himself and the victim ran into it twice; the State did not rely on the statement as the autopsy findings showed that both knife entries into the victim's body were followed by upper thrusts that caused the knife to penetrate first the liver and then the heart. *Defendant testified* in pertinent part that: The statement given to the police about the victim running upon his knife was false and that he intentionally stabbed the victim in defending himself and his girlfriend.

Though not based upon any exception to the charge or issues, defendant's main contention is that the court committed "plain error" under the rule of *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) in failing to charge the jury on involuntary manslaughter, which is a proper verdict only when there is evidence that the killing resulted from an unintentional act by the defendant. *State v. Davis*, 66 N.C. App. 334, 311 S.E. 2d 311 (1984). The only possible evidentiary support for an involuntary manslaughter verdict in this case is defendant's statement to the police to the effect that he did not stab the victim and that she twice ran onto his knife. Assuming *arguendo* that the statement is evidence of involuntary manslaughter, which we doubt, there was no error, plain or otherwise, in not submitting that issue to the jury, because defendant did not rely upon the statement in the trial court, but repudiated it as a lie. Having taken that position in the trial court he may not take another here. *State v. Simmington*, 235 N.C. 612, 70 S.E. 2d 842 (1952). Furthermore, since the purpose of a verdict under our law is to speak the truth, no litigant is entitled to obtain a verdict that is based upon an admitted falsehood.

Defendant's other contentions, likewise without merit, concern evidence that was clearly admissible and could not have conceivably prejudiced him in any event, and the judge's failure to find in mitigation of the sentence that defendant acted "under duress," about which there is no evidence in the record.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

Russell v. Town of Morehead City

THOMAS H. RUSSELL AND WIFE, IRIS W. RUSSELL, THOMAS H. RUSSELL, JR., AND EDDIE A. ARRANTS, PLAINTIFFS v. THE TOWN OF MOREHEAD CITY, A MUNICIPAL CORPORATION, EDWARD S. DIXON, MAYOR OF THE TOWN OF MOREHEAD CITY, DAVID WALKER, WILLIAM CONDIE, ALBERT LEA, JR., RICHARD ABELL, WILLIAM (BILL) SCARPETTI, STEVE SANDERS, DWIGHT LUCAS, DAVID McCABE, LARRY HOPKINS, JOHN HESTER, AND WILLIE STUBBS, DEFENDANTS

No. 883SC134

(Filed 19 July 1988)

1. **Trial § 10.1— comments by trial judge—cumulative prejudice**

In an action for damages and injunctive relief arising from disputed ownership of land and defendant's forcible entry onto that land, defendants received a new trial due to the cumulative prejudicial effect of comments by the trial judge which disparaged defendants as public officials and government employees and emphasized the rights of private citizens over government authority.

2. **Assault and Battery § 3— civil battery—spraying with water hose—evidence sufficient for jury**

There was sufficient evidence to go to the jury on a civil battery claim in an action arising from the town's forcible entry onto disputed property where there was evidence that defendant sprayed two people with a water hose, held in one instance twelve inches from the victim's face and in the other knocking off the victim's glasses and hat.

APPEAL by defendants from *Bailey (James H. Pou), Judge.* Judgment entered 18 September 1987 in Superior Court, CARTERET County. Heard in the Court of Appeals 8 June 1988.

Plaintiffs filed their complaint on 17 October 1986 alleging the following: that plaintiff Thomas H. Russell and his wife, plaintiff Iris Russell, are owners in fee simple of a tract of land located in Morehead City, North Carolina; that the land in question was covered by the navigable waters of Bogue Sound until 1955, when plaintiffs took possession of it; that defendant Town of Morehead City (hereinafter, defendant Town), defendant Mayor Dixon, and the other officials of defendant Town were fully aware that they had no valid claim to the land in question; that on 13 October 1986, defendant Town through its mayor, defendant Dixon, its city manager, defendant Walker, its police, defendants Condie, Lea, Abell, Scarpetti, and Sanders, and its employees, defendants Lucas, McCabe, Hopkins, Hester, and Stubbs, violently entered

upon the land in question; that upon the direction of defendant Town's city manager, defendant Walker, defendant police officers invaded the property, assaulted plaintiff Thomas H. Russell, Jr., and ripped down plaintiffs' fence; that defendants posted vessels stored on the land in question with notices directing removal of the vessels within seven days upon threat of removal of the vessels by defendant Town; and that the acts of defendants were malicious, wanton, and in reckless disregard of plaintiffs' rights. The complaint also alleged, in a second cause of action, that defendant Lea, a police officer for defendant Town, viciously assaulted plaintiff Thomas H. Russell, Jr. The complaint prayed for temporary and permanent injunctive relief, compensatory damages, and punitive damages.

Defendant Town and defendant Dixon filed a timely answer, denying the material allegations of the complaint and further alleging that the land in question is owned by defendant Town as a part of the Town's street system and is not subject to appropriation by adverse possession. Defendants further filed a counterclaim alleging that the land in question consisted of a portion of Ninth Street, a street in defendant Town's street system running southward from Shepard Street and terminating at the navigable waters of Bogue Sound; that plaintiffs used the land in question by express permission of defendant Town; and that approximately two weeks prior to 13 October 1986, plaintiffs erected a barrier across Ninth Street blocking access to Bogue Sound. Based on these allegations, defendants sought injunctive relief to prevent plaintiffs from blocking access to the land in question. Plaintiffs' timely reply denied defendants' allegations and reasserted plaintiffs' claim of adverse possession.

The remaining defendants filed a timely answer, denying the material allegations of plaintiffs' complaint and asserting that any actions by defendant Lea against plaintiff Thomas H. Russell, Jr., were taken in self-defense. Defendants Hopkins and Lea further asserted a counterclaim against plaintiffs Thomas H. Russell and Thomas H. Russell, Jr., alleging that plaintiff Thomas H. Russell, Jr., at the direction of plaintiff Thomas H. Russell, assaulted defendants Hopkins and Lea by spraying them with a water hose. The counterclaim sought compensatory and punitive damages. Plaintiffs filed a timely reply to this counterclaim, admitting that plaintiff Thomas H. Russell, Jr., sprayed defendants Hopkins and

Lea with a water hose, but asserting that he did so to protect himself, his father, and his father's property from the unwarranted trespass of defendants.

On 26 May 1987, defendant Town and defendant Dixon filed, with leave of court, an amended answer and counterclaim that asserted an additional claim for relief seeking damages and injunctive relief for trespass by plaintiff. This additional claim alleged that the property in question was conveyed to defendant Town by a deed, dated 10 March 1987, from the State of North Carolina.

The matter was heard before a jury. At the close of plaintiffs' evidence, defendants moved the court for directed verdicts as to all plaintiffs' claims. The court denied defendants' motions. At the close of all evidence, the court dismissed defendants' counterclaims and, again, denied defendants' motions for directed verdict.

Six issues were submitted to the jury and answered as follows:

1. Are the plaintiffs, Thomas H. Russell, Sr. and wife, Iris, the owner of and entitled to possession of the land as described in the Complaint?

Answer: YES

2. Did the Defendant Albert Lea, Jr. commit an assault and battery upon the Plaintiff Thomas H. Russell, Jr.?

Answer: YES

3. If so, did the Defendant David Walker aid and abet in said assault by directing the actions of the Defendant Lea?

Answer: YES

4. What damages, if any, did the Plaintiff Thomas H. Russell, Jr. sustain as a proximate result of the assault and battery committed upon him?

Answer: YES $88.00

5. What amount of punitive damages, if any, is the Plaintiff Thomas H. Russell, Jr. entitled to have and recover of the Defendant Albert Lea, Jr.?

Answer: YES $1.00

6. What amount of punitive damages, if any, is the Plaintiff Thomas H. Russell, Jr. entitled to have and recover of the Defendant David Walker?

Answer: YES $17,300.00

The court entered judgment in accordance with the jury's verdict. Defendants appeal.

Wheatly, Wheatly, Nobles and Weeks, P.A., by C. R. Wheatly, Jr., and Stevenson L. Weeks, for plaintiff-appellees.

Nelson W. Taylor, III, and M. Douglas Goines for defendant-appellants.

PARKER, Judge.

In this appeal, defendants have raised in their brief thirty-six assignments of error in reference to some one hundred forty-nine exceptions. In substance, defendants contend that the conduct and comments of the trial judge prejudiced the jury against defendants; that the trial court erred in denying defendants' motion for directed verdict on the issue of adverse possession; that the trial court erred in denying defendants' motion for directed verdict on the issue of defendant Walker's liability for assault and battery; that the trial court erred in dismissing at the close of all evidence the counterclaims of defendant Town and of defendants Lea and Hopkins; that the trial court erred in tendering to the jury certain instructions and refusing to tender to the jury certain other instructions; that the trial court erred in refusing to allow counsel for defendants to argue the grounds for their motions for directed verdict at the close of all evidence, for judgment notwithstanding the verdict, and for a new trial; that the trial court erred in denying defendants' motions for judgment notwithstanding the verdict and for a new trial; and that the trial court erred in admitting some evidence and refusing to admit some other evidence. For

the reasons that follow, we conclude that defendants are entitled to a new trial.

At the outset, we note three of the thirty-six questions presented in defendants' brief merely paraphrased a rule of evidence and then directed the Court to "examine each of the exceptions noted." The nineteen exceptions noted by these latter questions were not specifically identified, characterized, or discussed in the brief. The practice of directing the Court of Appeals to examine for itself each exception and to perform the task of applying the rule of evidence cited to each exception noted, foists on the Court the role of advocate as well as judge. An appellant's failure to relate authority cited to appellant's assignment of error or to any argument in support thereof violates Rule 28 of the North Carolina Rules of Appellate Procedure. *Brown v. Boney*, 41 N.C. App. 636, 255 S.E. 2d 784, *disc. rev. denied*, 298 N.C. 294, 259 S.E. 2d 910 (1979).

[1] In their first assignment of error, defendants contend that the trial judge's comments and conduct prejudiced the jury against defendants, their counsel, their witnesses, and their case. We agree for the reason that some of Judge Bailey's statements to the jury intimated his opinion as to the correct outcome of the case and the cumulative effect of these statements and other extraneous remarks mandates a new trial.

Every litigant in the courts of this State "is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury." *Withers v. Lane*, 144 N.C. 184, 192, 56 S.E. 855, 857-58 (1907). *See also Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 103, 310 S.E. 2d 338, 344 (1984). Generally, the trial judge occupies an exalted position in the trial court. *McNeill v. Durham ABC Bd.*, No. 524PA87, slip op. at 6 (N.C. 2 June 1988); *Colonial Pipeline Co.*, 310 N.C. at 103, 310 S.E. 2d at 344; *State v. Lynch*, 279 N.C. 1, 10, 181 S.E. 2d 561, 567 (1971). It is well recognized that juries earnestly seek to ascertain the trial judge's opinion on the controverted issues and to shift onto the court the responsibility of decision making. *Withers*, 144 N.C. at 188, 56 S.E. at 856; *In re York*, 18 N.C. App. 425, 429, 197 S.E. 2d 19, 21, *cert. denied*, 283 N.C. 753, 198 S.E. 2d 729 (1973). Therefore, "The slightest intimation from the judge as to the weight, importance or effect of

the evidence has great weight with the jury . . . ." *Upchurch v. Funeral Home*, 263 N.C. 560, 567, 140 S.E. 2d 17, 22 (1965). *See also Colonial Pipeline Co., supra.*

As a result of these considerations, the rule in this State is that the trial judge is prohibited from making comments at any time during the trial which amount to expressions of opinion as to what has or what has not been shown by the evidence. *Saintsing v. Taylor*, 57 N.C. App. 467, 472, 291 S.E. 2d 880, 883-84, *disc. rev. denied*, 306 N.C. 558, 294 S.E. 2d 224 (1982). *See also* G.S. 1A-1, Rule 51(a). Any remark by the presiding judge made in the presence of the jury that tends to prejudice the jury against the unsuccessful party may be grounds for a new trial. *Colonial Pipeline Co.*, 310 N.C. at 103, 310 S.E. 2d at 344; *Homes, Inc. v. Holt*, 266 N.C. 467, 475, 146 S.E. 2d 434, 440 (1966).

To determine whether a party's right to a fair trial has been impaired by the remarks of the trial judge, we must examine the probable effect of the remarks upon the jury, irrespective of the motives of the trial judge. *Colonial Pipeline Co.*, 310 N.C. at 103, 310 S.E. 2d at 344; *Saintsing*, 57 N.C. App. at 472-73, 291 S.E. 2d at 884. This test requires an examination of the circumstances under which the remarks were made and the probable meaning of the remarks to the jury. *Colonial Pipeline Co.*, 310 N.C. at 103, 310 S.E. 2d at 344; *Merchants Distributors v. Hutchinson and Lewis v. Hutchinson*, 16 N.C. App. 655, 661, 193 S.E. 2d 436, 441 (1972).

While defendants have cited seventy-five exceptions and discussed twenty-three of those exceptions in their brief, we find the following comments of the trial judge illustrative of a cumulative prejudicial effect on defendants' case.

On the second day of trial, counsel for defendants asked the court to excuse the mayor of defendant Town, defendant Dixon, and several of defendant Town's commissioners. The trial judge responded, "It would suit me just fine if they never come back." On the third day of trial, while plaintiffs continued to present evidence, counsel for defendants again requested the court's permission to excuse defendant Dixon and several councilmen so they could attend a ship's christening. Judge Bailey responded, "All politicians go to all meetings. I imagine they will have a pigpicking on the grounds." Thereafter, plaintiffs rested, and de-

fendants commenced to put on their evidence. One of defendants' witnesses, defendant Condie, Chief of Police of defendant Town, stated that when he arrived at the disputed property on 13 October 1986, he saw the defendants employed by defendant Town's Public Works Department sitting on the land adjoining the disputed property. At that point, Judge Bailey interjected, "Typical, public service workers sitting around doing nothing."

The fourth day of trial was 17 September 1987, the two hundredth anniversary of the signing of the United States Constitution. In honor of this occasion, before defendants continued with their evidence, Judge Bailey addressed the following remarks to the jury:

> Good morning, ladies and gentlemen. Ladies and gentlemen, before we get into this, I have several things on my mind that don't have anything to do with this case except indirectly. Two hundreds year [sic] ago we adopted in this country a constitution. It, and perhaps not coincidental that the case we are trying today, is a case in which citizens are in conflict with government. The constitution of the United States puts the government itself under law. We are the only country on earth in which the government itself is placed under law. Your public officials, your legislature, your government and your judges cannot with impunity disregard the law of the land, which is the constitution. The constitution is an interesting document. It gives very few powers to government. It mostly is a document that says what government cannot do. And it clearly says that all of the powers not specifically granted to government are reserved to the people. That's you and me. You can talk on the telephone with little or no fear that your conversation will be monitored; your right of privacy. Your right of protection from the invasion of your home is guaranteed by the constitution. You and I can get signs and go out here and picket the courthouse, demand that the place be burned down. Unless we try to burn it, we are perfectly safe. The constitution gives you and me the right to petition for the redress of grievances. Whether they are real or imaginary, grievances we can speak our piece. The newspapers can write any number of articles saying that the government is a bum; that the Legislature is incompetent, the editor won't be put in jail. If he had been,

> Johnathan Daniels would not have lasted more than ten minutes. But this is the constitution. You can go to any church or no church that suits you. Your right to worship your god in your way is guaranteed by the constitution. The government can't prevent it, not legally, and the courts say what the government can and can't do. But the courts themselves are under restraint. Look how clearly the thing is set up. We have three sections of government, three branches. The legislative branch controls the money. The executive branch controls the army and the judicial branch keeps the other two honest. But without all three of us, very little can be accomplished. That's the constitution.
>
> I know that you didn't come down here in the middle of the night to hear me make a speech. I am not going to make much of one. I am about through. But I do wish when you go home this evening that you pick up a copy of the News and Observer for this morning and read the lead editorial. It tells you a lot about the constitution. I don't ordinarily read the News and Observer, almost never endorse what they say, but they are right on this one. Take a look at it and think about the fact that you live in a country in which the government itself is subject to law.

At the close of all the evidence, in the presence of the jury, the trial judge predicted that the charge conference would take only a few minutes and "might not be over real fast." When counsel for defendant expressed doubts that they could finish that quickly, the judge responded, "You'd be surprised. I have already got my mind made up."

While one such comment, standing alone, might not be regarded as prejudicial, the cumulative effect of the foregoing comments by Judge Bailey, which disparaged defendants as public officials and government employees and which emphasized the rights of private citizens over governmental authority, diluted defendants' cause and amounted to an expression of opinion by the trial judge as to the proper outcome of the case. *See McNeill v. Durham ABC Bd., supra.* Moreover, although the two hundredth anniversary of our federal Constitution deserved some recognition by the court, the substance of the case, which involved alleged trespass and assault by government officials on the as-

serted private property of plaintiffs, required restraint and neutrality on the part of the trial judge. As a result of the cumulative prejudicial effect of Judge Bailey's remarks on defendants' case, defendants are entitled to a new trial.

Because defendants are entitled to a new trial, we do not address all of the remaining assignments of error before this Court for review. However, one assignment of error involves an issue likely to arise on retrial.

[2] At the close of all evidence, the trial judge dismissed the counterclaims of defendants Lea and Hopkins against plaintiffs Thomas H. Russell, Sr., and Thomas H. Russell, Jr., for battery. The dismissal of these counterclaims was erroneous.

Battery is an immediate harmful or offensive contact with one's person that is intentional and unpermitted. *Dickens v. Puryear*, 302 N.C. 437, 445, 276 S.E. 2d 325, 330 (1981). At trial, defendant Hopkins testified that on 13 October 1986 he was instructed as supervisor of streets and sanitation for defendant Town to go to the disputed property to remove a fence and clean up debris in the area. As defendant Hopkins began to pull up the fence, plaintiff Thomas H. Russell, Jr., sprayed defendant Hopkins with a water hose held about twelve inches away from defendant Hopkins' face. Defendant Lea testified that he was at the disputed property as a police lieutenant of defendant Town. Defendant Lea testified that when he saw plaintiff Thomas H. Russell, Jr., spray defendant Hopkins with the hose, he quickly walked toward them. As he approached, plaintiff Thomas H. Russell, Jr., turned the hose on defendant Lea and sprayed him in the face, knocking off his glasses and his hat. These facts are sufficient to go to the jury on the issue of battery.

The remaining assignments of error raised by defendants' brief are unlikely to arise on retrial. For the foregoing reasons, defendants are entitled to a

New trial.

Judges JOHNSON and COZORT concur.

BUDD TIRE CORPORATION v. PIERCE TIRE COMPANY, INC., PHIL PIERCE TIRE SALES, INC., PHILLIP LEE PIERCE, TODD PARKER, AND CLARENCE BAITY

No. 8811DC136

(Filed 19 July 1988)

1. **Corporations § 31; Fraudulent Conveyances § 3.4— purchase of assets of one corporation by another corporation—insufficient assets retained to pay creditors—transaction fraudulent**

Evidence was sufficient to support the trial court's findings that all of the assets of a tire company were sold for insufficient consideration, the tire company did not retain sufficient assets to pay existing creditors, and the purchaser knew of the tire company's debts and that the consideration paid would be inadequate to satisfy those debts. Such findings compelled the trial court's conclusion that the transfer was fraudulent.

2. **Corporations § 31; Fraudulent Conveyances § 2— purchase of assets of one corporation by another corporation—good will sold—fraudulent transaction—money damage award equal to value of good will**

Where one corporation purchases all or substantially all of the assets of another corporation, including the good will, in a manner deemed fraudulent, the selling corporation's creditors may follow the good will into the hands of the purchasing corporation and obtain a money damage award equal to its value.

3. **Unfair Competition § 1— sale of corporation's assets—insufficient assets retained to pay creditors—sale not unfair and deceptive trade practice**

In plaintiff's action to collect a debt owed under a contract by setting aside the sale of its debtor's assets, the trial court did not err in concluding that the sale was not an unfair and deceptive trade practice in violation of N.C.G.S. § 75-1.1, since the evidence showed no intent to defraud plaintiff but the transaction was merely deemed fraudulent to provide plaintiff an equitable remedy.

APPEAL by plaintiff and defendant from *Christian, Judge.* Judgment entered 10 September 1987 in District Court, LEE County. Heard in the Court of Appeals 2 June 1988.

This is an action to collect a debt of approximately $12,000. Plaintiff is a North Carolina corporation, engaged in the business of selling retread tires. Defendant Pierce Tire Company, Inc. (Tire Company), is a North Carolina corporation whose principal business is the retail sales and service of tires. Tire Company is owned entirely by Gilbert and Helen Pierce, whose son, Phil, worked as an employee servicing its largest customer, a local

soft drink distributor. Tire Company had purchased retread tires from plaintiff on account. In late 1984, however, Tire Company was insolvent and owed, in addition to the debt to plaintiff, approximately $10,000 to the Internal Revenue Service and over $2,000 to the North Carolina Department of Revenue. Tire Company's assets consisted of its equipment, a small inventory of tires, its goodwill, and accounts receivable of a few thousand dollars. Ms. Pierce, due to an illness suffered by Mr. Pierce, was, at all times relevant to this case, managing Tire Company.

Late in 1984, Mr. Clarence Baity, who owned a tire servicing business called "Baity's Tire Service, Inc.," approached Ms. Pierce about purchasing Tire Company. Mr. Baity was impressed with Tire Company's customer accounts, and he and Ms. Pierce discussed purchase prices ranging between $20,000 and $30,000. Following her discussions with Mr. Baity, Ms. Pierce talked with Mr. Todd Parker, an employee of Mr. Baity. Ms. Pierce testified that Mr. Parker told her that he and Mr. Baity could purchase only one-third of Tire Company's assets and would have to lease the other two-thirds. Ms. Pierce testified that she assumed, despite Mr. Parker's statements, that she had an agreement with Mr. Baity to sell all of Tire Company's assets for $25,000.

On 28 February 1985, Tire Company ceased doing business. The next day, defendant Phil Pierce Tire Sales, Inc. (Sales) moved into the same building and began its operation. Mr. Baity owns 75 percent of Sales' outstanding shares; the remaining 25 percent is owned by Mr. Parker. Phil Pierce is Sales' president. In addition to moving into the same building, Sales continued the same business as Tire Company, retaining the same sign on the building, answering the telephone in the same way, and servicing the same customers. The soft drink company account generated approximately $4,000 per month in gross revenues for Sales, about one-quarter of all its revenues. Shortly after Tire Company ceased operating, both Ms. Pierce and Phil Pierce telephoned Tire Company's customers and asked them to continue their business with the new corporation.

On 18 March 1985, Sales issued two checks, each for $5,000 and gave them to Ms. Pierce. One check was made payable to "Pierce Tire Service, Inc." and the other to Ms. Pierce individually. The later check was denominated as a "loan," although Sales

has never demanded or received repayment. Ms. Pierce cashed both checks and paid the entire $10,000 to the IRS. In March, April, and May, Sales sent Ms. Pierce checks for $150 each, as payment on the "leased" assets, but ceased further payments after the North Carolina Department of Revenue exacted over $2,000 from Sales to pay Tire Company's back taxes.

Plaintiff initially brought suit naming only Tire Company as defendant. By amended complaint, however, plaintiff added Sales as a defendant, alleging that it fraudulently purchased Tire Company's assets for inadequate consideration, leaving Tire Company without assets to pay existing creditors. Plaintiff also alleged that the transfer of assets was an unfair and deceptive trade practice under Chapter 75 of the General Statutes. Plaintiff's claim against Tire Company was reduced to judgment on 27 March 1986 but a subsequent execution was returned essentially unsatisfied after a portion of the transferred assets were sold for $470, less execution and sale expenses. Tire Company is not a party to this appeal.

After trial without a jury, the trial court found, in part, that Sales had agreed to pay $25,000 for the purchase of all of Tire Company's assets; that Sales purchased Tire Company's "entire business operation"; that Sales had attempted to change the terms of the sale by tendering only $10,000 to Ms. Pierce; that Ms. Pierce, by failing to pursue Tire Company's claim for the remaining $15,000, failed to retain sufficient assets to pay its creditors; and that Mr. Baity and Mr. Parker knew of Tire Company's outstanding debts and that the $10,000 payment was insufficient to satisfy these debts. The trial court concluded that the transfer of Tire Company's assets was fraudulent and that, therefore, Sales had assumed liability for Tire Company's debt to plaintiff. The trial court denied plaintiff's motion to treble the damages. Both parties appeal.

Moretz & Silverman, by J. Douglas Moretz, for the plaintiff.

Harrington, Ward, Gilleland & Winstead, by J. Allen Harrington and Eddie S. Winstead, III, for the defendant.

EAGLES, Judge.

SALES' APPEAL

Sales' appeal raises two issues: (1) whether the trial court erred in finding that Sales purchased all of Tire Company's assets, and (2) even assuming that Sales did purchase all the assets, whether the trial court erred in holding Sales liable for Tire Company's debt to plaintiff.

A corporation which purchases all, or substantially all, of the assets of another corporation is generally not liable for the old corporation's debts or liabilities. *See McAlister v. Express Co.*, 179 N.C. 556, 103 S.E. 129 (1920); Robinson, North Carolina Corporation Law and Practice, section 25-6 (1983); 15 Fletcher Cyc Corp, section 7122 (perm. ed. 1983). Exceptions exist where: (1) there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) the transfer amounts to a de facto merger of the two corporations; (3) the transfer of assets was done for the purpose of defrauding the corporation's creditors; or (4) the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers. *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F. 2d 1451 (11th Cir. 1985); *Robinson, supra; 15 Fletcher Cyc Corp, supra.* Some cases cite inadequate consideration for the purchase, or a lack of some of the elements of a good faith purchaser for value, as a separate exception, *see Kemos, Inc. v. Bader*, 545 F. 2d 913 (5th Cir. 1977); *Cyr v. B. Offen & Co. Inc.*, 501 F. 2d 1145 (1st Cir. 1974), although those are generally considered only as additional factors in determining whether the transaction was for the purpose of avoiding creditors' claims, *Bud Antle, Inc., supra*, or whether the new corporation is a mere continuation of the old one. *Robinson, supra.* Our case law is less recent but has adopted essentially the same exceptions. *See McAlister v. Express Co., supra* at 560, 561, 565, 103 S.E. at 130-131, 133.

[1] Sales argues that the record establishes that it did not purchase all or substantially all of Tire Company's assets, and does not fall within any of the exceptions to the general rule of purchaser corporation non-liability. We disagree.

A trial court's findings of fact are conclusive on appeal if there is evidence to support them, even if there is evidence to the contrary. *Menzel v. Metrolina Anesthesia Assoc.*, 66 N.C. App. 53, 310 S.E. 2d 400 (1984). Here, the record contains ample evidence to support the trial court's finding that Sales purchased all of Tire Company's assets. Sales' primary shareholder, Mr. Baity, discussed with Ms. Pierce purchasing Tire Company's entire business. Ms. Pierce testified that she believed the parties had agreed to a purchase of all of Tire Company's assets for $25,000 and that Mr. Parker told her that the "lease" arrangement was just to make the sale "legal." Moreover, plaintiff testified that the value of the equipment which Sales contends was only one-third of Tire Company's equipment was actually 65-80 percent of the value of all the equipment. Although both Mr. Parker and Mr. Baity testified that they agreed to purchase only one-third of the assets and to lease the other two-thirds, that does not establish that the transfer was not a sale of all or substantially all of the assets. That evidence merely creates a question of credibility, which is solely a question for the trial court. *Id.* The record shows no specific agreement between the parties as to the terms of a sale or lease. The trial court was left to determine the nature of the transfer from the surrounding circumstances. The evidence supports an inference that Sales purchased all of Tire Company's equipment.

Even assuming the evidence establishes that Sales only leased two-thirds of the equipment, the trial court could nevertheless have found that it purchased substantially all of Tire Company's assets. The evidence shows that Sales purchased Tire Company's good will. "Good will" is a property right which consists of intangibles associated with favorable community relations and identification of the business name. *See Faust v. Rohr*, 166 N.C. 187, 81 S.E. 1096 (1914); *North Clackamas Community Hospital v. Harris*, 664 F. 2d 701 (9th Cir. 1980). Although it exists as an incident of other property rights, *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910 (1953), "good will" is as much an "asset" as equipment, machinery, or other tangible property. *Bouligny, Inc. v. Steelworkers*, 270 N.C. 160, 154 S.E. 2d 344 (1967); *Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E. 2d 528 (1939), *overruled on other grounds, Watch Co. v. Brand Distributors*, 285 N.C. 467, 206 S.E. 2d 141 (1974). The record establishes that Sales

succeeded to the "good will" that Tire Company had established in its twenty years of existence. There is also evidence that the good will was, in fact, Tire Company's primary "asset" and the main reason that Mr. Baity and Mr. Parker were interested in purchasing Tire Company's business. The trial court did not err in finding that Sales purchased all of Tire Company's assets.

Sales also argues that, even assuming that it purchased Tire Company's assets, the transaction does not fall within any of the exceptions to the general rule that a purchasing corporation is not liable for the debts of the seller. Our case law has treated the question of a successor corporation's liability for the debts or liabilities of its predecessor as a matter of equity, endeavoring to protect the predecessor's creditors while respecting the separateness of the corporate entities. *See Everett v. Mortgage Co.*, 214 N.C. 778, 1 S.E. 2d 109 (1939); *Begnell v. Coach Lines*, 198 N.C. 688, 153 S.E. 264 (1930); *Askew v. Hotel Co.*, 195 N.C. 456, 142 S.E. 590 (1928); *McAlister v. Express Co., supra.* When a corporation purchases all or substantially all of the assets of another corporation for grossly inadequate consideration, the transfer will be deemed fraudulent as to the selling corporation's creditors, regardless of whether the parties had the actual intent to defraud. *Everett v. Mortgage Co., supra; Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979); G.S. 39-17. In addition:

> "[a] corporation holds its property subject to the payment of the corporate debts, and when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser, for satisfaction of their claims."

Everett v. Mortgage Co., supra at 785, 1 S.E. 2d at 113, quoting 7 R.C.L. p. 573, section 561.

The trial court found that the assets were sold for insufficient consideration, that Tire Company did not retain sufficient assets to pay existing creditors, and that Sales knew of Tire Company's debts and that the consideration paid would be inadequate to satisfy those debts. Those findings are supported by the evi-

dence and compel the trial court's conclusion that the transfer was fraudulent.

[2] Sales also argues that plaintiff's remedy is limited to treating the sale as void and that the trial court's award of damages in the amount of the debt was erroneous. We agree that the remedy must be limited to allowing plaintiff to follow the transferred property into Sales' possession. We do not agree, however, that a monetary award is necessarily inappropriate.

As noted, the sale of Tire Company as an ongoing business resulted in the transfer of its good will as well as its tangible assets. Good will, however, is not separable from the business as a whole and is not susceptible of being disposed of separately from the property right to which it is incident. *Ice Cream Co. v. Ice Cream Co., supra.* Good will is an asset capable of being fraudulently conveyed and, where the good will is put beyond reach of creditors, equity will allow a money damage award equal to the value of the good will. *See Colandrea v. Colandrea,* 42 Md. App. 421, 401 A. 2d 480 (1979). Therefore, where one corporation purchases all or substantially all of the assets of another corporation, including the good will, in a manner deemed fraudulent, the selling corporation's creditors may follow the good will into the hands of the purchasing corporation and obtain a money damage award equal to its value. To hold otherwise would allow what Sales apparently is seeking to accomplish here: the purchase of an ongoing business, including its good will, while remaining liable to the seller's creditors only to the extent of the value of its tangible assets.

The trial court did not err in concluding that the sale of assets was fraudulent as to plaintiff. The trial court, however, made no finding of the value of the good will transferred to Sales. The case is remanded for hearing, determination of the value of the good will transferred, and modification of the judgment to reflect the value determined.

Sales' remaining argument, that plaintiff made an election of remedies which precludes an action against Sales, is without merit.

PLAINTIFF'S APPEAL

[3] Plaintiff argues that the trial court erred in concluding that the transaction was not an unfair and deceptive trade practice in violation of G.S. 75-1.1. We disagree.

Whether a commercial act or practice is violative of G.S. 75-1.1 is a question of law. *Hoke v. Young*, 89 N.C. App. 569, 366 S.E. 2d 548 (1988). Whether an action is unfair or deceptive will depend on the facts of each case and its impact on the marketplace. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981). Our Supreme Court has stated that "[p]roof of fraud would necessarily constitute a violation" of G.S. 75-1.1. *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E. 2d 342, 346 (1975). An action to recover damages for "fraud," however, is different than an action to set aside a conveyance as fraudulent. *See Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 320 S.E. 2d 892 (1984), *disc. rev. denied*, 312 N.C. 797, 325 S.E. 2d 631 (1985). An action for "fraud" involves a claim for damages resulting from an intentional misrepresentation which the complaining party reasonably relied on, *id.*; consequently, fraud, by nature, is "unfair and deceptive." Here, plaintiff's action is merely to collect a debt owed under a contract by setting aside the sale of its debtor's assets. The evidence shows no intent to defraud plaintiff; the transaction is merely deemed fraudulent to provide plaintiff an equitable remedy. Consequently, we find none of the kind of deceptive or oppressive conduct against plaintiff which would classify Sales' actions as an unfair and deceptive trade practice.

Plaintiff's other argument, that the trial court erred in dismissing Mr. Baity and Mr. Parker from the action, fails to state any supporting legal authority as required by Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, and accordingly is deemed abandoned. Further, plaintiff articulates no theory of recovery against either Mr. Baity or Mr. Parker. We find no error in the trial court's dismissal of Mr. Baity and Mr. Parker.

Defendant's appeal—affirmed in part, vacated and remanded in part.

Plaintiff's appeal—affirmed.

Judges ORR and SMITH concur.

PIEDMONT FORD TRUCK SALE, INC., LAMB DISTRIBUTING COMPANY, LIMITORQUE COMPANY, TRIAD FREIGHTLINER OF GREENSBORO, INC., GEORGE H. SHARP, RUDOLPH C. AND GERALDINE S. NUNN, MARY C. BYRD, J. V. DAVENPORT, MARGARET L. NEEDHAM, FRANCES L. DEVER, HALLIE K. BURGESS, DOROTHY MARIANI, MARIE F. HANCOCK, JAMES S. AND HARRIET W. WILSON, DONALD D. HILL, LINDA K. JONES, EVA THOMPSON, OLLIE F. JOHNSON, DAVEY L. KENNEDY II, TERESA O. KENNEDY, JOHN D. AND LOUISE M. LEWIS, H. AUSTIN AND HELEN D. PHILLIPS, AND F. STUART KENNEDY v. CITY OF GREENSBORO

No. 8818SC172

(Filed 19 July 1988)

1. **Municipal Corporations § 2— annexation—local act—health and sanitation provision severable—constitutional**

Chapter 818 of the 1986 Session Laws, a local act providing for the annexation of certain property west of defendant's corporate limits, is constitutional even though sec. 3 of Chapter 818 constitutes a local act relating to health and sanitation in contravention of the North Carolina Constitution, Art. II, § 24(a), because sec. 3 is severable from the remainder of Chapter 818.

2. ***Constitutional Law* § 20; Municipal Corporations § 2— local act annexation—equal protection**

In an action in which plaintiff alleged that a local act providing for the annexation of property was arbitrary and capricious in violation of Art. I, § 19 of the North Carolina Constitution and the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, the trial court erred by granting defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) and the case was remanded for evaluation under the lower tier rational relationship equal protection standard.

3. **Municipal Corporations § 2— annexation—claim that burdens outweigh benefits—properly dismissed**

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim that a local act annexation violated Art. I, § 19 of the North Carolina Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution in that the benefits of annexation are outweighed by the burdens imposed.

APPEAL by plaintiffs from *Rousseau (Julius A.), Judge*. Order entered 17 November 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 June 1988.

Plaintiffs, property owners in Guilford County, instituted this action seeking declaratory and injunctive relief from the annexation of their property by defendant. This annexation was accom-

plished by enactment of a local act, S.L. 1986, C. 818 (hereinafter Chapter 818), by the General Assembly in 1986 and made effective on 30 June 1987. Chapter 818 provides for the annexation of certain property west of defendant's corporate limits and the exemption from annexation of other property owned by the Greensboro-High Point Airport Authority and certain areas adjacent thereto. Chapter 818 further provides that defendant must provide municipal services to the annexed area pursuant to G.S. 160A-47, 160A-49.1 and 160A-49.3.

By amended complaint filed 20 July 1987, plaintiffs challenged the constitutionality of Chapter 818. Specifically, plaintiffs alleged that the act violates Article I, sec. 19; Article II, sec. 24; and Article XIV, sec. 3 of the North Carolina Constitution as well as the Fifth and Fourteenth Amendments to the United States Constitution. On 21 August 1987, defendant moved to dismiss plaintiffs' amended complaint pursuant to G.S. 1A-1, Rule 12(b)(6). Defendant subsequently filed an answer on 17 September 1987. On 17 November 1987, the trial court granted defendant's motion to dismiss. Plaintiffs appeal.

Patton, Boggs & Blow, by Robert G. McIver, for plaintiffs-appellants.

Linda A. Miles and Becky Jo Peterson-Buie for defendant-appellee.

SMITH, Judge.

Plaintiffs bring forth as their sole assignment of error the trial court's dismissal of their amended complaint pursuant to G.S. 1A-1, Rule 12(b)(6). Plaintiffs contend that sufficient legal bases exist to sustain each of four separate claims for relief. To be legally sufficient, a claim must show on its face that there is no insurmountable bar to recovery and that the pleadings give the adverse party notice of the events giving rise to the claim so that the party understands the nature of the claim and is able to answer the allegations in the complaint and prepare for trial. *Rose v. Guilford County*, 60 N.C. App. 170, 298 S.E. 2d 200 (1982); *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E. 2d 12 (1970). However, a complaint must be dismissed under Rule 12(b)(6) when it is clear from the face of the complaint that plaintiffs cannot recover as a matter of law, some essential fact to plaintiffs' case

is missing or a fact is revealed in plaintiffs' complaint which defeats the action. *Schloss Outdoor Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 272 S.E. 2d 920 (1980); *Mozingo v. North Carolina National Bank*, 31 N.C. App. 157, 229 S.E. 2d 57 (1976), *cert. denied*, 291 N.C. 711, 232 S.E. 2d 204 (1977).

[1] Plaintiffs first contend that Chapter 818 violates Article II, sec. 24 of the North Carolina Constitution because Section 3 of Chapter 818 required defendant to render municipal services to the newly annexed areas "in accordance with the requirements of G.S. 160A-47; and the provisions of G.S. 160A-49.1 governing contracts with rural fire departments and the provisions of G.S. 160A-49.3 governing contracts with private solid waste collection firms." Article II, sec. 24(1)(a) provides that "[t]he General Assembly shall not enact any local, private, or special act or resolution: (a) Relating to health, sanitation, and the abatement of nuisances."

Defendant argues that Section 3 of Chapter 818 does not violate Article II, sec. 24 as the provision is merely declaratory of the powers already granted to defendant under general law and cites *In re Assessments*, 243 N.C. 494, 91 S.E. 2d 171 (1956), to support its argument. In *Assessments*, the City of Durham was empowered through local acts to make, without petition, street improvements and assess the cost of those improvements against the property abutting the improved area. Plaintiff property owners contended that the local acts violated Article II, sec. 29 (now Article II, sec. 24) which prohibited the passage of local acts affecting the "laying out, opening, altering, maintaining or discontinuing of highways, streets or alleys." The court in *Assessments* held that the provisions in the local acts did not violate Article II, sec. 29 because they were "only declaratory of, or supplementally, to the powers given [the city] under the general law." *Id.* at 498, 91 S.E. 2d at 174. The court noted that the constitution imposes on the General Assembly the duty to provide by general laws for improvements to cities.

The case at bar is distinguishable. Here the General Assembly, through local act, is requiring defendant to adopt a statutory plan for providing municipal services which defendant would not otherwise be authorized to implement under the type of annexation involved in the instant case.

G.S. 160A, art. 4A, part 3 sets forth statutory procedures whereby cities with a population of 5,000 or more may extend their own corporate boundaries. Governing municipal boards must conform to the requirements set out in these statutes as a precondition to their right to annex property. *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961). G.S. 160A-47, dealing with the submission of plans by the municipality for the extension of municipal services (including police and fire protection; solid waste collection; and street maintenance), and G.S. 160A-49.1 and G.S. 160A-49.3, dealing with the contracting for fire protection and sewage services, are required to be followed by a municipality but only where the annexation is to be achieved under G.S. 160A, art. 4A, part 3. Unlike *Assessments* where the local act provisions were merely declaratory of what the city could do under general law, the local act provisions here require the city to extend municipal services (which include services relating to health and sanitation) in a manner not authorized except when annexation is accomplished under general law. Thus, the General Assembly has passed a local act relating to health and sanitation in contravention of N.C. Const., Art. II, sec. 24(a). Section 3 of Chapter 818 is therefore void and unenforceable.

The unconstitutionality of Section 3 does not render the entire act void. This section is severable from the remainder of Chapter 818. "The general proposition must be . . . that in a[n] [act] which contains invalid or unconstitutional provisions, that which is unaffected by these provisions or which can stand without them must remain. If the valid and invalid are capable of separation, only the latter may be disregarded." *R.R. v. Reid*, 187 N.C. 320, 325, 121 S.E. 534, 537 (1924), *quoting Supervisors v. Stanley*, 105 U.S. 305, 312, 26 L.Ed. 1044, 1050 (1881). *Accord Banks v. Raleigh*, 220 N.C. 35, 16 S.E. 2d 413 (1941). Chapter 818 can stand on its own without Section 3. The purpose of Chapter 818 is to annex property in Guilford County to the City of Greensboro. Section 3 is not necessary to achieve this result. The power of the General Assembly to enlarge municipalities by local act is "clear beyond cavil." *Abbott v. Town of Highlands*, 52 N.C. App. 69, 73, 277 S.E. 2d 820, 823, *disc. rev. denied*, 303 N.C. 710, 283 S.E. 2d 136 (1981); *See* G.S. 160A-21; N.C. Const., Art. VII, sec. 1. We hold therefore that Chapter 818, excluding Section 3, is constitutional and affirm the trial court's dismissal of plaintiffs' first claim for relief.

[2] Plaintiffs next contend that Chapter 818 violates Article I, sec. 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution in that the newly annexed boundary "excludes . . . properties with the same or similar zoning, with the same or similar degree of development with the same or similar uses, and with similar tax valuation as the property of Plaintiff." Defendant argues that to successfully state such a claim for relief plaintiff must allege that either a fundamental constitutional right has been violated or that the annexation has created a "suspect classification." The law in North Carolina is in apparent conflict as to whether plaintiff has stated a claim in this regard. In *Abbott, supra,* property surrounding the town of Highlands was annexed pursuant to a local act. Plaintiffs there brought an action alleging that the act violated Article I, sec. 19 of the North Carolina Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution because the town failed to provide sewer services to the annexed area on an equal basis and failed to include within the annexed area a golf course which was surrounded by annexed property. The court stated that when an equal protection question is involved, a two-tier constitutional analysis is appropriate. When the claim involves either a "suspect class" or a fundamental right, an upper tier or "strict scrutiny" analysis is used. The government must show that the classification is necessary to promote a compelling governmental interest. If the claim does not involve a fundamental right or "suspect class," a lower tier analysis is used. The court then must determine whether the classification bears a "rational relationship" to a legitimate government interest. *Id.* Using a lower tier analysis, because plaintiffs' claim did not warrant upper tier scrutiny, the court in *Abbott* held that the act was reasonably related to a governmental purpose and nondiscriminatory as to plaintiffs.

A subsequent Court of Appeals case, *Forsyth Citizens v. City of Winston-Salem*, 67 N.C. App. 164, 312 S.E. 2d 517, *disc. rev. denied*, 310 N.C. 743, 315 S.E. 2d 701, *appeal dismissed, Brewer, et al. v. City of Winston-Salem, North Carolina, et al.*, 469 U.S. 802, 83 L.Ed. 2d 8, 105 S.Ct. 57 (1984), appears to reach an opposite conclusion. *Forsyth Citizens* involved an annexation by the City of Winston-Salem pursuant to G.S. 160A, art. 4A, part 3. Plaintiffs there alleged in part that the statute violated the due process

clause of the Fourteenth Amendment to the United States Constitution because it prohibited judicial review of the municipality's action and that the annexation was arbitrary and capricious. The court held that G.S. 160A-50(f), which sets forth review procedures to question whether the annexation was proper, limited the scope of judicial review but was sufficient to comport with due process. The court further held that plaintiffs' claim was not actionable under the Fourteenth Amendment because plaintiffs did not allege any infringement of fundamental rights or creation of a suspect class. The court stated, " 'the exercise by a state of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications.' " *Id.* at 166, 312 S.E. 2d at 519, *quoting Baldwin v. City of Winston-Salem*, 710 F. 2d 132, 135 (4th Cir. 1983).

Forsyth Citizens stands for the rule that there is no claim for relief under the Fourteenth Amendment unless a fundamental right has been violated or a suspect class created. On the other hand, *Abbott* holds that a lower tier analysis is available for claims which do not allege a fundamental right violation or suspect classification. However, the two cases are distinguishable. *Forsyth Citizens* was a case involving a claim under the due process clause of the Fourteenth Amendment and dealt with an annexation under a statutory scheme which limited judicial review. *Abbott* was a case involving a claim under the equal protection clause of the Fourteenth Amendment and dealt with an annexation by local act which had no limitation on judicial review. While the plaintiffs in both *Forsyth Citizens* and *Abbott* assert that the annexation was arbitrary and capricious, the legal basis for these assertions provides for different analyses. The court in *Abbott* specifically notes: " 'Traditionally courts employ a two-tiered scheme of analysis when an equal protection claim is made.' " *Id.* at 75, 277 S.E. 2d at 824 (citations omitted). Applying the facts here to the framework of both cases, we conclude that *Abbott* sets forth the correct analysis in this case.

Plaintiffs in the case *sub judice* allege that the annexation under Chapter 818 was arbitrary and capricious in violation of the equal protection clause. Plaintiffs do not contend that the annexation violated a fundamental right or created a suspect class. In

Abbott, there was a hearing on the merits of the plaintiffs' contentions, and this court was able to ascertain whether a rational relationship existed between the annexation and a legitimate government interest and whether such annexation was arbitrary and capricious. We are unable here to make a similar determination because defendant's Rule 12(b)(6) motion was granted. However, *Abbott* makes it clear that in this case, where an equal protection claim is made, a less heightened, lower tier avenue of review is available. For the foregoing reasons we hold that the trial court erred in dismissing plaintiffs' second claim for relief. Accordingly, we remand for the lower tier evaluation.

Plaintiffs also contend that Chapter 818 violates Article XIV, sec. 3 of the North Carolina Constitution by incorporating in Section 3 of Chapter 818 provisions that are exclusively the subject matter of general law. Having held that section is severable from the remainder of Chapter 818, we will not further address this issue. This claim for relief was properly dismissed under G.S. 1A-1, Rule 12(b)(6).

[3] Finally, plaintiffs contend that Chapter 818 violates Article I, sec. 19 of the North Carolina Constitution and the Fifth and Fourteenth Amendments to the United States Constitution as the benefits of the annexation are outweighed by the burdens imposed, such as increased taxes, fees, assessments and costs for services. Plaintiffs have again failed to state a claim. In *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L.Ed. 151, 28 S.Ct. 40 (1907), a case involving consolidation of two cities, the Supreme Court stated:

> Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences.

Id. at 179, 52 L.Ed. at 159, 28 S.Ct. at 46-47. Our Supreme Court has also stated: "[W]here additional territory is annexed in accordance with the law, the fact that the property of the residents in such area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process

clause of the State and Federal Constitution." *In re Annexation Ordinances*, 253 N.C. at 651-52, 117 S.E. 2d at 805; *Accord In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224 (1981). The trial court did not err in dismissing this claim for relief.

For the foregoing reasons, the trial court is

Affirmed in part and reversed and remanded in part.

Judges EAGLES and ORR concur.

CLARENCE WILLIAMS, ADMINISTRATOR OF THE ESTATE OF DELPHINE ADAMS WARREN v. CHARLES JEFFREY ODELL

No. 8812SC209

(Filed 19 July 1988)

1. **Automobiles and Other Vehicles § 83.2— pedestrian killed by automobile—contributory negligence**

In a wrongful death action arising from an automobile accident, the trial court properly granted a directed verdict for defendant on the grounds of contributory negligence where the decedent was involved in a minor automobile accident with George Allen Hargove on the entrance ramp to an expressway at approximately 7:20 p.m. on 17 March 1986; Mr. Hargrove moved his car to the right shoulder of the highway and activated his car's emergency flashers; the decedent drove ahead one car length, parked her car on the main traveled portion of the ramp, and exited the vehicle; decedent did not activate the car's emergency flashers and remained standing on the entrance ramp eight to twenty minutes waiting for a police officer; decedent was leaning against the rear of her automobile with her arms crossed, facing oncoming traffic; between 10 and 15 cars approached and some drivers applied their brakes to avoid striking her car, with at least three of those cars nearly hitting her vehicle and two of those three skidding to avoid a collision; defendant entered the entrance ramp, which was curved to the right with a downward slope; defendant accelerated and looked over his left shoulder two or three times to observe highway traffic; defendant did not see Mr. Hargrove's car nor Mr. Hargrove waving his flashlight to alert motorists entering the ramp; defendant saw Mrs. Warren about 200 feet from her car and applied his brakes; defendant's car skidded and left 57 feet of tire impression marks; and the front of defendant's car struck the rear of decedent's car and pinned her between the two vehicles.

2. **Automobiles and Other Vehicles § 86— death of pedestrian—last clear chance—evidence insufficient**

A directed verdict was properly granted for defendant in a wrongful death action in which plaintiff alleged last clear chance where, following a

minor accident at the entrance ramp of a freeway, the decedent stood behind her car in the main traveled portion of the ramp; she remained at the rear of her car for a substantial amount of time with the entire right shoulder of the entrance ramp available for a position of safety; she was uninjured, fully aware, and facing oncoming traffic the entire time; and she should have been able to appreciate the danger after witnessing three cars nearly collide with her vehicle. The decedent's negligence was active and continuous when she voluntarily chose to remain in absolute peril up until the moment of impact and the first element in the last clear chance doctrine is not satisfied.

APPEAL by plaintiff from *Ellis (B. Craig), Judge.* Judgment entered 22 September 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 2 June 1988.

Plaintiff brought this action seeking damages for the alleged wrongful death of his intestate, Delphine Adams Warren. At trial, defendant moved for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence. These motions were denied and the judge submitted to the jury the issues of negligence, contributory negligence, last clear chance and damages. The jury was unable to reach a verdict and the judge declared a mistrial. Defendant moved for judgment in accordance with his motions for a directed verdict. The trial court concluded that Ms. Warren was contributorily negligent as a matter of law and that the doctrine of last clear chance was inapplicable. From the judgment granting defendant's motion, plaintiff appeals.

Downing, David, Maxwell & Melvin, by Stephen R. Melvin, for plaintiff-appellant.

Singleton, Murray & Craven, by Rudolph G. Singleton, Jr., and Richard T. Craven, for defendant-appellee.

SMITH, Judge.

Plaintiff's sole assignment of error before this Court is that the trial court erred in granting defendant's motion for judgment in accordance with the motions for a directed verdict pursuant to G.S. 1A-1, Rule 50(b). First, plaintiff contends that the evidence presented genuine issues of material fact concerning Ms. Warren's contributory negligence which should have been determined by a jury. Second, he contends that in the event Ms. Warren was contributorily negligent as a matter of law, there are also issues of material fact relating to the doctrine of last clear chance which

require a jury determination. Plaintiff would be entitled to recover for the wrongful death of his intestate only if Ms. Warren would have been entitled to recover had she lived. G.S. 28A-18-2. We hold that the evidence was sufficient to establish that Ms. Warren was contributorily negligent as a matter of law and that the doctrine of last clear chance does not apply. Since Ms. Warren could not have recovered damages for her injuries had she lived, plaintiff may not recover. The judgment of the trial court is affirmed.

[1] A motion for judgment in accordance with a motion for a directed verdict made pursuant to G.S. 1A-1, Rule 50(b) and a motion for a directed verdict made pursuant to G.S. 1A-1, Rule 50(a) present essentially the same question: "whether the evidence, taken as true and considered in the light most favorable to the [plaintiff], is sufficient for submission to the jury." *McDaniel v. Bass-Smith Funeral Home, Inc.*, 80 N.C. App. 629, 632, 343 S.E. 2d 228, 230 (1986). *See Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973); *Snellings v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872, *cert. denied*, 279 N.C. 727, 184 S.E. 2d 886 (1971). Rule 50(b), in pertinent part, provides:

> Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion . . . . [I]f a verdict was not returned [a party who has moved for a directed verdict], within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict . . . . [T]he motion shall be granted if it appears that the motion for directed verdict could properly have been granted.

With regard to the issue of contributory negligence, a directed verdict may be granted only if the evidence is insufficient to justify a verdict for plaintiff as a matter of law. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). In an action for personal injury, the motion should be granted in favor of the defendant "if the jury could have drawn no conclusion from the evidence but that . . . the contributory negligence of [plaintiff's intestate] was a proximate cause of the [injury]." *Shay v. Nixon*, 45 N.C. App. 108, 109-10, 262 S.E. 2d 294, 296 (1980). In the case

sub judice, defendant was entitled to a directed verdict or judgment in accordance with the motion for directed verdict on the issue of contributory negligence if the evidence established Ms. Warren's contributory negligence as a matter of law.

It is well established that a claim is barred by the doctrine of contributory negligence if the injured party fails to exercise ordinary care for her own safety and such failure contributes to the injury. *Allen v. Pullen*, 82 N.C. App. 61, 345 S.E. 2d 469 (1986), *disc. rev. denied*, 318 N.C. 691, 351 S.E. 2d 738 (1987). The existence of contributory negligence does not depend on the injured party's subjective appreciation of the danger; the standard of ordinary care is an objective one—" 'the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.' " *Smith v. Fiber Control Corp.*, 300 N.C. 669, 673, 268 S.E. 2d 504, 507 (1980), *quoting Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E. 2d 593, 597 (1965). Where a motion for a directed verdict is grounded upon contributory negligence as a matter of law "the question before the trial court is whether 'the evidence taken in the light most favorable to plaintiff establishes [its intestate's] negligence so clearly that no other reasonable inference or conclusion may be drawn.' " *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468-69, 279 S.E. 2d 559, 563 (1981) (citations omitted).

The evidence viewed in the light most favorable to plaintiff allows no other reasonable inference except that Ms. Warren failed to exercise such care for her own safety as a reasonably careful and prudent person would have used under similar circumstances. The evidence tended to show that on 17 March 1986, at approximately 7:20 p.m., Ms. Warren was involved in a minor automobile accident with George Allen Hargrove on an entrance ramp to the All American Expressway in Cumberland County. Mr. Hargrove moved his car to the right shoulder of the highway and activated his car's emergency flashers. Ms. Warren drove ahead one car length, parked her car on the main travelled portion of the ramp and exited the vehicle. She did not activate the car's emergency flashers. She remained standing on the entrance ramp eight to ten minutes waiting for a police officer to arrive. According to the testimony, she was leaning against the rear of her automobile with her arms crossed, facing oncoming traffic. While she was waiting, between 10 and 15 cars approached and some drivers applied their brakes to avoid striking her or her car.

At least three of these cars nearly hit her vehicle and two of the three skidded to avoid a collision. Defendant entered the entrance ramp. The entrance ramp was curved to the right with a downward slope. As he accelerated, he looked over his left shoulder two or three times to observe highway traffic. Defendant did not see Mr. Hargrove's car nor Hargrove waving his flashlight to alert motorists entering the ramp. When defendant was about 100 feet away from Ms. Warren, he saw her and applied his brakes. Defendant's car skidded and left 57 feet of tire impression marks. The front of defendant's car struck the rear of Ms. Warren's car and pinned her between the two vehicles. It is clear from the evidence that by voluntarily placing herself on the main travelled portion of the entrance ramp and failing to exercise the care of an ordinarily prudent person, Ms. Warren was contributorily negligent as a matter of law. *Clemons v. Williams*, 61 N.C. App. 540, 300 S.E. 2d 873 (1983).

[2] Next we address plaintiff's contention that defendant had the last clear chance to avoid the collision. The doctrine of last clear chance would allow plaintiff to recover despite Ms. Warren's contributory negligence if defendant had the last clear chance to avoid Ms. Warren's injuries by exercising reasonable care and prudence but failed to do so. *Earle v. Wyrick*, 286 N.C. 175, 209 S.E. 2d 469 (1974), *reh'g denied*, 286 N.C. 547 (1975). The burden is on plaintiff to establish that the doctrine is applicable to the facts. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977).

Plaintiff is entitled to rely on last clear chance when the evidence considered in the light most favorable to plaintiff establishes each and every element of the doctrine. The elements are: (1) Ms. Warren, by her own negligence, placed herself in a *position of helpless peril (or a position of peril to which she was inadvertent)*; (2) defendant saw, or by the exercise of reasonable care should have seen, and understood Ms. Warren's perilous position; (3) defendant had the time and the means to avoid the accident had defendant seen or discovered her perilous condition; (4) defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) Ms. Warren was injured as a result of defendant's failure or refusal to avoid impending injury. *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968); *Wray v. Hughes*, 44 N.C. App. 678, 262 S.E. 2d 307, *disc. rev. denied*, 300 N.C. 203, 269 S.E. 2d 628 (1980). Applying the

above stated law to the facts, plaintiff has failed to establish that Ms. Warren was in a position of helpless or inadvertent peril.

Helpless peril arises when a person's prior contributory negligence has placed her in a position from which she is powerless to extricate herself. *Clodfelter v. Carroll*, 261 N.C. 630, 135 S.E. 2d 636 (1964); *Schaefer v. Wickstead*, 88 N.C. App. 468, 363 S.E. 2d 653 (1988). The last clear chance doctrine is thus inapplicable where the injured party is at all times in control of the danger and simply chooses to take the risk. *See Clodfelter, supra* ("[P]laintiff . . . unwittingly, carelessly, and in disregard of her own safety failed to remove herself from the path of defendant's oncoming car, when she had full time and opportunity to . . . avoid an obvious danger and the injuries she sustained." *Id.* at 635-36, 135 S.E. 2d at 639); *Stephens v. Mann*, 50 N.C. App. 133, 272 S.E. 2d 771 (1980), *disc. rev. denied*, 302 N.C. 221, 276 S.E. 2d 919 (1981) (Plaintiff, bouncing around in back of pickup truck, did not hold on and finally bounced out of the truck).

Inadvertent peril focuses on inattentiveness. The situation is not one of true helplessness, as the injured party is in a position to escape. Rather, the negligence consists of failure to pay attention to one's surroundings and discover his own peril. *Watson v. White*, 309 N.C. 498, 308 S.E. 2d 268 (1983). *See Earle, supra* (pedestrian walking in street was struck from behind by a car); *Exum, supra* (intestate changing a tire and not directly facing traffic was struck by a car).

Plaintiff argues that Ms. Warren could not escape from her perilous position by exercising reasonable care. Ms. Warren had witnessed approximately 15 cars successfully negotiate her parked car and plaintiff contends that by the time she realized that defendant would hit her, she did not have time to escape. We disagree.

It is reasonable to conclude that Ms. Warren could have, by the exercise of reasonable care, extricated herself from the position of peril in which she had negligently placed herself. Considering the evidence in the light most favorable to plaintiff, Ms. Warren remained at the rear of her car for a substantial amount of time with the entire right shoulder of the entrance ramp available for a position of safety. She was uninjured, fully aware, facing oncoming traffic the entire time, and should have been able to

appreciate the danger after witnessing three cars nearly collide with her vehicle. Ms. Warren's negligence was active and continuous when she voluntarily chose to remain in absolute peril up to the moment of impact. Thus, the first element of the last clear chance doctrine is not satisfied. *See Watson, supra; Clodfelter, supra.* Having determined that proof of this element of the doctrine is lacking, we need not discuss the evidence with regard to the other elements. The trial court correctly determined that the doctrine of last clear chance was inapplicable.

Affirmed.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. PLUMMER RUFFIN

No. 877SC1238

(Filed 19 July 1988)

1. **Burglary and Unlawful Breakings § 3— location of offense—variance between indictment and proof not fatal**

Because the location of the offense is not an element of first degree burglary, the variance between the proof at trial and defendant's indictment did not constitute grounds to arrest the judgment.

2. **Criminal Law § 9; Burglary and Unlawful Breakings § 5.3— breaking and entering not done by defendant—acting in concert—sufficiency of evidence**

Defendant's contention that he could not be charged with burglary because he neither procured nor participated in breaking and entering was without merit where defendant took the principals to a dwelling at night, furnished them with metal pipes, and told them to "rough up" the inhabitants, and it was a natural and probable consequence of the instructions that the principals would break and enter to accomplish that purpose. N.C.G.S. § 14-5.2.

3. **Criminal Law § 79— separate crimes committed during conspiracy by principals—defendant not prejudiced**

Even if the trial court in a burglary and assault prosecution of an accessory before the fact erred in admitting testimony concerning sexual assaults and robberies committed by the principals, such error was harmless where the uncontradicted evidence showed that one victim was beaten with pipes, punched, kicked, knocked down, and twice had plates broken across her face; the other victim was threatened at gunpoint, punched, kicked, and repeatedly

beaten with pipes; both suffered extensive bruising; one victim had two fingers broken and the other had a thumb broken; 100 stitches were required to close one victim's multiple head wounds; and, since defendant instructed the principals to "rough up" the victims, there was no reasonable possibility that the evidence of the rapes and robbery affected the verdict. N.C.G.S. § 8C-1, Rules 401, 404(b).

4. **Criminal Law § 138.40— sentence—mitigating factor of acknowledgment of wrongdoing—confession challenged at trial—no mitigating factor**

Where defendant, two days before his arrest, gave a statement admitting his involvement in the crime to the SBI, but challenged introduction of that statement at trial, he could not rely on the statement to show the mitigating factor of voluntary acknowledgment of wrongdoing to a law enforcement officer. N.C.G.S. § 15A-1340.4(a)(2)(l).

APPEAL by defendant from *Henry L. Stevens, III, Judge.* Judgment entered 30 July 1987 in Superior Court, WILSON County. Heard in the Court of Appeals 31 May 1988.

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

Farris & Farris, P.A., by Robert A. Farris, Jr. and Thomas J. Farris, for defendant-appellant.

BECTON, Judge.

Defendant, Plummer Ruffin, was convicted of first degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury. He was sentenced to fifty-nine years imprisonment. The defendant appeals, arguing that the trial court erred by: (1) denying his motion to dismiss and his motion to set aside the verdict as being against the greater weight of the evidence; (2) admitting evidence of crimes for which defendant was neither charged nor tried; (3) failing to give defendant's requested jury instruction regarding who leased the premises where the burglary occurred; and (4) failing to find a mitigating factor on his behalf at sentencing. We find no prejudicial error.

I

At trial, the State presented evidence, including a written statement by the defendant, tending to show that in November of 1986, defendant asked his nephew and three other men to go to Saratoga, North Carolina and beat up Mrs. Rosa Epps and her

boyfriend, William Earl Roberson. Mrs. Epps had once lived with the defendant but left him to live with Mr. Roberson. On the night of 5 January 1987, the defendant drove the four other men to Saratoga and dropped them off at a bridge near Rosa's house. He gave each of them a two and one-half foot solid aluminum pipe and instructed them to "rough up" Rosa and her boyfriend. Defendant further stated that he would pay them $50 each.

There is some conflict in the evidence as to how the men gained entry into the house. One of the principals testified that he tried to open the door by reaching through a pane of already broken glass, but could not unlock the door. He also stated that Mr. Roberson opened the door from within while attempting to escape. Rosa Epps and William Roberson testified that the four males attempted on two occasions to gain entry by asking to use the telephone or the bathroom and finally succeeded by kicking the door in. Once inside, the men beat Mrs. Epps and Mr. Roberson; two of them raped Mrs. Epps; and three of them raped her twelve-year-old daughter. One took approximately $220 and some jewelry from Mrs. Epps. The defendant was not physically present at the scene, although later that night he picked up the four men near the Epps household and drove them back to Wilson, North Carolina.

II

Defendant contends that the trial court erred in denying his motions to dismiss and to set aside the verdict as being against the greater weight of the evidence. At trial, these motions related to all charges, but defendant's arguments on appeal are confined solely to the burglary charge. Defendant argues, first, that the evidence at trial failed to correspond to the indictment, and second, that there is no evidence the defendant procured or participated in the burglary.

A

[1] The defendant was charged in an indictment with the crime of first degree burglary by breaking into the dwelling house of Rosa Epps, located at Route 1, Box 281, Stantonsburg, North Carolina, at nighttime while the house was occupied. All the evidence at trial was to the effect that the house in question was located in Saratoga, not Stantonsburg. Defendant admits the indictment is

not fatally defective on its face; however, he argues that the location of the house is important to apprise him of the proper charge, that the judgment should be arrested, that the indictment should be dismissed, and that a superseding indictment with the proper town should be drawn.

Regarding the county of an alleged offense, this Court has held that "a variance between the allegations in the indictment and [the] proof at trial," is not fatal error so long as the location of the offense is not an element of the crime. *See State v. Gardner*, 84 N.C. App. 616, 619, 353 S.E. 2d 662, 664 (1987); *State v. Currie*, 47 N.C. App. 446, 267 S.E. 2d 390, *cert. denied*, 301 N.C. 237, 283 S.E. 2d 134 (1980). The elements of first degree burglary are: (1) breaking and entering; (2) of the dwelling house of another; (3) in the nighttime; and (4) with the intent to commit a felony therein. *State v. Williams*, 314 N.C. 337, 355, 333 S.E. 2d 708, 720 (1985). Because the location of the offense is not an element of first degree burglary, the variance between the proof at trial and defendant's indictment does not constitute grounds to arrest the judgment.

B

[2] N.C. Gen. Stat. Sec. 14-5.2 (1986) abolishes "all distinctions between accessories before the fact and principals to the commission of a felony," and states that "[e]very person who . . . would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony." *Id.* "An accessory before the fact is one who is absent from the scene when the crime was committed but who procured, counselled, commanded or encouraged the principal to commit it." *State v. Benton*, 276 N.C. 641, 653, 174 S.E. 2d 793, 801 (1970); *State v. Wiggins*, 16 N.C. App. 527, 529, 192 S.E. 2d 680, 682 (1972). To convict a defendant on this theory, the State must also show that the principal committed the crime. *State v. Hunter*, 290 N.C. 556, 576, 227 S.E. 2d 535, 547 (1976), *cert. denied*, 429 U.S. 1093, 97 S.Ct. 1106, 51 L.Ed. 2d 539 (1977). The evidence at trial tended to show that on the night of 5 January 1987, defendant transported four men to Saratoga, provided them with aluminum pipes and instructed them to "rough up" Mrs. Epps and Mr. Roberson. It further showed that the men did in fact break into the dwelling and assault the inhabitants.

The defendant contends, however, that he cannot be charged with burglary because he neither procured nor participated in breaking and entering. This argument is without merit. An accessory is guilty of any other crimes committed by the principal which are the natural or probable consequence of the common purpose. *State v. Westbrook*, 279 N.C. 18, 41-2, 181 S.E. 2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761 (1972); *State v. Lovelace*, 272 N.C. 496, 498, 158 S.E. 2d 624, 625 (1968). Given that the defendant took the principals to the dwelling at night, armed them and told them to "rough up" the inhabitants, it is a natural and probable consequence of the instructions that the principals would break and enter to accomplish that purpose. Therefore, the trial court did not err in denying defendant's motion to dismiss or his motion to set aside the conviction of first degree burglary.

III

[3] The defendant next contends that the trial court committed reversible error by admitting in evidence, over defendant's objection, testimony about acts of the principals (sexual assault and robbery) for which defendant was neither charged nor tried. The court overruled his objections on the grounds that the evidence was admissible under Rule 404(b) of the North Carolina Rules of Evidence, N.C. Gen. Stat. Sec. 8C-1 (1986). Rule 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." *Id.* Although the rule goes on to list some permissible uses of this kind of evidence, it pertains only to other acts of the defendant and thus has no application to the case at bar. In its brief, the State argues that the evidence is also admissible as part of the chain of circumstances or "res gestae," but relies entirely upon a case decided well before the adoption of the North Carolina Rules of Evidence in July 1984. *See State v. Burleson*, 280 N.C. 112, 184 S.E. 2d 869 (1971). Under the Rules, the critical inquiry is whether the evidence is relevant, that is, whether it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. Arguably, the trial court could have found, considering the totality of the circumstances, that the evidence of rape and

robbery could not be reasonably separated from the testimony concerning the offenses charged and was therefore relevant.

We need not address this issue, however, because we conclude that even if there was error, it was harmless. When there is no reasonable possibility the error affected the verdict, the error is harmless. N.C. Gen. Stat. Sec. 15A-1443(a) (1983); *State v. Milby*, 302 N.C. 137, 142, 273 S.E. 2d 716, 720 (1981).

There was ample evidence for the jury to convict the defendant on the charges leveled against him. The State offered uncontradicted testimony that Mrs. Epps was beaten with pipes, punched, kicked, knocked down, and twice had plates broken across her face. Other uncontradicted testimony indicated that Mr. Roberson was threatened at gunpoint, punched, kicked and repeatedly beaten about the head and back with pipes. Both Epps and Roberson suffered extensive bruising. Two of Mrs. Epps' fingers were broken, one of Mr. Roberson's thumbs was broken, and 100 stitches were required to close his multiple head wounds. Thus, since defendant instructed the principals to "rough up" Mrs. Epps and Mr. Roberson, there is no reasonable possibility that the evidence of the rapes and robbery affected the verdict. This assignment of error is overruled.

IV

The defendant further argues that the trial court erred in failing to instruct the jury that a person cannot legally break into his own home. There was no evidence at trial that the residence belonged to the defendant, and his argument is without merit.

V

[4] Next, the defendant argues that the trial court erred in failing to find as a mitigating factor that "[p]rior to arrest . . . defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." N.C. Gen. Stat. Sec. 15A-1340.4(a)(2)(l) (1983). Two days before his arrest, defendant gave a statement admitting his involvement to the State Bureau of Investigation. At trial, defense counsel challenged the introduction of that statement. Our Supreme Court has held that when a defendant "moves to suppress a confession, he repudiates it and is not entitled to use evidence of the confession to prove this mitigating circumstance." *State v. Smith*, 321 N.C. 290, 292, 362

S.E. 2d 159, 160 (1987). We are compelled by the *Smith* decision to hold that, by challenging the introduction of the statement, the defendant forfeited its mitigating value.

Defendant also contends that the court erred by imposing the maximum sentence for first degree burglary. Burglary in the first degree is a class C felony, N.C. Gen. Stat. Sec. 14-52 (1986), and punishable by imprisonment up to fifty years, N.C. Gen. Stat. Sec. 14-1.1(a)(3) (1986), with a presumptive sentence of fifteen years. N.C. Gen. Stat. Sec. 15A-1340.4(f)(1). When the trial court "imposes a prison term for a felony that differs from the presumptive term," it must specifically list findings of aggravation and mitigation. Section 15A-1340.4(b). To impose a sentence greater than the presumptive term, the judge must find that the aggravating factors outweigh the mitigating ones. *Id.* "The question whether to increase the sentence above the presumptive term, and if so, to what extent remains within the trial judge's discretion." *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 492 (1982). The sentence will not be disturbed if the record supports the court's determination. *Id.* at 335, 293 S.E. 2d at 662. In the present case, the trial court made specific findings of aggravation and mitigation. It further found that the matters in aggravation outweighed the matters of mitigation. Finally, defendant points to nothing in the record to indicate that the court abused its discretion by imposing the maximum sentence for the first degree burglary conviction.

For the aforementioned reasons, we find that defendant received a fair trial free from prejudicial error.

No error.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILLIE RAY RUFFIN

No. 887SC105

(Filed 19 July 1988)

1. **Criminal Law § 92.1— consolidation of charges against two defendants—same offenses—joinder proper**

There was no merit to defendant's contention that the trial court erred in granting the State's motion for joinder and denying his motion to sever his trial from that of a codefendant where each defendant was charged with accountability for the same offenses, and defendant's assertion that he was deprived of his codefendant's favorable testimony was unsupported by any indication as to what that favorable testimony would have been. N.C.G.S. § 15A-926(b).

2. **Criminal Law § 79— assault conspiracy—first degree burglary charged—defendant responsible for crimes committed during conspiracy**

Defendant's contention that a first degree burglary charge should have been dismissed because there was no common scheme or plan to commit that crime was without merit, since the common plan was to "rough up" a named person; in order to commit the assault, it was necessary to enter the victim's home or to lure her outside; two of defendant's accomplices kicked in the door of the victim's home and entered it, followed later by defendant and a third accomplice; and the burglary was obviously committed in pursuance of the common plan or scheme to assault the victim.

3. **Burglary and Unlawful Breakings § 5.3— defendant absent from scene of burglary—conviction proper**

Defendant's contention that he could not be convicted of first degree burglary because he was not present at the scene was without merit, since, to be guilty of an offense by reason of acting in concert, a defendant need not actually be present if he is constructively present, and the evidence in this case supported a finding that defendant was constructively present because he was down the street from the home which was burglarized, near enough to render assistance and to encourage the perpetration of the crime.

4. **Burglary and Unlawful Breakings § 5.3— first degree burglary—acting in concert—sufficiency of evidence**

There was no merit to defendant's contention that the trial judge should not have submitted a burglary charge to the jury because defendant committed no act constituting an element of the offense, since there was ample evidence of a common plan or scheme, and it is not necessary that a defendant commit any act in order to be convicted under the theory of acting in concert if a defendant is present and there is a common scheme or plan with a principal.

5. **Criminal Law § 113.6— two defendants—jury instructions—use of and/or—defendant not prejudiced**

Defendant whose trial was joined with that of another was not prejudiced where the trial court used the phrase "defendant, and/or either of them" in

setting forth the elements of each of the offenses charged, since the court gave thorough instructions before the jury selection began and in its final instructions concerning the jury's duty to consider charges against each defendant separately; in its final mandate on each of the offenses the trial court properly instructed the jury without the use of the term "and/or"; the jury could not have been misled by the instructions; and the two defendants were convicted of different crimes.

APPEAL by defendant from *Stevens (Henry L., III), Judge.* Judgment entered 11 September 1987 in Superior Court, WILSON County. Heard in the Court of Appeals 1 June 1988.

Defendant was found guilty of two counts of assault with a deadly weapon inflicting serious injury and first-degree burglary. From judgments imposing a life sentence for the offense of first-degree burglary and consecutive three-year sentences for the felonious assaults, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Thomas R. Sallenger for defendant-appellant.

SMITH, Judge.

[1] Defendant assigns error to the trial court's granting of the State's motion for joinder and denial of his motion to sever his trial from that of co-defendant Irvin Barnes. Defendant contends that the joint trial deprived him of favorable testimony from his codefendant and further compelled him to accept the theory of defense advanced by the codefendant thereby denying defendant his constitutional right to a fair trial. We disagree.

G.S. 15A-926(b) provides in part:

(2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:

a. When each of the defendants is charged with accountability for each offense; or

b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

1. Were part of a common scheme or plan; or

2. Were part of the same act or transaction; or

3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

In the instant case, each defendant was charged with accountability for the same offenses, thus joinder was permissible. When joinder is permissible under the statute, whether to sever trials or deny joinder is a question lodged within the discretion of the trial judge whose rulings will not be disturbed on appeal unless it is demonstrated that joinder deprived defendant of a fair trial. *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982). *Accord State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed. 2d 282, 100 S.Ct. 1867 (1980).

In the case *sub judice*, the only assertion that defendant was deprived of the codefendant's favorable testimony is the unsupported statement of defendant's counsel. Neither the motion nor the record on appeal indicates what the exculpatory testimony would have been. Defendant's "unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in allowing the motion to consolidate." *State v. Davis*, 289 N.C. 500, 508, 223 S.E. 2d 296, 301, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 47 (1976). Additionally, the record in this case discloses that prior to any ruling on the motion to sever, defendant's counsel told the court "that joinder . . . effectively prevents codefendant Barnes from testifying in exculpation of the defendant Ruffin. We do not, however, have statements from the defendant Barnes placed into the record in support of that motion." At the same hearing, the codefendant's counsel stated he did not wish to be heard and felt that it was not damaging to the codefendant's case for the two defendants to be tried together. Defendant has failed to demonstrate that joinder of the cases deprived him of a fair trial. Defendant's further assertion to the trial court that the defendants' defenses would be antagonistic is likewise unsupported by the record. In the instant case, neither defendant offered evidence. This assignment of error is overruled.

Defendant next contends that the trial court erred in denying his motion to dismiss the burglary charge. The test for a motion to dismiss is whether, considering the evidence in the light most

favorable to the State and giving the State the benefit of all discrepancies and all reasonable inferences, there is substantial evidence of each material element of the offense. *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981); *State v. Dillard*, 90 N.C. App. ---, 368 S.E. 2d 442 (1988). Considering the evidence in this context, the facts necessary to an understanding of this assignment of error are essentially as follows. Defendant, Eric Blount, Irvin Barnes and David Howard were recruited by Plummer Ruffin to go to the home of Rosa Epps in or near Saratoga, North Carolina to "rough up" Epps, a former girlfriend of Plummer Ruffin. On the evening of 5 January 1987 Plummer Ruffin drove Howard, Blount, Barnes and defendant to an area near Epps' residence and gave them metal pipes. The four men then walked to the vicinity of Epps' home. Though the record is unclear as to the exact distance, defendant and Barnes remained down the street while Howard and Blount went to the residence and tried unsuccessfully to gain entry by subterfuge. The schemes included a request to use the telephone, a request to use the bathroom and a request for a ride, all of which were refused. The two men then left and started down the street. As they were walking, they discussed the uncooperativeness of the persons in the dwelling. Howard and Blount then returned to the residence, kicked in the door and entered the home. Subsequently, defendant and Barnes entered the home.

In support of his argument that the burglary charge should have been dismissed, defendant contends that he cannot be held accountable on the theory of acting in concert since the common plan or scheme was merely to "rough up" Epps. Defendant also contends that the evidence discloses he was not present at the scene when Howard and Blount committed the burglary.

[2] Defendant's contention that the first-degree burglary charge should have been dismissed because there was no common scheme or plan to commit that crime is without merit. Our Supreme Court in *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972), found no error in the following jury instruction:

> [I]f two persons join in a purpose to commit a crime, each of them, if *actually or constructively present*, is not only guilty

> as a principal if the other commits that particular crime, but he is also guilty of *any other crime* committed by the other in pursuance of the common purpose; . . . or as a natural or probable consequence thereof. (Emphasis added.)

Id. at 41-42, 181 S.E. 2d at 586. *Cited with approval State v. Miller*, 315 N.C. 773, 340 S.E. 2d 290 (1986). *Accord State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). In order to commit the assault on Rosa Epps, it was necessary that entry be gained to the home or that she be lured outside. Obviously this burglary was committed in pursuance of the common plan or scheme to assault Rosa Epps.

[3] We also hold that the defendant's contention that he was not present at the scene is without merit. To be guilty of an offense by reason of acting in concert, actual presence is not necessary and constructive presence will suffice. *State v. Westbrook, supra.* The evidence, considered in the light most favorable to the State, supports a finding that defendant was constructively present since he was near enough to render assistance and to encourage the perpetration of the crime. *State v. Buie*, 26 N.C. App. 151, 215 S.E. 2d 401 (1975). In defining constructive presence with regard to aiding and abetting, it has been held that actual distance from the scene is not determinative. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971); *State v. Gregory*, 37 N.C. App. 693, 247 S.E. 2d 19 (1978); *State v. Williams*, 28 N.C. App. 320, 220 S.E. 2d 856 (1976); *State v. Buie, supra.* In *Gregory*, as in this case, defendant was some distance away but sufficiently close to be able to render assistance if needed. We can discern no just reason for defining constructive presence any differently in cases involving acting in concert than in cases involving aiding and abetting and thus decline to do so.

[4] Defendant also contends the trial judge should not have submitted the burglary charge to the jury because defendant committed no act constituting an element of the offense. Defendant's reliance on *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975), is misplaced. In that case, this court held that (1) there was no evidence of a common scheme or plan and (2) that the defendant committed no act which constitutes an element of the crime. Here, we have ample evidence of a common plan or scheme. In discussing *Mitchell* our Supreme Court has held that it is not

necessary that a defendant commit any act in order to be convicted under the theory of acting in concert if a defendant is present and there is a common scheme or plan with a principal. *State v. Joyner, supra.*

[5] Lastly, defendant contends the trial court erred in its instructions to the jury by using the phrase "defendant, and/or either of them" in setting forth the elements of each of the offenses charged. Defendant argues that this type of instruction could have led the jury to believe (1) that they could convict defendant even though they did not believe defendant and Barnes were acting in concert or (2) that the jury could convict defendant if they found that any of the codefendants committed the offenses charged. Defendant did not object to the instruction. In fact, defense counsel informed the court that he had no objection to the instruction as given. Defendant thus relies on the "plain error doctrine." *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Although we highly disapprove of the term "and/or" as used by the trial judge, we find no prejudicial error.

Before jury selection began, the trial court instructed the jury in part as follows:

> Now, Ladies and Gentlemen of the Jury, the Court instructs you and wants it clearly understood that although these two defendants in this case are being tried on the same charges and at the same time, that each charge alleged against each one of these defendants is absolutely separate and independent from any charge or other charges alleged against another defendant. You will make your determination based solely upon the evidence and the charge in this case as it relates to each charge and each defendant, separate and apart from the other defendant or from any other charges. That is to say, each charge stands on its own bottom, so to speak, as against each defendant, and that your findings in one case does [sic] not dictate your findings in another case. As I said to you, each case is separate and independent of the other case to the same extent as if they were to be tried separately. They are being tried together, however, for a matter of convenience.

In its final instructions to the jury, the court stated:

> Now, the Court instructs you that although these two defendants, Barnes and Ruffin, are being tried on charges of rape, sexual offense, burglary, robbery and felonious assault at the same time, each of the alleged charges is to be considered by you separately and independently from each of the other charges, even though the charges have been joined for trial in this case. Therefore, your determination of the guilt or innocence of a particular defendant on one charge is not dependent or binding or controlling upon your determination of guilt or innocence of other charges found by you in favor of or against the same or the other defendant. A defendant shall be found guilty or not guilty of a particular charge by separate determination by you of each charge, completely independently and absolutely apart from another charge or charges, and each defendant shall be found guilty or innocent completely separate and absolutely independently from the other defendant.

Additionally, in its final mandate on each of the offenses the trial court properly instructed the jury without the use of the term "and/or." The facts in the instant case are readily distinguishable from *State v. McCollum*, 321 N.C. 557, 364 S.E. 2d 112 (1988), on which defendant relies. In that case, the trial judge used the term "and/or" in instructing the jury on the elements of the offenses as well as in his final mandate.

In this case, construing the judge's instructions contextually as we must, we hold that the jury could not have understood that if it found the codefendant guilty of an offense, it must also find defendant guilty of the same offense. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970). Defendant's assertions that the jury could have been misled are not supported by the record. Defendant was convicted of first-degree burglary and two counts of assault with a deadly weapon inflicting serious injury, but was found not guilty of two counts of rape, first-degree sexual offense and armed robbery. The codefendant was found guilty of the armed robbery, first degree sexual offense and rape in addition to the offenses for which defendant was convicted. In defining the elements of the rape, sexual offense and armed robbery, the trial judge also used the term "and/or." Obviously, the jury was not

misled by the use of the term or they would have convicted defendant and the codefendant of exactly the same crimes.

No prejudicial error.

No error.

Judges EAGLES and ORR concur.

NICOLY ELDON SASS v. LARRY CLAY THOMAS

No. 8730SC798

(Filed 19 July 1988)

1. **Automobiles and Other Vehicles § 45.2— testimony as to plaintiff's prior accident—evidence inadmissible and prejudicial**

In an action to recover for injuries sustained by plaintiff in a collision between his motorcycle and defendant's automobile, the trial court erred in allowing defendant to cross-examine plaintiff about a previous motorcycle accident, since this evidence was not admissible to determine whether the injuries for which plaintiff was seeking damages were proximately caused by the collision presently in question, and the inadmissible evidence was prejudicial to defendant.

2. **Automobiles and Other Vehicles § 9.3— changing lanes—duty to give turn signal**

The change of lanes normally necessary in order to pass another vehicle is "turning from a direct line" which requires the giving of a visible signal pursuant to N.C.G.S. § 20-154(a).

3. **Automobiles and Other Vehicles § 54— passing while traveling in same direction—passing in no passing zone—jury question**

In an action to recover for injuries sustained by plaintiff in a collision between his motorcycle and defendant's automobile, the trial court did not err in denying defendant's motion for directed verdict on the issue of plaintiff's contributory negligence, since a violation of N.C.G.S. § 20-150(e) which prohibits passing in a no passing zone is negligence per se if the violation proximately causes injury, but there was a question of fact as to whether plaintiff passed in a no passing zone.

APPEAL by plaintiff from *Kirby (Robert W.), Judge.* Judgment entered 4 February 1987 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 14 January 1988.

Smith & Queen, by Burton C. Smith, Jr. and Constance C. Moore, for plaintiff-appellant.

Robert G. McClure, Jr. for defendant-appellee.

GREENE, Judge.

Nicoly Eldon Sass, plaintiff, appeals from a judgment denying his recovery for injuries sustained in an automobile collision after a jury found that he was contributorily negligent. Larry Clay Thomas, defendant, cross-assigns as error the trial court's denial of his motion for directed verdict.

The evidence at trial tended to show that plaintiff was driving a motorcycle east on a straight portion of State Road 1523 in Haywood County when he collided with the automobile driven by defendant. Defendant had backed onto the highway and was traveling in front of plaintiff in the same direction. When plaintiff was fifty to sixty feet behind defendant, plaintiff pulled out to pass defendant. Defendant then began making a left turn into a driveway. Plaintiff braked and skidded for twenty-five feet before colliding with defendant's car.

Defendant testified he turned on his left turn signal before beginning his turn. Plaintiff testified that he did not see defendant give a turn signal. The collision occurred at or near the beginning of a no passing zone which was marked by a solid yellow line in the eastbound lane. Defendant also elicited testimony from plaintiff concerning a previous motorcycle accident in which plaintiff had been involved.

At the close of plaintiff's case, the trial judge denied defendant's motion for a directed verdict. In his instructions concerning plaintiff's alleged contributory negligence, the trial judge instructed the jury on N.C.G.S. Sec. 20-154(a) (1983) which provides a driver must signal his intent when stopping, starting, or turning from a direct line if the operation of another vehicle may be affected.

The issues presented are: I) whether the trial judge erred in allowing into evidence testimony concerning plaintiff's prior motorcycle accident; II) whether the trial judge erred in instructing the jury that a passing motorist has a duty to give a visible

sign of his intention to pass where the operation of another vehicle may be affected; and III) whether the trial judge erred in denying defendant's motion for a directed verdict on the issue of plaintiff's contributory negligence.

I

[1] Plaintiff first contends the trial court erred in allowing defendant to cross-examine him about a previous motorcycle accident. Defendant's attorney questioned plaintiff about whether plaintiff had wrecked a motorcycle that plaintiff had previously owned. Plaintiff argues this evidence was inadmissible as irrelevant and its admission was prejudicial error entitling him to a new trial.

The general rule is that " 'evidence of a driver's previous accidents is inadmissible in a civil action arising out of a motor vehicle accident, since such evidence is *immaterial in the determination of the driver's negligence* on the occasion in question.' " *Mason v. Gillikin*, 256 N.C. 527, 532, 124 S.E. 2d 537, 540 (1962) (emphasis added) (quoting 5A Am. Jur. *Automobiles and Highway Traffic* Sec. 946). However, evidence of similar injuries sustained in prior accidents may be admissible to determine whether the injuries, for which the plaintiff is seeking damages, were proximately caused by the collision presently in question. *See Fisher v. Thompson*, 50 N.C. App. 724, 730, 275 S.E. 2d 507, 512 (1981) (a comparison of the types of treatment plaintiff received after earlier accident and current accident provided evidence to the jury on the question of whether the injuries were caused by the current accident); *see also Khatib v. McDonald*, 87 Ill. App. 3d 1087, 1096, 410 N.E. 2d 266, 274 (1980) (evidence of prior accident involving similar injuries is admissible on the issue of the amount of damages and extent of injuries if there is a connection between the injuries caused by the two accidents).

Defendant argues that because plaintiff testified on direct examination about the damage done to his helmet in the present accident, plaintiff opened the door to questioning about whether some of this damage was caused in a previous accident. However, plaintiff specifically testified the helmet was new and that he was not wearing it during the previous accident. Furthermore, we note the record does not indicate plaintiff even sought damages for the helmet. In spite of this, defendant's attorney continued

questioning plaintiff about how the motorcycle he previously wrecked was faster and more powerful than the one involved in the current case. Defendant offers no other basis for these questions and our review of the record convinces us that they were irrelevant and therefore inadmissible. Furthermore, we hold this inadmissible evidence was prejudicial and entitled plaintiff to a new trial. *See Mason*, 256 N.C. 527, 124 S.E. 2d 537; and *Rouse v. Huffman*, 8 N.C. App. 307, 174 S.E. 2d 68 (1970); *see also Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E. 2d 859, 864 (an error in the admission of evidence is a ground for granting new trial where appellant shows a different result would likely have ensued had the error not occurred), *disc. rev. denied*, 314 N.C. 336, 333 S.E. 2d 496 (1985).

II

[2] Plaintiff next argues the trial court erred in instructing the jury concerning N.C.G.S. Sec. 20-154(a) on the issue of plaintiff's contributory negligence. That statute provides in pertinent part:

> The driver of any vehicle upon a highway before starting, stopping or *turning from a direct line* shall first see that such movement can be made in safety, . . . and *whenever the operation of any other vehicle may be affected* by such movement, *shall give a signal* as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

N.C.G.S. Sec. 20-154(a) (emphasis added).

The question before us is whether the change of lanes normally necessary in order to pass another vehicle is "turning from a direct line" as that term is used in N.C.G.S. Sec. 20-154(a). In construing Section 20-154(a) it "must be accorded a reasonable and realistic interpretation to effect the legislative purpose." *Cooley v. Baker*, 231 N.C. 533, 536, 58 S.E. 2d 115, 117 (1950). The object of the statute "is to promote and not to obstruct vehicular travel." *Id.* at 535, 58 S.E. 2d at 117.

This provision is designed to impose upon a driver the legal duty to exercise reasonable care under the circumstances in ascertaining that his movement can be made with safety to himself and others before he actually undertakes the movement. *Id.* at 536, 58 S.E. 2d at 117. It does not mean that a motorist may not

make a turn on a highway unless the circumstances render such turning absolutely free from danger. The duty to signal is imposed only where the surrounding circumstances afford the driver reasonable grounds for apprehending his turn might affect the operation of another vehicle. *Id.* The turning driver has the right to take it for granted in the absence of notice to the contrary that the other motorist will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care to avoid collision with the turning vehicle. *Id.*

While we have found no North Carolina cases directly on point, we believe a change of lanes by a passing motorist may require the same precautions as an actual turn and that such an interpretation promotes safe vehicular travel. *See* 60A C.J.S. *Motor Vehicles* Sec. 303(5) at 268 (1969); *cf. Queen v. Jarrett*, 258 N.C. 405, 128 S.E. 2d 894 (1963) (stating that provisions of Section 20-154 were pertinent to case where leading car began changing lanes without signal and collided with vehicle attempting to pass it). Furthermore, we believe this reading is a reasonable and realistic interpretation of the statute. Therefore, we hold the trial court did not commit error in instructing the jury to consider N.C.G.S. Sec. 20-154(a) in determining the issue of plaintiff's contributory negligence.

III

[3] In defendant's cross-assignment of error, defendant argues the trial court erred in denying his motion for directed verdict made at the close of all the evidence. Defendant contends that plaintiff was contributorily negligent as a matter of law in violating N.C.G.S. Sec. 20-150(e). That statute provides:

> The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs, markers or markings placed by the Department of Transportation stating or clearly indicating that passing should not be attempted.

Violation of N.C.G.S. Sec. 20-150 is negligence per se if the violation proximately causes injury. *Duncan v. Ayres*, 55 N.C. App. 40, 43-44, 284 S.E. 2d 561, 564 (1981).

> The general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted

when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.

Clark v. Bodycombe, 289 N.C. 246, 251, 221 S.E. 2d 506, 510 (1976).

The actual location of the yellow line and its proximity to the passing automobile were "evidential details" surrounding the accident. *See Rushing v. Polk*, 258 N.C. 256, 260, 128 S.E. 2d 675, 678 (1962). These questions as well as whether plaintiff's alleged violation of the statute was a proximate cause of the accident were all questions of fact for the jury where there was disputed evidence or the evidence was subject to more than one inference. Plaintiff testified he passed in a passing zone. The evidence shows the collision occurred almost exactly where the passing zone ends. This evidence failed to establish plaintiff's negligence so clearly that no other reasonable inference could have been drawn. Therefore, the trial court did not err in denying defendant's motion for a directed verdict.

For the reasons set out in Part I of this opinion, plaintiff is entitled to a

New trial.

Judges PARKER and COZORT concur.

DOROTHY LESNIAK COLE v. DONALD SCOTT COLE

No. 8715DC1021

(Filed 19 July 1988)

Rules of Civil Procedure § 60.2; Bastards § 6— paternity—blood test results—new evidence

The trial court erred in a child support action by reversing a judgment of the Court of Appeals based upon newly-discovered evidence where the trial court had initially found paternity based upon blood test results; the Court of Appeals reversed based upon an assumption in the blood test results that

defendant was a fertile male and evidence that defendant had had a vasectomy; there was new evidence that defendant's new wife had given birth to a daughter and medical testimony that defendant had probably had a recanalization which resulted in intermittent opening and closing of the severed vas tube, and that defendant had fathered the child in question; and the trial court granted plaintiff's motion under N.C.G.S. § 1A-1, Rule 60(b)(2) to set aside the judgment and upon a new trial again found paternity. None of the evidence of fertility existed at the time of the first trial and does not qualify as newly-discovered evidence because the theory of recanalization was not new and was apparently not offered at the first trial because of a lack of a positive sperm count, which did not arise until long after the first trial concluded, and conception of the daughter also did not occur until after the first trial.

APPEAL by defendant from *Stanley Peele, Judge.* Judgment entered 10 July 1987 in District Court, ORANGE County. Heard in the Court of Appeals 9 March 1988.

Hogue & Strickland by Lucy D. Strickland for plaintiff-appellee.

Clayton, Myrick, McClanahan & Coulter by Robert D. McClanahan for defendant-appellant.

BECTON, Judge.

In August 1983, plaintiff Dorothy Lesniak Cole brought this action against defendant Donald Scott Cole seeking child support for her three children—Jeffrey Scott Cole, Donald Wayne Cole, and Jonathan Derrick Cole. Defendant denied paternity of Jonathan Derrick Cole. In a judgment entered 8 March 1984, the trial judge found paternity, and defendant appealed to this Court. In *Cole v. Cole*, 74 N.C. App. 247, 328 S.E. 2d 446, *affirmed per curiam*, 314 N.C. 660, 335 S.E. 2d 897 (1985), this Court reversed the trial court, holding that the trial judge's findings of fact were insufficient to support a conclusion that defendant was the father of Jonathan Derrick Cole.

On 24 February 1986, plaintiff filed a motion to set aside the judgment pursuant to Rule 60(b)(2) of the North Carolina Rules of Civil Procedure. Judge Peele granted the motion and, upon a new trial again found paternity. Defendant appeals. We reverse.

I

A

Plaintiff's motion to set aside this Court's 1985 judgment was based on newly discovered evidence. Because defendant contends that the trial judge erred by granting plaintiff's motion to set aside the judgment, we will begin by recapitulating the facts found and evidence presented during the initial proceeding.

> Plaintiff and defendant were married on 19 April 1970. [Plaintiff] bore one child on 19 August 1971 and another on 29 September 1975. Defendant had a bilateral vasectomy on 20 February 1976. On 20 May 1976, the physician who performed the vasectomy made a sperm count on a specimen brought by defendant, and it was negative. Also a pathology test was performed on the sections of the vasa deferentia removed from defendant, and the test confirmed that the vasectomy had been successful.
>
> On 10 September 1982 the plaintiff gave birth to a son, Jonathan Derrick Cole. The defendant acknowledged that he was the child's father on the child's birth certificate. In the Spring of 1983 the parties' marriage deteriorated. They separated on 9 July 1983.
>
> . . .
>
> On 15 September 1983, Dr. John Grimes performed a semen analysis on defendant and determined that he was [non-fertile]. Dr. Grimes found no evidence of any vasectomy performed on defendant except for the one of 20 February 1976. Dr. Grimes testified that he believed defendant was [non-fertile] during the years 1981-82 and that the likelihood of defendant becoming fertile after his vasectomy was "one in a million and probably less than that now."
>
> A blood test was performed on defendant, on the child Jonathan Cole, and on plaintiff. The test indicated that the probability of defendant being Jonathan's father was 95.98%, assuming that defendant "was a fertile male at the time of presumed conception. [sic] Undisputed evidence to the contrary would drop the probability of paternity to 0%."

> The [trial] judge ruled that the defendant [was] the biological father of Jonathan Derrick Cole.

Id. at 248-49, 328 S.E. 2d at 447.

This Court's reversal of the trial court was based largely on the trial judge's misuse of the evidence concerning the probability of defendant's paternity. The trial judge relied on the high probability assigned to defendant's blood test but ignored the qualification attached to the finding, i.e., that the probability fell to 0% if defendant was non-fertile. There was undisputed evidence that defendant had a successful vasectomy which rendered him non-fertile during the time when Jonathan Cole was likely to have been conceived.

We now turn to defendant's first contention—that the trial judge erred by setting aside the above judgment.

B

N.C. Gen. Stat. Sec. 1A-1, Rule 60(b)(2) provides in pertinent part that a trial judge may relieve a party from a judgment when there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Our review of Rule 60(b) motions is limited to determining whether the trial court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). However, a motion based on newly discovered evidence must meet the criteria established in Subsection (b)(2) of Rule 60. Prior to the enactment of the Rule, but to the same end, our courts formulated the following prerequisites: "(1) [t]hat the witness will give newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring testimony at the trial [sic]; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail." *Brown v. Sheets*, 197 N.C. 268, 273-74, 148 S.E. 233, 236 (1929).

Significantly, in *Grupen v. Furniture Industries*, 28 N.C. App. 119, 220 S.E. 2d 201 (1975), *cert. denied*, 289 N.C. 297, 222 S.E. 2d 696 (1976), this Court held that plaintiff's results from a physical

he had undergone after his initial trial did not qualify as newly discovered evidence within the meaning of Rule 60(b), because it was not evidence of facts existing at the time of the trial and because the plaintiff was dilatory in pursuing his cause of action. This limitation on newly discovered evidence has been justified on the firm policy ground that, if the situation were otherwise, litigation would never come to an end. *See, e.g., Campbell v. American Foreign S.S. Corporation*, 116 F. 2d 926 (2d Cir. 1941). With all of these principles in mind, we now examine plaintiff's new evidence.

Plaintiff's new evidence is that on 18 December 1985, defendant's new wife gave birth to a daughter, Krystle Renee Cole, who was born three to four weeks premature and whom defendant acknowledges as his child. Plaintiff's expert, Dr. Stuart S. Howards, an urologist specializing in male reproduction, testified on deposition that the conception of Krystle Cole, coupled with the other circumstances of defendant's history, made it highly likely that he had a recanalization—that is, a reconnection of the severed vas tube—which resulted in intermittent opening and closing, and that he fathered Derrick Cole.

At the hearing, defendant speculated that Krystle Cole was conceived in April or May of 1985. Her conception coincided with some physical problems, typically associated with recanalization, which he experienced during February or March of 1985, two and one-half years after Derrick's birth. Defendant had not undergone any type of reversal surgery in the interim between Derrick and Krystle Cole's conceptions.

Defendant argues that plaintiff's new evidence does not qualify as "newly discovered evidence" within the meaning of Rule 60(b)(2) because the child, Krystle Cole, was neither born, nor even conceived, at the time of the first trial. Thus, the evidence did not exist and is not useful as a basis for setting aside a judgment under *Grupen*. We must agree.

The first trial in this matter was held in late February and early March 1984. This Court, in an opinion filed 16 April 1985, reversed the trial court largely because there was unequivocal evidence that defendant was non-fertile in 1982 and his non-fertility discounted the probability of paternity to 0%. The new evidence which called defendant's non-fertility into question was (a)

the conception of Krystle Cole in April or May 1985, (b) the pain and swelling of defendant's scrotum reported to his physician, Dr. Grimes, in July 1985, and (c) a positive sperm count obtained in January 1986, all of which suggested to Dr. Grimes that a recanalization had in fact occurred. Neither Dr. Grimes nor Dr. Howards could state with any certainty, however, when the recanalization occurred. Both agree that such cases are rare and that they are more likely to occur within the first year after a vasectomy is performed. They also suggest that recanalization is a microscopic event which may not be detected if asymptomatic (approximately half occur without the patient noticing symptoms).

In the instant case, unlike *Grupen*, there is no indication that plaintiff was dilatory in pursuing her action. However, the theory of recanalization is not new. An expert might have offered the opinion at the time of the first trial that a recanalization had occurred, and apparently one would have been more inclined to do so, if defendant had yielded just one semen specimen with a positive sperm count. No such evidence arose until long after the first trial concluded. The conception of Krystle Cole would have been probative as well, but that event did not occur until approximately one year after the first trial. None of this evidence regarding defendant's fertility existed at the time of the first trial. Thus, we are bound by precedent to hold that the evidence does not qualify as newly discovered evidence within the meaning of Rule 60(b)(2), and the judgment of the trial court must be reversed.

II

Because of our disposition of defendant's first assignment of error, we need not and do not address his remaining arguments.

Judgment is reversed.

Judges ARNOLD and PARKER concur.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. DONNA JEAN HOLLAND

No. 8718SC350

(Filed 19 July 1988)

1. **Torts § 5; Judgments § 36.3— action determining negligence of mother in death of daughter—subsequent action against mother for contribution—prior action as collateral estoppel**

Findings of the jury in an action for the wrongful death of a child in an automobile accident that the death of the child was proximately caused by the negligence of both the child's mother and the driver of a second vehicle collaterally estopped the mother from denying negligence in an action for contribution by the other driver's insurer against the mother since the issue of the mother's negligence here was the same as that present in the prior action, and the jury's finding in the first action was relevant and essential to the judgment in the earlier case.

2. **Torts § 2.1— death as single indivisible injury—two drivers as joint tortfeasors**

The death of defendant mother's child was a single indivisible injury so that the mother and another driver were joint tortfeasors, and plaintiff insurer of the other driver was therefore entitled to contribution from defendant mother pursuant to N.C.G.S. § 1B-1 *et seq.*

APPEAL by plaintiff from *Albright (Douglas), Judge.* Judgment entered 16 November 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 October 1987.

Frazier, Frazier & Mahler, by James D. McKinney, for plaintiff-appellant.

Smith Helms Mulliss & Moore, by Stephen P. Millikin and Alan W. Duncan, for defendant-appellee.

GREENE, Judge.

This is an appeal from a summary judgment dismissing plaintiff's claim for contribution.

On 6 June 1984, Donna Jean Holland (hereinafter "Holland"), the current defendant, and her husband Allen Greg Holland, Sr., as administrator for the estate of their three-month-old daughter, Alicia Jean Holland, filed suit against Jo Ann Cowan Wall (hereinafter "Wall"). The Hollands alleged Wall negligently caused an automobile accident which injured Holland and resulted in the

death of Alicia Jean Holland. At that trial, the jury gave the following answers to issues presented:

. . . .

4. Was the death of Alicia Jean Holland proximately caused by the negligence of the defendant, Jo Ann Cowan Wall?

ANSWER: Yes.

5. Was the death of Alicia Jean Holland proximately caused by the negligence of the plaintiff, Donna Jean Holland?

ANSWER: Yes.

. . . .

Based on these findings, the jury awarded $100,000 to Mr. Holland as administrator of the estate of his infant daughter. Wall was insured by State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"), the plaintiff in the current suit. After judgment was entered for $100,000 against Wall, Mr. Holland, as administrator, accepted $50,000 from State Farm in settlement of the judgment.

In the current suit, State Farm sues Holland for contribution of one-half of the $50,000 settlement pursuant to N.C.G.S. Sec. 1B-1 *et seq.* (1983). Plaintiff appeals from the grant of summary judgment in favor of defendant.

The issues presented in this case are: I) whether the findings of the jury in the first trial are binding in this action through collateral estoppel, and II) whether the death of the child was a single indivisible injury.

I

[1] Having discharged the liability of its insured, the original defendant Wall, State Farm filed this action seeking contribution from Holland. Section 1B-1(e) of the North Carolina General Statutes permits an insurer who discharges the liability of a tortfeasor to succeed to the tortfeasor's right of contribution. To recover contribution, State Farm has the burden of proving that Holland and Wall were both liable to the estate of the child as joint tortfeasors. *See Pascal v. Burke Transit Co.*, 229 N.C. 435,

438, 50 S.E. 2d 534, 536-37 (1948) (where injured party sues defendant and defendant alleges third party was a joint tortfeasor, burden of proof is on original defendant to show third party was tortfeasor). Joint tortfeasors include persons who commit separate negligent acts which concur as to time and place and unite in proximately causing a single indivisible injury. *See Phillips v. Hassett Mining Co.*, 244 N.C. 17, 22, 92 S.E. 2d 429, 433 (1956). A single indivisible injury arises if apportionment of the damages among the tortfeasors is impossible. *Ipock v. Gilmore*, 73 N.C. App. 182, 186, 326 S.E. 2d 271, 275, *disc. rev. denied*, 314 N.C. 116, 332 S.E. 2d 481 (1985).

State Farm contends that because of collateral estoppel, Holland and Wall are joint tortfeasors since the jury in the first action found the negligence of Wall and Holland to be proximate causes of the death of the child. Under the doctrine of collateral estoppel, a party is barred from relitigating issues which have already been fully litigated in a suit which involved the same parties or those who stand in privy to the parties in earlier litigation. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973). In order to apply collateral estoppel, four requirements must be satisfied:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Id. at 358, 200 S.E. 2d at 806.

The issue of Holland's negligence here is the same as that present in the prior action where it was raised and actually litigated. However, Holland contends the jury's finding in the first action was not material and relevant or necessary and essential to the resulting judgment in the earlier case because the amount awarded to the estate of the child by the jury was not reduced in the judgment entered by the trial court. We disagree.

Since this record does not include the instructions given by the trial court in the first action, it must be presumed that the

jury was correctly instructed on every principle of law applicable to the facts. *Robertson v. Stanley*, 285 N.C. 561, 564, 206 S.E. 2d 190, 193 (1974). The trial judge in the first action was required to instruct the jury that in ascertaining the amount of damages recoverable by the estate of the child, the jury could consider only the losses suffered by the father of the child and not the losses suffered by the mother of the child if the jury found the mother negligent in causing her child's death. *See Carver v. Carver*, 310 N.C. 669, 314 S.E. 2d 739 (1984) (where mother's negligence results in death to her child, losses to the mother may not be considered in assessing damages for the wrongful death of the child). Therefore, the finding of the jury that Holland's negligence proximately caused the death of the child was material and relevant to the disposition of that action and necessary and essential to the resulting judgment. Consequently, Holland is collaterally estopped to now deny her negligence in causing her daughter's death. We note Holland does not dispute that the negligence of Wall as determined in the first action is binding in this action under the doctrine of collateral estoppel.

II

[2] However, a finding that Wall and Holland were both negligent, each proximately causing the death of the child, does not end the inquiry in determining if they are joint tortfeasors. It must first be determined that the injury sustained by the child is a single indivisible injury. Here, the injury was death. Death, by its very nature, is not capable of any practical or reasonable division and is therefore indivisible as a matter of law. *See* W. Keeton *et al., Prosser & Keeton on the Law of Torts* Sec. 52 at 347 (5th ed. 1984); *see also Gay v. Piggly Wiggly Southern, Inc.*, 183 Ga. App. 175, 181, 358 S.E. 2d 468, 474 (1987) (citing cases which indicate death is a single and indivisible injury) and *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1190 (Ala. 1985) (death is an indivisible injury). Therefore, Wall and Holland are joint tortfeasors and State Farm is entitled to contribution from Holland pursuant to N.C.G.S. Sec. 1B-1 *et seq.*

III

Accordingly, the trial court erred in granting summary judgment for Holland and we remand for entry of summary judgment for State Farm, as there do not exist any genuine issues of mate-

rial fact and plaintiff is entitled to judgment as a matter of law. *See A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979) (summary judgment in favor of non-movant is appropriate when evidence demonstrates no material issues of fact exist and non-movant entitled to entry of judgment as a matter of law).

As Holland did not plead or argue parental immunity as a bar, we do not address the question of whether she was immune from an action by her child and therefore not a joint tortfeasor. *See Clemmons v. King*, 265 N.C. 199, 201, 143 S.E. 2d 83, 85 (1965) (defendant in action for contribution must be liable as tortfeasor to original plaintiff) and N.C.G.S. Sec. 1-539.21 (1983) (abolishing parent/child immunity in cases involving the "operation of a motor vehicle" by a parent).

Reversed and remanded.

Judge BECTON concurs.

Judge PHILLIPS concurs in the results only.

DOUGLAS M. STROTHER AND REBECCA T. STROTHER v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 8810SC156

(Filed 19 July 1988)

Insurance § 140.2— sleet damage to greenhouse—policy coverage

The trial court erred by granting summary judgment for defendant and should have entered summary judgment for plaintiffs in an action to determine coverage under an insurance policy where plaintiffs' greenhouses were damaged by sleet and the policy excluded damage from ice other than hail, snow or sleet and excluded greenhouses used to service the residence premises. Plaintiffs could reasonably have read the policy as including coverage for loss caused by the weight of the accumulated sleet, and whether the exclusion for service of the residence premises was intended to apply to greenhouses used to grow tomatoes for commercial sale is not clear by the plain language of the exclusion.

Strother v. N.C. Farm Bureau Mut. Ins. Co.

APPEAL by plaintiffs from *Battle, Judge.* Judgment entered 4 December 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 9 June 1988.

This is an action to recover proceeds allegedly due under an insurance policy. Plaintiffs reside in Wake County on property on which are located six greenhouses. Plaintiffs use the greenhouses to grow tomatoes for commercial sale. On 17 February 1987, three of the greenhouses collapsed from the weight of accumulated sleet. The greenhouses were insured for $5,000 each under a policy issued by defendant. Defendant denied plaintiffs' claim and, on 26 May 1987, plaintiffs brought this action to recover the limits of the policy's coverage. Both parties moved for summary judgment. On 4 December 1987, the trial court granted summary judgment for defendant. Plaintiffs appeal the granting of summary judgment for defendant and the denial of their own motion for summary judgment.

Holleman and Stam, by Paul Stam, Jr., for the plaintiff-appellants.

Yates, Fleishman, McLamb & Weyher, by R. Scott Brown, for the defendant-appellee.

EAGLES, Judge.

Neither the cause nor the amount of damage is in dispute. The sole issue is whether the collapse of the greenhouses is a loss which the insurance policy covers. We hold that it is.

The relevant provision of the policy reads, in pertinent part, as follows:

> PERILS INSURED AGAINST
>
> We insure for direct loss to the property described in Coverage F caused by:
>
> . . . .
>
> 2. Windstorm or hail
>
> . . . .
>
> This peril does not include loss caused directly or indirectly by frost or cold weather or ice other than hail, snow or sleet all whether driven by the wind or not.

Courts must enforce the terms of an insurance policy according to its express language, without rewriting the policy to provide coverage. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 348 S.E. 2d 794 (1986). Where a provision is susceptible to more than one reasonable construction, however, it is ambiguous, *Maddox v. Insurance Co.*, 303 N.C. 648, 280 S.E. 2d 907 (1981), and must be construed in the insured's favor. *Chavis v. Southern Life Ins. Co.*, 318 N.C. 259, 347 S.E. 2d 425 (1986); *Akzona, Inc. v. Am. Credit Indem. Co.*, 71 N.C. App. 498, 322 S.E. 2d 623 (1984). Even if we assume the plain language of the provision does not clearly provide for coverage, plaintiffs nevertheless reasonably could have read the disputed provision as covering the loss. Accordingly, the trial court should have entered summary judgment for plaintiffs.

Defendant argues that the term "hail" is unambiguous and, as used in the policy, does not include sleet. Plaintiffs contend that "hail" is ambiguous and should be construed to include sheet. We need not, however, decide whether the ordinary meaning of the word "hail" includes sleet since the policy itself can be read to include sleet within the definition of the peril. The "peril" is entitled "windstorm and hail." To clarify what kinds of losses are within its coverage, the policy provision states that damage from ice "other than hail, snow or sleet" is not an included loss. The sentence uses "other than" to modify "snow" and "sleet" as well as "hail," and provides that damage caused by any of the three is not excluded from the policy's coverage. We cannot attribute to plaintiffs the ability to read the provision and conclude from its plain language that damage from sleet is not within the scope of the peril. Rather, the policy language is phrased in such a way that its reader could easily conclude that sleet and snow, as small particles of ice, are included within the meaning of "hail" in the peril's title.

Defendant argues that other parts of the policy indicate that damage from accumulated sleet was not intended to be covered. For example, defendant cites the inclusion of a provision in plaintiffs' homeowner's policy specifically covering damage caused by the weight of ice, snow, or sleet, and argues that the absence of a similar provision in the greenhouses' policy shows the parties did not intend similar damage coverage for the greenhouses. Defendant also points out that the policy does not use the terms "hail" and "sleet" synonymously. While we have no reason to doubt that

defendant did not intend to provide coverage for plaintiffs' loss, the insurer's intent is not the proper focus of inquiry. *Joyner v. Insurance*, 46 N.C. App. 807, 266 S.E. 2d 30 (1980), *disc. rev. denied*, 301 N.C. 91 (1981). The determinative question is whether a reasonable person in the position of the insured, from reading the policy, would believe the policy provided coverage. *Id.* Plaintiffs could reasonably read the policy as including coverage for loss caused by the weight of accumulated sleet. Defendant, as the party who drafted the policy, could have written it to state clearly that such damage was not included.

Defendant's reliance on *Harrison v. Insurance Co.*, 11 N.C. App. 367, 181 S.E. 2d 253 (1971) is misplaced. In *Harrison*, the plaintiff was seeking recovery for damage to his home caused by a tree limb which had fallen during a winter storm. The policy contained the following provision:

> [t]his company shall not be liable for loss caused directly or indirectly by frost or cold weather, or ice (other than hail), snow or sleet, whether driven by wind or not.

The Court there held that the trial court erred in failing to instruct the jury that it should find for the defendant/insurer if it also found that the ice and snow were contributing causes of the damage. Defendant argues that since the provision in *Harrison* is almost identical to the language in plaintiffs' policy, the Court's decision there requires us to hold that plaintiffs' loss is not covered. We disagree.

The Court in *Harrison* was not addressing the issue raised here. More importantly, the parentheses in the policy provision in *Harrison* is a critical distinction. Although punctuation, or its absence, does not control a policy's construction as against the plain meaning of its language, punctuation may be used to point out division in the parts of a sentence, which in turn may control the sentence's meaning. *See Huffman v. Insurance Co.*, 264 N.C. 335, 141 S.E. 2d 496 (1965). The parentheses in the provision in *Harrison* restricts the modifying effect of "other than" to the word "hail," causing the sentence to read as excluding damage caused by ice, snow, or sleet. The absence of the parentheses changes the entire meaning of the sentence as it relates to sleet and snow. *Harrison* is not persuasive here.

Defendant also relies on language in the policy excluding from the peril's coverage, damage to a "greenhouse . . . used to service the residence premises." The meaning of the word "service" will depend upon the context in which it is used. Black's Law Dictionary 1227 (5th ed. 1979). Here, "service" is used as a verb to describe the way in which the greenhouse is employed. Webster's Ninth New Collegiate Dictionary 1074 (1984) defines the verb "serve" to mean "be favorable, opportune, or convenient." The record establishes that plaintiffs use the greenhouses to grow tomatoes for commercial sale. Whether the exclusion intends to apply to greenhouses used in that manner is not made clear by its plain language. Consequently, the exclusion cannot be construed as applicable to plaintiffs' greenhouses.

The materials before the trial court establish that there is no genuine issue of material fact for trial and that plaintiffs are entitled to judgment as a matter of law. Accordingly, the judgment of the trial court is reversed and the case is remanded for entry of judgment in favor of plaintiffs.

Reversed.

Judges ORR and SMITH concur.

SOUTHERN UNIFORM RENTALS, INC., PLAINTIFF v. IOWA NATIONAL MUTUAL INSURANCE COMPANY, AND HOOKER & BUCHANAN, INC., DEFENDANTS

No. 874SC1179

(Filed 19 July 1988)

Appeal and Error § 6.6— appeal from denial of motion to dismiss—appeal interlocutory—no substantial right affected

An order denying defendant insurer's motion to dismiss was interlocutory and an appeal therefrom would not lie where the adjudication of plaintiff's action would not affect any of defendant's substantial rights, including rights and responsibilities under rehabilitation and liquidation orders to preserve defendant's assets.

APPEAL by defendant Iowa National Mutual Insurance Company from *Brown, Frank R., Judge.* Order entered 8 September

1987 in ONSLOW County Superior Court. Heard in the Court of Appeals 31 May 1988.

This appeal grows out of an action filed 8 August 1985 in which plaintiff alleged that: (1) Defendants Iowa National Mutual Insurance Company (Iowa National) and Hooker & Buchanan, Inc. had failed to provide sufficient insurance coverage under an insurance policy issued to plaintiff by defendants when plaintiff's business building and goods contained therein had burned and (2) that defendant Iowa National owed plaintiff $10,880.00 for additional interruption of business coverage under the effective policy.

Shortly after plaintiff had filed the above action and before defendant filed its Answer, the Insurance Commissioner of Iowa petitioned the District Court in Polk County, Iowa for an Order of Rehabilitation which Order was granted 19 September 1985. The Rehabilitation Order was later superseded by an Order declaring liquidation and insolvency dated 10 October 1985.

Similarly, for purposes of assisting in defendant's rehabilitation in North Carolina, the North Carolina Insurance Commissioner petitioned the Wake County Superior Court for a "Restraining Order and Appointment of Ancillary Receiver" which Order was granted 18 October 1985 followed by a "Preliminary Injunction and Continuation of Ancillary Receivership" entered 29 October 1985.

On 16 December 1985, defendant Iowa National filed its Answer to the 8 August Complaint in which it denied liability claiming *inter alia* that an exclusionary clause contained in the policy precluded recovery for the destroyed goods. The Answer made no reference to the pending Rehabilitation proceedings.

On 21 August 1987, defendant Iowa National moved to dismiss the action pursuant to N.C. Gen. Stat. § 1A-1, Rules 12 and 41 of the N.C. Rules of Civil Procedure contending that the Orders of Rehabilitation of the Polk County District Court and Wake County Superior Court dated 19 September 1985, 10 October 1985 and 29 October 1985, respectively, barred plaintiff's action. After the hearing on the motion, the trial court denied defendant's Motion to Dismiss. From the trial court's ruling, defendant Iowa National gave notice of appeal on 11 September 1987. On 4 January 1988, defendant also filed a petition for a Writ

of Certiorari. Defendant Hooker & Buchanan, Inc. did not take part in this appeal.

Ellis, Hooper, Warlick, Waters & Morgan, by William J. Morgan and Amy R. Cummings, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Ann Strader Tise and P. Scott Hedrick, for defendant-appellant Iowa National Mutual Insurance Company.

No brief filed by Ward and Smith, P.A., by John A. J. Ward, for defendants Hooker & Buchanan, Inc.

WELLS, Judge.

The sole question for review is whether the interlocutory order denying defendant's Motion to Dismiss is properly before us. We hold that it is not and dismiss defendant's appeal as of right and deny defendant's petition for Writ of Certiorari.

An appeal of an interlocutory order will not lie to an appellate court unless the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983); N.C. Gen. Stat. §§ 1-277 and 7A-27 of the N.C. Rules of Civil Procedure. An order is interlocutory if made during the pendency of an action, and the order does not dispose of the case but leaves its final resolution for further action by the trial court. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980). Moreover, the determination of whether a substantial right is involved in the appeal depends on whether that right is one which will be lost or irremediably and adversely affected if the order is not reviewed before final judgment. *Jenkins v. Maintenance, Inc.*, 76 N.C. App. 110, 332 S.E. 2d 90 (1985).

In the present case, the trial court's denial of defendant's Motion to Dismiss clearly represents an interlocutory order. The decision to allow plaintiff's case to go forward is not a final determination of or resolution to the controversy. Additionally, despite defendant's contentions to the contrary, the adjudication of plaintiff's action does not affect any of defendant's substantial rights. In fact, denials of motions to dismiss for failure to state a claim are not appealable because they neither represent a final judg-

ment nor do they affect a substantial right. *Wright v. Fiber Industries, Inc.*, 60 N.C. App. 486, 299 S.E. 2d 284 (1983). The refusal to dismiss an action generally does not or will not impair any of defendant's rights that could not be corrected on appeal after final judgment. *Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979).

Nevertheless, defendant vigorously argues that the legal expenses required in the defense to plaintiff's action will effect a waste of defendant's assets thereby affecting a substantial right. Defendant also claims that if the present case goes to trial and judgment is entered against defendant, such would amount to an interference with defendant's assets as it would create a lien against defendant's property in direct conflict with the rehabilitation and liquidation orders. We disagree.

Defendant cites the following language found in the orders which defendant claims is prohibitive:

> Order Terminating Rehabilitation and
> Ordering Liquidation and Declaring Insolvency
> Polk County District Court, Iowa
>
> 6. All persons, corporations or associations are enjoined and restrained from commencing, maintaining or further prosecuting any action at law or in equity or any other proceeding against the defendant, the Liquidator, or defendant's reinsurers, or any action which the defendant is obligated to defend; . . . .

Defendant also refers to the Order of the Wake County Superior Court entitled "Preliminary Injunction and Continuation of Ancillary Receivership" which likewise barred defendant's officers and attorneys from utilizing or wasting defendant's assets and from bringing any suit against the ancillary receiver.

However, each of the Orders refers also to the powers accorded the liquidator/rehabilitator which powers include the right to file actions on behalf of the insurer and incur expenses, including legal expenses, to protect and operate the insurer's business. *See* Iowa Code Ann. § 507C.21 (West 1985) and Part II, Subparagraph 4 of the Wake County "Restraining Order and Appointment of Ancillary Receiver" which provides in part:

> That said ancillary receiver be and he is hereby authorized, . . . to incur such expenses for additional employees, . . . and fees for attorneys, including the Attorney General and legal counsel outside the State of North Carolina, as may be necessary in the proper administration of his duties and to incur such other fees and expenses as he may deem advisable or necessary in order to properly conduct, carry on, and perform his duties; . . . .

The orders of rehabilitation and liquidation themselves therefore contemplate the use of assets to defray the costs of liquidating and conducting the business of preserving the defendant's assets, including the costs of defending a legal action. Even if the full adjudication of the action creates additional legal expenses for the defendant, such would not constitute the serious or irremediable impairment of defendant's right to maintain its assets requiring immediate appellate review. If defendant is dissatisfied with the final judgment of the case, defendant may at that time appeal the issues it seeks to raise here.

Accordingly, the trial court's denial of defendant's Motion to Dismiss is

Affirmed.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JAMES F. COX, DEFENDANT, AND TOMMY D. SCOGGINS, SURETY

No. 8818DC16

(Filed 19 July 1988)

Arrest and Bail § 11.4— criminal appearance bond—judgment against surety—lack of notice—void

The trial court erred by entering an order and judgment of forfeiture on a criminal appearance bond without a proper notice to the surety pursuant to N.C.G.S. § 15A-544(b) where the surety was not personally served in Alamance County; the surety was not mailed a copy of the order of forfeiture and notice; the sheriff had a record of the surety's address throughout the proceedings; the surety had no knowledge of the order of forfeiture and notice,

that the judgment was absolute, or that the matter was transferred to the sheriff's department for execution; and the sheriff's department did not comply with the statutory requirements of N.C.G.S. § 15A-544(b).

APPEAL by surety, Tommy D. Scoggins, from *Bencini, Judge.* Order entered 19 November 1987 in District Court, GUILFORD County. Heard in the Court of Appeals 7 June 1988.

No brief filed on behalf of the State of North Carolina.

Douglas R. Hoy and James F. Walker for surety, defendant-appellant.

JOHNSON, Judge.

The State of North Carolina issued a warrant for the arrest of James F. Cox on 12 February 1986 for the violation of G.S. 14-107, which makes it unlawful to issue a check knowing at the time that there are insufficient funds to pay the check upon presentation. Mr. Cox was arrested on 25 May 1986 and charged with giving a worthless check to L & M Machine and Tool Company. On the same date, the defendant, James F. Cox, was released when the surety, Tommy D. Scoggins (hereinafter surety), signed an appearance bond in the amount of $2,000.00. The defendant's court date was set for 13 June 1986 at 9:30 a.m. in the Criminal District Court of Guilford County.

At the 13 June 1986 Criminal Session of the District Court of Guilford County, the matter was continued until 17 July 1986. At the 17 July 1986 Criminal Session of the District Court of Guilford County, the matter was again continued until 14 October 1986. At the 14 October 1986 Criminal Session of the District Court of Guilford County, the defendant, James F. Cox, did not appear and an order of forfeiture and notice to appear were issued and mailed to the Alamance County Sheriff's Department for service. A copy of the order of forfeiture and notice were mailed to defendant's last known address, but he was not served since he could not be located. A copy of the order of forfeiture and notice were neither mailed nor personally served upon the surety, who has resided at 1086 Gant Road, Graham, North Carolina, at all times during the course of these proceedings.

On 3 December 1986, Judge Bencini entered a judgment of forfeiture for $2,000.00. On 16 March 1987, the execution was

docketed in Guilford County Superior Court. On 19 March 1987, the execution was issued to the Alamance County Sheriff's Department in order to levy and execute against the surety's property. This was the first time that the surety acquired knowledge that the order of forfeiture and notice had been entered on 14 October 1986, that the judgment had been made absolute, and that the matter had been transferred to the Alamance County Sheriff's Department for execution.

On 12 April 1987, the surety filed a motion for remission pursuant to G.S. 15A-544(h). Judge Morton entered a stay preventing any levy, attachment or execution against his property until the motion for remission could be heard. On 11 May 1987, Judge Bencini granted the surety an additional 90 days in which to locate and surrender the defendant, James F. Cox. On 12 August 1987, the surety's motion for remission was denied. He then filed notice of appeal on 24 August 1987.

On appeal, the surety contends that the trial court committed reversible error when it entered an order of forfeiture and a subsequent judgment of forfeiture without proper notice to him pursuant to G.S. 15A-544(b). The purpose of this statute is to regulate the forfeiture of bonds in criminal proceedings and to establish "an orderly procedure for forfeiture." *State v. Moore*, 57 N.C. App. 676, 678, 292 S.E. 2d 153, 155 (1982), *citing, State v. Rakina and State v. Zofira*, 49 N.C. App. 537, 539, 272 S.E. 2d 3, 4 (1980), *disc. rev. denied*, 302 N.C. 221, 277 S.E. 2d 70 (1981).

G.S. 15A-544(b) provides in pertinent part that:

> [A] copy of the order of forfeiture and notice that judgment will be entered upon the order after 30 days *must* be served on each obligor. Service is to be made by the sheriff by delivery of the order and notice to him or by delivery at his dwelling house. . . . If the sheriff is unable to effect service . . . , he *must* file a return to this effect; the clerk *must* then mail a copy of the order of forfeiture and notice to the obligor at his address of record. . . .

These statutory requirements are not discretionary but mandatory. G.S. 15A-531 defines obligor as "a principal or a surety on a bail bond." The surety was an obligor and therefore was entitled to notice as required under G.S. 15A-544(b).

Notice was neither personally served nor mailed to the surety. As a result, he had no knowledge that the judgment was made absolute or that the matter had been transferred to the sheriff's office for execution. The surety received notice when the sheriff contacted him in order to levy and execute against his property.

"The law recognizes that it must make provisions for notice additional to that required by the law of the land and due process of law if it is to be a practical instrument for the administration of justice." *Randleman v. Hinshaw*, 267 N.C. 136, 141, 147 S.E. 2d 902, 905 (1966), *citing, Collins v. Highway Commission*, 237 N.C. 277, 281, 74 S.E. 2d 709, 713 (1953). Therefore, reason dictates that if the wording of a statute indicates that a specific procedure for forfeiting a bail bond is to be followed, then the specified steps *must* be adhered to in order to enforce the forfeiture, or else the judgment is null and void.

Notice and an opportunity to be heard prior to depriving a person of his property, are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Art. I, sec. 17, of the North Carolina State Constitution. "An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Randleman, supra*, at 140, 147 S.E. 2d at 905, *citing, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The failure to follow the statutory requirements denied the surety his right to receive notice of the order of forfeiture.

Judge Bencini found as a fact that (1) the surety was not personally served in Alamance County, (2) the surety was not mailed a copy of the order of forfeiture or notice, (3) the sheriff had a record of the surety's address throughout the proceedings, (4) the surety had no knowledge of the order of forfeiture and notice, that the judgment was made absolute, or that the matter was transferred to the sheriff's department for execution, and (5) the sheriff's department did not comply with the statutory requirements of G.S. 15A-544(b).

We hold therefore that the judgment is null and void and should be vacated. In light of our holding, it is not necessary to address the surety's remaining assignment of error.

Reversed and remanded.

Judges PARKER and COZORT concur.

GEORGE L. PROCTOR, ADMINISTRATOR OF THE ESTATE OF JOYCE BATTS PROCTOR v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND BOBBY F. JONES, ADMINISTRATOR C.T.A OF THE ESTATE OF WILLIAM GRAY EDWARDS, JR.

No. 887SC119

(Filed 19 July 1988)

Insurance § 69.1— underinsured motorist—statutory amount equal to liability coverage

Where an insurance policy failed to provide underinsured motorist coverage, the amount provided by N.C.G.S. § 20-279.21(b)(4) was equal to insured's liability coverage, which was $100,000, rather than the minimum underinsured motorist coverage available during the policy period, which was $50,000.

Judge WELLS dissenting.

APPEAL by defendant from *Paul M. Wright, Judge.* Judgment entered 2 November 1987 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 8 June 1988.

Bridgers, Horton & Rountree by Charles S. Rountree for plaintiff-appellee.

Poyner & Spruill by Diane Dimond and Mary Beth Forsyth Johnston for defendant-appellant.

BECTON, Judge.

Plaintiff, George L. Proctor, acting in his capacity as Administrator of the Estate of Joyce Batts Proctor, brought this action to recover underinsured motorist insurance proceeds from defendant, North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). The trial judge granted plaintiff's motion for sum-

mary judgment and awarded him $75,000—the amount by which plaintiff's decedent's maximum *liability* insurance coverage exceeded that of the negligent driver. Defendant appeals. We affirm.

I

Plaintiff's decedent, Joyce Batts Proctor, was killed on 27 September 1984 when her vehicle (owned by Country Manor Antiques, of which she was a partner) was struck head-on by one driven by William Gray Edwards, Jr. Edward's estate paid Proctor's estate an advance of $20,000. Edward's policy liability limit was $25,000. Proctor's estate was damaged in excess of $100,000. The policy Country Manor Antiques had with defendant Farm Bureau contained *un*insured motorist coverage with limits of $25,000 per person and $100,000 per accident, and liability coverage with limits of $100,000 per person and $300,000 per accident. However, the policy did not provide *under*insured motorist (or UIM) coverage. Rather, the owner was informed that UIM coverage would be provided only if the owner requested it.

The North Carolina Financial Responsibility Act, at N.C. Gen. Stat. Sec. 20-279.21(b)(4) (1983), mandates UIM coverage for policies that exceed the minimum liability limits and that afford uninsured motorist coverage as provided elsewhere in Section 21, in an amount "*not to exceed* the policy limits for automobile bodily injury liability as specified in the owner's policy," unless such coverage is *rejected* by the insured. By requiring the policyholder in the instant case to specifically request UIM coverage, Farm Bureau failed to comply with Section 20-279.21(b)(4). The statutory coverage is thus written into the Farm Bureau policy by operation of law. The sole question presented by this appeal then is *what amount of coverage* the statute provided.

II

Section 20-279.21(b)(4) (1983) does not specify the UIM coverage to be provided when the insurance policy fails to do so. The statute provides only that UIM coverage may not *exceed* the policy liability limits. Farm Bureau argues that because the policy provided no UIM coverage, and because $50,000 was the minimum UIM coverage available during the policy period, plaintiff should receive only $50,000 of coverage under the statute. Plaintiff con-

tends, on the other hand, that coverage should be fixed at an amount equal to the policy liability limit which was $100,000.

When filling such statutory voids, our decisions are guided by statutory history, the goals and purposes of the legislation, and equity. We note at the outset that the primary purpose of the uninsured motorist and compulsory motor vehicle liability insurance required by North Carolina's Financial Responsibility Act is to compensate innocent victims who have been injured by financially irresponsible motorists. *See Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967). The same concern guides underinsured motorist protection as well. Furthermore, the Act is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. *Moore; South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 313 S.E. 2d 856, *cert. denied*, 311 N.C. 306, 317 S.E. 2d 782 (1984). This general purpose is fulfilled by applying either amount of coverage because, in either instance, plaintiff's estate will receive protection not provided by the policy.

Our research has revealed nothing to suggest what amount was intended by the legislature when it first enacted subsection (b)(4). However, subsection (b)(4) was amended effective 1 October 1985 to provide UIM coverage "in an amount *equal to* the policy limits for automobile bodily injury liability as specified in the owner's policy." N.C. Gen. Stat. Sec. 20-279.21(b)(4) (Interim Supp. 1986). Although subsequent amendments shed little light on prior legislative intent, it is noteworthy that the amendment was consistent with the legislature's preference toward making UIM coverage a function of the policy liability coverage. See *Driscoll v. USLIC*, 90 N.C. App. 569, 369 S.E. 2d 110 (1988). Indeed, the unspecified amount in the 1983 version of subsection (b)(4) is nonetheless related to the policy liability coverage because it may not exceed such coverage.

Farm Bureau argues that the equities favor establishing UIM coverage at the minimum coverage available. They argue that plaintiff is receiving coverage for which no one paid and, in light of the fact that the owner chose the lowest available *un*insured motorist protection, that plaintiff may now receive coverage that the owner would not have chosen even had the option been properly presented. This argument by Farm Bureau misses the mark.

The statute alone provides coverage in this instance, and in our view, the coverage must be a function of liability coverage. Moreover, Farm Bureau's argument that the statutory UIM coverage should be based on Farm Bureau's $50,000 minimum amount of UIM coverage loses all force if the policyholder selects any amount above the minimum required liability coverage of $25,000 but less than $50,000. In such a situation, the statute would mandate coverage in the amount of the liability coverage, not the $50,000 *under*insured minimum. Proctor's liability coverage was $100,000. Thus, we hold that her UIM coverage as provided by N.C. Gen. Stat. Sec. 20-279.21(b)(4) is equal to her liability coverage.

Judgment is affirmed.

Judge PHILLIPS concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

As Joyce Batts Proctor did not contract or pay for any underinsured coverage, I would hold that defendant should be liable only for the then statutorily required minimum coverage of $50,000.00, and I therefore dissent.

STATE OF NORTH CAROLINA v. RONALD EARL ABBOTT

No. 8727SC1228

(Filed 19 July 1988)

Criminal Law § 138.13— resentencing—consideration of prior determination

The trial judge erred in a resentencing hearing for rape, sexual offense, and kidnapping by basing his decision in part upon his perception of the evidence and judgment at the prior sentencing hearing. Each sentencing hearing in a particular case is a *de novo* proceeding.

APPEAL by defendant from *Kirby, Robert W., Judge.* Judgment entered 28 August 1987 in Superior Court, GASTON County. Heard in the Court of Appeals 3 May 1988.

Attorney General Lacy H. Thornburg, by Associate Attorney General Richard G. Sowerby, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant.

JOHNSON, Judge.

The defendant, Ronald Earl Abbott, was convicted of first-degree rape, first-degree sexual offense and first-degree kidnapping. At defendant's sentencing hearing on 30 January 1986, the trial court found as an aggravating factor that defendant had a prior conviction punishable by more than sixty days in prison and found as a mitigating factor that defendant had been on good behavior in the Gaston County jail and the North Carolina Department of Correction. The trial court then found that the aggravating factors outweighed the mitigating factors, and sentenced defendant to two consecutive life terms plus forty years. Defendant appealed. On appeal, the North Carolina Supreme Court held that defendant could not be sentenced on all three charges and remanded the case for resentencing. *State v. Abbott*, 320 N.C. 475, 358 S.E. 2d 365 (1987).

On 28 August 1987, at the resentencing hearing, the court arrested judgment on the first-degree kidnapping charge and ordered a judgment of guilty of second-degree kidnapping. The court found the same aggravating and mitigating factors as the original sentencing court. The court then sentenced defendant to two consecutive life terms for first-degree rape and for first-degree sexual offense. On the second-degree kidnapping conviction, the court sentenced defendant to an additional term of thirty years, the maximum term allowable. The presumptive term is nine years.

Defendant contends that the resentencing court improperly considered the judgment of the original sentencing court for the purpose of making findings of aggravation and mitigation. The following colloquy by the sentencing court is what defendant contends is error:

> *The Court*: . . . , the Presiding Judge, Claude Sitton, heard this case from the beginning to the end; and he felt it necessary based upon his perception of the evidence in this case to

> enter the sentence that he did; and *I've tried to be consistent with Judge Sitton* and also my individual consideration of the factors that you offered me and have, therefore, imposed the sentences I have imposed.

Defendant contends that consideration of and reliance upon the previous court's determination denied defendant his right to a *de novo* hearing. We agree.

It has been established that each sentencing hearing in a particular case is a *de novo* proceeding. *State v. Jones*, 314 N.C. 644, 336 S.E. 2d 385 (1985). Furthermore, in *State v. Daye*, 78 N.C. App. 753, 338 S.E. 2d 557, *aff'd per curiam*, 318 N.C. 502, 349 S.E. 2d 576 (1986), the defendant contended that the trial court erred during a second sentencing hearing by treating the prior finding in aggravation, to wit: that defendant was a danger to others, found in the original hearing and approved on appeal, as the law of the case. This Court held that "on resentencing, the trial court must make *a new and fresh determination of the sufficiency of the evidence* underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court." *Id.* at 755, 338 S.E. 2d at 559 (emphasis added).

In the case *sub judice*, the trial court considered the aggravating factor found by the previous trial court, and perused defendant's file before finding the identical aggravating factor. In considering evidence as to the mitigating factor, defendant requested that the court find the identical mitigating factor found by the previous court. The court then stated that the evidence presented was consistent with what the prior court had found, and renewed the finding that defendant had been on good behavior while in prison. It appears that at this point the trial court made a new and fresh determination of the evidence when it found these factors.

This procedure is consistent with this Court's assessment of a trial court's task at the second sentencing hearing enunciated in *Daye, supra.* This Court stated that "[t]his may require no more than a review of the record and transcript of the trial or original sentencing hearing, at least when no additional evidence is offered at the resentencing hearing." *Id.* However, the similarity in this case and *Daye* ends here. The distinguishing factor in *Daye* was that the trial court stated that the previous factors found by

the original court were the law of the case, and thus being bound by those factors, it was not required to make an independent review of them.

In the case *sub judice*, the trial court's statement that it was trying to be consistent with Judge Sitton, while not intimating that the previous findings were the law of the case, indicates to us that its decision was not independent. We agree with defendant that it appears that the resentencing court based its decision in part upon the trial court's perception of the evidence and judgment at the prior sentencing hearing. In having made the aforementioned statement, the trial court created an ambiguity as to its reasoning for imposing the sentence that it did. The judgment by the previous court on the first-degree kidnapping charge was the maximum term allowed, and the judgment entered by the new resentencing court was for the maximum term allowed as well. To us, the identical sentencing, coupled with the statement suggests that the court sentenced defendant consistently with the previous court and not upon its independent decision-making process.

Thus, the apparent consideration of the trial court's judgment upon resentencing violated the defendant's right to a hearing *de novo*. Accordingly, for all the aforementioned reasons, we vacate the sentence imposed and remand for a new resentencing hearing.

Vacated and remanded.

Judges PHILLIPS and SMITH concur.

RIVERVIEW PROPERTY OWNERS ASSOCIATION, INC. AND CHARLES WILSON, RALPH FRAME, ROSE MARY WHALEY, LEON FERGUSON, JACK HOLMES AND WILLARD RITTER, INDIVIDUALLY v. JACK WELDON HEWETT, DANLEY MARK HOOKER, JOAN MOONEY HEWETT, LORA FAYE MOONEY CLEMMONS, DONNA DEAN, STEVEN DEAN, MARION WOODYARD, JANICE POWELL, BILLY JO HEWETT, RICKY CLEMMONS, R. A. CLEMMONS, RACHEL HEWETT, HANK WILLIAMS, ROYCE WOODYARD, MORRIS MOONEY, PAM MOONEY, TOM WILLIAMS, JACK POWELL, STEPHANIE KELLY GREER, JOYCE TALBERT, MERLE MOONEY AND SNOOKY WHALEY

No. 8713DC813

(Filed 19 July 1988)

Deeds § 20— restrictive covenant in subdivision—lot used for access to another lot —covenant not violated

Defendants' use of a little, cleared pathway across one defendant's subdivision lot to get to the other defendant's lot which was outside the subdivision did not amount to a violation of restrictive covenants limiting use of subdivision lots to "single family residential or recreational purposes," since the pathway led only to the second defendant's riverfront lot, and that lot was used by defendants occasionally for fishing, roasting oysters, and otherwise having a good time.

APPEAL by plaintiffs from *Hooks, Judge*. Judgment entered 29 May 1987, *nunc pro tunc* 19 May 1987, in District Court, BRUNSWICK County. Heard in the Court of Appeals 2 February 1988.

The only defendants involved in this appeal are Danley Mark Hooker, who owns Lot 49 in a Brunswick County subdivision known as Riverview, and Jack Weldon Hewett, who owns Lot 2 in the subdivision and a tract outside the development that lies between Hooker's Lot 49 and the Shallotte River. The two appellees occasionally go to Hewett's riverside tract, which has a mobile home on it, to fish, roast oysters and otherwise enjoy themselves; and in getting there they travel across Hooker's lot by a little, cleared pathway that leads only to Hewett's property, which is used only for recreational and social purposes. Plaintiffs, who either own Riverview lots or represent persons who do, seek to enjoin the appellees from using Hooker's lot in getting to Hewett's place on the ground that their use violates covenants which limit the use of Riverview lots to "single family residential or recreational purposes" and which prohibit "noxious or offen-

sive activity" on any lot or anything "which may be or become a nuisance or any annoyance to the neighboring lot owners." Following a hearing on plaintiffs' motion for summary judgment at which affidavits and other materials were considered the court found facts in substance as above stated, concluded that the described use of Hooker's lot does not violate the Riverview restrictions, and dismissed plaintiffs' complaint against Hooker by summary judgment and the complaint against Hewett on the pleadings, which we treat as a summary judgment also since materials other than pleadings were considered.

Anderson & McLamb, by Sheila K. McLamb and Mason H. Anderson, for plaintiff appellants.

Martin, Wessell & Raney, by John C. Wessell, III, for defendant appellees Jack Weldon Hewett and Danley Mark Hooker.

PHILLIPS, Judge.

Plaintiffs made and brought forward eleven assignments of error, not one of which states "the basis upon which error is assigned," as Rule 10(c) of our appellate rules requires. These are broadside assignments that for the reasons stated in innumerable decisions of our Courts, including *Columbus County v. Thompson*, 249 N.C. 607, 107 S.E. 2d 302 (1959), and *Pamlico Properties IV v. SEG Anstalt Co.*, 89 N.C. App. 323, 365 S.E. 2d 686 (1988), do not call into question any of the court's specific findings and conclusions that plaintiffs argue in their brief.

Nevertheless, we have considered plaintiffs' several arguments and reject them. The following principles of law apply: Restrictive covenants, being in derogation of the unfettered use of land, must be "strictly construed against limitations" on the use of property, *Long v. Branham*, 271 N.C. 264, 268, 156 S.E. 2d 235, 238-39 (1967); ordinarily the opening or maintenance of a street or a right-of-way "for the better enjoyment of residential property as such does not violate a covenant restricting the property to residential purposes," *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E. 2d 619, 624 (1954); whether traveling over a lot restricted to residential purposes in getting to adjacent property violates the restriction depends upon the circumstances involved. *Franzle v. Waters*, 18 N.C. App. 371, 376, 197 S.E. 2d 15, 18 (1973). Under the facts of this case the appellees' use of Hooker's Lot 49 to get to

Hewett's place on the river is no violation of the Riverview Subdivision restrictive covenants and the court was not required to permanently enjoin the practice, as the appellants contend. When our Courts have held that using a lot as a right-of-way violated the covenant restricting its use to residential purposes, they did so upon facts quite different from those recorded here. For example, in *Long v. Branham, supra* and in *Franzle v. Waters, supra,* the defendants were undertaking to open and maintain a street across their lots to an adjoining subdivision, which would have greatly increased traffic into the development; and in *Starmount Company v. Greensboro Memorial Park, Inc.*, 233 N.C. 613, 65 S.E. 2d 134 (1951), the defendant was undertaking to construct and maintain a road across his lot to a commercially operated cemetery, which would have also increased traffic and attracted many strangers to the subdivision. In this case no street for general use has been constructed or attempted; no commercial activity or traffic by outsiders is involved; the appellee lot owners are merely traveling across the lot to a non-commercial, private, riverside recreational retreat that one of them owns.

Affirmed.

Judges ARNOLD and COZORT concur.

DUKE POWER COMPANY v. CITY OF MORGANTON, A MUNICIPAL CORPORATION

No. 8725SC1133

(Filed 19 July 1988)

Electricity § 2.3— right to supply electricity—temporary line in place on determination date

The trial court erred by holding that defendant had abandoned its right to supply electricity to a particular property under N.C.G.S. § 160A-332, the 1965 Electric Act, and that plaintiff had the exclusive right to provide electric service to the area where both parties had lines in place within 300 feet of the property when the property was annexed; the customer was therefore free to choose its supplier; the customer chose defendant; and defendant's line, which was a temporary line used in the construction of a hospital, was removed in 1975 or 1976. The determinative date was 1 June 1971, when the property was

taken into the city, and the rights created by the act are not subject to forfeiture because of later events occurring after the determination date.

APPEAL by defendant from *Gaines, Judge.* Judgment entered 13 July 1987 in Superior Court, BURKE County. Heard in the Court of Appeals 6 April 1988.

Duke Power Company Deputy General Counsel W. Edward Poe, Jr. and Patton, Starnes, Thompson, Aycock & Teele, by Thomas M. Starnes, for plaintiff appellee.

Poyner & Spruill, by Ernie K. Murray, and Settlemyer & Hodges, by Steve B. Settlemyer, for defendant appellant.

PHILLIPS, Judge.

This dispute is over the right to provide electric service to property in the City of Morganton on which the Bush-Denny automobile dealership is situated. The case is governed by the 1965 Electric Act (G.S. 62-110.2, G.S. 160A-331 to 160A-338), which was enacted at the behest of virtually all the State's suppliers of electric power. *Domestic Electric Service, Inc. v. City of Rocky Mount*, 285 N.C. 135, 203 S.E. 2d 838 (1974). The act has two purposes, to curtail litigation and prevent wasteful duplication of transmission and distribution systems, *Domestic Electric Service, Inc. v. City of Rocky Mount, supra*, 285 N.C. at 141, 203 S.E. 2d at 842, and the language used to accomplish them was carefully chosen. The rights of competing suppliers of electricity within the corporate limits of a city are governed by the provisions of Sections 331 and 332 of G.S. 160A; these statutes define primary and secondary suppliers and state the conditions under which each is entitled to serve property within our municipalities, and as so defined the City of Morganton, a municipal corporation, is the primary supplier of electrical services within its limits. G.S. 160A-332 also provides:

> (a) The suppliers of electric service inside the corporate limits of any city in which a secondary supplier was furnishing electric service on the determination date (as defined in G.S. 160A-331(1)) shall have rights and be subject to restrictions as follows:
>
> . . . .

(2) The secondary supplier shall have the right, subject to subdivision (3) of this section, to serve all premises initially requiring electric service after the determination date which are located wholly within 300 feet of its lines and located wholly more than 300 feet from the lines of the primary supplier, as such suppliers' lines existed on the determination date.

. . . .

(5) Any premises initially requiring electric service after the determination date which are located wholly or partially within 300 feet of the primary supplier's lines and are located wholly or partially within 300 feet of the secondary supplier's lines, as such suppliers' lines existed on the determination date, may be served by either the secondary supplier or the primary supplier, whichever the consumer chooses, and no other supplier shall thereafter furnish service to such premises, . . .

The facts of the case are not in dispute: When the property both parties now want to serve was annexed by the City of Morganton on 1 June 1971, the City had a line in place that was partially within 300 feet of it and Duke had two lines in place, one along the southern border of the property and one running to the northeast corner of the property, both of which were within 300 feet. The parties agree, as the trial judge found, that under these circumstances defendant is the primary supplier of electricity under G.S. 160A-331(4); plaintiff is the secondary supplier under G.S. 160A-331(5); under G.S. 160A-331(1) the determination date is 1 June 1971 when the property was taken into the city and since both parties then had lines in place within 300 feet of the property the customer was free to choose which party would supply it with electricity as G.S. 160A-332(a)(5) permits; and the customer chose defendant. The dispute turns upon the conclusions that were drawn from an additional fact—that the part of defendant's line that was within 300 feet of the property in 1971 (a temporary line, used during the construction of a nearby hospital) was removed in 1975 or 1976. From the fact of removal the trial judge found and concluded that the line had been abandoned and that the abandonment left the premises solely within the area served

by Duke's lines and that under G.S. 160A-332(a)(2) Duke has the exclusive right to provide electric service to the property. Thus, the decisive question before us is whether the common law doctrine of abandonment applies to the 1965 Electric Act. We hold that it does not.

An act that is clear and unambiguous must be given its plain and definite meaning, *Underwood v. Howland, Commissioner of Motor Vehicles*, 274 N.C. 473, 164 S.E. 2d 2 (1968), and in our opinion the 1965 Electric Act is such an act. It carefully defined and established the rights of competing power suppliers according to lines that were in place on a set date—matters that can usually be ascertained without either difficulty or dispute; and it gave no effect whatever to subsequent events of any kind, the likelihood and variety of which were certainly understood by the General Assembly. This means to us that the General Assembly intends for this clear statutory scheme to be effectuated when disputes arise between competing suppliers of electricity; that the rights created by the act are not subject to forfeiture because of later events occurring after the determination date; and that the court erred in holding that defendant had abandoned its rights under the act.

Reversed.

Chief Judge HEDRICK and Judge EAGLES concur.

ADARON GROUP, INC., PLAINTIFF v. INDUSTRIAL INNOVATORS, INC., DEFENDANT

No. 8814SC80

(Filed 19 July 1988)

Brokers and Factors § 6.6— exclusive listing contract—purchaser not procured by broker—sale completed after expiration of contract—right to commission

There was no merit to defendant's contention that no real estate commission was due plaintiff because under an exclusive listing contract between the parties the commission was due only "upon the sale or exchange of said property," and the sale by defendant was not completed until the purchase price was received and the title transferred twelve days after the listing period expired, since, pursuant to the listing contract, plaintiff's function was to seek a

contract of sale during the listing period, not to complete a sale; furthermore, the provision of the agreement entitling plaintiff to a commission if one of its prospects contracted to buy the property within 30 days after the listing period expired was even clearer proof of the parties' understanding that a commission did not depend upon the sale being completed during the listing period.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 2 November 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 1 June 1988.

William S. Mills for plaintiff appellee.

Newsom, Graham, Hedrick, Bryson & Kennon, by William P. Daniell and Charles F. Carpenter, for defendant appellant.

PHILLIPS, Judge.

This appeal is from a ruling by summary judgment that defendant owes plaintiff, a real estate broker, $75,000 under a contract, admittedly executed by the parties on 13 June 1986, which gave plaintiff the exclusive listing of defendant's land in Eno Industrial Park at the sale price of $1,300,000 for 180 days. The judgment is based upon the foregoing facts and those that follow, all of which were established by the papers recorded in the court below.

The listing contract contains the following provisions:

> . . . I/we hereby give and grant you for a period of 180 days from the date of this instrument, *the exclusive right and authority to sell the property,* hereinafter described for the price and upon the terms hereinafter set forth.
>
> *I/we here agree to pay you in cash a commission of 6% on the gross consideration upon the sale or exchange of said property, by whomsoever the same may be made or effected, upon the terms hereinafter mentioned, or upon any other terms mutually agreeable.* If within seven days after this listing expires you furnish me/us with a list of prospects to whom you or your representative have actually shown this property, then I/we will pay you the full commission should any of these prospects purchase, or contract to purchase, this property within 30 days after expiration of this listing. After

this period I/we shall be under no further obligation to you whatsoever. (Emphasis supplied.)

On 8 December 1986, two days before plaintiff's 180 day listing expired, defendant and the Durham County Board of Education entered into a written contract wherein defendant agreed to sell the property and the Board agreed to buy it for $1,250,000, and to close the transaction by paying the purchase price on or before 23 December 1986. In compliance with that agreement the Board paid the purchase price and received the title to the property on 22 December 1986. Plaintiff had nothing to do with this sale.

The facts stated, in our opinion, inevitably lead to the conclusion, as the court ruled, that plaintiff is entitled to the commission sued for. Defendant's main contention, the only one requiring discussion, is that no commission is due plaintiff because under the agreement the commission was due only "upon the sale or exchange of said property," and the sale was not completed until the purchase price was received and the title transferred twelve days after the listing period expired. Apparently, our Courts have not heretofore determined whether under the usual exclusive listing contract, such as the one here involved, a commission is due the broker when the purchase of the property is contracted for but not completed during the listing period. And for that matter our examination of the exclusive listing decisions in our reports indicates that it has not been contended until now that the broker's commission under such a contract depends upon the sale being completed during the listing period; though such a contention could have been made, with more basis than here, in *Joel T. Cheatham, Inc. v. Hall*, 64 N.C. App. 678, 308 S.E. 2d 457 (1983) where, as the record shows, the sale was not completed until seven months after the exclusive listing period expired. In all events the contention is fallacious on its face and we reject it. For under the listing contract, as the parties clearly understood, plaintiff's function was to seek a contract of sale during the listing period, not to complete a sale, which it could not possibly do anytime, since it did not own the property; and the provision entitling plaintiff to a commission if one of its prospects contracted to buy the property within 30 days after the listing period expired is even clearer proof of their understanding that a commission did not depend upon the sale being completed during the listing period, but rather upon a contract of sale being entered

into within the time designated. The words "upon the sale or exchange of said property," relied upon by defendant, merely established when any commission due plaintiff would be paid. Other courts in considering similar cases have generally reached the same result. 12 C.J.S. *Brokers* Sec. 175, pp. 556, 558-559 (1980).

Affirmed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. REDELL J. CAMPBELL

No. 8815SC8

(Filed 19 July 1988)

1. **Criminal Law § 143.12— probation revocation—initial sentence consecutive to new sentence—no error**

The trial judge did not err when revoking defendant's probation and placing into effect the suspended sentence by making the suspended sentence consecutive to another sentence where defendant was given a suspended sentence for felonious sale and delivery of a controlled substance on 9 October 1986, pled guilty to two counts of felonious sale and delivery of a controlled substance on 31 August 1987, the trial judge imposed a ten-year active sentence, and the trial court subsequently found that defendant had violated the conditions of his probation, revoked probation, and ordered that the 9 October 1986 sentence run at the expiration of the 31 August 1987 sentence. The applicable statute is N.C.G.S. § 15A-1344(d) rather than N.C.G.S. § 15A-1354(a).

2. **Constitutional Law § 34; Criminal Law § 143.12— revocation of probation—consecutive sentences—no violation of double jeopardy**

The statute which allows a court to activate a defendant's suspended probationary sentence and to run it consecutively to another sentence, N.C.G.S. § 15A-1344(d), does not violate the double jeopardy clause of the United States Constitution or the North Carolina Constitution.

APPEAL by defendant from *Brannon, Anthony M., Judge.* Judgment entered 4 September 1987 in Superior Court, ORANGE County. Heard in the Court of Appeals 10 May 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

Public Defender J. Kirk Osborn for defendant-appellant.

JOHNSON, Judge.

This is an appeal from a court order revoking defendant's probation and placing into immediate effect the suspended sentence given with probation. The chronological events leading up to this appeal are as follows.

On 9 October 1986, in the Superior Court of Orange County, defendant pled guilty to felonious sale and delivery of a Schedule II controlled substance. Defendant was given a three year suspended sentence and placed on probation for three years.

On 31 August 1987, in the Superior Court of Orange County, defendant pled guilty to two counts of felonious sale and delivery of a Schedule II controlled substance. The trial court imposed a ten year active sentence and directed the probation officer to serve a violation report on defendant for having violated the conditions of probation imposed on defendant 9 October 1986. The Public Defender was appointed to represent defendant at his probation violation hearing scheduled for 4 September 1987. Defendant's convictions on 31 August 1987 to the two counts of felonious sale and delivery of a Schedule II controlled substance served as the basis for the violation of probation report.

At the 4 September 1987 hearing, the trial court found that defendant had willfully violated the conditions of his 9 October 1986 probationary judgment by being convicted of a criminal offense, to wit: defendant's 31 August 1987 conviction on two counts of felonious sale and delivery of a Schedule II controlled substance. The trial court revoked defendant's probation and ordered that the three year sentence suspended on 9 October 1986 be placed into immediate effect, and to run at the expiration of the ten year sentence imposed on 31 August 1987. From this order, defendant appeals.

The sole issue raised by defendant in this appeal is whether the trial court erred in ordering the three year sentence to run at the expiration of the ten year sentence.

[1] Defendant argues that his 9 October 1986 probationary judgment contained no provision that his sentence was to run consecutive to any other sentence; therefore, defendant contends that under the provisions of G.S. 15A-1354(a) his sentence, once

activated, must run concurrently with any other sentence he might receive. G.S. 15A-1354(a) provides in pertinent part that:

> [W]hen a term of imprisonment is imposed on a person *who is already subject to an undischarged term of imprisonment*, . . . the sentences may run either concurrently or consecutively, as determined by the court. If not specified, sentences shall run concurrently. (Emphasis added.)

Defendant's reliance upon this statutory provision is misplaced. Defendant overlooks the emphasized language of G.S. 15A-1354(a) which refers to an individual who, at the time of sentencing, is "already" subject to an undischarged term of imprisonment. At the time defendant was sentenced on 9 October 1986, the trial judge could have ordered the three year sentence to run consecutively or concurrently with any *undischarged term of imprisonment to which defendant was "already" subject at that time*. It is clear from the reading of G.S. 15A-1354(a) that the statutory language does not mean any term of imprisonment to which defendant *might* become subject in the future. The ten year sentence imposed upon defendant on 31 August 1987 was not an undischarged term of imprisonment defendant was "already" subject to on 9 October 1986, when the three year sentence probationary judgment was imposed. G.S. 15A-1354 has no application to the facts of this case.

We find G.S. 15A-1344 to be the applicable statute for disposition of the issue. G.S. 15A-1344(d) provides in pertinent part that:

> A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

At the time defendant's probation was revoked on 4 September 1987, he was subject to a separate term of imprisonment of ten years and it was, therefore, within the authority and discretion of the judge revoking defendant's probation to run the sentence either concurrently or consecutively.

[2] We have carefully reviewed defendant's contention that G.S. 15A-1344(d), which allows the court to activate defendant's suspended probationary sentence and to run it consecutively to another sentence, violates the double jeopardy clause under both the United States Constitution and the North Carolina Constitution. We conclude that this contention is without merit.

We affirm the trial court's judgment.

Affirmed.

Judges PHILLIPS and SMITH concur.

MARGARET E. POTEAT v. SHELIA ROBINSON, ADMINISTRATRIX FOR THE ESTATE OF HUBRA BEDFORD LEA

No. 8817SC66

(Filed 19 July 1988)

Executors and Administrators § 19.2— illegitimate child's claim on estate—claim denied—time for filing action

The trial court erred in dismissing plaintiff's action claiming a share in decedent's estate on the ground that it was barred by N.C.G.S. § 28A-19-16 because it was filed more than three months after the claim had been rejected by decedent's personal representative, since that statute applies only to creditor's claims against an estate and not to the interests of heirs.

APPEAL by plaintiff from *Lewis, John B., Jr., Judge.* Order entered 24 August 1987 in CASWELL County Superior Court. Heard in the Court of Appeals 1 June 1988.

The plaintiff, Margaret E. Poteat, brought this action on 22 December 1986 for a share in the estate of Hubra Bedford Lea, deceased. In her complaint, plaintiff alleged that she was born illegitimately on 19 December 1949, that on or about 20 February 1950, Lea was adjudged the father of plaintiff, and that pursuant to the provisions of N.C. Gen. Stat. § 29-19, she is entitled to share in Lea's estate. The defendant, Shelia Robinson, answered in apt time and moved to dismiss on the ground, *inter alia*, that plaintiff's right to recovery is barred by the applicable statute of limitations. The trial court concluded that plaintiff's action is

barred by N.C. Gen. Stat. § 28A-19-16 and granted defendant's motion to dismiss. The plaintiff appealed.

Dawson, Watkins & Hardy, by Christopher T. Watkins, for plaintiff-appellant.

W. Osmond Smith, III for defendant-appellee.

WELLS, Judge.

The sole question presented by this appeal is whether G.S. § 28A-19-16 is applicable to plaintiff's action.

On 24 June 1983 Hubra Bedford Lea died intestate, and Shelia Robinson, defendant herein, was appointed the administratrix of his estate. The plaintiff wrote a letter to defendant's agent within six months after the date of first publication of notice to creditors stating that she was an heir of the deceased and wished to share in the distribution of his estate. By written letter dated and mailed to plaintiff on 31 July 1984 the defendant, by her agent, rejected plaintiff's claim. In its order dismissing plaintiff's claim the trial court concluded that since the plaintiff did not commence an action until 22 December 1986, a date more than three months after written notice of rejection had been communicated, G.S. § 28A-19-16 applies and bars plaintiff's claim.

G.S. § 28A-19-16 provides as follows:

> *Disputed claim not referred barred in three months.* If a claim is presented to and rejected by the personal representative or collector, and not referred as provided in G.S. 28A-19-15, the claimant must, within three months, after due notice in writing of such rejection, or after some part of the claim becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon.

Plaintiff contends that G.S. § 28A-19-16 applies to creditors' claims against an estate and not to the interests of heirs. We agree. The cases construing article 19 of chapter 28A involve actions by creditors to recover debts. Moreover, N.C. Gen. Stat. § 28A-19-3(h) expressly provides that the word "claim" as used in article 19 "does not apply to claims of heirs or devisees to their respective shares or interests in the decedent's estate in their

capacity as such heirs or devisees." Thus, it was error for the trial court to dismiss plaintiff's claim on the basis that it was barred by G.S. § 28A-19-16.

For the reasons stated the judgment of the trial court must be and is

Reversed.

Judges BECTON and PHILLIPS concur.

CAREFREE CAROLINA COMMUNITIES, INC., JOHN B. RICHARD AND WIFE, WILDA L. RICHARD, JEFFREY K. PORTMAN AND WIFE, MARGARET PORTMAN; AND ROBERT FRICKHOEFFER AND WIFE, KAY FRICKHOEFFER v. ROBERT S. CILLEY, TRUSTEE; NC-GA, INC., AND BREVARD FEDERAL SAVINGS & LOAN ASSOCIATION

No. 8729SC287

(Filed 19 July 1988)

Partnerships § 3; Mortgages and Deeds of Trust § 1— partnership—action for accounting and to enjoin foreclosure—summary judgment improper

Summary judgment was improperly granted for defendants in an action in which plaintiffs alleged that defendants were their partners in developing encumbered land but wrongfully hindered development where the trial court based its summary judgment decision on the previous appeal of a denial of plaintiffs' motion for a preliminary injunction, which had no application to this question, and the only materials considered by the court were sharply conflicting pleadings which raised several issues of material fact.

APPEAL by plaintiffs from *Beaty, Judge.* Order entered 14 November 1986 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 1 October 1987.

Shuford, Best, Rowe & Brondyke, by James Gary Rowe, for plaintiff appellants.

Ladson F. Hart, Robert S. Cilley and Cecil J. Hill for defendant appellees.

PHILLIPS, Judge.

In their complaint plaintiffs allege, in substance, that they are entitled to an accounting from the defendants, to have them enjoined from foreclosing on 319.29 acres of land covered by two deeds of trust, and to recover damages from the corporate defendants because they were partners of the corporate plaintiff in developing the encumbered land and wrongfully hindered the development in violation of their partnership duties and G.S. 75-1, *et seq.* Defendants in their answers denied the material allegations in the complaint and counterclaimed on various grounds, which plaintiffs denied in their replies. Plaintiffs' motion for a preliminary injunction was denied and in an earlier appeal to this Court that order was affirmed. Upon the return of the case to the trial court defendants moved for summary judgment under the provisions of Rule 56, N.C. Rules of Civil Procedure, and after a hearing an order was entered dismissing plaintiffs' remaining claims. The stated basis for the order was as follows:

> During the hearing, the court considered said Defendants' Motion, Plaintiffs' verified complaint, and Defendants' verified Answer and Counterclaim. . . . Neither party . . . served affidavits . . . .
>
> . . . [A]fter considering applicable North Carolina law including *CAREFREE CAROLINA COMMUNITIES, INC. ET AL, v ROBERT S. CILLEY, TRUSTEE, ET AL*, 79 NC App 742, 340 SE 2d 529 (1986), cert. den. 316 NC 374, 342 SE 2d 891 (1986), and it having been made to appear to the court that there is no genuine issue as to any material fact and that the Defendants, Brevard Federal Savings and Loan Association and NC-GA, Inc. are entitled to judgment as a matter of law as to Plaintiffs' Complaint.

The order has no proper basis and is clearly erroneous for two reasons. *First*, the decision in the previous appeal has no application whatever to the question raised by this appeal. Contrary to the defendants' argument and the impressions of the trial court the previous appeal, as the cited opinion clearly states, did not establish that plaintiffs' other claims are unsupportable by proof and thus devoid of merit; it established only that plaintiffs were not entitled to a preliminary injunction because they had not shown that in the trial they can *probably* establish the partner-

ship rights upon which their several claims rest. Thus, though plaintiffs' ability to prove their case was judicially doubted their inability to do so was not judicially determined. *Second*, under our law, as our Courts have stated too many times to require a citation of authority, summary judgment is proper only when it clearly and without contradiction appears from the materials considered by the court that no genuine issue of material fact exists; and in this case the only materials considered by the court, the sharply conflicting pleadings of the parties, instead of eliminating all material factual issues or establishing an insurmountable bar to plaintiffs' case, raise several genuine issues of material fact that must be adjudicated in some approved manner. Thus, we vacate the order appealed from and remand the case for such adjudication.

Vacated and remanded.

Judges COZORT and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JULY 1988

ALEXANDER v. ALEXANDER No. 8826DC152	Mecklenburg (86CVD8609)	Affirmed in part; vacated in part and remanded
BAKER v. BAKER No. 8817DC149	Rockingham (85CVD118)	Appeal Dismissed
COLLIER v. NISBET No. 871SC892	Currituck (86SP27)	Affirmed and Remanded
CUMMINGS v. QUICK No. 8812DC241	Cumberland (87CVD427)	Affirmed
IN RE BRADLEY No. 8829DC289	Henderson (85J66)	Affirmed
IN RE FARMER No. 8814DC138	Durham (80J141)	Vacated and Remanded
IN RE FORECLOSURE OF SUGAR No. 8816SC146	Robeson (86SP173)	Reversed and Remanded
IN RE JORDAN, TRUSTEE No. 884SC187	Sampson (84CVS200)	Affirmed
PITT COUNTY MEMORIAL HOSP. v. SMITH No. 873SC1053	Pitt (86CVS2113)	Vacated and Remanded
REEDER v. REEDER No. 871DC1034	Pasquotank (83CVD269)	Affirmed
STAMPLEY v. YOUNG WORLD, INC. No. 8818DC96	Guilford (85CVD3013)	Affirmed
STATE v. BANKS No. 8819SC36	Cabarrus (86CRS8328)	No Error
STATE v. BARNES No. 8818SC108	Guilford (86CRS84866) (86CRS84867)	No Error
STATE v. CROSSON No. 889SC205	Vance (87CRS1790)	No Error
STATE v. DENDY No. 8826SC162	Mecklenburg (87CRS019562)	Appeal Dismissed
STATE v. HAMM No. 888SC255	Wayne (87CRS4022)	No Error

STATE v. JONES No. 8826SC91	Mecklenburg (87CRS9674)	No Error
STATE v. MOORE No. 8816SC275	Robeson (86CRS23301)	Affirmed
STATE v. REEP No. 8826SC226	Mecklenburg (87CRS7400)	No Error
STATE v. RICKS No. 887SC215	Nash (87CRS6391)	Affirmed
STATE v. STRICKLAND No. 8816SC230	Robeson (87CRS9115)	No Error
STATE v. WHITE No. 884SC190	Onslow (87CRS6918) (87CRS6979)	Vacated and remanded for resentencing
STATE EX REL. BRYANT v. STOREY No. 8821SC251	Forsyth (87CVS3882)	Affirmed
VENABLE v. VENABLE No. 8821DC141	Forsyth (87CVD3662)	Vacated and Remanded

FILED 19 JULY 1988

BARTHOLOMEW v. WAKE FOREST UNIVERSITY No. 8710IC494	Ind. Comm. (030743)	Affirmed
BENNETT v. BENNETT No. 8810DC223	Wake (85CVD2699)	Affirmed in part, reversed in part and remanded
GREENE v. SHELBY MUT. INS. No. 8718SC787	Guilford (86CVS3069)	Affirmed
GROSSE v. HARGETT No. 8718SC907	Guilford (86CVS6724)	Affirmed
HITCHCOCK v. MITCHELL CONST. CO. No. 8718SC1009	Guilford (87CVS4014)	Dismissed
IN RE FOSTER v. WAKE COUNTY COUNCIL ON AGING No. 8710SC1265	Wake (87CVS2886)	Appeal Dismissed
IN RE HAYES No. 8723DC1134	Alleghany (85J27) (85J28)	Affirmed

IN RE HERALD No. 8825DC159	Caldwell (84J38) (85J13)	Affirmed in part; vacated and remanded in part
IN RE WILLIAMS No. 8813DC281	Columbus (87J17)	Affirmed
LEASE MOORE EQUIPMENT CO. v. WARLICK'S, INC. No. 8723SC1220	Yadkin (85CVS123)	Affirmed
MERCY HOSP. v. VERBAL No. 8826SC63	Mecklenburg (86CVS2956)	Reversed and Remanded
REID v. DURHAM HERALD No. 8814SC22	Durham (86CVS02720)	Affirmed
SHORT v. BRYANT No. 8721SC1075	Forsyth (83CVS4968)	Vacated
STATE v. ALEXANDER No. 8726SC1236	Mecklenburg (86CRS11496)	Affirmed
STATE v. BAITY No. 8827SC110	Gaston (87CRS11141) (87CRS11142) (87CRS11143) (87CRS11144) (87CRS11145) (87CRS11182) (87CRS11183) (87CRS11184)	No Error
STATE v. CARROLL No. 8816SC144	Robeson (85CRS8484)	Affirmed
STATE v. DAVIS No. 8830SC35	Jackson (86CRS2622)	New Trial
STATE v. DAY No. 8819SC263	Cabarrus (87CRS4388) (87CRS4389)	No Error
STATE v. FULLER No. 883SC307	Pitt (87CRS4346)	No Error
STATE v. GAY No. 8716SC1177	Robeson (87CRS1715)	No Error
STATE v. GROOMS No. 884SC19	Onslow (87CRS5552)	No Error
STATE v. JONES No. 8812SC309	Cumberland (86CRS44157)	No Error

STATE v. JONES No. 8726SC1226	Mecklenburg (86CRS20156) (86CRS25545) (86CRS32226) (86CRS32225) (86CRS32228) (86CRS35662) (86CRS46058)	Affirmed
STATE v. JONES No. 8829SC12	McDowell (87CRS538)	No Error
STATE v. LUNSFORD No. 8819SC9	Rowan (87CRS2027)	No. Error
STATE v. McQUEARY No. 8826SC273	Mecklenburg (86CRS96419) (86CRS96420)	No Error in the trial; remanded for correction of the judgment in case No. 86CRS96419
STATE v. PAIGE No. 8826SC32	Mecklenburg (87CRS10005)	No Error
STATE v. PITTMAN No. 8811SC208	Lee (87CRS5822) (87CRS5823)	No Error
STATE v. PRICE No. 881SC319	Pasquotank (83CRS3036)	No Error
STATE v. SMUTEK No. 871SC1096	Dare (87CRS888)	No Error
STATE v. VANCE No. 8821SC34	Forsyth (87CRS3011) (87CRS3012)	Appeal Dismissed
STATE v. WORSLEY No. 873SC1250	Pitt (86CRS21045)	No error in the trial; remanded for resentencing
STATE OF WISCONSIN EX REL. IVERSON v. IVERSON No. 8821DC68	Forsyth (87CVD3026)	Affirmed
UNIFIRST CORP. v. HOGAN No. 8815DC246	Alamance (86CVD1303)	Vacated and Remanded
WHITING v. THE DURHAM HERALD No. 8814SC145	Durham (87CVS02171)	Affirmed

APPENDIXES

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

AMENDMENT TO RULES OF APPELLATE PROCEDURE

Rules 4, 21, 29 and 31 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. The amendments to Rules 4 and 21 shall be applicable to all appeals from judgments entered on and after 24 July 1987. The Amendments to Rules 29 and 31 shall be applicable to all appeals in which the notice of appeal is filed on or after 1 October 1987.

Adopted by the Court in Conference this 3rd day of September, 1987. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

s/WHICHARD, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 22nd day of June, 1988.

J. GREGORY WALLACE
Clerk of the Supreme Court

RULE 4

APPEAL IN CRIMINAL CASES—HOW AND WHEN TAKEN

(a) **Manner and Time.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 10 days after entry of the judgment or order or within 10 days after a ruling on a motion for appropriate relief made during the ten-day period following entry of the judgment or order.

(b) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) **To Which Appellate Court Addressed.** An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

Adopted: 13 June 1975:
Amended: 4 October 1978—(a)(2)—effective 1 January 1979;
13 July 1982—(d);
3 September 1987—(d)—effective for all judgments of the superior court entered on or after 24 July 1987.

RULE 21

CERTIORARI

(a) **Scope of the Writ.**

(1) **Review of the Judgments and Orders of Trial Tribunals.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals.** The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ; to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied

by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.** Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

Adopted: 13 June 1975.
Amended: 18 November 1981—21(a) and (e);
27 November 1984—21(a)—effective 1 February 1985;
3 September 1987—21(e)—effective for all judgments of the superior court entered on and after 24 July 1987.

RULE 29

SESSIONS OF COURTS; CALENDAR OF HEARINGS

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the week beginning the second Monday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.** Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. When a reply brief is allowed by rule or ordered by the Court, the appeal will be calendared or recalendared for hearing at a time not less than 10 days after the time for filing the reply brief.

Adopted: 13 June 1975.
Amended: 3 March 1982—29(a)(1);
3 September 1987—29(a)(1).

RULE 31

PETITION FOR REHEARING

(a) **Time for Filing; Content.** A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies thereof shall be filed with the clerk.

(c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 20 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than 30 days after the filing of the petitioner's brief on rehearing.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

Adopted: 13 June 1975.
Amended: 27 November 1984—31(a)—effective 1 February 1985;
3 September 1987—31(d).

AMENDMENT TO RULES OF APPELLATE PROCEDURE

Rules 13, 14, 15, 16, 26, and 28 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. All amendments shall be effective on and after 1 September 1988.

Effective 1 September 1988, the Drafting Committee Notes and Commentary which have been appended to each of the Rules of Appellate Procedure shall be deleted. In their stead shall be annotations containing the date of each rule's adoption and any subsequent dates of amendment, indicating which of the rule's paragraphs was amended by the action and the effective date thereof.

Adopted by the Court in Conference this 30th day of June, 1988. These amendments shall be promulgated by publication in the Advance sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

RULE 13

FILING AND SERVICE OF BRIEFS

(a) Time for Filing and Service of Briefs.

(1) **Cases Other Than Death Penalty Cases.** Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 30 days for filing and serving the brief shall run from the date of docketing the record on appeal in the appellate court. Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(2) **Death Penalty Cases.** Within 60 days after the Clerk of the Supreme Court has mailed the printed record to the parties, the defendant-appellant in a criminal appeal which includes a sentence of death shall file his brief in the office of the Clerk and serve copies thereof upon all other parties separately represented. Within 60 days after appellant's brief has been served, the State-appellee shall similarly file and serve copies of its brief. The appellant may serve and file a reply brief within 21 days after service of the brief of the State-appellee.

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve

his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Adopted: 13 June 1975.
Amended: 7 October 1980—13(a)—effective 1 January 1981;
27 November 1984—13(a) and (b)—effective 1 February 1985;
30 June 1988—13(a)—effective 1 September 1988.

RULE 14

APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. 7A-30

(a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) **Content of Notice of Appeal.**

(1) **Appeal Based Upon Dissent in Court of Appeals.** In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the

dissenting opinion and which are to be presented to the Supreme Court for review.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) **Briefs.**

(1) **Filing and Service; Copies.** Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided,

however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 30 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court.

Adopted: 13 June 1975.
Amended: 31 January 1977—14(d)(1);
7 October 1980—14(d)(1)—effective 1 January 1981;
27 November 1984—14(a), (b), and (d)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
30 June 1988—14(b)(2), (d)(1)—effective 1 September 1988.

RULE 15

DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in G.S. 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89, or in valuation of exempt property under G.S. Chap. 1C.

(b) **Same; Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) **Same; Content.** The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. 7A-31 for discretionary review. The petition shall state each question for which review is sought, and shall be

accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present questions in addition to those presented by the petitioner, those additional questions shall be stated in the response.

(e) **Certification by Supreme Court; How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders; Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith

transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner to cover the costs thereof.

(g) **Filing and Service of Briefs.**

(1) **Cases Certified Before Determination by Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a

deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to the Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee," a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee," the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party appellant or appellee for purposes of proceeding under this Rule 15.

Adopted: 13 June 1975.

Amended: 7 October 1980—15(g)(2)—effective 1 January 1981;
18 November 1981—15(a);
30 June 1988—15(a), (c), (d), (g)(2)—effective 1 September 1988.

RULE 16

SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the questions stated in the notice of appeal or petition for discretionary review, unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) **Scope of Review in Appeal Based Solely Upon Dissent.** Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) **Appellant, Appellee Defined.** As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner, "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals; "appellee" means the opposing party. Provided that in its order of certification the Supreme Court may designate either party "appellant" or "appellee" for purposes of proceeding under this Rule 16.

Adopted: 13 June 1975.

Amended: 3 November 1983—16(a) and (b)—applicable to all notices of appeal filed in the Supreme Court on and after 1 January 1984;
30 June 1988—16(a) and (b)—effective 1 September 1988.

RULE 26

FILING AND SERVICE

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that notice of service of proposed records on appeal, motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of

service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½ x 11″) with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8½ x 14″). All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985;
30 June 1988—26(a) and (g)—effective 1 September 1988.

RULE 28

BRIEFS: FUNCTION AND CONTENT

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a table of contents and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(6) A short conclusion stating the precise relief sought.

(7) Identification of counsel by signature, typed name, office address and telephone number.

(8) The proof of service required by Rule 26(d).

(9) The appendix required by Rule 28(d).

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain a table of contents and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having

taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

(i) those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

(ii) those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence;

(iii) relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

(i) whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

(ii) to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

(iii) to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** Appellee must reproduce appendixes to his brief in the following circumstances:

(i) Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

(ii) Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional

argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) **Reply Briefs.** The appellant may file a brief in reply to the brief of the appellee and if the appellee has cross-appealed the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of the appellate court.

(i) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Adopted: 13 June 1975.

Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;
10 June 1981—28(b) and (c)—effective 1 October 1981;
12 January 1982—28(b)(4)—effective 15 March 1982;
7 December 1982—28(i)—effective 1 January 1983;
27 November 1984—28(b), (c), (d), (e), (g), and (h)—effective 1 February 1985;
30 June 1988—28(a), (b), (c), (d), (e), (h), and (i)—effective 1 September 1988.

AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, 306 N.C. 797, as amended 10 November 1982, 307 N.C. 741, and 24 June 1987, 319 N.C. 679, is hereby amended as follows:

Rewrite the proviso at the end of subsection 5(c) to read as follows:

> Provided, however, hand-held audio tape recorders or camera-mounted video-audio recorders may be used upon prior notification to, and with the approval of, the presiding judge; such approval may be withdrawn at any time.

As amended the Order adopted 21 September 1982 shall be in effect from 1 July 1988 to 30 June 1990 unless earlier amended, rescinded, or extended by order of the Court.

This order shall be published in the advance sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this the 30th day of June 1988.

WHICHARD, J.
For the Court

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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

ADOPTION

§ 2. Parties Generally

The trial court did not err in an adoption action by allowing the grandparents to intervene seeking visitation. *Hedrick v. Hedrick*, 151.

ADVERSE POSSESSION

§ 25.2. Particular Cases; Evidence Insufficient

The trial court erred in entering summary judgment for defendants on their claim of adverse possession under color of title where plaintiffs' evidence raised an issue of fact as to whether a dwelling, shed and area from which sand was taken were within the area encompassed by the description in the deed under which defendants claimed. *Phipps v. Paley*, 170.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

Where one panel of the Court of Appeals had denied certiorari to review an order of the trial court, a second panel of the Court of Appeals has no authority to grant a review of the trial court's order. *Fox v. Barrett*, 135.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

Denial of a motion for summary judgment and denial of a motion to dismiss for failure to state a claim are interlocutory and nonappealable. *Fox v. Barrett*, 135.

Defendant's appeal from a partial summary judgment for plaintiffs on the issue of liability only and plaintiffs' appeal from a judgment which disposed of fewer than all the claims or the rights and liabilities of fewer than all the parties were dismissed as premature. *Pelican Watch v. U.S. Fire Ins. Co.*, 140.

An appeal from the denial of a motion to dismiss cross-claims was interlocutory and was dismissed. *Burlington Industries, Inc. v. Richmond County*, 577.

§ 6.6. Appeals Based on Motions to Dismiss

An order denying defendant insurer's motion to dismiss was interlocutory and not immediately appealable where plaintiff's action would not affect any of defendant's rights under rehabilitation and liquidation orders. *Southern Uniform Rentals v. Iowa Nat'l Mutual Ins. Co.*, 758.

§ 14. Appeal and Appeal Entries

A breach of warranty action is remanded for a determination as to when judgment was entered and whether defendants gave notice of appeal within 10 days after entry of the judgment. *Behar v. Toyota of Fayetteville*, 603.

§ 24. Necessity for Objections, Exceptions, and Assignments of Error

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§ 45.1. Effect of Failure to Discuss Exceptions and Assignments of Error in Brief

Four of plaintiffs' assignments of error were overruled where plaintiffs failed to include any argument or cite any authorities. *Matthews v. Prince*, 541.

ARCHITECTS

§ 3. Liability for Defective Conditions

The evidence did not require the trial court to instruct the jury that a contractor who complies with the plans and specifications prepared by the owner or the owner's architect is not liable for the consequences of defects in the plans or specifications. *Butler & Sidbury, Inc. v. Green Street Baptist Church*, 65.

ARREST AND BAIL

§ 3.1. Right of Officer to Arrest without Warrant; Requirement of Probable Cause

The trial court did not err during a suppression hearing in a prosecution for narcotics offenses by sustaining the State's objection to questions concerning a detective's opinion of his authority to ask defendant to halt. *S. v. Allen*, 15.

§ 3.8. Legality of Warrantless Arrest for Driving while Impaired

Probable cause existed to justify an officer's warrantless arrest of defendant for driving while impaired. *S. v. Adkerson*, 333.

§ 6.2. Resisting Arrest; Sufficiency of Evidence

The evidence was insufficient to support defendant's conviction of resisting an officer in the performance of his duties in attempting to arrest defendant for burglary where the evidence disclosed that defendant had not been arrested and that the officer was merely investigating the area after responding to a call. *S. v. Davis*, 185.

§ 11.4. Liabilities on Bail Bonds; Judgments against Sureties

The trial court erred by entering an order and judgment of forfeiture on a criminal appearance bond without a proper notice to the surety. *S. v. Cox*, 742.

ARSON

§ 4.1. Cases where Evidence Was Sufficient

The State's evidence was sufficient for the jury to find that the male defendant unlawfully burned a grocery store which he owned and that the burning was willful and wanton. *S. v. Clark*, 489.

§ 4.2. Cases where Evidence Was Insufficient

The State's evidence was insufficient to support the female defendant's conviction of unlawfully burning a grocery store. *S. v. Clark*, 489.

ASSAULT AND BATTERY

§ 3. Actions for Civil Assault

There was sufficient evidence to go to the jury on a civil battery claim in an action arising from the town's forcible entry onto disputed property. *Russell v. Town of Morehead City*, 675.

§ 13. Competency of Evidence

There was no prejudicial error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury from the exclusion of photographs of two of the victims in happier times, testimony of an investigating officer that black specks on a victim were the residue from a discharged gun, or the questioning of defendant concerning another murder. *S. v. Butler*, 463.

ASSAULT AND BATTERY — Continued

§ 14.4. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury where Weapon Is a Firearm

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, an inference of an attempt to kill was not negated by the facts that shotgun pellets entering the body of the victim did so away from vital organs and that some pellets came out on their own. *S. v. Hensley*, 245.

§ 16.1. Submission of Lesser Offenses not Required

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by not instructing the jury on lesser included offenses where defendant's evidence that the victim's injuries could have been more serious did not negate the evidence of serious injury. *S. v. Hensley*, 245.

ATTORNEYS AT LAW

§ 3. Scope and Duration of Attorney's Authority Generally

A law firm employed by an automobile liability insurer to defend its insured is an independent contractor so that alleged negligence by the law firm in defending the action is not imputable to the liability insurer. *Brown v. Lumbermens Mut. Casualty Co.*, 464.

§ 7.1. Validity and Construction of Fee Agreements

The trial court's findings were not sufficient to support an award of attorney's fees under G.S. 6-21.1. *Epps v. Ewers*, 597.

§ 7.5. Allowance of Fees as Part of Costs

The trial court did not abuse its discretion in an action arising from an automobile accident by awarding attorney's fees to plaintiff where plaintiff's counsel rejected an offer of $4,630.55 and settled for $6,501. *Epps v. Ewers*, 597.

AUTOMOBILES AND OTHER VEHICLES

§ 9.3. Turning and Turning Signals; Lane Changes

The change of lanes necessary in order to pass another vehicle is "turning from a direct line" which requires the giving of a visible signal under G.S. 20-154. *Sass v. Thomas*, 719.

§ 45.2. Actions for Negligent Operation; Competency of Evidence of Conduct or Events Prior to Trial

In an action to recover for injuries sustained by plaintiff in a collision between his motorcycle and defendant's automobile, the trial court erred in allowing defendant to cross-examine plaintiff about a previous motorcycle accident. *Sass v. Thomas*, 719.

§ 77. Contributory Negligence; Passing Vehicle Traveling in Same Direction

The trial court properly denied defendant's motion for directed verdict on the issue of plaintiff's contributory negligence where there was a question of fact as to whether plaintiff passed in a no passing zone. *Sass v. Thomas*, 719.

§ 83.2. Contributory Negligence of Pedestrians while Standing on Highway

The trial court properly granted a directed verdict for defendant on the grounds of contributory negligence in a wrongful death action arising from an

AUTOMOBILES AND OTHER VEHICLES — Continued

automobile striking a woman who was leaning against her car following a prior accident. *Williams v. Odell*, 699.

§ 86. Last Clear Chance

A directed verdict was properly granted for defendant in a wrongful death action in which plaintiff alleged last clear chance following a minor accident at the entrance ramp of a freeway. *Williams v. Odell*, 699.

§ 110. Culpable Negligence in Homicide Cases

The misdemeanor death by a vehicle statute does not violate due process because it imposes criminal liability without requiring a finding of criminal intent. *S. v. Smith*, 161.

A conviction of misdemeanor death by vehicle may constitutionally be based upon a finding of ordinary negligence, and the statute was constitutionally applied to defendant where the jury's finding of guilt necessarily included a finding that defendant was negligent in violating the statute prohibiting the overtaking and passing of another vehicle unless the pass can be made in safety. *Ibid.*

§ 113. Homicide; Sufficiency of Evidence

Felony death by a vehicle is not a lesser included offense of involuntary manslaughter while driving under the influence of alcohol. *S. v. Williams*, 614.

§ 114. Homicide; Instructions Generally

The trial court erred in failing to submit misdemeanor death by a vehicle as a lesser included offense in a prosecution for involuntary manslaughter while driving under the influence of alcohol. *S. v. Williams*, 614.

§ 125. Arrest for Operating Vehicle while Impaired Generally

Judgment on a conviction for driving while impaired was vacated and the case remanded for further findings where defendant presented evidence that he called his wife to witness the breathalyzer test and she arrived in time but was denied access to defendant. *S. v. Ferguson*, 513.

§ 132. Passing Standing School Bus

The evidence in a prosecution for passing a stopped school bus was sufficient for the jury to find that defendant was the driver of the car which passed the stopped bus. *S. v. Williams*, 120.

BASTARDS

§ 6. Sufficiency of Evidence

The trial court erred in a child support action by reversing a judgment of the Court of Appeals based upon newly-discovered evidence relating to blood test results and defendant's fertility. *Cole v. Cole*, 724.

BROKERS AND FACTORS

§ 6.6. Right to Commission where Broker Does Not Procure Purchaser

A real estate broker was entitled to a commission under an exclusive listing contract where a contract of sale was entered during the listing period but the purchase price was received and the title transferred twelve days after the listing period expired. *Adaron Group, Inc. v. Industrial Innovators, Inc.*, 758.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment Generally

Variance between the proof at trial and a burglary indictment concerning the location of the offense was not a fatal defect. *S. v. Ruffin*, 705.

§ 5.3. Sufficiency of Evidence; Aiding and Abetting

Defendant's contention that he could not be charged with burglary because he neither procured nor participated in breaking and entering was without merit where defendant took the principals to a dwelling at night and told them to "rough up" the inhabitants, since the breaking and entering was a natural and probable consequence of defendant's instructions to the principals. *S. v. Ruffin*, 705.

A first degree burglary charge was not subject to dismissal on the ground that there was no common scheme or plan to commit that crime where the burglary was committed in pursuance of a common plan or scheme to assault the victim. *Ibid.*

Defendant could be convicted of first degree burglary where the evidence would support a finding that he was constructively present at the scene in that he was near enough to render assistance and to encourage the perpetration of the crime. *Ibid.*

Defendant could properly be convicted of burglary under a theory of acting in concert even though he committed no act constituting an element of the offense. *Ibid.*

§ 5.8. Sufficiency of Evidence of Breaking and Entering and Larceny of Residential Premises

The evidence was insufficient to support defendant's conviction of first degree burglary in that it failed to show an intent to commit rape as alleged in the indictment even though evidence was presented that defendant had been convicted for a rape carried out in the same apartment complex by a similar method. *S. v. Davis*, 185.

CONSPIRACY

§ 6. Sufficiency of Evidence

The evidence was sufficient for the jury in a prosecution for conspiracy to commit armed robbery of a bank. *S. v. Colvin*, 50.

CONSTITUTIONAL LAW

§ 20. Equal Protection Generally

There is a reasonable basis for the classification listed in G.S. 50-13.2A between grandparents of children whose adoptive parents are neither related nor a stepparent to the children, and grandparents of children who are adopted by a relative or stepparent. *Hedrick v. Hedrick*, 151.

The trial court erred by granting defendant's motion for a Rule 12(b)(6) dismissal in an action in which plaintiff alleged that a local act providing for the annexation of property was arbitrary and capricious. *Piedmont Ford Truck Sale v. City of Greensboro*, 692.

§ 26.1. Full Faith and Credit; Foreign Judgments Obtained without Jurisdiction

Plaintiffs' action upon a default judgment obtained against defendant in New York was properly dismissed on the ground that the default judgment was invalid as a matter of law and not entitled to full faith and credit where a New York proc-

ess server who tried to serve defendant did not make a duly diligent effort to serve defendant personally before resorting to the "nail and mail" substitute service allowed by New York law. *Jaffe v. Vasilakos*, 662.

§ 34. Double Jeopardy

The statute which allows a court to activate a defendant's suspended probationary sentence and to run it consecutively to another sentence does not violate the double jeopardy clause. *S. v. Campbell*, 761.

§ 45. Right to Appear Pro Se

The trial court complied with G.S. 15A-1242 when it allowed defendant to remove her court-appointed counsel and to proceed pro se. *S. v. Seraphem*, 368.

§ 46. Removal or Withdrawal of Appointed Counsel

The trial judge did not abuse his discretion by appointing an attorney as standby counsel for defendant after removing him as counsel, and the attorney did not have a conflict of interest because defendant was contemplating a lawsuit against him for neglect in handling her case. *S. v. Seraphem*, 368.

§ 66. Right of Confrontation; Presence of Defendant at Proceedings

Defendant was not prejudiced by her absence during the jury's deliberation and verdict due to an attempted suicide where the jury was not informed of the reason for her absence and standby counsel was present at all times. *S. v. Seraphem*, 368.

§ 77. Self-Incrimination; Waiver

Defendant's filing of a verified answer in an action for alienation of affections and criminal conversation did not constitute a waiver of the right to assert self-incrimination, and she could properly assert this privilege in refusing to answer interrogatories with regard to her sexual behavior toward plaintiff's husband. *Gunn v. Hess*, 131.

CONSUMER CREDIT

§ 1. Generally

An oral referral agreement, an option to renew, and the initial two-year spa membership contract were all parts of an integrated transaction which constituted an illegal referral sale under G.S. 25A-37. *Chapel Hill Spa Health Club v. Goodman*, 198.

Plaintiff's taking of a nonpossessory, nonpurchase money security interest in defendant's household goods and furnishings was not an unfair trade practice because of subsequently enacted federal regulations stating that such action is an unfair trade practice or because the N.C. statute entitling a debtor to retain $2,500 worth of household goods and furnishings free from judgment. *Ken-Mar Finance v. Harvey*, 362.

The trial court did not err in granting a money judgment when plaintiff already had possession of defendant's car pursuant to a security agreement. *Ibid.*

The trial court did not err in an action for violation of the Fair Credit Reporting Act by granting a directed verdict for defendant automobile dealer. *Hageman v. Twin City Chrysler-Plymouth*, 594.

CONTEMPT OF COURT

§ 1.1. Distinction between Civil and Criminal Contempt

In determining whether contempt orders were civil or criminal or both, the purposes of the orders should be drawn from an examination of the character of the actual relief ordered by the court. *Bishop v. Bishop*, 499.

A contempt order was construed as adjudicating defendant in civil contempt. *Ibid.*

§ 6. Hearings on Orders to Show Cause

The court must make all findings necessary to impose both civil and criminal relief when both civil and criminal relief are imposed in a contempt order. *Bishop v. Bishop*, 499.

§ 6.3. Findings and Judgment

There were inadequate findings to support an adjudication of civil contempt. *Bishop v. Bishop*, 499.

CONTRACTS

§ 6. Contracts against Public Policy Generally

An oral referral agreement, an option to renew, and the initial two-year spa membership contract were all parts of an integrated transaction which constituted an illegal referral sale under G.S. 25A-37. *Chapel Hill Spa Health Club v. Goodman*, 198.

§ 7. Contracts Restricting Business Competition Generally

A covenant not to compete between an optician and an optometrist who had formerly rented office space from the optician was overbroad and summary judgment should have been entered for defendant optometrist. *Beasley v. Banks*, 458.

§ 10. Contracts Limiting Liability for Negligence

Where an employee of defendant suffered an accident while defendant was performing work for plaintiff pursuant to an agreement to construct and alter an appliance, any promise by defendant in connection with that agreement to indemnify or hold plaintiff harmless was against public policy and void under G.S. 22B-1, and plaintiff was not entitled to indemnification from defendant for a claim filed against plaintiff by defendant's employee. *Miller Brewing Co. v. Morgan Mechanical Contractors, Inc.*, 310.

§ 28. Actions on Contracts; Instructions

The evidence did not require the trial court to instruct the jury that a contractor who complies with the plans and specifications prepared by the owner or the owner's architect is not liable for the consequences of defects in the plans or specifications. *Butler & Sidbury, Inc. v. Green Street Baptist Church*, 65.

The trial court erred in submitting issues to the jury directed to an express contract theory of liability after giving the jury instructions which combined both express and implied contract theories of recovery, and the jury's verdict was inconsistent on its face where it found that plaintiff had not substantially performed its contractual obligations but still awarded plaintiff damages. *D. W. Ward Construction Co. v. Adams*, 241.

CORPORATIONS

§ 31. Purchase of Assets of the Corporation by another Corporation

The evidence and findings supported the trial court's conclusion that the transfer of the assets of a tire company to another corporation was fraudulent as to creditors. *Budd Tire Corp. v. Pierce Tire Co.*, 684.

Where one corporation purchases all or substantially all of the assets of another corporation, including the good will, in a manner deemed fraudulent, the selling corporation's creditors may follow the good will into the hands of the purchasing corporation and obtain a money damage award equal to its value. *Ibid.*

COSTS

§ 3. Taxing of Costs in Discretion of Court

It is within the trial court's discretion to require that expenses of obtaining an order compelling discovery assessed pursuant to Rule 37(a)(4) be paid at any time after entry of an order pursuant to the rule, and the better practice is for all such orders to include a provision as to when payment of such expenses shall be made. *Hall v. Carter*, 668.

CRIMINAL LAW

§ 9. Aiders and Abettors

Defendant's contention that he could not be charged with burglary because he neither procured nor participated in breaking and entering was without merit where defendant took the principals to a dwelling at night and told them to "rough up" the inhabitants, since the breaking and entering was a natural and probable consequence of defendant's instructions to the principals. *S. v. Ruffin*, 705.

§ 34.1. Evidence of Defendant's Guilt of other Offenses to Show Defendant's Character and Disposition to Commit Offense

In a prosecution for unlawfully burning a grocery store, the trial court erred in permitting the State to elicit testimony on cross-examination of the female defendant that her employment at another grocery store owned by the male defendant had terminated when the store burned. *S. v. Clark*, 489.

§ 35. Evidence that Offense Was Committed by Another

The trial court in an involuntary manslaughter case properly excluded testimony by the investigating officer that he originally charged another person with the offense. *S. v. Williams*, 614.

§ 60. Evidence in Regard to Fingerprints

The trial court did not err in a prosecution for kidnapping and common law robbery by admitting evidence regarding defendant's fingerprints where defendant was surprised when his fingerprints were taken for comparison purposes on the day trial commenced. *S. v. McNeill*, 257.

§ 66.8. Identification of Defendant from Photographs; Admission in Evidence

There was no prejudice in a prosecution for kidnapping and common law robbery from allowing the State to examine the victim regarding a photographic identification where the victim never connected defendant to any photograph. *S. v. McNeill*, 257.

CRIMINAL LAW — Continued

§ 113.6. Charge where there Are Several Defendants

A defendant whose trial was joined with that of another was not prejudiced when the trial court used the phrase "defendant, and/or either of them" in setting forth the elements of each of the offenses charged. *S. v. Ruffin*, 712.

§ 138.13. Fair Sentencing Act

The trial judge erred in a resentencing hearing by basing his decision in part upon his perception of the evidence and judgment at the prior sentencing hearing. *S. v. Abbott*, 749.

§ 138.28. Fair Sentencing Act; Aggravating Factor of Prior Convictions

The trial court erred in finding as an aggravating factor that defendant was twice convicted of communicating threats where one of those convictions resulted in a prayer for judgment continued. *S. v. Soles*, 606.

§ 138.30. Fair Sentencing Act; Mitigating Factors in General

A defendant was entitled to a new sentencing hearing on a conviction for assault with a deadly weapon inflicting serious injury where the trial court relied on the jury's verdict of a lesser included offense to determine that statutory mitigating factors had been satisfied. *S. v. Faison*, 237.

§ 138.34. Fair Sentencing Act; Mitigating Factor of Mental Condition

The trial court did not err in failing to find defendant's limited mental capacity as a mitigating factor where reports submitted by defendant established only his borderline intelligence. *S. v. Colvin*, 50.

§ 138.38. Fair Sentencing Act; Mitigating Factor of Strong Provocation

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury by not finding the mitigating factor of strong provocation. *S. v. Faison*, 237.

§ 138.40. Fair Sentencing Act; Mitigating Factor of Acknowledgment of Wrongdoing

Where defendant challenged the introduction of an in-custody statement at trial, he could not rely on the statement to show the voluntary acknowledgment of wrongdoing mitigating factor. *S. v. Ruffin*, 705.

§ 142.4. Particular Conditions of Probation Held Improper

The trial court erred in ordering defendant to pay $500,000 in restitution to the victim's next of kin as a condition of probation for misdemeanor death by vehicle. *S. v. Smith*, 161.

While the trial court properly used the wrongful death statute to compute the amount of restitution to be paid to a death by vehicle victim's parents as a condition of defendant's probation, the trial court erred in using the victim's annual salary as a base figure for the restitution. *Ibid.*

§ 143.12. Sentence upon Revocation of Probation

The trial court did not err when activating previous sentences after a probation revocation by ordering that defendant's sentence for felonious breaking or entering begin at the expiration of his sentence for possession of stolen goods. *S. v. Paige*, 142.

DIVORCE AND ALIMONY — Continued

ELECTRICITY

EMINENT DOMAIN

§ 1. Nature and Extent of Power Generally

Judgment on the pleadings was properly granted for defendant in an action in which plaintiff sought injunctive relief to prevent condemnation of its property. *Tradewinds Campground, Inc. v. Town of Atlantic Beach*, 601.

ESTOPPEL

§ 8. Sufficiency of Evidence on Issue of Estoppel

Summary judgment was properly granted for plaintiff insurance company in a declaratory judgment action arising from a construction dispute. *Western World Ins. Co. v. Carrington*, 520.

EVIDENCE

§ 29.3. Hospital Records

The trial court did not err in a termination of parental rights proceeding by excluding the mother's hospital records because of a lack of adequate foundation. *In re Parker*, 423.

§ 48. Competency and Qualification of Experts in General

The trial court did not err in permitting an expert to testify that calcium chloride was deliberately added to mortar used in the building constructed by plaintiff for defendant based on the testimony of another expert witness. *Butler & Sidbury, Inc. v. Green Street Baptist Church*, 65.

EXECUTORS AND ADMINISTRATORS

§ 9. Rights, Duties, and Powers of Representative

Plaintiff's personal injury action against the collectors by affidavit of decedent's estate was properly dismissed since plaintiff should have brought his action against the collector or personal representative of decedent. *Brace v. Strother*, 357.

§ 19.1. Time for Filing Claim against Estate

The trial court properly dismissed plaintiff's personal injury claim against decedent's estate in excess of decedent's $25,000 automobile liability policy where plaintiff initiated this action more than six months after the date on which the claim arose. *Brace v. Strother*, 357.

The underinsured motorist coverage contained in plaintiff's automobile insurance policy did not come within the exception to the six-month limitation period of G.S. 28A-19-3 since that statute provides an exception to the limitations statute only for claims where there is insurance under which decedent, and not the plaintiff, was an insured. *Ibid.*

§ 19.2. Claims against Estate; Time for Contest of Claim

Plaintiff's action claiming a share in decedent's estate was not barred because it was filed more than three months after the claim had been rejected by decedent's personal representative since G.S. 28A-19-16 applies only to creditor's claims against an estate and not to the interests of heirs. *Poteat v. Robinson*, 764.

FALSE PRETENSE

§ 3. Evidence

Evidence was insufficient to support defendant's conviction of obtaining property by false pretenses where he agreed to sell land to a buyer for money and various items of personal property, and defendant took the personal property to his home in New York but never conveyed the land. *S. v. Compton*, 101.

FORGERY

§ 2.2. Sufficiency of Evidence

The State sufficiently proved that checks were actually forged in a prosecution for forgery and uttering. *S. v. Seraphem*, 368.

FRAUD

§ 9. Pleadings

Plaintiffs' complaint was insufficient to state a claim against defendant automobile manufacturer for fraudulent concealment of defects in the braking system of plaintiffs' automobile. *Brown v. Lumbermens Mut. Casualty Co.*, 464.

Plaintiffs' complaint was sufficient to state a claim against defendant automobile manufacturer for fraud in expressly misrepresenting to plaintiffs that it would provide counsel for plaintiffs to defend an action against them arising out of an automobile collision after plaintiffs' liability insurer paid the limits of its coverage and discharged counsel it had hired to defend plaintiffs. *Ibid.*

§ 12. Sufficiency of Evidence

In an action to enforce a promissory note and contract arising from the sale of plaintiffs' business, there was sufficient evidence to support the court's finding that defendant relied on one plaintiff's representation of a distributorship agreement. *Matthews v. Prince*, 541.

There was sufficient evidence to support the court's conclusion that plaintiffs defrauded defendant in an action on a promissory note and contract arising from the sale of plaintiffs' business. *Ibid.*

FRAUDULENT CONVEYANCES

§ 2. Parties Entitled to Invoke the Remedy

Where one corporation purchases all or substantially all of the assets of another corporation, including the good will, in a manner deemed fraudulent, the selling corporation's creditors may follow the good will into the hands of the purchasing corporation and obtain a money damage award equal to its value. *Budd Tire Corp. v. Pierce Tire Co.*, 684.

§ 3.4. Sufficiency of Evidence

The evidence and findings supported the trial court's conclusion that the transfer of the assets of a tire company to another corporation was fraudulent as to creditors. *Budd Tire Corp. v. Pierce Tire Co.*, 684.

GIFTS

§ 1. Gifts Inter Vivos Generally

In an action to determine ownership of a gold and diamond brooch, the evidence was sufficient to support the trial court's finding that the brooch was given to defendant's late husband. *Blalock v. Dandelake*, 461.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS

§ 6. Personal Property Exemptions

Plaintiff's taking of a nonpossessory, nonpurchase money security interest in defendant's household goods and furnishings was not an unfair trade practice because of subsequently enacted federal regulations stating that such action is an unfair trade practice or because of the N.C. statute entitling a debtor to retain $2,500 worth of household goods and furnishings free from judgment. *Ken-Mar Finance v. Harvey*, 362.

HOMICIDE

§ 19.1. Evidence of Character or Reputation Competent on Question of Self-Defense

The trial court in a murder prosecution did not err in refusing to admit the record of deceased's violent crimes. *S. v. Adams*, 145.

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence in a prosecution for murder was sufficient to show malice. *S. v. Roberson*, 219.

§ 21.8. Sufficiency of Evidence of Guilt of Second Degree Murder where Defendant Enters Plea of Self-Defense

The trial court in a second degree murder prosecution did not err by not dismissing the prosecution at the close of all the evidence. *S. v. Roberson*, 219.

§ 28.4. Instructions on Self-Defense; Duty to Retreat; Right to Stand Ground

The trial court did not err in a prosecution for second degree murder by refusing to instruct the jury on imperfect defense of home. *S. v. Roberson*, 219.

§ 30.3. Submission of Guilt of Lesser Offense of Involuntary Manslaughter not Required

The trial court did not err in failing to charge on involuntary manslaughter where the only possible evidence to support such a verdict was defendant's statement to the police that the victim twice ran onto his knife but defendant repudiated that statement at the trial. *S. v. Pulley*, 673.

HUSBAND AND WIFE

§ 9. Liability of Third Person for Injury to Spouse

The trial court erred in denying plaintiff's motion to join his loss of consortium claim with his wife's personal injury action and in dismissing his claim for loss of consortium on the ground that it was not joined with his wife's action. *Mrosla v. Feldman*, 261.

IMPERSONATING AN OFFICER

§ 1. Generally

In a prosecution of defendant for falsely representing to another that he was a sworn law enforcement officer in violation of G.S. 14-277(a), the trial court's erroneous instructions on acting in accordance with the authority of a law enforcement officer as set forth in G.S. 14-277(b) did not constitute plain error. *S. v. Chisholm*, 526.

INDEMNITY

§ 3.2. Evidence

Summary judgment was properly entered for the indemnitor in an action to recover under an indemnity contract where the indemnitee's negligent handling of an action against it resulted in a judgment against it. *Sky City Stores v. United Overton Corp.*, 124.

INJUNCTIONS

§ 13.4. Restraint of Operation of Legitimate Business

Defendant's appeal from a preliminary injunction enjoining defendant from conducting topless dancing at its place of business was dismissed as interlocutory. *City of Fayetteville v. E & J Investments, Inc.*, 268.

INSANE PERSONS

§ 13. Rights of Minor Patients

The statute defining mental illness when applied to a minor is unconstitutionally vague. *In re Lynette H.*, 373.

INSURANCE

§ 13. Life Insurance; Effective Date of Policy

The trial court correctly entered summary judgment for defendant in an action seeking payment under a life insurance policy where plaintiff did not produce a forecast of evidence of coverage. *Walker v. Durham Life Ins. Co.*, 191.

§ 18. Life Insurance; Avoidance of Policy for Misrepresentation or Fraud

The trial court erred in striking portions of plaintiff's affidavit which were not offered to prove the truth of the matters asserted but were offered to show that defendant's agent had knowledge of the insured's driving while impaired conviction and his high blood pressure condition, but the court properly struck legal conclusions stated in the affidavit. *Ward v. Durham Life Ins. Co.*, 286.

The trial court erred in entering summary judgment for defendant life insurer where there was a genuine issue of material fact as to whether the omission of material facts in insured's application was attributable to the applicant or to the insurer's agent who sold the policy to the insured. *Ibid.*

§ 69. Automobile Insurance; Protection against Injury by Uninsured Motorist Generally

Plaintiff's failure to obtain the written consent of defendant insurer before settling a tort claim against an underinsured motorist in violation of a provision of the policy was not prejudicial to defendant in view of its renunciation of a right of

INSURANCE — Continued

subrogation against an uninsured motorist. *Branch v. The Travelers Indemnity Co.*, 116.

Where an automobile policy providing underinsured motorist coverage stated that the insured would pay damages which a covered person was "legally entitled to recover" from an underinsured motorist, and the policy also provided that the insurer would pay only after the limits of liability had been exhausted by payment of judgments or settlements, plaintiff was not barred from recovery under the underinsured liability provision because she had entered into a consent judgment with the tortfeasors and had been paid the maximum amount under their liability policy. *Silvers v. Horace Mann Ins. Co.*, 1.

Plaintiff's action to recover underinsurance benefits was not barred by her failure to obtain defendant insurer's consent before entering into a consent judgment with the tortfeasors. *Ibid.*

Plaintiff's recovery of underinsured motorists benefits was not precluded because plaintiff failed to serve copies of the summons or complaint in her action against the tortfeasors on defendant insurer. *Ibid.*

The underinsured motorist coverage contained in plaintiff's automobile insurance policy did not come within the exception to the six-month limitation period of G.S. 28A-19-3 since that statute provides an exception to the limitations statute only for claims where there is insurance under which decedent, and not the plaintiff, was an insured. *Brace v. Strother*, 357.

Plaintiff's underinsurance claim was barred by a settlement made without defendant insurer's consent only to the extent, if any, that defendant's subrogation rights were prejudiced. *Parrish v. Grain Dealers Mutual Ins. Co.*, 646.

§ 69.1. Automobile Insurance Policy Provisions in Conflict with Uninsured Motorist Statutes

Where an insurance policy failed to provide underinsured motorist coverage, the amount provided by G.S. 20-279.21(b)(4) was equal to the insured's liability coverage rather than the minimum underinsured motorist coverage statutorily required during the policy period. *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 746.

§ 69.3. Rejection or Waiver of Uninsured Motorist Coverage

Summary judgment was properly granted for defendant in a declaratory judgment action to determine whether plaintiff was covered under an underinsured motorist's provision of her daughter's policy with defendant. *Driscoll v. U.S. Liability Ins. Co.*, 569.

§ 79. Termination of Liability Insurance

Mid-term cancellation by the insurer of a compulsory automobile insurance policy for nonpayment of premium installments was not effective where the insurer gave the insured only twelve days' notice of cancellation rather than fifteen as required by statute. *Pearson v. Nationwide Mutual Ins. Co.*, 295.

§ 92. Liability Insurance; "Other Insurance" Clause

In a declaratory judgment action between two insurance companies to determine the order of payment to an individual insured under two separate underinsurance policies, defendant Hilliard's insurer must pay one-fourth of Hilliard's damages and State Farm three-fourths of her damages even though Hilliard was a State Farm insured only as a third-party beneficiary based on her sister's policy. *N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 507.

INSURANCE — Continued

§ 100. Obligations of Parties after Accident; Duty of Insurer to Defend

A law firm employed by an automobile liability insurer to defend its insured is an independent contractor so that alleged negligence by the law firm in defending the action is not imputable to the liability insurer. *Brown v. Lumbermens Mut. Casualty Co.*, 464.

An automobile liability policy providing that the insurer's duty to defend ends when its limit of liability for the coverage has been "exhausted" requires the insurer to continue defending the insureds in a motor vehicle liability action until a settlement or judgment has been reached even though the insurer has paid its policy limits to the injured claimant. *Ibid.*

§ 140.2. Actions on Hail Policies

The trial court erred by granting summary judgment for defendant and should have entered summary judgment for plaintiffs in an action to determine coverage under an insurance policy for damage to greenhouses by sleet. *Strother v. N.C. Farm Bureau Mut. Ins. Co.*, 734.

§ 143. Construction of Property Damage Policies Generally

A work product exclusionary clause in a liability insurance policy applied and the policy did not provide coverage for a claim by a general contractor against a subcontractor. *Western World Ins. Co. v. Carrington*, 520.

INTOXICATING LIQUOR

§ 24. Civil Liability Generally

Plaintiff's evidence was insufficient to establish a valid claim under the dram shop liability statute. *Harshbarger v. Murphy*, 393.

JUDGMENTS

§ 10. Construction and Operation of Consent Judgments

The trial court erred in ordering plaintiff to reimburse defendant for the portion of escrowed funds which were used to pay plaintiff's tax obligations as a result of a payoff of a note to plaintiff where defendant's attorney stipulated that the language of the parties' earlier consent judgment was literally followed when the funds were used to pay plaintiff's obligations. *Goff v. Goff*, 388.

§ 27.1. Fraud as Grounds for Attack; Intrinsic Fraud

Allegations that plaintiff's loan officer made misrepresentations to defendant which were imputable to plaintiff and that defendant's attorney in Florida litigation had conflicts of interest and inadequately represented defendant were claims of intrinsic fraud which are not a defense to plaintiff's action to enforce a Florida judgment. *Florida National Bank v. Satterfield*, 105.

§ 35. Conclusiveness of Judgments in General

An indemnitee is not collaterally estopped from bringing an action to recover under an indemnification contract when the issue of the indemnitor's agency was not decided in the first action. *Sky City Stores v. United Overton Corp.*, 124.

§ 36. Parties Concluded

In an action to recover death benefits under G.S. 97-38, plaintiff wife was not collaterally estopped to prove that her husband was totally disabled at the time of

LANDLORD AND TENANT

§ 8. Duty of Landlord to Repair Demised Premises

The trial court properly granted summary judgment for defendant in an action for money damages for loss of personal property resulting from the burning of a house which plaintiffs rented from defendant. *Bradley v. Wachovia Bank & Trust Co.*, 581.

§ 13.1. Option to Terminate or Provision for Termination

The trial court should have denied lessors' claim for summary ejectment where the lessors' letter requesting lessee to vacate was insufficient to comply with the terms of the lease. *Stanley v. Harvey*, 535.

§ 14. Holding Over

Lessors were not entitled to all rent paid to the court in excess of the original rent as a condition of appeal in a summary ejectment action. *Stanley v. Harvey*, 535.

§ 19. Rent and Actions Therefor

The trial court erred by granting summary judgment in an action to recover rental payments due under a lease where the lease contained a cost of living index adjustment but there was a question as to the base rental period. *Marsh Realty Co. v. 2420 Roswell Ave.*, 573.

LIBEL AND SLANDER

§ 11. Absolute Privilege

Plaintiffs' complaint for libel was insufficient where the allegedly libelous statements were allegations in a prior lawsuit between the parties. *Fox v. Barrett*, 135.

LIMITATION OF ACTIONS

§ 4.2. Accrual of Negligence Actions

Plaintiffs' claim against an automobile manufacturer for defective design of the brakes on plaintiffs' automobile was barred by the six-year statute of repose of G.S. 1-50(6). *Brown v. Lumbermens Mut. Casualty Co.*, 464.

§ 8.3. Fraud as Exception to Operation of Limitation Laws; Particular Actions

The statute of repose of G.S. 1-50(6) was inapplicable to a claim against an automobile manufacturer for fraud in misrepresenting that it would provide counsel for plaintiffs in an action against them. *Brown v. Lumbermens Mut. Casualty Co.*, 464.

§ 11. Effect of Personal Incapacity

The statute tolling the limitations period during a person's minority applied to a written notice of a claim by illegitimate children upon the estate of their putative father so that a claim filed more than six months after publication of the notice to creditors but within six months of the appointment of a guardian ad litem for the children was timely. *Jefferys v. Tolin*, 233.

MASTER AND SERVANT

§ 7.5. Discrimination in Employment

The superior court did not err by affirming the State Personnel Commission's decision that the Department of Correction's stated reasons for discharging peti-

MASTER AND SERVANT — Continued

tioner were not merely a pretext for racial discrimination. *Abron v. N.C. Dept. of Correction*, 229.

§ 8. Terms of Contract Generally

The jury in a wrongful discharge action was entitled to find the creation of a valid and enforceable employment contract despite the parties' failure to execute a written contract. *Walker v. Goodson Farms, Inc.*, 478.

§ 10.1. Grounds for Discharge

The trial court did not err in a wrongful discharge action by denying defendants' motions to dismiss and for judgment n.o.v. where the evidence was sufficient for the jury to determine that plaintiff's use of alcohol and advancements of company funds did not constitute just cause for discharge. *Walker v. Goodson Farms, Inc.*, 478.

§ 10.2. Actions for Wrongful Discharge

The trial court did not err by granting defendant sheriff's motion for summary judgment in a wrongful discharge action by a dispatcher. *Peele v. Provident Mut. Life Ins. Co.*, 447.

A "buildings and grounds maintenance man" whose job description required him to perform "related work as required" was properly discharged for refusal to paint a courthouse restroom. *Walter v. Vance County*, 636.

§ 56. Workers' Compensation; Causal Relation between Employment and Injury

The evidence supported a finding that plaintiff's hearing loss was not caused by exposure to harmful noise in his employment but was a result of a hereditary hearing problem. *Price v. Broyhill Furniture*, 224.

§ 68. Workers' Compensation; Occupational Diseases

The evidence supported a determination by the Industrial Commission that plaintiff became totally disabled on 1 October 1968 from chronic obstructive pulmonary disease and that her compensation should be based on the version of G.S. 97-29 in effect on that date, although she worked a few days in some of the years from 1969 to 1980. *Gregory v. Sadie Cotton Mills*, 433.

§ 69.1. Workers' Compensation; Meaning of "Disability"

The Industrial Commission erred in concluding that a cotton mill worker who was temporarily disabled by his obstructive lung disease improved to the extent that he was no longer disabled because he was employable outside the cotton textile industry at the same wages he had previously earned. *Bridges v. Linn-Corriher Corp.*, 397.

§ 77.1. Workers' Compensation; Modification of Award; Grounds; Change of Condition

The evidence supported a finding by the Industrial Commission that a substantial change of condition in plaintiff's back had occurred so as to entitle her to additional compensation benefits. *Lucas v. Bunn Manuf. Co.*, 401.

§ 108. Right to Unemployment Compensation Generally

The Employment Security Commission did not err in ruling that claimant left work voluntarily as a hairdresser without good cause attributable to her employer. *McGaha v. Nancy's Styling Salon*, 214.

Petitioner voluntarily quit her job without good cause attributable to her employer and was not entitled to unemployment compensation where the employer

NARCOTICS — Continued

§ 3.1. Competency of Evidence

There was no prejudicial error during a suppression hearing where the court allowed a detective to answer a question as to whether defendant's name appeared on a passenger manifest by whispering to the reporter. *S. v. Allen*, 15.

§ 3.2. Competency of Evidence Obtained by Search and Seizure

The trial court did not err by denying defendant's motion to suppress evidence of narcotics possession where defendant was arrested after running from two officers at an airport and a construction foreman approached the officers with bags of a white powder which he had seen defendant drop. *S. v. Allen*, 15.

§ 3.3. Competency of Opinion Testimony

An officer was properly permitted to state his opinion that defendant appeared to be high and that he had consumed an impairing substance. *S. v. Adkerson*, 333.

In a prosecution for attempted robbery in which defendant contended that the incident was a drug deal gone bad and not an attempted robbery, the trial court properly permitted a vice officer to state his opinion that marijuana found on the victim was packaged in a manner for private use. *S. v. Chisholm*, 526.

§ 4. Sufficiency of Evidence

The evidence was sufficient to deny defendant's motion to dismiss the charge of sale of cocaine. *S. v. Narcisse*, 414.

§ 4.3. Sufficiency of Evidence of Constructive Possession

There was sufficient evidence of constructive possession in a prosecution for possession of cocaine with intent to sell and trafficking in cocaine. *S. v. Narcisse*, 414.

The trial court in a prosecution for trafficking in cocaine properly denied defendant's motion to dismiss. *S. v. Graham*, 564.

§ 4.5. Instructions Generally

The Court of Appeals declined to adopt the doctrine of "willful blindness" as the basis for a proper jury instruciton on the element of knowledge in a criminal case, but defendant was not prejudiced by such an instruction in this prosecution for trafficking in marijuana. *S. v. Bogle*, 277.

The trial court did not err in refusing to instruct the jury that it could consider evidence of defendant's good character as substantive evidence in a prosecution for trafficking in marijuana. *Ibid.*

NEGLIGENCE

§ 29. Sufficiency of Evidence

The trial court erred in entering summary judgment for defendant recapper in an action for wrongful death arising from a collision which occurred when a recapped tire on the front of a truck disintegrated and the truck collided with deceased's vehicle. *Herbert v. Browning-Ferris Industries*, 339.

§ 59.3. Sufficiency of Evidence in Actions by Licensees

A plaintiff who went to defendants' home at their invitation to see two new rooms they had added and who answered questions concerning the value of the work done was a licensee, and defendants' failure to repair a handrail which gave way when plaintiff grabbed it to stop his fall on deck stairs did not amount to willful or wanton negligence which would render defendants liable for plaintiff's injuries. *McCurry v. Wilson*, 642.

PARENT AND CHILD

§ 1.5. Procedure for Termination of Parental Rights

The trial court did not abuse its discretion in the dispositional stage of a termination of parental rights proceeding by terminating parental rights. *In re Parker,* 423.

§ 1.6. Termination of Parental Rights; Competency and Sufficiency of Evidence

Detailed findings of fact entered by the trial judge in an action to terminate parental rights depicted circumstances and events existing prior to removal of the children from the home by DSS as well as those occurring while the children were in foster care and supported the conclusion of the trial court that the children were neglected at the time of the termination proceeding. *In re Parker,* 423.

The mother in a termination of parental rights proceeding failed in her burden to show that the alleged error was prejudicial. *Ibid.*

§ 7. Parental Duty to Support Child

The trial court properly dismissed an action under G.S. 50-13.4 for child support. *Becton v. George,* 607.

§ 10. Uniform Reciprocal Enforcement of Support Act

Petitioner could not use URESA as a vehicle to enforce in North Carolina a foreign support decree requiring respondent to provide educational support for the parties' child until he reaches 22 years of age. *Pieper v. Pieper,* 405.

PARTITION

§ 3.1. Proceeding for Judicial Partition; Jurisdiction

The superior court had no authority to partition marital property after divorce of the parties where the jurisdiction of the district court had been properly invoked in the divorce proceeding to equitably distribute such marital property. *Garrison v. Garrison,* 670.

PARTNERSHIP

§ 1.1. Formation and Existence of Partnership

The trial court properly granted summary judgment for defendant in plaintiff's action to recover damages for an alleged misappropriation of a partnership business opportunity where the undisputed evidence revealed that there was no partnership between plaintiff and defendant. *Sturm v. Goss,* 326.

§ 3. Rights, Duties, and Liabilities of Partners among Themselves

Summary judgment was improperly granted for defendants in an action in which plaintiffs alleged that defendants were their partners in developing encumbered land but wrongfully hindered development. *Carefree Carolina Communities v. Cilley,* 766.

§ 6. Actions against Partners

Plaintiff should have sued defendant's corporation rather than defendant individually for misappropriation of a partnership business opportunity in violation of their partnership agreement where the parties and a third person had formed a partnership to provide marketing services, the partnership business was acquired by a partnership of corporations owned by the partners, and defendant was never individually a partner in the new partnership. *Sturm v. Goss,* 326.

PARTNERSHIP — Continued

§ 9. Dissolution of Partnership

A judicial decree of dissolution of a partnership would have been superfluous where dissolution occurred automatically by operation of law upon any partner's unequivocal expression of an intent and desire to dissolve the partnership, and the filing of this lawsuit constituted such an unequivocal expression. *Sturm v. Goss*, 326.

PRINCIPAL AND AGENT

§ 9. Liability of Principal for Torts of Agent

A law firm employed by an automobile liability insurer to defend its insured is an independent contractor so that alleged negligence by the law firm in defending the action is not imputable to the liability insurer. *Brown v. Lumbermens Mut. Casualty Co.*, 464.

PROCESS

§ 16.1. Application of Statute Authorizing Service on Nonresident Motorists

The trial court properly denied defendant's motion to dismiss a wrongful death action arising from an automobile accident for lack of jurisdiction over the person and insufficient process where plaintiff and plaintiff's intestate were residents of Virginia and defendant was a resident of Florida. *Smith v. Schraffenberger*, 589.

§ 19. Actions for Abuse of Process

Plaintiffs' complaint failed to state a claim for abuse of process where they did not allege any improper act by defendant occurring subsequent to the institution of the prior lawsuit. *Fox v. Barrett*, 135.

PUBLIC OFFICERS

§ 9. Personal Liability of Public Officers to Private Individuals

The Commissioner of Motor Vehicles was immune from liability for mere negligence in the issuance of certificates of title for stolen vehicles. *Columbus County Auto Auction v. Aycock Auction Co.*, 439.

RAPE AND ALLIED OFFENSES

§ 3. Indictment

An indictment was sufficient to charge defendant with a second degree sexual offense, and allegations regarding the ages of the victim and defendant did not render the indictment insufficient to charge a second degree sexual offense. *S. v. Dillard*, 318.

§ 4. Relevancy and Competency of Evidence

The trial judge did not abuse his discretion in allowing the district attorney to ask leading questions of an 8-year-old sexual offense victim. *S. v. Dillard*, 318.

There was no plain error in the trial court's admission of an investigator's testimony that charges against the person originally identified by the victim as her assailant had been dropped. *S. v. Hartman*, 379.

RAPE AND ALLIED OFFENSES — Continued

§ 5. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for second degree sexual offense based on the testimony of the victim that defendant put his hand in her underwear and "went around and around in [her] bing bing." *S. v. Dillard*, 318.

The evidence was sufficient for the jury in a prosecution for attempted second degree rape and second degree sexual offense against a package store employee although the victim initially identified another person as her assailant. *S. v. Hartman*, 379.

Defendant's conviction for engaging in a sexual act by a substitute parent was reversed because of a variance between indictment and evidence as to the specific sexual act. *S. v. Bruce*, 547.

There was sufficient evidence of defendant's intent to engage in vaginal intercourse by force and against the will of the victim to submit charges of felonious breaking and entering and attempted second degree rape to the jury. *S. v. Walton*, 532.

The evidence was sufficient to support an inference that defendant intended to engage in vaginal intercourse with his victim so as to support his conviction of attempted second degree rape. *S. v. Dunston*, 622.

§ 6. Instructions

Defendant was not prejudiced by the trial court's instruction that a second degree sexual offense could have occurred at any time during the month of November 1985. *S. v. Dillard*, 318.

Defendant was not prejudiced by the court's instruction that an element of attempted second degree sexual offense was that defendant intended to insert his finger in the vagina or "vaginal area" of the victim. *Ibid.*

§ 19. Taking Indecent Liberties with Child

The trial court did not err in a prosecution for taking indecent liberties with a minor by denying defendant's motion to dismiss. *S. v. Bruce*, 547.

There was no plain error in a prosecution for taking indecent liberties with a minor from the court's alleged failure to specify to the jury which of defendant's alleged acts was to support the indecent liberties conviction and the date the act occurred. *Ibid.*

RECEIVERS

§ 2. Receivership to Preserve Property Pending Litigation

The trial court erred in denying petitioner's request for additional compensation for his services as receiver of plaintiff's corporation where the court's order was based on evidence presented at a hearing on an entirely different matter. *Hollerbach v. Hollerbach*, 384.

RULES OF CIVIL PROCEDURE

§ 8.1. Complaint

The trial court erred in an action for damages for trespass, to quiet title, and for injunctive relief by dismissing the action for failure to state a claim upon which relief could be granted. *Warren v. Halifax County*, 271.

RULES OF CIVIL PROCEDURE — Continued

§ 12. Defenses

The trial court did not err in going outside the pleadings to consider the complaint in a prior action in deciding defendants' Rule 12(b)(6) motion in a libel action based on the complaint in the prior action. *Fox v. Barrett*, 135.

§ 15. Amendment

The trial court did not err in granting defendant's motion to amend while at the same time granting plaintiff's motion for summary judgment. *Florida National Bank v. Satterfield*, 105.

§ 19. Necessary Joinder of Parties

The trial court did not err by joining the prospective adoptive father in an action by the paternal grandparents for visitation rights where the adoption was not finalized until one month after the entry of judgment. *Hedrick v. Hedrick*, 151.

The trial court erred in denying plaintiff's motion to join his loss of consortium claim with his wife's personal injury action and in dismissing his claim for loss of consortium on the ground that it was not joined with his wife's action. *Mrosla v. Feldman*, 261.

§ 33. Interrogatories to Parties

Defendant's filing of a verified answer in an action for alienation of affections and criminal conversation did not constitute a waiver of the right to assert self-incrimination, and she could properly assert this privilege in refusing to answer interrogatories with regard to her sexual behavior toward plaintiff's husband. *Gunn v. Hess*, 131.

§ 37. Failure to Make Discovery; Consequences

It is within the trial court's discretion to require that expenses of obtaining an order compelling discovery assessed pursuant to Rule 37(a)(4) be paid at any time after entry of an order pursuant to the rule, and the better practice is for all such orders to include a provision as to when payment of such expenses shall be made. *Hall v. Carter*, 668.

§ 41. Dismissal of Actions

Where plaintiff appealed a magistrate's small claim judgment for a trial de novo in the district court, plaintiff's taking of a voluntary dismissal of the action without prejudice in the district court pursuant to Rule 41(a) did not cause the magistrate's judgment to become a final judgment which would be res judicata in the subsequent action brought by plaintiff against defendant in the district court. *First Union National Bank v. Richards*, 650.

G.S. 7A-228 does not prevent Rule 41(a)(1) from applying in actions in the district court on appeal de novo from a magistrate's judgment. *Ibid.*

§ 58. Entry of Judgment

A breach of warranty action is remanded for a determination as to when judgment was entered and whether defendants gave notice of appeal within 10 days after entry of the judgment. *Behar v. Toyota of Fayetteville*, 603.

§ 60.2. Grounds for Relief from Judgment or Order

The trial court erred in a child support action by reversing a judgment of the Court of Appeals based upon newly-discovered evidence relating to blood test results and defendant's fertility. *Cole v. Cole*, 724.

RULES OF CIVIL PROCEDURE — Continued

§ 60.4. Relief from Judgment or Order; Appeal

A motion under Rule 60 to reduce prejudgment interest was not improperly used as a substitute for appellate review. *Petty v. Housing Authority of Charlotte*, 559.

SALES

§ 22. Actions for Personal Injuries Based upon Negligence; Defective Goods; Manufacturer's Liability

Plaintiffs' claim against an automobile manufacturer for defective design of the brakes on plaintiffs' automobile was barred by the six-year statute of repose of G.S. 1-50(6). *Brown v. Lumbermens Mut. Casualty Co.*, 464.

SEARCHES AND SEIZURES

§ 2. Searches by Particular Persons

Narcotics which were dropped by a defendant as he fled from officers and retrieved by a construction foreman were not improperly seized. *S. v. Allen*, 15.

§ 9. Search and Seizure Incident to Arrest for Traffic Violations

Contraband seized from defendant's car after he was stopped for speeding should not have been admitted in a prosecution for felonious possession of marijuana because the search of the car could not be justified as being incident to arrest. *S. v. Braxton*, 204.

A bag of marijuana cigarettes found without a warrant in defendant's car was lawfully seized as an incident to a lawful arrest. *S. v. Adkerson*, 333.

§ 11. Search and Seizure of Vehicles on Probable Cause

Contraband seized from defendant's vehicle should have been excluded from evidence in a prosecution for felonious possession of marijuana where a detective stopped defendant to give a warning about his speed and defendant's movements, though highly suspicious, could not be said to be clearly furtive. *S. v. Braxton*, 204.

The trial court erred in a prosecution for misdemeanor possession of marijuana and possession of drug paraphernalia by denying defendant's motion to suppress marijuana and drug paraphernalia seized by a highway patrolman where the trooper had no probable cause for searching defendant's vehicle. *S. v. Poczontek*, 455.

§ 12. "Stop and Frisk" Procedures

An officer had a reasonable suspicion that a vehicle was being driven by an impaired person so that the officer's investigatory stop of defendant's vehicle did not violate defendant's Fourth Amendment rights. *S. v. Adkerson*, 333.

Circumstances warranted an officer's decision to make a pat-down search for weapons of one defendant who was a passenger in a vehicle whose driver was stopped for driving while impaired. *Ibid.*

§ 23. Application for Warrant; Necessity and Sufficiency of Showing Probable Cause

The trial court did not err in a prosecution for trafficking in drugs by denying defendant's motion to suppress evidence seized under a search warrant. *S. v. Graham*, 564.

SUBROGATION

§ 1. Generally

The trial court did not err in an action arising from an automobile accident by disbursing the entire settlement between a patrolman and defendant to the patrolman and giving the Department of Crime Control and Public Safety nothing on its subrogation interest. *Pollard v. Smith,* 585.

TORTS

§ 2.1. Joint Tortfeasors; Nature of Joint Liability; Particular Cases

The death of defendant mother's child was a single indivisible injury so that the mother and another driver were joint tortfeasors, and plaintiff insurer of the other driver was entitled to contribution from defendant mother. *State Farm Mutual Auto. Ins. Co. v. Holland,* 730.

§ 5. Judgment in Prior Action as Affecting Right to Contribution or Right to File Cross Action

Findings by the jury in an action for the wrongful death of a child in an automobile accident that the death of the child was proximately caused by the negligence of both the child's mother and the driver of a second vehicle collaterally estopped the mother from denying negligence in an action for contribution by the other driver's insurer against the mother. *State Farm Mutual Auto. Ins. Co. v. Holland,* 730.

TRIAL

§ 6.1. Particular Stipulations

The trial court erred in ordering plaintiff to reimburse defendant for the portion of escrowed funds which were used to pay plaintiff's tax obligations as a result of a payoff of a note to plaintiff where defendant's attorney stipulated that the language of the parties' earlier consent judgment was literally followed when the funds were used to pay plaintiff's obligations. *Goff v. Goff,* 388.

§ 10.1. Expression of Opinion on Evidence by Court during Progress of the Trial; Particular Cases

Defendants in an action arising from disputed ownership of land received a new trial due to the cumulative prejudicial effect of comments by the trial judge. *Russell v. Town of Morehead City,* 675.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Plaintiff's taking of a nonpossessory, nonpurchase money security interest in defendant's household goods and furnishings was not an unfair trade practice because of subsequently enacted federal regulations stating that such action is an unfair trade practice or because of the N.C. statute entitling a debtor to retain $2,500 worth of household goods and furnishings free from judgment. *Ken-Mar Finance v. Harvey,* 362.

The sale of a corporate debtor's assets did not constitute an unfair and deceptive trade practice where the evidence showed no intent to defraud plaintiff but the transaction was merely deemed fraudulent to provide plaintiff an equitable remedy. *Budd Tire Corp. v. Pierce Tire Co.,* 684.

VENDOR AND PURCHASER

§ 4. Title

A genuine issue of fact existed as to whether plaintiff's agreement to convey a deed free from "title irregularities" included only those defects in title which would prevent plaintiff from conveying good and marketable title or whether it included restrictive covenants prohibiting the placement of a mobile home upon the land in question. *Robertson v. Hartman*, 250.

VENUE

§ 5.1. Actions Involving Real Property

Defendant's motion for a change of venue was properly denied in an action in which plaintiffs sought a declaratory judgment interpreting a rent adjustment provision in a lease where the resolution of the primary issue would not directly affect title or interest in the property. *Pierce v. Associated Rest and Nursing Care, Inc.*, 210.

WILLS

§ 44. Per Stirpes Distribution

The trial court correctly construed the portion of a will which devised property per stirpes in equal shares to eight people named or the survivors thereof as making a devise in equal shares to those of the eight named parties who survived the testatrix. *Mitchell v. Lowery*, 177.

§ 73. Actions to Construe Wills

The trial court did not err in a declaratory judgment action to construe a will by failing to make specific findings of fact as to the nature of the defect in the will, the qualifications of the party who drafted the will, or the familial relationships among testatrix and named beneficiaries, or by including its conclusions of law as to two contested articles of the will in a single paragraph. *Mitchell v. Lowery*, 177.

WORD AND PHRASE INDEX

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