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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF: THE APPEAL FROM THE CIVIL PENALTY ASSESSED FOR VIOLATIONS OF THE SEDIMENTATION POLLUTION CONTROL ACT ADMINISTERED BY THE DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT BY DENNIS W. HARRIS AND WIFE, NATALIE G. HARRIS AND ROY J. HALL

No. 8710SC430

(Filed 15 November 1988)

1. **Administrative Law § 8— review of agency decision—failure to cross-appeal—waiver of error**

Insofar as the trial court may have erroneously failed to render conclusions concerning all the statutory grounds for review of an agency decision raised by the petition for review, petitioners' failure to cross-appeal any such error waives consideration of such error by the appellate court. N.C.G.S. § 150A-52; App. Rule 10(a).

2. **Administrative Law § 8— agency decision—appeal to superior court—constitutional issue not presented**

An assertion that an agency's assessment of a civil penalty under N.C.G.S. § 113A-64 was arbitrary and capricious did not present for review in the superior court the question of whether the statute constituted a legislative grant of judicial power prohibited by Art. IV, § 3 of the N.C. Constitution.

3. **Administrative Law § 4— civil penalty not based on absolute discretion**

An assessment of a civil penalty by the Department of Natural Resources and Community Development under N.C.G.S. § 113A-64 for violations of the Sedimentation Pollution Control Act was not improperly based upon the Secretary's "absolute" discretion but was instead based upon numerous penalty factors set forth in an administrative regulation which was reasonably related to the Act's administration and enforcement. The assessment was not rendered arbitrary and capricious because it was based upon penalty factors

set forth in a properly adopted administrative regulation rather than in the statute itself.

4. **Administrative Law § 3; Constitutional Law § 10.3— civil penalty—no agency discretion permitted**

Art. IV, § 3 of the N.C. Constitution does not permit an administrative agency to assess a civil penalty which varies in amount with *any* agency discretion.

5. **Administrative Law § 3; Constitutional Law § 10.3— violations of Sedimentation Pollution Control Act—civil penalty—unlawful delegation of judicial power**

The attempted grant of authority to the Secretary of the Department of Natural Resources and Community Development in N.C.G.S. § 113A-64 to assess a civil penalty of up to one hundred dollars per day for violations of the Sedimentation Pollution Control Act is not reasonably necessary to accomplishment of the Department's purposes and constitutes a legislative grant of judicial power prohibited by Art. IV, § 3 of the N.C. Constitution.

Judge PHILLIPS concurs in the result.

Judge BECTON dissenting.

APPEAL by respondent from *Smith (Donald L.), Judge.* Judgment entered 10 February 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 28 October 1987.

Beach & Correll, P.A., by J. Michael Correll, for petitioner-appellees.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel F. McLawhorn and Assistant Attorney General Walter M. Smith, for respondent-appellant.

GREENE, Judge.

This appeal arises from an attempt by the Department of Natural Resources and Community Development (the "Department") to assess a civil penalty against petitioners for violations of the Sedimentation Pollution Control Act of 1973 (the "Act"). *See* N.C.G.S. Sec. 113A-50 *et seq.* (1983). The administrative record tends to show petitioners Harris and Hall own and have subdivided an approximately eighteen acre tract of land in Caldwell County, North Carolina. In enlarging a subdivision of this tract, petitioners allegedly disturbed approximately two and one-half acres of land by grading, cutting and filling in order to construct a street. Petitioners had previously paid the Department civil penalties in connection with earlier phases of the sub-

division's development. Subsequent inspections by the Department revealed that petitioners continued to violate various requirements of the Act. The Department sent petitioners a Notice of Violation which specified the violations of the Act, the steps necessary to correct them, set a deadline for compliance and warned that a civil penalty could be imposed if the violations were not corrected. After the alleged violations were not corrected, the Department assessed a $4,200 civil penalty against petitioners pursuant to Section 113A-64 which provides in part:

> Any person who violates any of the provisions of this [Act] . . . shall be subject to a civil penalty of not more than one hundred dollars . . . . Each day of a continuing violation shall constitute a separate violation under G.S. 113A-64(a)(1) . . . . The Secretary . . . shall determine the amount of the civil penalty to be assessed . . . and shall make written demand for payment upon the person responsible for the violation . . . . If payment is not received or equitable settlement reached within 30 days after demand for payment is made, the Secretary shall refer the matter to the Attorney General for the institution of a civil action in the name of the State in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the penalty . . . .

N.C.G.S. Sec. 113A-64(a)(1)-(2) (1983).

Petitioners subsequently challenged this assessment in a hearing before a Department hearing officer whose findings, conclusions and proposed decision were adopted by the Secretary in his final assessment and demand for payment in October 1985. Upon petitioners' appeal to superior court, the trial court concluded the Department's assessment under Section 113A-64 was "not affected by error of law" but vacated the penalty as arising from a legislative grant of judicial power prohibited by Article IV, Section 3 of the North Carolina Constitution. The Department appeals the judgment of the superior court.

As this case commenced before 1 January 1986 and as there is no other procedure for judicial review of the Department's penalty assessment under Section 113A-64, the general scope of

our review is governed by former Section 150A-51 (codified 1 January 1986 as N.C.G.S. Sec. 150B-51). N.C.G.S. Sec. 150A-51 (1978 & 1984 Cum. Supp.); N.C.G.S. Sec. 150A-43 (1978) (administrative procedure act only applies if no other procedure for judicial review); *cf.* N.C.G.S. Sec. 113A-64(a)(2) (1983) (providing for judicial enforcement of civil penalty after Department's final assessment).

Thus, the issues presented are: I) given the errors raised by the Department on appeal, what is the proper scope of judicial review of these proceedings under Section 150A-51; and II) whether petitioners' substantial rights were prejudiced by the Department's assessing a civil penalty under Section 113A-64 (A) in an arbitrary and capricious manner based solely on the Secretary's "absolute" discretion, or (B) which arose from a legislative grant to the Department of a judicial power prohibited by Article IV, Section 3 of the North Carolina Constitution.

I

Section 150A-51 permits our courts to reverse or modify agency decisions if a petitioner's substantial rights have been prejudiced because the agency's findings, inferences, conclusions, or decision are:

> (1) in violation of constitutional provisions; or (2) in excess of the statutory authority or jurisdiction of the agency; or (3) made upon unlawful procedure; or (4) affected by other error of law; or (5) unsupported by substantial evidence . . . in view of the entire record as submitted; or (6) arbitrary or capricious.

It is always " 'necessary . . . to determine under which criterion for review the Court of Appeals [and the superior court] should address' " the proceeding. *Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 579, 281 S.E. 2d 24, 28 (1981) (parenthetical in original) (quoting *State ex rel. Util. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 20-21, 273 S.E. 2d 232, 236 (1981)). In determining the superior court's and our own scope of review under Section 150A-51, we are guided by our Supreme Court's statement that "the proper scope of review can be determined only from an examination of the issues presented for review by the appealing party. The nature of the contended error dictates the applicable

scope of review." *Bird Oil*, 302 N.C. at 21, 273 S.E. 2d at 236. Review in this court is further limited to the exceptions and assignments of error properly noted to the superior court's judgment. *Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 639, 362 S.E. 2d 294, 296, *disc. rev. denied*, 321 N.C. 746, 365 S.E. 2d 296 (1987).

As the Department correctly stated in its brief to the superior court, the statutory grounds raised by the petition for review under Section 150A-51 challenged the Secretary's assessment as made upon unlawful procedure, as affected by other error of law, as unsupported by substantial evidence, and as arbitrary and capricious. *Cf.* Sec. 150A-51(3), (4), (5), (6). However, after noting its consideration of the record, arguments and briefs, the trial court simply found the assessment was not "[a]ffected by error of law," but vacated the penalty as arising from an "unlawful delegation of absolute discretion to the Secretary" which was not "reasonably necessary" to the Department's purposes as required by Article IV, Section 3 of the North Carolina Constitution. Although neither the petition for judicial review nor supporting briefs raised any specific constitutional grounds, the trial court found petitioners' complaint that the civil penalty was "arbitrary, excessive and without adequate guidelines" constituted an allegation the penalty arose from a transfer of judicial power to the Department prohibited by Article IV, Section 3. Article IV, Section 3 states that "the General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, sec. 3 (1970).

[1] We first note the trial court's apparent conclusion under Section 150A-51(4) that the penalty was not "affected by error of law" does not specifically address petitioners' contentions that petitioner Hall had not been properly notified and that various findings and conclusions were not supported by substantial evidence. However, petitioners have neither assigned any error to that conclusion nor to the trial court's failure to make additional conclusions concerning the other grounds for review arguably raised by the petition for judicial review. Thus, insofar as the trial court may have erroneously failed to render conclusions concerning *all* the statutory grounds for review raised by the peti-

tion for review, petitioners' failure to cross-appeal any such error to this court waives our consideration on appeal. *Watson*, 87 N.C. App. at 639, 362 S.E. 2d at 296; N.C.G.S. Sec. 150A-52 (1983); N.C.R. App. P. 10(a).

[2] While the superior court did not specifically address all the errors asserted in the petition for review, the court conversely based its judgment on a constitutional objection that was apparently not asserted in the petition or in supporting briefs to the trial court. Petitioners did not specifically challenge the constitutionality of Section 113A-64 but only complained the Department's assessment was arbitrary, excessive and not based on adequate guidelines. While arbitrary and capricious agency action is itself prohibited by federal and state due process, we reject the court's reasoning that any assertion of arbitrary agency action necessarily requires the agency's action be reviewed for compliance with every other requirement under our state and federal constitutions, much less that it specifically asserts a violation of Article IV, Section 3. There is a rebuttable presumption that an administrative agency has properly performed its official duties. *See In re Broad and Gales Creek Community Ass'n*, 300 N.C. 267, 280, 266 S.E. 2d 645, 654 (1980). As Section 150A-51(1) charges petitioners with proving their "substantial rights" may have been constitutionally violated, petitioners here had the burden to establish their substantial rights were prejudiced by a constitutional defect in the Department's assessment. *See Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 668-69, 174 S.E. 2d 542, 548 (1970); *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 428-29, 269 S.E. 2d 547, 578 (1980). The record does not demonstrate that petitioners ever asserted this proposition, much less proved it. In apparently raising that constitutional issue *sua sponte*, the trial court did not apply "the standard which deals most directly with the alleged error, the gravamen of the petitioners' complaint [which] is the proper scope of review." *In re Appeal of North Carolina Savings and Loan League*, 302 N.C. 458, 465, 276 S.E. 2d 404, 409 (1981).

Thus, we think the superior court misperceived the proper scope of its review since the record nowhere demonstrates petitioners ever raised any constitutional issues in a manner requiring the superior court pass on the constitutional validity of any assessment under Section 113A-64. *See North Carolina Rate*

Bureau, 300 N.C. at 428-29, 269 S.E. 2d at 578 (declining to review constitutional question on direct appeal where no prior assertion that appellant's substantial rights may have been prejudiced by constitutional defect); *cf. In re Gorski v. North Carolina Symphony Society, Inc.*, 310 N.C. 686, 690-92, 314 S.E. 2d 539, 542 (1984) (petitioners could raise issue on appeal to superior court not previously raised in administrative hearings). However, as the trial court vacated the Department's assessment based on an interpretation of Article IV, Section 3 which the Department has properly challenged on appeal to this court, we will nevertheless address that constitutional ground in the exercise of our supervisory jurisdiction. *See Rice v. Rigsby*, 259 N.C. 506, 511-12, 131 S.E. 2d 469, 472-73 (1963) (where defendant did not properly raise constitutional error but trial court addressed it, Supreme Court invoked supervisory power to consider); *Stillwell Enterprises, Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 288-89, 266 S.E. 2d 812, 814 (1980) (Court of Appeals had supervisory power to consider improperly raised question as matter of "appellate grace").

We thus limit our review to the two basic errors assigned by the Department to the superior court's conclusions that (A) Section 113A-64 authorizes the Department to assess civil penalties based solely on the Secretary's "absolute discretion" and (B) therefore any civil penalty assessed under Section 113A-64 violates Article IV, Section 3 of the North Carolina Constitution.

II

A

[3] We reject the trial court's conclusion that the Department's assessment under Section 113A-64 was based on the Secretary's "absolute" discretion. The Secretary adopted the hearing officer's findings and conclusions that petitioners had violated the Act for fifty-six days. Based upon his weighing pertinent penalty factors set forth at 15 N.C. Adm. Code 4C.006 in light of the "Guidelines for Assessing Pollution Control Act Penalties" (the "Guidelines"), the Secretary also adopted the hearing officer's Conclusion No. Four that a penalty of $4,200 ($75.00 × 56 days) was

> reasonable given the nature, extent and duration of the violations, the number of site inspections conducted by the division, the number of communications with Harris-Hall, the

> ineffectiveness of the steps taken, the failure to adhere to the plans submitted, the average degree of difficulty of compliance, and the previous record of compliance of the violator.

The eight penalty factors quoted above are included among thirteen penalty factors specified in 15 N.C. Adm. Code 4C.006. The Guidelines mentioned are intended to systematize the administrative officer's application of these factors by assigning "point" values to each factor and then deriving a penalty amount based on the point total. However, the penalty could be increased or decreased if the resulting penalty was deemed unfair in light of other stated legitimate factors. The Guidelines also generally guide the administrative officer in reducing or waiving penalties based on such factors as the weakness of the Department's case or the cost of litigation.

The trial court's conclusion that the Department's assessment was based on the Secretary's "absolute" discretion presents the question whether the Department acted in an arbitrary and capricious manner without adequate legislative guidelines. *See Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 697-98, 249 S.E. 2d 402, 411 (1978). Although what constitutes arbitrary and capricious action requires a flexible definition under Section 150A-51(6), our Supreme Court has stated certain relevant principles:

> Agency decisions have been found arbitrary and capricious, *inter alia*, when such decisions are 'whimsical' because they indicate a lack of fair and careful consideration; when they fail to indicate 'any course of reasoning and the exercise of judgment,' or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements . . .

North Carolina Rate Bureau, 300 N.C. at 420, 269 S.E. 2d at 573 (citations omitted). The Legislature guards against arbitrary and capricious agency action by authorizing adequate guiding standards which "insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made" by the appropriate branches of government. *Adams*, 295 N.C. at 697-98, 249 S.E. 2d at 411; *cf. North Carolina Rate Bureau*,

300 N.C. at 420, 269 S.E. 2d at 573 (holding order arbitrary and capricious in part because no adequate guidelines for compliance).

The Department's assessment of the monetary penalty in this case was not arbitrary and capricious. The penalty assessed by the Department was within the statutory limits provided in Section 113A-64. The findings and conclusions concerning the administratively promulgated factors underlying the Department's assessment do not evidence a "lack of fairness or careful consideration" or the Secretary's "absolute" discretion. The record instead evidences the Secretary's reasoned weighing of the penalty factors announced in 15 N.C. Adm. Code 4C.006 which are reasonably related to the Act's administration and enforcement.

We reject the contention that the Guidelines for applying the penalty factors were not used by the Secretary as they had not been adopted at the time the hearing officer originally proposed the $4,200 penalty. The copy of the Guidelines in the record indicates the Guidelines were adopted 23 January 1984. Petitioners have in any event not challenged the Secretary's adoption of Finding No. 39 which states, "the amount of the penalties were [sic] determined under the Guidelines . . . which were adopted January 23, 1984 and used on a trial basis prior thereto." The Secretary adopted the hearing officer's proposed penalty on 14 October 1985—twenty-one months after the Guidelines had been adopted.

In any event, we do not believe the Department's assessment would be rendered arbitrary and capricious had the Department not adopted the highly specific Guidelines for assessing civil penalties. No substantial right of petitioners would be prejudiced by a civil penalty based upon the Secretary's application of the stated penalty factors absent formally adopted Guidelines: petitioners do not have a substantial right to calculate in advance to the penny whether the financial benefits of violating the Act outweigh the possible expense of civil penalties.

Nor is the Department's assessment rendered arbitrary and capricious because it is based on penalty factors set forth in a properly adopted administrative regulation rather than in Section 113A-64 itself. *See Westmoreland v. Laird*, 364 F. Supp. 948, 951 (E.D.N.C. 1973), *aff'd per curiam*, 485 F. 2d 1237 (4th Cir. 1973) (violation of regulation by agency is violation of statute). As Pro-

fessor Davis states, "Standards formulated and announced by administrative agencies can just as effectively protect against arbitrary action as standards formulated and enacted by legislative bodies." K. Davis, 2 *Administrative Law Treatise* Sec. 2.11 at 69 (Supp. 1970). The Act in general and Section 113A-64 in particular provide sufficient guidance for the Department's promulgating penalty factors based on its experience and expertise in enforcing the Act since "it is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Adams*, 295 N.C. at 698, 249 S.E. 2d at 411.

Since the penalty factors must reflect the Department's trial-and-error experience in enforcing the Act in order to be effective, it is not necessary to require their ongoing enactment by the Legislature. Even so, we note Section 113A-64 was amended effective 2 June 1987 (after this penalty was finally assessed in October 1985) and now sets forth five factors to be considered by the Department in assessing a civil penalty. N.C.G.S. Sec. 113A-64(a)(3) (Cum. Supp. 1988) (factors include degree of harm, cost of rectifying damage, money saved by petitioner by noncompliance and prior record of compliance). Several of the penalty factors upon which the Department based its assessment are included among those factors considered under the amended statute.

We thus conclude the Department's assessment was not based upon the Secretary's "absolute" discretion but was instead based upon numerous penalty factors which are reasonably related to the Act's administration and enforcement and resulted in a fair and reasoned penalty assessment. We accordingly reject the trial court's conclusion that the Department's assessment was based upon the Secretary's "absolute" discretion.

B

[4, 5] Citing *Young's Sheet Metal and Roofing Inc. v. Wilkins*, 77 N.C. App. 180, 334 S.E. 2d 419, *disc. rev. denied*, 316 N.C. 202, 341 S.E. 2d 574 (1986), the trial court reasoned that Section 113A-64 granted the Secretary "absolute" discretion to assess a civil penalty which was not "reasonably necessary" to the Act's enforcement. The trial court thus held the Department's assessment

was prohibited by Article IV, Section 3 of our constitution. We have above rejected the trial court's premise that Section 113A-64 granted the Secretary *absolute* discretion to assess civil penalties. However, we believe our Supreme Court clearly held in *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E. 2d 161 (1968), that Article IV, Section 3 of our state constitution does not permit an administrative agency to assess a civil penalty whose amount varies with *any* agency discretion. We must therefore affirm the superior court's conclusion that our state constitution does not permit the Department's penalty assessment under Section 113A-64.

Article IV, Section 3 states that "the General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." The *Lanier* Court stated that, "Whether a judicial power is 'reasonably necessary as an incident to the accomplishment of the purposes for which' an administrative office or agency was created must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred." 274 N.C. at 497, 164 S.E. 2d at 168. The application of Article IV, Section 3 thus requires three questions be answered: (1) For what purposes was the agency created? (2) Which peculiarly "judicial" power has the General Assembly attempted to vest in the agency? and (3) Is the Legislature's grant of such judicial power reasonably necessary as an incident to the accomplishment of the purposes for which the agency was created?

First, the purposes for which the Department was created are generally stated by Section 113-3 and Section 113-8. Section 113-3 states in part that "it shall be the duty of the Department . . . to aid . . . in the promotion of the conservation and development of the natural resources of the State [and] . . . a more profitable use of lands and forests . . . ." N.C.G.S. Sec. 113-3(a)(1), (2) (1987). Section 113-8 states that the Department "shall have the duty of enforcing all laws relating to the conservation of marine and estuarine resources." N.C.G.S. Sec. 113-8 (1987). One of these laws is the Act, the purpose of which is "to provide for the creation, administration, and enforcement of a program . . . which

will permit development of this State to continue with the least detrimental effects from pollution by sedimentation." N.C.G.S. Sec. 113A-51 (1983).

Second, the disputed "judicial" power vested in the Department by Section 113A-64 is the power to assess a civil penalty of not more than one hundred dollars for each day the Act is violated. Our Supreme Court analyzed the judicial power to assess a civil penalty in *Lanier*. In that case, former Section 58-44.6 provided that the Insurance Commissioner could impose a civil penalty varying from a nominal sum to $25,000 for each violation of insurance statutes or regulations. The Court reasoned:

> Thus far, the statute is an exercise of the legislative power. . . . Obviously, however, someone must determine the amount of the penalty to be inflicted in each case. This application of the law, which has been enacted by the Legislature, to the facts found in a specific case, so as to make the penalty commensurate with the conduct of the agent in question, is of the essence of judicial power.

274 N.C. at 496, 164 S.E. 2d at 167. The Court further stated, "the power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative." *Id.* at 495, 164 S.E. 2d at 166. As in *Lanier*, the "judicial" power here disputed is the power to assess a varying civil penalty—in this case up to one hundred dollars per day—"commensurate" with petitioners' violation of a statute.

The remaining question is thus whether the specific judicial power to assess a varying civil penalty up to the legislative maximum of one hundred dollars per day is "reasonably necessary" to the accomplishment of the Department's purposes. The reasonable necessity of each legislative grant of judicial power must be determined "in each instance in light of the purpose for which the agency was established and in light of the nature and extent of the judicial power undertaken to be conferred." *Id.* at 497, 164 S.E. 2d at 168. However, it would appear the *Lanier* Court necessarily determined the unconstitutionality of any agency

penalty whose amount varied in the discretion of the agency since the Court specifically held there was "no reasonable necessity for conferring upon the Commissioner the judicial power to impose . . . a monetary penalty, *varying, in the Commissioner's discretion,* from a nominal sum to $25,000 for each violation." 274 N.C. at 497, 164 S.E. 2d at 167-68 (emphasis added). Indeed, we note that in 1983 the Legislature repealed the civil penalty statute struck down in *Lanier* and enacted a new statute effective 10 July 1985 which requires the Commissioner petition a court of competent jurisdiction in order to assess a monetary penalty varying from $500 to $40,000. N.C.G.S. Sec. 58-9.7 (Cum. Supp. 1988) (also permitting license suspension or revocation in addition to monetary penalty).

However, this court has subsequently attempted to distinguish *Lanier* and upheld a statutory civil penalty which was (1) limited to $2,000, (2) could only be assessed in lieu of license revocation or suspension, and (3) circumscribed the agency's discretion by requiring it to consider the "degree and extent of the harm caused by the violation" in assessing the penalty. *North Carolina Private Protective Services Bd. v. Gray, Inc.*, 87 N.C. App. 143, 146-47, 360 S.E. 2d 135, 138 (1987). The *Protective Services Board* court stated:

> We do not find *Lanier* to mean that all administrative civil penalties are *per se* in violation of the State Constitution, and we so hold. Rather, the granting of the judicial power to assess a civil penalty must be 'reasonably necessary' to the purposes for which the agency was created *and with appropriate guidelines for the exercise of discretion.*

Id. at 146, 360 S.E. 2d at 137 (emphasis added). Although Article IV, Section 3 only concerns legislative grants of judicial power, we also note that in *Young's Sheet Metal and Roofing, Inc.* this court vacated an agency's penalty assessment as based on "absolute" discretion purportedly prohibited by *Lanier* although the agency's statutes did not expressly grant the agency *any* power to assess a civil penalty. 77 N.C. App. at 183, 334 S.E. 2d at 420.

We believe the *Protective Services Board* decision contradicts the express language, rationale and result of *Lanier.* By attempting to distinguish *Lanier* on the basis of maximum penalty amounts, availability of other sanctions and legislatively pre-

scribed penalty factors, the *Protective Services Board* court limited *Lanier* to prohibiting an agency's assessing civil penalties only when there are inadequate legislative safeguards against excessive agency discretion. The *Lanier* Court's complete statement of its rationale explicitly rejects that interpretation of *Lanier:*

> Decisions of this and other courts to the effect that the Legislature may delegate to administrative officers and agencies its own power to prescribe detailed administrative rules and regulations, so long as the Legislature, itself, prescribes the broad principles and standards within which such administrative authority is to be confined . . . are not applicable to the present case. Here, we are concerned with the extent to which the Legislature has undertaken to confer upon an administrative officer a power which the Legislature, itself, never had. *Thus, we are not here concerned with whether the Legislature has or has not prescribed standards to guide and confine the administrative officer in his exercise of the power conferred. With or without standards to guide the administrative discretion, the Legislature cannot confer upon an administrative officer judicial power, except within the limits specified in Art. IV, Sec. 3, of the Constitution* . . . . Under Article IV, Secs. 1 and 3, . . . the Legislature may [vest an agency with the judicial power to determine penalties within the statutory range] *if, but only if, conferring this segment of the judicial power of the State upon the [agency] is 'reasonably necessary as an incident to the accomplishment of the purposes for which' the [agency] was created . . . . We find, however, no reasonable necessity for conferring upon the Commissioner the judicial power to impose upon an agent a monetary penalty, varying, in the Commissioner's discretion, from a nominal sum to $25,000 for each violation.*

274 N.C. at 496-97, 164 S.E. 2d at 167 (emphasis added) (citation omitted).

The *Lanier* Court specifically approved agency exercise of some "segments" of the judicial power of the state such as (1) holding hearings to (2) determine the facts of an agent's conduct in order to (3) grant or revoke licenses. 274 N.C. at 497, 164 S.E. 2d at 166. However, the Court found no reasonable necessity to

confer upon the agency the "segment" of judicial power here at issue—the power to impose a monetary penalty which varied in the agency's discretion although within certain legislative limits.

The factual background of *Lanier* further supports this understanding of the passage quoted above. Two questions were certified to the *Lanier* Court: (1) whether the civil penalty violated the constitutional requirement of separated powers; and (2) whether the statute "confers upon the Commissioner of Insurance a discretion, subject to no guiding rules or standards, to impose a civil penalty not in excess of $25,000." 274 N.C. at 488, 164 S.E. 2d at 162. The superior court had concluded that the statute did not violate the separation-of-powers doctrine *and* that it contained "adequate safeguards for due process of law and for the imposition of a civil penalty." 274 N.C. at 491, 164 S.E. 2d at 163-64. The Court of Appeals affirmed the superior court in both respects and specifically held that the penalty statute did not confer upon the Commissioner "unguided" discretion. *State ex rel. Lanier v. Vines*, 1 N.C. App. 208, 213, 161 S.E. 2d 35, 37-38 (1968). However, the *Lanier* Court refers to an agency's unguided discretion nowhere but in the passage quoted above: even then, it raises the issue only to dismiss it as a basis for its application of Article IV, Section 3. Thus, as the *Lanier* Court explicitly rejected the relevance of legislative "guidelines" to its "separation-of-powers" analysis, it defies logic to construe *Lanier* to have struck down the civil penalty in that case only because the statute lacked adequate legislative safeguards against unbridled agency discretion.

We also note the *Protective Services Board* focus on the maximum size of the civil penalty and the permitted range of alternative sanctions unnecessarily intrudes on the Legislature's delegation of its own legislative functions. For example, the terms of Section 113A-64 permit the Department to assess a penalty up to $100 each day the violation continues. While the $100 limitation results in penalties which are proportionate to the duration of any violation, there is no maximum limit on the penalty which may be assessed so long as the violation continues. The potential size of the penalty under Section 113A-64 would thus be a constitutional defect under the *Protective Services Board* analysis. However, considerations such as the maximum size of the civil penalty and the availability of alternative enforcement sanctions

are in fact irrelevant to the question whether a civil penalty is a peculiarly "judicial" power reasonably necessary to the accomplishment of an agency's purposes. *Cf. Lanier*, 274 N.C. at 496, 164 S.E. 2d at 167 (since size of penalty is legislative determination, Court did not consider whether penalty was excessive). Since the judiciary does not possess the power to enact specific civil penalties or other alternative enforcement sanctions, these legislative choices are not at issue in determining whether the Legislature has usurped a judicial power which may not be conferred under Article IV, Section 3.

Specifying a penalty's maximum size and/or alternative sanctions and/or penalty factors indeed serves to limit the agency's discretion in assessing penalties. However, the lack of adequate legislative safeguards in assessing monetary penalties is clearly not the constitutional defect addressed in *Lanier:* the *Lanier* Court was instead offended by the Legislature's granting under any circumstances the judicial power to assess a monetary penalty commensurate with a statutory violation, which the Court deemed the "essence" of judicial power. 274 N.C. at 496, 164 S.E. 2d at 167; *cf. id.* at 495-96, 164 S.E. 2d at 166-67 (contrasting approved legislative grants of "quasi-judicial" power with grant of "supreme" judicial power). Thus, the rationale, plain language, and result in *Lanier* permit no other conclusion but that the *Lanier* Court held that the "segment" of the judicial power to impose civil penalties varying within legislative limits is *not* "within the limits specified in Article IV, Section 3 of the Constitution." 274 N.C. at 496, 164 S.E. 2d at 167.

We question the *Lanier* Court's references to "segments" of a single "supreme" judicial power: Article IV, Section 3 clearly contemplates granting a multiplicity of judicial "powers" rather than segments of one indivisible power. However, we do not follow *Lanier* because we necessarily believe it was correctly decided but because it plainly controls the outcome of this case. Nor do we decline to apply the *Protective Services Board* distinctions because they are arguably too broad or intrusive but because their rationale directly contradicts the rationale and result of *Lanier* quoted above. *See Lumley v. Dancy Const. Co., Inc.*, 79 N.C. App. 114, 121-22, 339 S.E. 2d 9, 14 (1986) (statements in Court of Appeals opinion conflicting with Supreme Court opinion held

without precedential value); *see also Cannon v. Miller*, 313 N.C. 324, 327 S.E. 2d 888 (1985).

We concede a major purpose of Article IV, Section 3 is to reconcile the retention of judicial power in the judicial branch required by Article IV, Section 1 with the recognized need to utilize administrative expertise in implementing complicated regulatory schemes such as the Act. While Article IV, Section 1 does not permit the Legislature to "deprive" the judiciary of judicial power, it does allow such power to be shared with administrative agencies in a limited fashion through Article IV, Section 3. N.C. Const. art. IV, sec. 1 (1970) (Legislature may not "deprive" judiciary of powers which pertain to it as "coordinate department of government"). We believe the grant of judicial powers to administrative agencies under Article IV, Section 3 is not different in kind from the Legislature's delegation of its own powers to agencies which our Supreme Court has repeatedly upheld since "the constitutional inhibition against delegating legislative authority does not preclude the Legislature from transferring adjudicative . . . powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers." *Adams*, 295 N.C. at 697, 249 S.E. 2d at 410. However, the passage from *Lanier* quoted previously explicitly rejects the application to Article IV, Section 3 of those cases upholding the delegation of "legislative" powers so long as the Legislature enacts adequate guidelines for the agency's discretion. *Cf. State v. Harris*, 216 N.C. 746, 754, 6 S.E. 2d 854, 860 (1939) (unlimited discretion to grant licenses without legislative guidelines deemed unconstitutional delegation of legislative function) (cited by *Lanier* as inapplicable).

Given the procedural safeguards set forth by the North Carolina Administrative Procedure Act and the numerous grounds for judicially reviewing the administrative assessment of civil penalties under Section 150A-51 (now Section 150B-51), we fail to see why granting an agency the judicial power to impose a civil penalty—varying within legislative limits but commensurate with the violation in light of appropriate statutory or regulatory guidelines—frustrates the constitutional requirement that only those judicial powers that are "reasonably necessary" to an agency's purposes may be vested by the Legislature.

However, the rationale, holding and plain language of *Lanier* do not permit this analysis. While we agree that *Lanier*, a twenty-year-old case, may not express the "modern" view of an agency's exercise of judicial powers, *Lanier* controls the result in this case; and *Lanier* permits only the judiciary (rather than the agency itself) to assess a varying penalty such as that enacted in Section 113A-64. Rather than rest with the assertion in *Young's Sheet Metal and Roofing* that *Lanier* only prohibits "absolute" agency discretion, the Department's lengthy brief primarily argues *Lanier* should be overturned. We agree that long-term enforcement of the Act would be better served by our Supreme Court's overturning *Lanier* than by our drawing questionable distinctions which *Lanier* has in any event rejected in advance.

Accordingly, we affirm the trial court's conclusion that the Department's assessment of a civil penalty under Section 113A-64 arose from an unconstitutional transfer of judicial power under Article IV, Section 3 which requires the penalty be vacated.

Affirmed.

Judge PHILLIPS concurs in the result.

Judge BECTON dissents.

Judge BECTON dissenting.

I am unpersuaded by the majority's reading of *State ex rel. Lanier v. Vines.* The majority interprets *Lanier* to prohibit, in all cases, agency imposition of "a civil penalty whose amount varies with *any* agency discretion. . . ." (Emphasis supplied.)

Article IV, Sec. 3 of the North Carolina Constitution contemplates that discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes. Although couched in the negative, the same conclusion was reached by our Supreme Court in *Lanier*:

> . . . With or without standards to guide the administrative discretion, the Legislature cannot confer upon an administrative officer judicial power, *except within the limits specified in Art. IV, Sec. 3, of the Constitution.* . . . The Legislature . . . has undertaken to vest [the] judicial power

> [to determine the penalty amount within the range established by statute] in an administrative officer. Under Art. IV, Secs. 1 and 3, of the North Carolina Constitution, . . . *the Legislature may do this, if,* but only if, *conferring this segment of the judicial power* of the State upon the [agency] *is "reasonably necessary as an incident to the accomplishment of the purposes for which" the [agency] was created.*

274 N.C. 486, 496-97, 164 S.E. 2d 161, 167 (1968) (emphasis added) (quoting N.C. Const. Art. IV, Sec. 3). Although the court held that the power of license revocation was " 'reasonably necessary' to the effective policing" of the statute, it further held that there was "no reasonable necessity for conferring upon the [agency] the judicial power to impose . . . a monetary penalty, varying, in the [agency's] discretion, from a nominal sum to $25,000 for each violation." *Id.* at 497, 164 S.E. 2d at 167-68.

Lanier did not hold that agency exercise of the judicial power to impose a varying penalty offends our Constitution in all circumstances. Instead, the court held that that power was not, upon the facts before it, "reasonably necessary." *Lanier* established that whether our Constitution permits a particular grant of judicial authority should be determined case-by-case:

> *Whether a judicial power is "reasonably necessary* as an incident to the accomplishment of the purposes for which" an administrative office or agency was created *must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred.*

Id. at 497, 164 S.E. 2d at 168 (emphasis added) (quoting N.C. Const. Art. IV, Sec. 3).

I believe that the Department's power to impose civil penalties for violation of the Sedimentation Control Act *is* reasonably necessary, (1) "in the light of the purpose for which the agency was established"—in part to promote development of natural resources while limiting detrimental effects from erosion and sedimentation pollution, and (2) "in the light of the nature and extent of the judicial power undertaken to be conferred"—here, to impose civil penalties legislatively confined to a maximum of $100 for each violation of the Act.

Mechanical application of the *Lanier* result ignores the progress made in the way the role of administrative agencies is regarded. As our Supreme Court stated in *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*,

> Clearly, . . . we must expect the Legislature to legislate only so far as is reasonable and practical to do and we must leave to [the agency] the authority to accomplish the legislative purpose, *guided of course by proper standards. . . . The modern tendency is to be more liberal in permitting grants of discretion to administrative agencies* in order to ease the administration of laws as the complexity of economic and governmental conditions increases. . . . North Carolina cases have long been consistent with this "modern tendency."

300 N.C. 381, 402, 269 S.E. 2d 547, 563 (1980), *reh'g denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980) (emphasis added) (citations omitted). And in *Adams v. North Carolina Dep't of Natural and Economic Resources*, the court stated that transfers of "adjudicative and rule-making powers to administrative bodies [are not constitutionally precluded] provided such transfers are accompanied by adequate *guiding standards* to govern the exercise of the delegated powers." 295 N.C. 683, 697, 249 S.E. 2d 402, 410 (1978) (emphasis added) (citations omitted).

In the case before us, sufficient guiding standards exist in the statute to check administrative discretion. Explicit "mandatory standards" are articulated in N.C. Gen. Stat. Sec. 113A-57, providing specific guidance to the Department in its determination whether violations of the Act have occurred. Administrative discretion is further limited by the minimal penalty the Department may impose for violations.

Finally, I cannot support the majority's choice to decline to follow our recent construction of *Lanier* in *North Carolina Private Protective Services Board v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E. 2d 135 (1987). There we interpreted *Lanier* to permit an agency, pursuant to statute, to assess a civil penalty up to $2,000 in lieu of license revocation. We stated then, and I still agree, that

> . . . *Lanier* [does not] mean that all administrative civil penalties are *per se* in violation of the State Constitution.

> . . . Rather, the granting of the judicial power to assess a civil penalty must be "reasonably necessary" to the purposes for which the agency was created and with appropriate guidelines for the exercise of the discretion.

287 N.C. App. at 146, 360 S.E. 2d at 137. By its holding, the majority unjustifiably overrules *North Carolina Private Protective Services Board.* I maintain that that case was correctly decided and should have governed the court's decision in the case before us.

For the reasons above, I respectfully dissent.

IREDELL DIGESTIVE DISEASE CLINIC, P.A., A NORTH CAROLINA PROFESSIONAL ASSOCIATION v. JOSEPH A. PETROZZA, M.D.

No. 8822SC245

(Filed 15 November 1988)

1. **Appeal and Error § 6.2— enforcement of covenant not to compete—denial of preliminary injunction—appealable**

An appeal from the denial of a preliminary injunction involved a substantial right, and was heard by the Court of Appeals, where plaintiff sought to enforce a covenant not to compete which would run from 3 August 1987 to 30 August 1990, if valid, and more than one-third of that time had elapsed as of the filing of the Court of Appeals' opinion.

2. **Master and Servant § 11.1— covenant not to compete between physicians—preliminary injunction for enforcement denied**

The trial court properly denied a preliminary injunction to enforce a covenant not to compete between physicians where plaintiff would be unlikely to prevail at trial because the covenant was void as against public policy in that the public health and welfare would be harmed if there were only one gastroenterologist in Statesville. This case is distinguishable from other cases in which covenants between physicians have been enforced in that their enforcement only lowered the number of doctors of a certain specialty within a community, and enforcement here would create a monopoly, and would have an impact on fees and the availability of a doctor for emergencies.

3. **Trial § 9— preliminary injunction—ex parte communication by judge with affiant—no prejudice**

There was no prejudicial error in an action for a preliminary injunction to enforce a covenant not to compete where the trial judge initiated an ex parte communication by telephone with an affiant to clarify his statement. The judge

noted in his own handwriting on the affidavit the time and substance of the conversation and that the affiant restated his contention in his affidavit.

Judge COZORT dissenting.

APPEAL by plaintiff from *Walker, R. G., Jr., Judge.* Judgment entered 1 October 1987 in Superior Court, IREDELL County. Heard in the Court of Appeals 31 August 1988.

This appeal involves a suit on a covenant not to compete contained within an employment agreement.

Pope, McMillian, Gourley, Kutteh & Parker, by William P. Pope; and Hall & Brooks, by John E. Hall, for plaintiff-appellant.

Vannoy, Moore, Colvard, Triplett & Freeman, by Anthony R. Triplett; and James H. Early, Jr. for defendant-appellee.

JOHNSON, Judge.

The question presented by this case is whether the trial court erred in denying a request for a preliminary injunction sought by a covenantee-professional association (plaintiff) to enforce against a physician-covenantor (defendant) the terms of a covenant not to compete contained in an employment agreement. The trial court concluded that the plaintiff had failed to present evidence sufficient to establish a likelihood that at trial the plaintiff would be able to show that the covenant was not void as against public policy. We agree.

Plaintiff is a professional association engaged in the business of providing medical services, specifically, gastroenterology and general internal medicine, to patients in Iredell County, with its principal place of business located in the City of Statesville. Plaintiff's president and sole owner is Dr. David G. Kogut, a physician who has practiced internal medicine and its subspecialty, gastroenterology, in Statesville since June of 1979. Plaintiff was incorporated in 1980 as Iredell Digestive Disease Clinic, P.A. Defendant is a physician who also specializes in gastroenterology and internal medicine.

On or about 18 August 1983, plaintiff and defendant entered into an employment agreement (agreement) which provided that defendant would be employed as an associate for a term of three years, beginning on 1 July 1984 and ending on 30 June 1987. At

the time defendant signed the agreement, he had not engaged in the private practice of medicine, having just completed his medical schooling. The agreement set forth a compensation schedule for the three-year period as well as various obligations of the parties with respect to the employment relationship. The agreement also contained a covenant not to compete, which reads:

> 19. In further consideration of the sum of ONE DOLLAR ($1), to be paid to the Employee by the Corporation on his first day of service, Employee agrees that in the event of his discharge by the Corporation for any breach of this Agreement or any other good cause, whether upon expiration of the term of this Agreement or contrary to the provision of this Agreement, and whether voluntarily or involuntarily, Employee will not thereafter for a period of three (3) years from the date of such termination directly or indirectly, alone or for his own account, or as a partner, member, employee, or agent of any partnership or joint venture, or as a trustee, officer, director, shareholder, or employee or agent of any corporation, trust or other business organization or entity, engaged in, trusted in or concerned with any business having an office or being carried on within a twenty (20) mile radius of Statesville or within a five (5) mile radius of any other hospital or office serviced by the Corporation, whichever is greater, if such business is directly or indirectly in competition with the business of Employer as defined above, namely the general practice of internal medicine or gastroenterology. [*sic*] The Employee agrees that in the event that he violates the conditions of either (a) or (b) above by establishing a general internal medicine or gastroenterology practice within the above proscribed radius, that he will pay to the Corporation to indemnify the Corporation for the Employee's said breach, the sum of FIFTY THOUSAND DOLLARS ($50,000) immediately upon the commencement of such practice, plus 15% of gross income per year for three (3) years, payment to be made on the first of each month during the three (3) years.

Defendant began employment with plaintiff as anticipated in the agreement, and their association apparently prospered without major conflict until the fall of 1986, when the parties began discussing a partnership arrangement to succeed the 1983 agreement. The parties' versions of the events surrounding the part-

nership discussion are conflicting, with each party accusing the other of negotiating in bad faith. In any event, on or about 31 August 1987, having failed to reach an agreement with plaintiff, defendant informed plaintiff of his resignation. Thereafter, in mid-September of 1987, defendant opened his own office in Statesville for the practice of gastroenterology and internal medicine.

On 18 September 1987 plaintiff filed a civil complaint for breach of contract, including breach of the covenant not to compete. Plaintiff requested equitable relief in the form of a temporary restraining order and a preliminary injunction, and monetary damages under the liquidated damages provision in the agreement. A temporary restraining order was issued by Superior Court Judge Robert A. Collier, Jr., on 17 September 1987. Upon its expiration on 28 September 1987, and after hearing the arguments of counsel and receiving affidavits submitted by the parties, Superior Court Judge R. G. Walker, Jr., denied plaintiff's motion for a preliminary injunction on 1 October 1987, and plaintiff appealed.

[1] A trial court's ruling on a party's motion for a preliminary injunction is an interlocutory order. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975). No appeal lies from an interlocutory order unless the order deprives appellant of a substantial right which might be lost absent review before final judgment. G.S. secs. 1-277(a) and 7A-27(d)(1). Plaintiff seeks to enforce a covenant not to compete which, if found valid, would run from 31 August 1987 to 30 August 1990. As of the filing of this opinion, more than one-third of that time period has already elapsed. Therefore, failure to hear plaintiff's appeal would involve a substantial right that may be lost before trial on the merits. *See Robins & Weill v. Mason*, 70 N.C. App. 537, 320 S.E. 2d 693 (1984). We will proceed to the merits of the appeal.

[2] The purpose of a preliminary injunction is to preserve the *status quo* of the parties pending trial on the merits. *State v. School*, 299 N.C. 351, 357, 261 S.E. 2d 908, 913, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed. 2d 11 (1980). A preliminary injunction is an extraordinary measure, to be issued by the court, in the exercise of its sound discretion, only when plaintiff satisfies a two-pronged test: (1) that plaintiff is able to show *likelihood* of success on the merits and (2) that plaintiff is likely to sustain ir-

reparable loss unless the injunction is issued, or if, in the court's opinion issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E. 2d 566, 574 (1977). The trial court determined that plaintiff had failed to satisfy either prong. Specifically, the court made the following findings of fact:

> 1. That plaintiff cannot, through its sole employee, Dr. Kogut, maintain the established level of medical services in the specialty of gastroenterology, to which the public in the locale served by Iredell Memorial and Davis Community Hospitals has become both accustomed and entitled;
>
> 2. That the health and welfare of that segment of the public requiring gastroenterological services in the locale served by Iredell Memorial and Davis Community Hospitals would be harmed if only one gastroenterologist was available;
>
> 3. That the availability of only one gastroenterologist in the locale served by Iredell Memorial and Davis Community Hospitals would place an undue burden on other medical professionals who might be called upon to provide medical services normally provided by this medical specialty and would thus have an adverse impact upon the delivery of all medical services in the locale served by Iredell Memorial and Davis Community Hospitals;
>
> 4. That plaintiff, in its prayer for relief, does not seek to enforce the covenant not to compete contained in the contract between the plaintiff and defendant, but merely seeks to restrain the defendant from practicing the medical specialties of internal medicine and gastroenterology pending the trial of this case;
>
> 5. That plaintiff, in its prayer for relief, seeks its provable damages in addition to the lump-sum damages specified in the liquidated damages provision of its contract with defendant.

Based on these findings, the court reached the following conclusions of law:

> 1. That the plaintiff has not presented sufficient evidence to establish a likelihood that at trial it will be able to

establish that the covenant not to compete is not void as against public policy;

2. That plaintiff has failed to present evidence sufficient to satisfy the undersigned that its remedy at law is inadequate or that its damages are irreparable, or that there exists some right of the plaintiff which ought to be protected by injunctive relief pending trial;

3. That the inclusion in the contract between the parties of a liquidated damages provision specifically measured as a lump-sum plus a percentage of the defendant's gross revenues clearly indicates that the parties contemplated that any damage flowing from a breach of the covenant not to compete would be duly and satisfactorily remedied by an award of money, the amount of which could be easily proven at trial;

4. That, balancing the equities in this controversy, the undersigned should not and will not grant the plaintiff the temporary enforcement of a covenant not to compete pending the trial of this case, especially when the plaintiff has not sought in this action to enforce the covenant not to compete for the full duration as provided in the contract, and that to do so would provide the plaintiff, on a temporary basis, a remedy which would be grossly inequitable.

Plaintiff contends the trial court erred in these findings and conclusions. We do not agree.

In reviewing the denial of a preliminary injunction, although there is a presumption that the lower court's ruling was correct, *Conference v. Creech*, 256 N.C. 128, 123 S.E. 2d 619 (1962), we are not bound by the trial court's findings, but may review and weigh the evidence and find facts for ourselves. *A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983). Therefore our scope of review is basically *de novo*. *Robins & Weill* at 540, 320 S.E. 2d at 696.

To be enforceable, a covenant not to compete must be (1) in writing, (2) entered into at the time and as part of the contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. *A.E.P.* at 402-03, 302 S.E. 2d at 760. Whether the covenant is in fact reasonable and enforceable is a matter to be determined

at trial; we look at the evidence presented on plaintiff's motion for the preliminary injunction to decide whether plaintiff has shown a likelihood that the covenant will be upheld when the case is heard on the merits. *Robins & Weill* at 541, 320 S.E. 2d at 696.

The trial court made no findings regarding the first four elements to be established by plaintiff. Nonetheless, on appeal we must consider each challenge to the enforceability of the agreement. *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 257 S.E. 2d 109 (1979).

We find that the covenant not to compete was part of a written employment agreement, signed by the parties following consultation with legal counsel, and was given for valuable consideration. The time and territory restrictions appear to be reasonable and not unduly oppressive. *See Beam v. Rutledge*, 217 N.C. 670, 9 S.E. 2d 476 (1940); *Robins & Weill, supra.* We now address whether the plaintiff's evidence was sufficient to carry its burden of proof in establishing a likelihood of success at trial on the issue of whether the covenant is not void as against public policy.

A covenant not to compete between physicians is not contrary to public policy if it is intended to protect a legitimate interest of the covenantee and is not so broad as to be oppressive to the covenantor or the public. *Beam* at 673, 9 S.E. 2d at 478. Defendant argues on appeal, as he did before the trial court, that the covenant is void on public policy grounds because enforcing the covenant would deprive Statesville residents of necessary medical care. We find no North Carolina decision which has addressed this particular issue. Other jurisdictions considering the question have found relevant the availability of other physicians in the community affected by the covenant. *See, e.g., Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W. 2d 678 (1962); *Middlesex Neurological Associates, Inc. v. Cohen*, 3 Mass. App. 126, 324 N.E. 2d 911 (1975); *Odess v. Taylor*, 282 Ala. 389, 211 So. 2d 805 (1968). If ordering the covenantor to honor his contractual obligation would create a substantial question of potential harm to the public health, then the public interests outweighs the contract interests of the covenantee, and the court will refuse to enforce the covenant. *See, e.g., Dick v. Geist*, 107 Idaho Ct. App. 931, 693 P. 2d 1133 (1985); and *Lowe v. Reynolds*, 75 A.D. 2d 967, 428 N.Y.S.

2d 358 (1980). But if ordering the covenantor to honor his agreement will merely inconvenience the public without causing substantial harm, then the covenantee is entitled to have his contract enforced. *See, e.g., Marshall v. Covington*, 81 Idaho 199, 339 P. 2d 504 (1959).

Both parties submitted affidavits supporting their respective positions. There is some uniformity among the affidavits on both sides. This is not unusual and does not bear on our assessment of them. Forty-one physicians in Statesville signed affidavits in support of defendant stating that in their view one gastroenterologist would not be able to meet the community's demand for such services; that losing defendant Petrozza's services would create an excessive workload on plaintiff; and would "likely result in undesirable and possibly critical delays in patient care and treatment." They also noted that many patients needing GI (gastroenterological) care are elderly and frail, and would be forced to travel about 40 miles from Statesville if plaintiff Kogut were unavailable or if the patients preferred to see a different gastroenterologist. Affiants further indicated that several emergency situations, such as GI bleeding, liver coma and jaundice, and pancreatitis from biliary stones, occur in the GI field, and could make travel for care life-threatening. They also claimed that defendant Petrozza performs certain highly specialized procedures which plaintiff Kogut does not perform. Three of the physician affiants circulated petitions stating that losing Dr. Petrozza's services would be tragic for the community. These petitions were signed by numerous other physicians.

Plaintiff also submitted affidavits from fourteen Statesville physicians who stated that Dr. Kogut has provided prompt and efficient care, and that they had no knowledge of patients going untreated. They noted that there are presently four surgeons in Statesville who can perform certain semi-surgical procedures performed by gastroenterologists; and that in severe cases patients can be transferred by helicopter from the hospital in Statesville to Baptist Hospital in Winston-Salem, a trip of about forty-five miles.

One internal medicine specialist stated that he and plaintiff Kogut cover each other's cases. He also noted that becoming certified in the subspecialty of gastroenterology requires two ad-

ditional years of training beyond that required to become an internist.

To be sure, there is conflict between plaintiff's and defendant's affidavits as to the precise impact Dr. Petrozza's leaving would have on the community. However, we believe after reviewing the affidavits *de novo*, that the trial court was correct in finding that the public health and welfare would be harmed if there were only one gastroenterologist in Statesville.

In so finding, the trial court acted in accord with the law as enunciated by our Supreme Court when it stated that "[i]t is also proper for the court to take into account probable injuries to persons not parties to the action and to the public if such an injunction were to be issued." *Huggins v. Board of Education*, 272 N.C. 33, 41, 157 S.E. 2d 703, 709 (1967).

Many courts in other jurisdictions have recognized the need to balance the public interest in health care with personal freedom of contract, and have determined that under the particular facts before them, the public interest must prevail. For example, an injunction was denied against an orthopedic specialist where there was testimony of a shortage of such specialists in the county and patients experienced delays in getting appointments. *New Castle Orthopedic Associates v. Burns*, 481 Pa. 460, 392 A. 2d 1383 (1978).

A covenant was not enforced against an ear, nose, and throat doctor (under a statute unlike our restraint of trade provision, G.S. Chapter 75), where the court noted that it was common knowledge that specialists were in short supply in the state, and that the public interest was its first consideration. *Odess, supra.* It is noteworthy that in *Odess* there was conflicting testimony as to the number of ear, nose, and throat specialists in the area, just as there is conflict between the affidavits in the case *sub judice* as to the impact enforcing the covenant would have on the community.

In Arkansas, enforcement was denied against an orthopedic surgeon in an action brought by the two employer orthopedic surgeons where the court said enforcement of the covenant would unduly interfere with the public's right to choose the orthopedic surgeon it preferred. *Duffner v. Alberty*, 19 Ark. App. 137, 718

S.W. 2d 111 (1986). A covenant asserted against a defendant speech and hearing pathologist was struck when she argued that the patients she treated were not readily transferable to another therapist. (This argument implies that there were other therapists available.) The court, in ruling for defendant, asserted its concern for potential harm to the public. *Lowe v. Reynolds, supra.*

In *Ellis v. McDaniel,* 95 Nev. 455, 596 P. 2d 222 (1979), the court denied enforcement against an orthopedic specialist who was the only such physician in his small community. Lastly, a court denied enforcement of a covenant against two pediatric and neonatology specialists who were instrumental in developing and maintaining a neonatal intensive care unit. There was substantial testimony that the neonatal unit would suffer greatly without defendants' services, even though the community would still have five pediatricians. *Geist, supra.*

Plaintiff cites us to various cases from other states where restrictive covenants between physicians have been enforced. We are certainly mindful that medical doctors are by no means immune from such agreements. However, it is our opinion that many of the restrictive covenants are distinguishable from the case at bar in that there were usually several other doctors practicing the specialty in question in the community. *See, e.g., Cogley, supra* (over sixty other surgeons in community, many of whom were orthopedists); *Foltz v. Struxness,* 168 Kan. 714, 215 P. 2d 133 (1950) (ten new physicians in community); *Wilson v. Gamble,* 180 Miss. 499, 511, 177 So. 363, 366 (1937) ("the number of physicians in Greenville is amply sufficient . . ., no monopoly was either contemplated by the contracts or will result from their enforcement.").

Given the particular facts of this case, we believe the public's interest in adequate health care must predominate over the parties' freedom of contract. *See,* 14 Williston on Contracts sec. 1639 (Jaeger 3d ed. 1972). The case *sub judice* is distinguishable from many other cases in which covenants between physicians have been enforced, in that their enforcement only lowered the number of doctors of a certain specialty within a community. In the case at bar, enforcement would create a monopoly for Dr. Kogut. In balancing the equities, we must consider the possible ramifica-

tions of creating a monopoly, including impact on fees in the future and the availability of a doctor at all times for emergencies. Should Dr. Kogut be unavailable, it is possible that patients would have to travel about forty-five miles for care, either by car or helicopter. This is more than a mere inconvenience, and could on occasion be life-threatening. The creation of a monopoly also raises the issue of the public's interest in having some choice in the selection of a physician. The doctor-patient relationship is a personal one and we are extremely hesitant to deny the patient-consumer any choice whatsoever. *See Duffner, supra.*

For all the foregoing reasons we find that at a trial on the merits, plaintiff would be unlikely to prevail because his covenant is void as against public policy. Although there are some statements in the affidavits to the effect that a new GI specialist would be hired should Dr. Petrozza's covenant be enforced, we cannot consider this in weighing the equities since such evidence is at this point speculative and not the situation before us.

In light of our finding that plaintiff would not likely prevail on the merits, we deem it unnecessary to address the question of whether plaintiff will suffer irreparable harm if a preliminary injunction does not issue, or whether issuance is necessary to protect its rights pending litigation.

[3] Plaintiff asserts in its first Assignment of Error that the trial judge erred when he initiated an *ex parte* communication by telephone with an affiant for the purpose of clarifying his statement. The plaintiff is correct that the action taken by the trial judge was highly improper and we certainly do not condone it. However, the burden is on plaintiff not only to show error but to show that if the error had not occurred there is a reasonable probability that the result of the trial would have favored him. *Mayberry v. Coach Lines*, 260 N.C. 126, 131 S.E. 2d 671 (1963). Plaintiff has not met this burden. There is no indication that the trial judge considered any evidence outside the affidavit. The judge, in his own handwriting, noted on the affidavit in question the time and substance of the conversation. The notation indicates that the affiant restated the contention in his affidavit that the workload in Statesville requires two gastroenterologists. Although error, the judge's action did not rise to the level of being prejudicial to plaintiff and is not grounds for reversal.

For all the foregoing reasons, we hold that the trial court did not err in denying plaintiff a preliminary injunction, and therefore we

Affirm.

Judge PARKER concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I believe the trial court erred in denying the plaintiff's request for a preliminary injunction. I must, therefore, dissent from the majority opinion affirming the trial court's order.

The majority holds that "the trial court was correct in finding that the public health and welfare would be harmed if there were only one gastroenterologist in Statesville." In support of this holding, the majority states: "The public's interest in adequate health care must predominate over the parties' freedom of contract." The majority further concludes that enforcement of the contract "would create a monopoly for Dr. Kogut." In so doing, the majority dismisses, as speculative evidence which cannot be considered, Dr. Kogut's testimony that he is searching for a new associate and expects to hire one soon. I disagree with these conclusions.

I first address the majority's conclusion that evidence of Dr. Kogut's hiring of a new associate to replace the defendant is speculative. This evidence is no more speculative than the evidence upon which the majority relies to find harm to the public health and welfare. In fact the majority's conclusions are based on evidence which is much more speculative. There is no evidence that a patient has gone without proper care at those times when Dr. Kogut was the only gastroenterologist in Statesville. It is pure speculation that some rare emergency may arise which might require transporting the patient 45 miles to Winston-Salem. And, of course, not enforcing Dr. Petrozza's covenant would not guarantee that a rare emergency, if one arose, would still not require moving the patient to Winston-Salem.

The majority's opinion that enforcement of the covenant would create a monopoly for Dr. Kogut is even more speculative; in fact, that conclusion has no basis in the record before us. Significantly, the trial court made no such finding. There is no evidence whatsoever that Dr. Kogut is attempting to establish a monopoly; to the contrary, the evidence shows that Dr. Kogut is attempting to hire another gastroenterologist. All the evidence shows that Dr. Kogut's motive in enforcing the covenant is to protect his significant financial investment, which he has a right to do, and not to create a monopoly.

I believe a fair reading of the evidence shows that plaintiff is entitled to injunctive relief. Defendant submitted virtually identical affidavits from forty physicians and from administrators of the two hospitals serving the community. These affidavits express the view that one gastroenterologist would not be able to meet the community's demand for such services, and that losing defendant's services "would likely result in undesirable and possibly critical delays in patient care and treatment." Yet, in an affidavit submitted by plaintiff, one of these same administrators stated that "the caseload of the [plaintiff's] clinic has not suffered if either doctor was out of town."

Plaintiff also submitted affidavits from fourteen Statesville physicians who stated that Dr. Kogut has provided prompt and efficient care and that they had no knowledge of patients going untreated. Affiants stated that, since Dr. Kogut's arrival, four surgeons who perform semi-surgical procedures performed by gastroenterologists had located in Statesville; that GI (gastrointestinal) bleeding, one of the few GI emergencies, could be handled by one of those surgeons; that, in severe cases, patients are often transferred to Baptist Hospital in Winston-Salem forty-five miles away; and that helicopter facilities are available at Baptist and Iredell Memorial Hospitals in Statesville. One affiant, a specialist in internal medicine, stated that he and Dr. Kogut had an arrangement whereby each covered the other's cases when necessary, including GI emergency cases. Uncontroverted evidence also shows that, in addition to treating his patients, Dr. Kogut has had time to obtain and complete a large number of pharmaceutical contracts for major drug companies, has worked with local businesses in conducting preventive medicine programs and cost benefit studies, and, even prior to defendant's arrival in

Statesville, has traveled outside the city to other communities in order to serve patients. Plaintiff also serves patients who reside outside Iredell County.

Finally, as I previously noted, Dr. Kogut stated that he had begun a search for a new associate and expected to hire defendant's replacement soon. Defendant acknowledged that fact in his own affidavit. It is also uncontroverted that at least fifty-four gastroenterologists practice within forty-five miles of Statesville. There is certainly no shortage of specialists in internal medicine in Statesville, as no less than twenty internists have signed affidavits in this case.

The majority relies, in part, on the decision of the Idaho Court of Appeals in *Dick v. Geist*, 107 Idaho 931, 693 P. 2d 1133 (Ct. App. 1985). In that case, the two defendants were pediatricians specializing in neonatology, practicing in Twin Falls, Idaho. They were employed by the plaintiff under an employment contract that contained a covenant not to compete within a twenty-five mile radius of Twin Falls for two years after separation. When the defendants breached the covenant, the plaintiff sought injunctive relief. The court found that while there was conflicting testimony in the record regarding the city's need for pediatricians, six doctors had testified that five pediatricians were not enough to provide the necessary care. Moreover, the court also found that family practitioners in the area could not provide care to critically ill newborns, that the hospital where the defendants would be prevented from practicing was one of two in the state having a long-term respiratory care unit, and that the defendants provided 90% of the critically ill newborn care at the hospital and had been instrumental in developing the intensive care unit. The court further found that many pediatricians are reluctant to engage in neonatal intensive care because providing care for just one critically ill newborn per month is a tremendous burden on a physician's practice. On these facts, the court ruled that the public interest affected by the loss of defendant's services outweighed the benefit derived from enforcing the contract. I believe the case before us is distinguishable. While there is evidence to support a finding that more than one gastroenterologist located in Statesville is *desirable*, nowhere in the record is there evidence that patients needing emergency care will go untreated if the covenant is enforced, that defendant's particular skills are

necessary for the public welfare, that Statesville cannot attract another gastroenterologist, or that there is a shortage of gastroenterologists in general.

Furthermore, the availability of other practitioners is not the sole factor relevant to the public policy question. Indeed, in cases involving covenants not to compete, including covenants between physicians, more than one public policy is at issue. *Beam v. Rutledge*, 217 N.C. 670, 673, 9 S.E. 2d 476, 478 (1940). Plaintiff invokes its contract rights; defendant invokes the public's right to essential medical care. As our Supreme Court has recognized,

> "[I]t is just as important to protect the enjoyment of an establishment in trade or profession, which its possessor has built up by his own honest application to every-day duty and the faithful performance of the tasks which every day imposes upon the ordinary man. What one creates by his own labor is his. Public policy does not intend that another than the producer shall reap the fruits of labor. Rather it gives to him who labors the right by every legitimate means to protect the fruits of his labor and secure the enjoyment of them to himself. Freedom to contract must not be unreasonably abridged. Neither must the right to protect by reasonable restrictions that which a man by industry, skill and good judgment has built up, be denied."

Scott v. Gillis, 197 N.C. 223, 228, 148 S.E. 315, 317-18 (1929), *quoting Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924).

Prior to Dr. Kogut's arrival in 1979, there had never been a gastroenterologist practicing in Statesville. Dr. Kogut has established a successful practice. He recruited defendant, a recent medical school graduate with no private practice experience, to practice in Statesville, and is in the process of bringing another gastroenterologist into the community. In enforcing noncompetition agreements, other courts have emphasized the benefit, both to the public and to the covenantor, that is derived from agreements between young doctors and older or more experienced practitioners. *See, e.g., Ladd v. Hikes*, 55 Or. App. 801, 639 P. 2d 1307, *review denied*, 292 Or. 722, 644 P. 2d 1131 (1982); *Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W. 2d 678 (1962); *Erikson v. Hawley*, 56 App. D.C. 268, 12 F. 2d 491 (1926); *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924); and *Freudenthal v.*

Espey, 45 Colo. 488, 102 P. 280 (1909). *See also Keen v. Schneider*, 202 Misc. 298, 114 N.Y.S. 2d 126, *aff'd*, 280 A.D. 954, 116 N.Y.S. 2d 494 (1952); *Canfield v. Spears*, 44 Ill. 2d 49, 254 N.E. 2d 433 (1969).

I would hold that the balance of equities tips in plaintiff's favor. Loss of defendant's services will not deprive Statesville of essential medical care. Plaintiff has met its burden of proving likelihood of success on the merits on the public policy issue.

I would also hold that plaintiff has shown that it will suffer irreparable harm if a preliminary injunction does not issue and that issuance is necessary for the protection of its rights during the course of litigation.

In a case involving a noncompetition agreement, where the plaintiff has shown a likelihood of success on the merits, the presumption is that injunctive relief will issue. *A.E.P. Industries v. McClure*, 308 N.C. 393, 406, 302 S.E. 2d 754, 762 (1983). The ultimate relief plaintiff seeks is enforcement of a covenant in which the promised performance is forbearance to act. In order to be enforceable, the covenant must proscribe defendant's activity for a reasonable, limited period of time. *Id.* at 405, 302 S.E. 2d at 762. The trial court below concluded that plaintiff had not shown either irreparable harm, or the necessity for preservation of its rights pending trial, for two reasons: (1) because the prayer for relief in plaintiff's complaint did not include a request for a permanent injunction, and (2) because the inclusion of a liquidated damages provision in the Agreement indicated that the parties intended to limit plaintiff's remedy to monetary relief. I do not agree with either reason.

N.C. Gen. Stat. § 1-485(1) (1987) provides that a preliminary injunction shall issue "[w]hen it appears *by the complaint* that the plaintiff is entitled to the relief demanded . . . ." (Emphasis added.) In its complaint, to which the Employment Agreement was attached, plaintiff set forth all the essential facts to state a claim for breach of the Agreement and, therefore, for injunctive relief. The complaint states that "there is no adequate remedy at law," and prays for a temporary restraining order and a preliminary injunction. Neither the statute nor our case law conditions the issuance of a preliminary injunction on a specific prayer for a permanent injunction. Furthermore, Rule 54(c) of the N.C. Rules of Civil Procedure provides that "[e]xcept as to a party against

whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." N.C. Gen. Stat. § 1A-1, Rule 54(c) (1987). Plaintiff's failure to request a permanent injunction, therefore, does not deprive a court of its equity jurisdiction. The same reasoning applies in the instant case: the crucial factor is not whether plaintiff has *asked* for the proper remedy, but whether plaintiff is *entitled* to it. I would find that, especially in light of *A.E.P. Industries*, plaintiff is entitled to a preliminary injunction. It should be noted that plaintiff has subsequently amended its complaint, as it was entitled to do as a matter of course under Rule 15(c) of the N.C. Rules of Civil Procedure, to include a specific request for a permanent injunction.

Finally, the existence of a liquidated damages provision in the Agreement does not foreclose the equitable remedy. *A.E.P. Industries*, 308 N.C. at 407, 302 S.E. 2d at 762-63. Defendant argues, citing *Bradshaw v. Millikin*, 173 N.C. 432, 92 S.E. 161 (1917), that the liquidated damages clause in this Agreement is "a very detailed provision setting up payment amounts and dates," and it is clear that the parties intended to provide the defendant with the "alternative to perform or pay." In *Bradshaw*, however, the court held that the plaintiff was entitled to an injunction under the usual rule that "[t]he mere insertion in the contract of a clause describing the sum to be recovered for a breach as liquidated damages . . . will not exclude the equitable remedy, and is regarded as put there for the purpose of settling the damages if there should be a suit and recovery for a breach, instead of an action, in the nature of a bill in equity . . . ." *Id.* at 436, 92 S.E. at 163. The court noted that the contract could expressly provide for the payment of a fixed sum as the exclusive remedy, or the contract might clearly indicate that the parties intended that the covenantor had the right to resume his restrained activity upon payment of a sum. The court emphasized that the intention of the parties governs, and the contract must be construed as a whole. *Id.* at 439, 92 S.E. 2d at 165. In the instant case, the contract expressly provides:

> The parties agree that the remedy at law for any actual or threatened breach of this Agreement by either will be inadequate and that both shall be entitled to specific performance

> hereof or injunctive relief or both by temporary or permanent injunction . . . in addition to any damages which both may be legally entitled to recover . . . .

The intention of the parties was to allow the parties the right to pursue equitable and legal relief. The specificity of the liquidated damages clause does not, therefore, support the conclusion that the parties intended a "pay or perform" agreement.

For the foregoing reasons, I would find the denial of the preliminary injunction to be error, and I would vacate the order and remand the case to the Superior Court of Iredell County for entry of a preliminary injunction and for further proceedings.

SUSIE MAE WOODSON, ADMINISTRATRIX OF THE ESTATE OF THOMAS ALFRED SPROUSE, DECEASED v. NEAL MORRIS ROWLAND; MORRIS ROWLAND UTILITY, INC.; DAVIDSON & JONES, INC.; AND PINNACLE ONE ASSOCIATES, A NORTH CAROLINA PARTNERSHIP

No. 8814SC148

(Filed 15 November 1988)

1. Master and Servant § 87— workers' compensation—exclusivity of remedy

Plaintiff's remedy was limited to the Workers' Compensation Act in an action arising from a cave-in at a construction site where plaintiff alleged that the conduct of her decedent's employer was so grossly negligent as to be equivalent to an intentional tort. Allowing a suit by an employee against his employer, even for gross, willful and wanton negligence, would skew the balance of interests inherent in the Workers' Compensation Act. *Pleasant v. Johnson*, 312 N.C. 710, involved a claim between co-employees.

2. Corporations § 1.1— suit against co-employee—co-employee corporate alter ego

In an action arising from a construction cave-in, plaintiff could not sue her decedent's co-employee individually in tort where the co-employee was the sole shareholder in the construction company and was the alter ego of the corporate employer. The individual plaintiff must be given the same immunity for negligence actions that is granted to employers pursuant to the Workers' Compensation Act. N.C.G.S. § 97-10.1.

3. Master and Servant § 21.1— trench excavation—not inherently dangerous

The trial court properly granted summary judgment for defendant general contractor and defendant project owner in a negligence action arising from a construction cave-in arising from the subcontractor's failure to comply with appropriate OSHA regulations for trench work where the plaintiff alleged that the general contractor and project owner were liable under the doctrine of

non-delegable duties because trench excavation is inherently dangerous. Trench excavation is common on most construction projects and is not especially hazardous when done properly; the injury here arose from a danger collaterally created by the independent negligence of the subcontractor.

4. Master and Servant § 21— construction cave-in—employee of subcontractor killed—summary judgment for general contractor proper

In an action arising from a construction cave-in, summary judgment was properly granted for defendant general contractor where plaintiff, whose decedent was an employee of the subcontractor, was alleging liability based on negligent hiring of the subcontractor. A general contractor does not owe a duty of care to the employees of his independent contractor to terminate the relationship with the independent contractor even where, as here, the principal knows or should have known of negligence on the part of the independent contractor which could cause injury to the independent contractor's employees.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by defendants from *Barnette, Judge*. Orders entered 14 September 1987, 16 September 1987, 9 November 1987, and 9 December 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 September 1988.

Plaintiff administratrix brings this action pursuant to G.S. 28A-18-2 to recover compensatory and punitive damages in the death of Thomas Alfred Sprouse (Sprouse). Sprouse died on 4 August 1985 as the result of a cave-in at a construction site where he was working laying sewer pipe in a trench. The trench in which Sprouse was working was neither braced nor shored to prevent a cave-in, a violation of federal occupational safety regulations.

Sprouse worked as a pipe layer for defendant Morris Rowland Utility, Inc. (Rowland Utility). Defendant Neal Morris Rowland (Rowland) is the president and sole shareholder of Rowland Utility. At the time of Sprouse's death Rowland Utility was a subcontractor for defendant Davidson & Jones, Inc. (D & J). D & J was the general contractor for defendant Pinnacle One Associates (Pinnacle).

After defendants answered, each defendant moved for summary judgment. In separate orders the trial court granted summary judgment for all of the defendants, including each of plaintiff's two claims against D & J. Plaintiff appeals.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith and Bryan E. Lessley; John T. Manning for plaintiff-appellant.

Spears, Barnes, Baker, Hoof & Wainio, by J. Bruce Hoof and Mark A. Scruggs; Poyner & Spruill, by John L. Shaw, for Neal Morris Rowland and Morris Rowland Utility, Inc., defendant-appellees.

Smith Helms Mulliss & Moore, by L. D. Simmons, II, for Davidson & Jones, Inc., defendant-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Grady S. Patterson, Jr. and David H. Batten, for Pinnacle One Associates, defendant-appellee.

EAGLES, Judge.

Plaintiff presents four issues on appeal. She first argues that Rowland Utility's actions in violating certain Occupational Safety and Health Administration (OSHA) safety regulations were so grossly negligent as to amount to an intentional assault on her decedent. She next argues that Rowland's individual actions were those of a co-employee rather than Sprouse's employer. She further contends that both D & J and Pinnacle breached a nondelegable duty by allowing Rowland Utility's negligence in failing to maintain a safe work place while performing an inherently dangerous activity. Plaintiff also alleges that D & J negligently hired and retained Rowland Utility as its subcontractor. Based on the record before us, we disagree and affirm.

I

[1] Plaintiff first attempts to overcome the exclusivity provision of the North Carolina Workers' Compensation Act (Act), G.S. 97-10.1. She argues that Rowland Utility's gross and wanton negligence amounts to intentional conduct. Plaintiff recognizes that our long-standing precedents prevent an employee covered by the Act from bringing an action against his employer for ordinary negligence. *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E. 2d 240 (1966). On the other hand, the Act does not immunize an employer or a co-employee for his intentional torts. *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E. 2d 582 (1982). Additionally, our Supreme Court has allowed an employee injured by the will-

ful, wanton, and reckless negligence of a co-employee on the job to sue the co-employee for damages. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244 (1985).

G.S. 97-10.1 provides that

> [i]f the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

In her complaint plaintiff admits that her decedent was an employee of Rowland Utility and that he was acting within the course and scope of his duties at the time of his death. However, plaintiff argues that because Rowland Utility's conduct was so grossly negligent as to be equivalent to an intentional tort, plaintiff's remedy is not limited to a claim for workers' compensation benefits under the Act.

Defendants argue that plaintiff has chosen her remedy by filing a claim for workers' compensation benefits. They argue that the mere filing of a claim is an election of remedies which precludes this action for wrongful death. We reject defendant's contention that plaintiff has elected her remedy merely by filing her claim with the Industrial Commission without more. *Freeman v. SCM Corporation*, 311 N.C. 294, 316 S.E. 2d 81 (1984) (per curiam); *see also McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 364 S.E. 2d 186 (1988); *Stack v. Mecklenburg County*, 86 N.C. App. 550, 359 S.E. 2d 16, *disc. rev. denied*, 321 N.C. 121, 361 S.E. 2d 597 (1987). However, upon a careful review of the Act and the explanatory case law we conclude that the employer's conduct, though grossly negligent, was not such that it would prevent application of G.S. 97-10.1.

A

Our courts have recognized a general exception to the Act's exclusivity provision when an employer intentionally injures his employee. *Daniels* at 560, 286 S.E. 2d at 585. Professor Larson explains the rationale for this exception by stating that Workers' Compensation Acts are designed to protect employers for dam-

ages resulting from *accidents. See* 2A Larson, *The Law of Workmen's Compensation* Section 68.11 (1988) (hereinafter cited as Larson). Intentional torts are beyond the scope of the Act.

Plaintiff relies on our Supreme Court's decision in *Pleasant* which stated that "willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers' Compensation Act." *Pleasant* at 715, 325 S.E. 2d at 248. However, *Pleasant* involves a personal injury claim between co-employees and does not decide whether an employer could be sued by an employee for grossly negligent acts. *Id.* at 717, 325 S.E. 2d at 250. Accordingly, *Pleasant* does not control here.

The Act assures employees compensation for *accidental* work related injuries. *Id.* at 712, 325 S.E. 2d at 246. The Act features a balance of benefits for rights where "the employee and his dependents give up their common law right to sue the employer for negligence in exchange for limited but assured benefits." *Id.* The Act's exclusivity provision maintains the balance. Larson, Section 68.15.

In holding co-employees liable for willful, reckless and wanton acts, the *Pleasant* court pointed out that

> [s]ince the negligent co-employee is neither required to participate in the defense of the compensation claim nor contribute to the award, he is not unduly prejudiced by permitting the injured employee to sue him after receiving benefits under the Act. Furthermore, when an employee who receives benefits under the Act is awarded a judgment against a co-worker, any amount obtained will be disbursed according to the provisions of N.C.G.S. 97-10.2 and may reduce the burden otherwise placed upon an innocent employer or insurer.

Id. at 717, 325 S.E. 2d at 249-250. Significantly, those factors insured that the delicate balance established by the Act was not disturbed. Here, those considerations are not present. To allow a suit by an employee against his employer, even for gross, willful and wanton negligence, would skew the balance of interests inherent in our Workers' Compensation Act. Changes in the Act's delicate balance of interests is more properly a legislative prerogative than a judicial function. Accordingly, we hold that the Act bars an employee's suit against his employer for injuries caused on the job by the employer's grossly negligent acts.

B

In *Freeman v. SCM Corporation*, 66 N.C. App. 341, 311 S.E. 2d 75, *aff'd*, 311 N.C. 294, 316 S.E. 2d 81 (1984), our court held, in part, that because plaintiff employee had received workers' compensation benefits he could no longer bring a tort action against his employer. The Supreme Court affirmed in a *per curiam* opinion. The Supreme Court wrote specifically "to make it abundantly clear that in fact plaintiff had no 'selection' as to the appropriate avenue of recovery for injuries." *Freeman v. SCM Corporation*, 311 N.C. 294, 296, 316 S.E. 2d 81, 82 (1984). The court concluded by stating that as long as the employee was covered by the Workers' Compensation Act, he must make any negligence claims against his employer before the Industrial Commission.

Most recently, in *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 340 S.E. 2d 295 (1986), a divided Supreme Court held that an employee who had received workers' compensation benefits could not sue his employer in the civil courts for grossly negligent conduct. Justice Billings, joined by Justice Mitchell, concurred separately but ruled against plaintiff's action relying on the fact that plaintiff had elected his remedy by accepting workers' compensation benefits. Three justices dissented.

In *Stack v. Mecklenburg County, supra*, we attempted to harmonize these two positions. We held that both *Freeman* and *Barrino* mandate that once coverage under the Act is established, the plaintiff employee could not bring an independent negligence action against the employer.

Here the evidence shows that plaintiff's decedent, Sprouse, is an employee covered under the Act. Therefore, plaintiff may not bring an action for negligence against Sprouse's employer. Plaintiff had no right to select a remedy other than a workers' compensation claim.

Whether plaintiff filed a claim or actually received workers' compensation benefits is irrelevant here. Plaintiff's exclusive remedy as against the employer was to pursue her claim under the Act and receive the workers' compensation benefits allowed by law.

II

[2] Plaintiff argues that Rowland, individually, was grossly negligent in failing to ensure the work site complied with North Carolina Department of Labor and federal OSHA regulations and that the failure resulted in her decedent's death. She further claims that when Rowland made these decisions, he was acting as Sprouse's co-employee, not his employer. Rowland argues that he is the corporate alter ego and is, like the corporate employer, immune from a negligence action.

Rowland contends, without contradiction, that he is the sole shareholder of Rowland Utility. The record here shows that Rowland made all of the decisions concerning the corporation including which jobs to bid, who to hire, and salaries. Because Rowland Utility had "no separate mind, will or existence of its own and [was] but a business conduit for its principal," we hold that Neal Morris Rowland is the alter ego of the corporate employer, Morris Rowland Utility, Inc. *J. M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 426, 324 S.E. 2d 909, 914, *disc. rev. denied*, 313 N.C. 602, 330 S.E. 2d 611 (1985). Accordingly, Morris Rowland must be given the same immunity from negligence actions that is granted employers pursuant to G.S. 97-10.1. Larson, Section 72.13. To do otherwise would effectively negate the exclusivity provision of the Act as to small businesses. We hold that a plaintiff, representing a deceased employee, may not sue her decedent's co-employee individually, in tort, when the co-employee is the corporate employer's alter ego.

III

[3] Plaintiff next argues that D & J and Pinnacle are vicariously liable for Rowland Utility's negligence under the doctrine of non-delegable duties. Plaintiff contends that trench excavation is inherently dangerous and that a general contractor and owner may not escape liability for injuries arising from inherently dangerous work by contracting with a subcontractor.

Generally, an employer is not liable for the negligence of an independent contractor. *Rivenbark v. Construction Co.*, 14 N.C. App. 609, 188 S.E. 2d 747, *cert. denied*, 281 N.C. 623, 190 S.E. 2d 471 (1972). An exception to the rule occurs when an activity contracted for is inherently dangerous. The inherently dangerous ex-

ception "imposes liability on an employer for the negligent torts of independent contractors performing, for the employer, an activity which would result in harmful consequences unless proper precautions are taken." *Dietz v. Jackson*, 57 N.C. App. 275, 279, 291 S.E. 2d 282, 285 (1982). Whether an activity is inherently dangerous is a question of law for the trial court. *Id.* at 280, 291 S.E. 2d at 286.

Our Supreme Court has ruled that an inherently dangerous activity is one where there is "a recognizable and substantial danger inherent in the work, *as distinguished from a danger collaterally created by the independent negligence of the contractor*, which latter might take place on a job itself involving no inherent danger." (Emphasis added.) *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 259, 17 S.E. 2d 125, 128 (1941).

We find that trench excavation work of this nature is not an inherently dangerous activity. Trench excavation work is common on most construction projects. When done properly, it is not especially hazardous. Rowland Utility's failure to comply with the appropriate OSHA regulations for trench work caused the trench to collapse. Proper shoring or sloping of the trench walls would have prevented any injuries from occurring. We hold that the injury here arose "from a danger collaterally created by the independent negligence of the contractor." *Id.* Accordingly, summary judgment in favor of Pinnacle and D & J on the issue of an inherently dangerous activity was correct.

IV

[4] By plaintiff's final assignment of error she argues that D & J is directly liable to her decedent for the negligent hiring and retention of Rowland Utility as a subcontractor. D & J contends that plaintiff should not be allowed to bring this claim because Sprouse was not D & J's employee, but rather was Rowland Utility's employee. D & J next argues that even if plaintiff can bring this action, D & J was not negligent in hiring or retaining Rowland Utility. In essence, plaintiff asks us to permit tort recovery by employees of independent subcontractors against a general contractor based upon negligence of their employer, the independent subcontractor. We reject plaintiff's argument and affirm the trial court's judgment.

A

Plaintiff cites two North Carolina cases in support of her claim based on negligent hiring. Both are distinguishable from the instant case. In *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972), the Supreme Court held that a motel guest could recover damages for injuries received when an electric water heater exploded. The innkeeper had earlier hired a plumber to repair the water heater. The court stated that whether the innkeeper was negligent in hiring a plumber rather than an electrician was a jury question. The ruling, however, was premised on the innkeeper's nondelegable duty to provide for the protection of his guests. There is no such duty in the instant case.

In *Dietz*, at 278, 291 S.E. 2d at 285, we stated that "a general contractor may be subject to liability for an injury done to a plaintiff as a proximate result of the general contractor's negligence in hiring an independent contractor to perform construction work." The plaintiff in *Dietz* was the employee of an independent subcontractor. The employee sued the general contractor for the negligent hiring of a different subcontractor, not his employer. *Dietz* is distinguishable on its facts from the present case.

As in any other negligence case, to prevail here the plaintiff must show a legal duty, a breach of the duty, proximate cause, and damages. *Petty v. Print Works*, 243 N.C. 292, 90 S.E. 2d 717 (1956). We hold that under these circumstances defendant D & J owed no legal duty to Sprouse based on D & J's negligent hiring of Sprouse's employer. Accordingly, the trial court's entry of summary judgment on the claim based on negligent hiring was correct.

To allow the employee of a subcontractor to recover against the general contractor or developer for its negligent hiring of the subcontractor would circumvent the exclusivity provisions of the Workers' Compensation Act and, further, would encourage general contractors to avoid hiring independent contractors. Here, if plaintiff's decedent had been the general contractor's own employee, the general contractor's liability would be limited by the Workers' Compensation Act. It seems incongruous to allow an employee of a subcontractor to bring his employer's general contractor into court and question the general contractor's hiring

decision in hiring the employer subcontractor. Plaintiff's theory rests on the proposition that when the general contractor hired a subcontractor for a job, the general contractor then "owed [the decedent] a duty to protect him from the negligence of his own employer." *Chapman v. Black*, 49 Wash. App. 94, 104, 741 P. 2d 998, 1004 (1987). We are not persuaded by this argument and believe that such a broadening of tort liability is a legislative issue.

B

Plaintiff argues that a genuine issue of material fact exists in her claim of negligent retention of Rowland Utility as D & J's subcontractor. She contends that D & J, in the exercise of reasonable care, knew or should have known that Rowland Utility was violating state and federal safety practices and, therefore, should have terminated Rowland Utility's contract. We disagree and affirm the trial court's entry of summary judgment on plaintiff's claim of negligent retention.

Our courts have recognized that an employer may be held liable for his negligent retention of an incompetent employee or for retaining an employee whose wrongful conduct causes injury to another. *Pleasants v. Barnes*, 221 N.C. 173, 19 S.E. 2d 627 (1942); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986). However, in each of these cases the relationship involved was employer-employee, rather than principal-independent contractor as in the instant case.

There are significant differences between the relationships of employer-employee and principal-independent contractor. One court has aptly noted the primary distinction is that:

> the principal does not supervise the details of the independent contractor's work and therefore is not in a good position to prevent negligent performance, whereas the essence of the contractual relationship known as employment is that the employee surrenders to the employer the right to direct the details of his work, in exchange for receiving a wage.

Anderson v. Marathon Petroleum Co., 801 F. 2d 936, 938 (7th Cir. 1986). The amount of control an employer has over his employee is significantly greater than the control a principal may exert over an independent contractor.

The evidence here shows that Lynn Craig, an operator and on-site crew supervisor for D & J, observed Rowland Utility working on the job the day before the accident. By deposition Craig testified that the project plans called for trenches eighteen to twenty feet deep in which to lay the pipes. He further testified that he would not allow the D & J crew he supervised to work in the trench until Rowland Utility supplied Craig with a trench box. A trench box is a shell-like device sometimes used to ensure a trench worker's safety from cave-in when working in trenches deeper than five feet. Craig personally observed that Rowland Utility's employees were not using a trench box but were attempting to slope the trench walls. Craig also stated that he would have sloped the trench walls more than Rowland Utility did before he would have allowed his men to work in it. Neither Craig nor anyone else from D & J observed Rowland Utility's work on the day of the accident.

On this record, we hold here that a general contractor does not owe a duty of due care to the employees of his independent contractor to terminate the general contractor's relationship with the independent contractor even where, as here, the principal knows or should have known of negligence on the part of the independent contractor which could cause injury to the independent contractor's employees.

Affirmed.

Judge PARKER concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part and dissenting in part.

Though I agree that under various decisions of our Supreme Court the claims against the decedent's employer and the individual defendant were properly dismissed, the opinion with respect to these claims, in my view, is incorrectly and unduly broad in several respects. *First*, it erroneously broadens the alter ego doctrine, a device not for escaping individual liability but establishing it; and the action against the individual defendant was properly dismissed not just because he owns and operates the corporation, but because the duty he allegedly violated was not

one that one employee owed to another but was the nondelegable duty the corporate employer owed the decedent to provide him a safe working place. 2A A. Larson, Workmen's Compensation Law Sec. 72.13, pp. 14-81 to 14-84 (1988). *Second*, nor would holding Rowland individually liable, if he had violated an employee's duty, negate the exclusivity provision of the act, as the majority supposes; for the exclusivity provision, as G.S. 97-10.1 explicitly provides, applies only to an employee's claim against his employer and holding that it automatically applies to any third party, whoever it may be, is without legislative authority. *Third*, holding that working a man in a narrow dirt ditch 18 feet deep is not inherently dangerous is contrary to reality, in my opinion; and the legal test applied to this question, despite its origin, is meaningless legal jargon.

But in my view the dismissal of plaintiff's action against the general contractor, Davidson & Jones, was erroneous. The majority holding that notwithstanding the contractor's direct knowledge, through its on-the-site supervisor, that the subcontractor was recklessly exposing its employees to death or serious injury by working them in an 18 foot trench that was unshored, inadequately sloped and not equipped with a trench box, it had no duty to take steps to eliminate that hazard is a view of the law I do not share. That a general contractor ordinarily has no general duty to protect the employees of its independent contractor against its neglect of which it knows nothing is sound law, but it does not apply to these circumstances. As the occupier of the construction site, defendant Davidson & Jones had a duty to warn even nontrespassing strangers as to dangers in the premises that it knew of and the contractor knew about the hazardous ditch and according to the supervisor would not have permitted its employees to work in it. But it was more than a mere occupier of land, as all the construction work, including that farmed out to independent contractors, was being done for it. Having direct knowledge of an imminent hazard to the life of a worker on its project, the efficiency of the construction, its own interest and that of the subcontractor, and the law's concern for human life required that it take steps at once to eliminate that hazard. No reasonable general contractor knowing of such a hazard to a subcontractor's employee—whether it was a potentially crumbling ditch, an insecure hoist, inefficient bolting and riveting of steel framing, or an unin-

sulated line charged with electricity—would idly permit the hazard to remain unabated to the danger of workers on its project.

STATE OF NORTH CAROLINA v. JAMES MORRIS FLETCHER

No. 8824SC87

(Filed 15 November 1988)

1. **Intoxicating Liquor § 14— unlawful sale of alcohol—receipt of consideration—sufficient evidence**

There was sufficient evidence of a transfer for consideration to support defendant's conviction of unlawful sale of an alcoholic beverage where it tended to show that an undercover officer asked defendant to provide her with an ounce of marijuana and a fifth of Seagram's Seven; defendant left his house and shortly thereafter returned and gave the officer a ziplock bag containing marijuana and a fifth of Seagram's Seven; defendant's son insisted that the merchandise was worth fifty dollars; the officer gave the son a one-hundred dollar bill and the son returned fifty dollars to her; and the son then passed the one-hundred dollar bill to defendant.

2. **Intoxicating Liquor § 14— unlawful sale of alcohol—burden of proving permit to sell**

A defendant charged with the unlawful sale of an alcoholic beverage had the burden of proving that he possessed a permit to sell alcohol, and defendant's motion to dismiss on the ground that no evidence was presented to show that he did not possess a permit was properly denied by the trial court.

3. **Narcotics § 4.2— possession of marijuana with intent to sell—sufficient evidence**

The State's evidence was sufficient for the jury in a prosecution for possession with intent to sell a controlled substance where it tended to show that defendant knew an undercover officer was interested in buying marijuana, led the officer to his house after indicating to her that he had "stuff" to smoke and sell, obtained a substance from his house and brought it to her in a plastic bag after she requested "an ounce," and where the undercover officer and another officer gave opinion testimony that the substance in the plastic bag was marijuana.

4. **Narcotics § 3.3— law officers—expert testimony identifying marijuana**

Two law officers were properly permitted to give expert opinion testimony that the substance in a clear plastic bag provided by defendant was marijuana where the first officer testified that she had been a law officer for five years, was a narcotics investigator, and had received schooling and on-the-job training in the identification of marijuana, and where the second officer testified that he had been a law officer for sixteen and one-half years and that he had had special training in the identification of drugs.

5. Narcotics § 4— sale of marijuana—sufficient evidence

The State's evidence was sufficient for the jury in a prosecution for sale of a controlled substance where it tended to show that defendant knew that a State's witness wanted to buy marijuana, brought marijuana from his house to the place where the witness was waiting, received fifty dollars for the marijuana and a fifth of liquor, and made no verbal or physical efforts to return or reject the money.

APPEAL by defendant from *Lamm (Charles), Judge.* Judgment entered 24 August 1987 in Superior Court, WATAUGA County. Heard in the Court of Appeals 7 September 1988.

Attorney General Lacy H. Thornburg, by Associate Attorney General Rodney S. Maddox, for the State.

Robert T. Speed for defendant-appellant.

GREENE, Judge.

This is an appeal from a criminal action in which defendant was found guilty of unlawful sale of an alcoholic beverage, possession with intent to sell a controlled substance, and sale of a controlled substance. Defendant assigns as error the Superior Court's denial of his motions to dismiss at the close of the State's evidence on the ground that there was insufficient evidence to submit the case to the jury.

The State's evidence at trial tended to show that on 10 October 1986, the defendant, James Morris Fletcher, was approached by Ann Biggerstaff (hereinafter "Biggerstaff"), a deputy from the Catawba County Sheriff's Department and Roxanne Dempster, an acquaintance of the defendant, while in the parking lot of a combination convenience store and gas station. Biggerstaff was loaned to the Watauga County Sheriff's Department to participate in an undercover drug program in which Dempster served as her informant.

Biggerstaff asked the defendant if he had anything to smoke and defendant responded by saying, "Yes, and plenty to drink also." Biggerstaff then asked defendant if he had anything to sell and defendant responded in the affirmative. The defendant then instructed Biggerstaff and Dempster to meet him at his house. When the women arrived at that location, the defendant was standing alone across the street from his house and showed them

where to park. Defendant then told the women to accompany him to the house adjacent to his house. As the three were walking, they passed the defendant's son, Bill, working on a car in the yard and defendant asked him if he had any pot. His son replied that he did not but that "there might be some in the house that belongs to James." The defendant, his son, and the women continued to the house and when they entered there was a small amount of marijuana lying on the table and his son began rolling a marijuana joint.

Biggerstaff asked the defendant if she could get a bag of pot like that on the table and defendant inquired as to how much she wanted. Biggerstaff responded "an ounce" and he said he would have to walk back down to his house to get it. At that time, Biggerstaff also asked him for "a fifth of Seagram's Seven" and the defendant responded that he "could do that too" and then left. After approximately fifteen minutes, the defendant returned with what Biggerstaff testified was a clear ziplock bag containing marijuana and a "fifth of Seagram's Seven."

Biggerstaff then asked the defendant what he wanted for the "stuff" and the defendant replied that he did not want to sell it but would give it to her. Defendant's son, Bill, however, insisted that the merchandise was worth fifty dollars and Biggerstaff then gave a one-hundred dollar bill to Bill and Bill returned fifty dollars to her. Bill then passed the one-hundred dollar bill to the defendant. The defendant did not try to give Biggerstaff any money back after Bill had handed her the fifty dollars in change.

At the close of the State's testimony, the defendant began discussion regarding the sufficiency of the evidence on all three charges. The court treated this discussion as three motions to dismiss and denied them accordingly. The defendant did not put on any evidence. At the conference on jury instructions, the defendant renewed his request to dismiss the charge relating to the sale of alcohol on the grounds the State offered no evidence on whether the defendant had a permit for the sale of alcohol. The court again denied the motion to dismiss on that particular charge. After receiving instructions, the jury found defendant guilty of (1) knowingly selling an alcoholic beverage without a permit, (2) possession with intent to sell a controlled substance, and (3) sale of a controlled substance.

The three questions presented for review are whether the trial judge: I) erred in denying defendant's motion to dismiss the charge of knowingly selling an alcoholic beverage without a permit; II) erred in denying defendant's motion to dismiss the charge of possession with intent to sell a controlled substance; and III) erred in denying defendant's motion to dismiss the charge of sale of a controlled substance.

We note initially that Rule 12(a) of the Rules of Appellate Procedure provides that "no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken." The judgment from which this appeal was taken was entered on 25 August 1987 and notice of appeal was given on the same date. Defendant was required to file the record on appeal on or before Friday, 22 January 1988, the 150th day after notice. The record in this case was filed on Wednesday, 27 January 1988, at least five days late. An appeal is subject to dismissal for failure "within the time allowed" to comply with Rule 12(a). App. R. 25. As the State has made no motion to dismiss the appeal for violations of Rule 12(a), we proceed to address the merits of this case. *Id.*

I

As his first assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charge of unlawful sale of an alcoholic beverage because insufficient evidence was presented on all elements of the offense. We disagree.

The defendant was charged with violation of N.C.G.S. Sec. 18B-102 which provides in part:

> (a) It shall be unlawful for any person to manufacture, *sell*, transport, import, export, deliver, furnish, purchase, consume, or possess any alcoholic beverages except as authorized by the ABC Law.

N.C.G.S. Sec. 18B-102(a) (1983) (emphasis added).

A

[1] To be a sale under N.C.G.S. Sec. 18B-102, there must be a "transfer . . . in any manner or by any means, for consideration." N.C.G.S. Sec. 18B-101 (13) (1983). Defendant argues there was no

mention of a sale of alcohol nor was there any mention of a price to be paid or received for the bottle that Biggerstaff took with her when she left defendant. The State offered evidence that defendant left the house with the request from Biggerstaff that he provide her with a specific quantity and brand of whiskey. Defendant complied with that request and was present as his son, Bill, insisted the merchandise was worth fifty dollars. The defendant, according to the testimony, actually received a one-hundred dollar bill for the transfer of the alcohol and marijuana. The testimony does not reflect that Bill was reimbursed by the defendant for the fifty dollars given to Biggerstaff in change nor does it show that the defendant tried to give the money back.

A trial court properly denies the defendant's motion to dismiss made at the close of the state's evidence where the state has produced substantial evidence on each element of the offense. *State v. Walton*, 90 N.C. App. 532, 369 S.E. 2d 101, 102 (1988). When ruling on a motion to dismiss, a trial court must view all the evidence in the light most favorable to the state, giving the state the benefit of every inference that can be drawn. *State v. Griffin*, 319 N.C. 429, 433, 355 S.E. 2d 474, 476 (1987). We believe that the evidence on this element of the charge when viewed in the light most favorable to defendant is substantial.

B

Defendant next argues insufficient evidence was presented that the bottle transferred to Biggerstaff by defendant actually contained an alcoholic beverage. Biggerstaff testified that the bottle was that of an unopened "fifth of Seagram's Seven" bourbon. Defendant objected to the testimony but failed to object when the bottle was offered into evidence before the jury. Furthermore, without objection, this exhibit was identified by Captain Dana Townsend of the Watauga County Sheriff's Department as a "bottle of Seagram's whiskey." It is a well established rule in North Carolina that "when evidence is admitted over objection, but the same evidence has . . . thereafter been admitted without objection, the benefit of the objection is ordinarily lost." 1 Brandis on North Carolina Evidence Sec. 30, p. 112 (1988); *see also State v. Wilson*, 313 N.C. 516, 532, 330 S.E. 2d 450, 461 (1985). Therefore, because the objection was not properly preserved for appeal, we will not address the sufficiency of evidence presented on this element of the charge, N.C.G.S. Sec. 15A-1446(b)(1983).

C

[2] Defendant also argues insufficient evidence was presented to show he did not possess a permit which would have authorized the sale of alcohol. Under N.C.G.S. Sec. 18B-102, however, the State is not required to prove the defendant did not possess a permit. Possession of a permit to sell is an exception to the prohibition against sale of alcohol. *See* N.C.G.S. Sec. 18B-900 to -906 (1983) (qualifications for permit to sell). The "burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class authorized by law to have intoxicants in his possession" for the purpose of sale. *State v. Gordon*, 224 N.C. 304, 307-08, 30 S.E. 2d 43, 45 (1944) (burden on person charged with unlawful possession or transportation of an intoxicating liquor for purpose of sale to show he is authorized by law to engage in the "bona fide transportation of liquor through, but not to be delivered in, the State"). Here, defendant offered no evidence that he possessed a permit for the sale of alcohol. Therefore, defendant's motion to dismiss the alcohol charge was properly denied.

II

[3] As the second assignment of error, defendant contends the trial court erred in denying his motion to dismiss the charge of possession with intent to sell a controlled substance on the ground there was insufficient evidence to submit the case to the jury. We disagree.

The defendant was charged with violation of N.C.G.S. Sec. 90-95(a)(1) (1985) which provides:

> (a) Except as authorized by this Article, it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or *possess with intent to* manufacture, *sell* or deliver, *a controlled substance;*

Id. (emphasis added). There are three elements to this offense: (A) possession of a substance; (B) the substance must be a controlled substance; and (C) there must be intent to sell the controlled substance. *State v. Casey*, 59 N.C. App. 99, 116, 296 S.E. 2d 473, 483-84 (1982).

A

An accused has possession of a controlled substance within the meaning of N.C.G.S. Sec. 90-95(a)(1) when he has both the "power and the intent to control its disposition or use." *State v. Pevia*, 56 N.C. App. 384, 388, 289 S.E. 2d 135, 138, *cert. denied*, 306 N.C. 391, 294 S.E. 2d 218 (1982). Viewing the present evidence in the light most favorable to the State, the defendant had the "power and the intent to control" the disposition of the marijuana. The evidence shows defendant knew Biggerstaff was interested in buying marijuana, led Biggerstaff to his house after indicating to her he had "stuff" to smoke and sell, and obtained the marijuana from his house and brought it to her after she requested "an ounce."

B

[4] Defendant contends the State failed to present evidence sufficient to show the substance obtained by Biggerstaff was marijuana. We disagree.

At the time of trial, Biggerstaff had been a law enforcement officer for almost five years and was a narcotics investigator with the Catawba County Sheriff's Department. She had schooling and on-the-job training in the identification of marijuana. At trial, she testified that in her opinion the substance in the clear plastic bag provided by the defendant was marijuana. Furthermore, Captain Townsend testified without objection that the substance in the clear plastic bag was in his opinion marijuana. Townsend testified that he had been a law enforcement officer for sixteen and one-half years and that he had special training in the identification of drugs.

Expert testimony is properly admissible when it "can assist the jury to draw certain inferences from facts because the expert is better qualified" than the jury to form an opinion on the particular subject. *State v. Bullard*, 312 N.C. 129, 139, 322 S.E. 2d 370, 376 (1984); *see also State v. Jenkins*, 74 N.C. App. 295, 299, 328 S.E. 2d 460, 463 (1985) (S.B.I. chemist's expert opinion that substance seized was marijuana was properly admitted where she had special training in analysis of controlled substances and whose job duties included analysis of controlled substances). "The test for admissibility is whether the jury can receive 'appreciable

help' from the expert witness." *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E. 2d 154, 156 (1985) (citation omitted). Here we believe the two officers, because of their study and experience, were better qualified than the jury to form an opinion as to the contents of the clear plastic bag. *See* N.C. R. Evid. 702 (witness qualified as expert by experience, training, or education may testify in form of opinion). The jury received "appreciable help" from the expert testimony and was free to consider the opinions in deciding whether they were convinced the substance was marijuana.

Admittedly, it would have been better for the State to have introduced evidence of chemical analysis of the substance, especially in light of the fact that testimony indicated the State Bureau of Investigation had conducted an analysis. *See State v. Bundridge*, 294 N.C. 45, 58, 239 S.E. 2d 811, 820 (1978) (absence of chemical analysis of bloodstains on clothing goes to weight of evidence rather than its admissibility). However, the absence of such direct evidence does not, as the appellant suggests, prove fatal. Though direct evidence may be entitled to much greater weight with the jury, the absence of such evidence does not render the opinion testimony insufficient to show the substance was marijuana. *See State v. Henry*, 51 W.Va. 283, 294, 41 S.E. 439, 444 (1902) (testimony of chemist who has analyzed blood and that of observer who merely recognizes it are both admissible although one may be entitled to much greater weight than the other).

Defendant also argues that no basis in fact existed for Biggerstaff's opinion that the substance was marijuana and at no time did she reveal what means she used to form her opinion. However, defendant failed to request the basis for her opinion on cross-examination. North Carolina Rules of Evidence 705 provides that an:

> [E]xpert may testify in terms of opinion or inference and give his reasons therefor [sic] without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise . . . . The expert may in any event be required to disclose the underlying facts or data on cross-examination. . . .

Id. The basis of an expert's opinion need not be stated unless requested by an adverse party and here defendant made no such re-

quest. *Cherry v. Harrell*, 84 N.C. App. 598, 605, 353 S.E. 2d 433, 438, *disc. rev. denied*, 320 N.C. 167, 358 S.E. 2d 49 (1987).

C

Sufficient evidence was also presented on the third element of this offense. The state may rely upon ordinary circumstantial evidence to prove a defendant has the intent to sell a controlled substance. *State v. Casey*, 59 N.C. App. 99, 118, 296 S.E. 2d 473, 484 (1982). As stated above, the evidence shows that defendant knew Biggerstaff was interested in buying marijuana, led her to his house after indicating to her he had "stuff" to smoke and sell, and obtained marijuana from his house and brought it to her after she requested "an ounce." Viewing this evidence in the light most favorable to the State, the defendant had the "intent to sell" the marijuana.

III

[5] Defendant's third assignment of error is the court's denial of his motion to dismiss the charge of sale of a controlled substance on the ground there was insufficient evidence to submit the case to the jury. We disagree. The sale of a controlled substance is a violation of N.C.G.S. Sec. 90-95(a)(1) (quoted above) as is the crime discussed in Section II. Sale and possession with intent to sell a controlled substance are separate offenses and defendant may be charged with both as a result of the same transaction without violating his right of double jeopardy. *State v. Stoner*, 59 N.C. App. 656, 659-61, 298 S.E. 2d 66, 68-69 (1982).

A sale in the context of this statute is a "*transfer* of property for a specified price payable in money." *State v. Creason*, 313 N.C. 122, 129, 326 S.E. 2d 24, 28 (1985) (emphasis in original) (*quoting State v. Albarthy*, 238 N.C. 130, 132, 76 S.E. 2d 381, 383 (1953)). The evidence shows defendant brought marijuana from his house to the place where Biggerstaff was waiting, knew she wanted to buy the marijuana, received fifty dollars in cash proceeds for the marijuana, and at no time made any verbal or physical efforts to return or reject the money. This evidence and the evidence that the substance transferred was a controlled substance as discussed above, taken in the light most favorable to the State, is sufficient to justify submitting the case to the jury on this charge.

IV

Defendant asserts as a fourth assignment of error the jury instruction by the court on acting in concert on the ground there was insufficient evidence to justify such an instruction. Whereas no reason or argument is stated or authority cited in appellant's brief for such assignment of error, it will be taken as abandoned. App. R. 28(b)(5).

No error.

Judges ORR and SMITH concur.

FRANCES I. ALSTON v. RAY MONK, ROVETTA ALLEN, AND GRADY PERKINS, D/B/A RALEIGH INSTITUTE OF COSMETOLOGY

No. 8810SC229

(Filed 15 November 1988)

1. **Rules of Civil Procedure § 15.2— contributory negligence—trial by implied consent**

The issue of contributory negligence was tried by the implied consent of the parties where there was no objection when the trial court submitted such issue to the jury.

2. **Negligence § 13.1— loss of hair—failure to have patch test of dye—no contributory negligence as matter of law**

Plaintiff was not contributorily negligent as a matter of law in failing to have a patch test before she had her hair dyed by defendants where the evidence showed that plaintiff did not know anything about a patch test until after the date on which her hair was dyed.

3. **Negligence § 14— hair coloring services—cosmetology school—no assumption of risk**

Plaintiff's claim for loss of hair allegedly caused by defendants' negligent performance of hair coloring services was not barred as a matter of law by assumption of the risk when plaintiff went to a cosmetology school which uses students to color and style hair where plaintiff testified that defendant instructors, not a student, colored her hair, and defendants claimed that a student did the work under the supervision of defendant instructors.

4. **Trial § 38.1— giving requested instructions in substance**

The trial court need not give special instructions exactly as requested by a party so long as the court's charge, taken as a whole, conveys the substance of the necessary requested instructions.

5. Contracts § 10— cosmetology school—release from liability against public policy

The owner of a cosmetology school and the school's instructors could not contract away their duty of reasonable care by having customers sign a release before receiving cosmetology services at the school, since the practice of cosmetology and the education of students in this field may affect the health of the general public.

6. Rules of Civil Procedure § 16— photograph not listed in pretrial order

The trial court did not abuse its discretion in the admission during plaintiff's rebuttal of a photograph of plaintiff which had not been listed in the pretrial order. N.C.G.S. § 1A-1, Rule 16.

7. Witnesses § 6— impeachment of witness who hasn't testified

The trial court did not err in excluding cross-examination of plaintiff designed to impeach a witness who had not yet testified.

8. Appeal and Error § 49.1— refusal to allow hair examination during testimony —failure of record to show testimony

In an action involving the coloring of plaintiff's hair, the trial court's refusal to permit one defendant during direct examination to physically examine plaintiff's hair could not be held erroneous where the record fails to show what such defendant's testimony would have been during or after her examination of plaintiff's hair.

9. Negligence § 40— instruction on causation—supporting evidence

When viewed in context, plaintiff's expert expressed his opinion that dye used in coloring plaintiff's hair caused her baldness, and this evidence supported the trial court's instruction to the jury on causation.

10. Appeal and Error § 31.1— plain error rule—inapplicability in civil cases

The plain error rule is inapplicable in civil cases.

11. Damages § 9— avoidable consequences—instruction not required

In an action to recover damages for the loss of plaintiff's hair after it was colored by defendants, the evidence did not require the trial court to give defendants' requested instruction on avoidable consequences where plaintiff's evidence showed that, following the incident, she went to her doctor and promptly thereafter to a dermatologist, and that she took medication and applied a cream to her scalp pursuant to her doctors' instructions.

12. Pleadings § 37— admissions of employment—no need for jury determination

Where defendants' answers admitted plaintiff's allegations that two defendants were employed by the third defendant, plaintiff's allegations will be taken as true and there was no need for the jury to determine this issue.

APPEAL by defendants from *Battle, Judge.* Judgment entered 24 September 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 8 September 1988.

This is a personal injury action in which plaintiff alleges negligent performance of hair styling and coloring services by defendants which caused plaintiff to lose her hair. Defendant Grady Perkins (Perkins) does business as the Raleigh Institute of Cosmetology (Institute). Defendants Ray Monk (Monk) and Rovetta Allen (Allen) are employed as instructors at the Institute. The Raleigh Institute of Cosmetology is a school which trains its students to do hair styling and coloring, cosmetology and other beauty services. The students receive practical training by providing services to the public under the supervision of the Institute's instructors.

On 28 March 1985 plaintiff went to the Institute to have her hair colored and styled. She alleged that Monk and Allen negligently performed these services for her. Plaintiff contends that the defendants' negligence caused her to lose her hair.

At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence, defendants moved for a directed verdict. Both motions were denied. The trial court submitted the case to the jury on the issues of defendants' negligence and plaintiff's contributory negligence. The jury returned a verdict for plaintiff for $70,000. From the judgment entered, defendants appeal.

Kirk, Gay, Kirk, Gwynn & Howell, by Philip G. Kirk and Joseph T. Howell, for plaintiff-appellee.

Yeargan, Thompson & Mitchiner, by W. Hugh Thompson, for defendant-appellants.

EAGLES, Judge.

Defendants here present numerous assignments of error and argue they are entitled to a new trial. After a careful review of the record we disagree and affirm the trial court's judgment.

By defendants' first assignment of error they contend that denial of their motions to dismiss at the close of plaintiff's evidence and at the close of all the evidence was error. We disagree.

By presenting evidence on their own behalf, defendants waived their motion to dismiss made at the close of plaintiff's evidence. *Overman v. Products Co.*, 30 N.C. App. 516, 227 S.E. 2d 159

(1976). Defendants properly renewed their motion at the close of all the evidence and asserted that plaintiff either assumed the risk or was contributorily negligent as a matter of law. The trial court denied defendants' motion.

[1] Here defendants failed to properly plead contributory negligence as an affirmative defense. G.S. 1A-1, Rule 8(c). This failure would ordinarily result in a waiver of the defense, but we have held that the parties may still try the unpleaded issue by implied consent. *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E. 2d 656 (1984). Since there was no objection when the trial court submitted the issue of contributory negligence to the jury, we hold that contributory negligence was tried by the implied consent of the parties.

The question presented by defendants' motion for a directed verdict is whether the evidence, in the light most favorable to the plaintiff, is sufficient to be submitted to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). As a general rule, a directed verdict motion should not be granted in a negligence action. *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981). On the other hand, a directed verdict against plaintiff should be granted if plaintiff fails to establish the elements of her case, *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 348 S.E. 2d 162 (1986), *cert. denied*, 318 N.C. 695, 351 S.E. 2d 748 (1987), or if the evidence presented clearly establishes plaintiff's contributory negligence and no other reasonable inference may be drawn. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978).

[2] Defendants claim that plaintiff, as a matter of law, was either contributorily negligent or assumed the risk. They argue that plaintiff was contributorily negligent in that she knew she was supposed to have a patch test done, and yet failed to do so. The purpose of the patch test is to determine whether plaintiff might have an adverse reaction to the chemicals in the hair dye. In the light most favorable to the plaintiff, the evidence here showed that plaintiff did not know anything about a patch test until *after* she went to the Institute on 28 March 1985. Accordingly, we cannot say that plaintiff's actions constituted contributory negligence as a matter of law.

[3] Defendants' assumption of the risk claim arises from their contention that plaintiff knew the inherent risks involved when she hired defendant who used students to color and style her hair. However, both plaintiff's allegations and her testimony assert that defendants Monk and Allen themselves, not a student, colored her hair. Defendants claim that a student did the work on plaintiff's hair under the supervision of defendants Monk and Allen. From this record, we cannot say that as a matter of law plaintiff is barred by assumption of the risk.

As an alternative basis for relief here, defendants argue that the trial court erred in refusing to give defendants' requested instructions on the issue of contributory negligence and in refusing to charge the jury on the issue of release. We disagree.

[4] Any party may make a written request for special jury instructions. G.S. 1A-1, Rule 51(b). The trial court need not give special instructions exactly as requested by a party so long as the court's charge, taken as a whole, conveys the substance of the necessary requested instructions. *Anderson v. Smith*, 29 N.C. App. 72, 223 S.E. 2d 402 (1976). Here the trial court's instruction told the jury that it was for them to determine whether or not failing to have a patch test done constituted negligence on the part of the plaintiff. This instruction, though stated differently, conveys the substance of defendants' requested instruction. *White v. Lowery*, 84 N.C. App. 433, 352 S.E. 2d 866, *disc. rev. denied*, 319 N.C. 678, 356 S.E. 2d 786 (1987).

[5] Defendants argue that plaintiff signed a written release before accepting the Institute's services and that the release bars plaintiff's claim. The trial court refused to charge the jury on the issue of release stating that defendants did not properly raise the issue in their answer. Even though the trial court erred when it commented, outside the presence of the jury, that defendants had not raised the issue of release, we hold that these defendants may not contract away their duty of reasonable care.

A release defense is an affirmative defense which must be specially pleaded and on which defendants have the burden of proof. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E. 2d 277 (1979). Furthermore, the courts do not favor releases from one's own negligence. *Johnson v. Dunlap*, 53 N.C. App. 312, 280 S.E. 2d 759 (1981), *cert. denied*, 305 N.C. 153, 289 S.E. 2d 380

(1982). While recognizing the right to contract against liability, our courts have stated "that a party cannot protect himself by contract[ing] against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved." *Hall v. Refining Co.*, 242 N.C. 707, 710, 89 S.E. 2d 396, 398 (1955).

We note that the practice of cosmetology and instruction leading to licenses in cosmetology involves the use of hazardous chemicals which may adversely affect the health of any customer. Consequently, our General Assembly extensively regulates the practice of cosmetology and prescribes extensive education and training requirements. G.S. 88-1, *et seq.* A registered cosmetologist must have successfully completed many hours of education in an approved school and much practical training in the field. Additionally, to be licensed they must pass an examination administered by the State Board of Cosmetic Art Examiners. The practice of cosmetology and the education of students in this field may affect the health of the general public. Accordingly, we hold that the Institute and its employees may not contract with their customers in a manner that would absolve themselves from their duty to use reasonable care.

[6] Defendants next assign as error the trial court's admission during plaintiff's rebuttal of a photograph of plaintiff which had not been listed in the pretrial order. We find this assignment of error to be without merit.

A pretrial order controls the subsequent course of trial unless modified by the trial court in order to prevent manifest injustice. G.S. 1A-1, Rule 16; *Gilbert v. Thomas*, 64 N.C. App. 582, 307 S.E. 2d 853 (1983). However, admission of evidence not delineated in the pretrial order is within the sound discretion of the trial court. *See Lay v. Mangum*, 87 N.C. App. 251, 360 S.E. 2d 481 (1987).

In an attempt to diminish plaintiff's claim for damages defendants presented evidence which suggested that even before her treatment at the Institute plaintiff's hair was so thin that her scalp could be seen. In rebuttal plaintiff submitted a photograph of herself taken before the incident. We see no abuse of discretion by the trial court in allowing the photograph into evidence.

[7] By their third assignment of error defendants claim that the trial court erred in excluding from the jury's consideration a portion of defendants' cross-examination of plaintiff. The portion excluded questioned plaintiff's relationship with a potential witness, Charles Harris, which defendants claim would show that Harris' testimony might be biased.

While defendants are allowed wide latitude on cross-examination, the trial court may still limit cross-examination when the matters sought to be inquired into are only marginally relevant. *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983). Here defendants attempted, through cross-examination of plaintiff, to impeach a witness who had not yet testified. In fact, at that point in the trial there was no guarantee that plaintiff would call Harris as a witness. Once Harris took the stand, attempts to impeach his testimony would be proper; but at this stage of the trial, the relevance of the information is questionable. *State v. Pearson*, 24 N.C. App. 410, 210 S.E. 2d 887, *aff'd*, 288 N.C. 34, 215 S.E. 2d 598 (1975). This assignment of error is without merit.

[8] Defendants next assign as error the trial court's refusal to permit defendant Allen, during her direct examination, to physically examine plaintiff's hair. Defendants claim the court's refusal was prejudicial in that it had allowed other witnesses to examine plaintiff's hair during the trial. This record, however, fails to indicate what defendant Allen's testimony would have been during or after her examination of plaintiff's hair. Accordingly, we are unable to determine whether the exclusion of Allen's testimony was error. *Hinson v. Brown*, 80 N.C. App. 661, 343 S.E. 2d 284, *disc. rev. denied and appeal dismissed*, 318 N.C. 282, 348 S.E. 2d 138 (1986). This assignment of error is overruled.

[9] By defendants' fourth assignment of error they argue that the trial court erred by allowing the testimony of plaintiff's expert, Dr. Robert W. McDowell, concerning the cause of plaintiff's baldness. Defendants further claim that without Dr. McDowell's testimony there was no evidence of causation warranting an instruction to the jury on that element of plaintiff's case. We disagree.

The following direct examination of Dr. McDowell occurred:

> Q. Do you have an opinion as to what may have caused the baldness?

A. I would assume that the dye caused it.

Mr. Fellers: I'm going to object to that, Your Honor. Motion to strike.

Court: Well, objection sustained as to what he assumes.

Q. Aside from an assumption, do you have an opinion as to what may have caused it?

A. In my opinion.

Mr. Fellers: I'm going to object.

Court: Objection overruled. Go ahead.

When viewed in context, it is clear that Dr. McDowell expressed that it was his opinion that the dye used in coloring plaintiff's hair caused her baldness. Accordingly, the trial court's ruling and its subsequent instruction on causation were proper.

[10] Defendants' fifth assignment of error concerns the jury instructions. The court instructed the jury that defendants were required to use their best judgment and that failure to use their best judgment constituted negligence. Defendant now argues that the instruction was error but we note that at trial defendants failed to object to this portion of the court's charge. Accordingly, we may consider this exception only if it falls within the plain error rule. N.C.R. App. Proc. 10(b)(2); *In re Will of Maynard*, 64 N.C. App. 211, 307 S.E. 2d 416 (1983), *disc. rev. denied*, 310 N.C. 477, 312 S.E. 2d 885 (1984). In *Wachovia Bank v. Guthrie*, 67 N.C. App. 622, 313 S.E. 2d 603, *cert. denied*, 312 N.C. 90, 321 S.E. 2d 909 (1984), we held that the plain error rule was not available in civil cases. Accordingly, this assignment of error is without merit.

[11] Defendants next assign as error the trial court's refusal to give defendants' requested instruction on avoidable consequences. Defendants argue that plaintiff presented no evidence showing that she exercised reasonable care in avoiding the loss of her hair. We disagree.

When a defendant submits a request for specific instructions which are correct and are supported by the evidence, the trial court commits reversible error in failing to submit the substance of those instructions to the jury. *The Property Shop v. Mountain City Investment Co.*, 56 N.C. App. 644, 290 S.E. 2d 222 (1982).

However, the evidence here does not support an instruction on avoidable consequences. Following this incident, plaintiff went to her doctor, Dr. McDowell, and promptly thereafter to a dermatologist, Dr. Reid. No evidence presented by any party showed that plaintiff failed to follow either doctor's advice. In fact, plaintiff testified on direct examination that pursuant to her doctors' instructions she took certain medications orally and, further, applied a cream to her scalp and forehead several times daily for several days. No testimony indicates that plaintiff acted other than reasonably and pursuant to her doctors' advice in dealing with her injuries. This assignment of error is overruled.

[12] Defendants' seventh assignment of error alleges that the trial court erred in instructing the jury that any negligence on the part of defendants Monk and Allen would be imputed to defendant Perkins as a matter of law. Instead, defendants contend the court should have given a peremptory instruction which would have allowed the jury to determine the factual issue of whether or not Monk and Allen were employed by Perkins. We disagree.

Plaintiff's complaint alleged that Perkins was doing business as the Raleigh Institute of Cosmetology and that Monk and Allen were employed there. Defendants' answers admitted each of these allegations. Having been admitted in the answer the allegations are taken as true. *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588, *cert. denied*, 281 N.C. 758, 191 S.E. 2d 356 (1972). There was no need for the jury to determine facts which had been admitted in the pleadings. Accordingly, we hold that the trial court's instruction was proper.

For the foregoing reasons, we find no error in the trial court's judgment.

No error.

Judges PHILLIPS and PARKER concur.

Northampton County Drainage District Number One v. Bailey

NORTHAMPTON COUNTY DRAINAGE DISTRICT NUMBER ONE, PLAINTIFF v. LARRY DONALD BAILEY, JR. AND WIFE, MAXINE SPENCE BAILEY; BETTY GATLIN, UNMARRIED; CLAUDE M. FENNELL AND WIFE, BRENDA D. FENNELL; THOMAS L. REDD AND WIFE, CONNIE B. REDD; JESSE B. OUTLAW AND WIFE, DESSIE B. OUTLAW; WILLIAM SLADE AND WIFE, KATHLEEN SLADE; JAMES M. BUSH AND WIFE, DOROTHY W. BUSH; THOMAS DAVID TANN AND WIFE, VERNEAR O. TANN; JESSE LEE EASON AND WIFE, LILY M. EASON; LUCIUS CORNELL SLADE, UNMARRIED; WHALLON HOLLOMAN AND WIFE, SAWYER HOLLY HOLLOMAN; JAMES O. BUCHANAN, TRUSTEE FOR FARMER'S HOME ADMINISTRATION, LIENHOLDER; JOSEPH J. FLYTHE, TRUSTEE FOR THE FEDERAL LAND BANK OF COLUMBIA, LIENHOLDER; THURMAN E. BURNETTE, TRUSTEE FOR FARMER'S HOME ADMINISTRATION, LIENHOLDER; JOSEPH J. FLYTHE, TRUSTEE FOR JOHN M. FIELDS, LIENHOLDER, DEFENDANTS, AND MANNING P. COOKE, AGENT, ROBERT DARRELL MORRIS, JOHN SOUTHGATE VAUGHAN, PHILLIP B. PARKER AND JOHN D. SNIPES, JR., INTERVENOR-DEFENDANTS

No. 876SC1204

(Filed 15 November 1988)

1. **Drainage § 4— method of selecting commissioners of drainage districts—not unconstitutional**

There is no unconstitutional infirmity in N.C.G.S. § 156-81(a) and (i) in permitting the Clerk of Superior Court of Northampton County to either appoint the commissioners of a two-county drainage district or provide for their election by the landowners of the district.

2. **Drainage § 4— drainage district meetings—subject to open meetings requirement**

Plaintiff drainage district was subject to the open meetings requirement of N.C.G.S. § 143-318.10, but its failure to notify defendants of meetings at which assessments were levied did not deprive defendants of due process because defendants had a right to seek a declaratory judgment voiding the disputed action within 45 days after plaintiffs' action was disclosed.

3. **Drainage § 8— collection of assessments—failure to levy by first Monday in September**

Plaintiff drainage district's failure to levy the annual assessments for 1974 and 1983 by the first Monday in September of those years did not bar the collection of the assessments for those years because the assessments are to be collected in the same manner as State and county taxes, and the failure to levy any tax within the time prescribed by law is an immaterial irregularity that does not affect the validity of the assessment. N.C.G.S. § 105-394(3).

4. **Limitation of Actions § 1.1— collection of drainage district assessments—defensive statute of limitations—not available to intervenors**

In an action by a drainage district to collect assessments in which some defendants intervened, the statute of limitations was not available to the in-

tervenors because statutes of limitation are affirmative defenses available only to the person against whom an action is brought. N.C.G.S. § 1-46.

5. Attorneys at Law § 7.5— collection of drainage district assessments—attorney's fees

The trial court erred by taxing attorney fees against plaintiff drainage district in an action to collect drainage assessments because the specific provision of N.C.G.S. § 105-374(i) takes precedence over the general one in N.C.G.S. § 6-21.

Judge BECTON dissenting.

APPEAL by plaintiff from *Phillips, Judge*. Judgment entered 6 August 1987 in Superior Court, HERTFORD County. Heard in the Court of Appeals 6 June 1988.

Plaintiff drainage district, formed in 1960 pursuant to a special proceeding filed in Northampton County, maintains 17.2 miles of canals and ditches that serve 29,750 acres of land in Northampton and Hertford Counties. Its commissioners are appointed by the Clerk of Superior Court of Northampton County, as G.S. 156-54, *et seq.* permits. Plaintiff has never filed a schedule of its meetings or notified landowners in the district when its meetings to levy assessments would be held. John S. Vaughan owns land in Hertford County within the district, and in December, 1982 plaintiff brought foreclosure proceedings against him to collect maintenance assessments levied for the years 1968, 1969, 1974, 1975, 1976, 1978, 1980, and 1981. Vaughan immediately paid the assessments and plaintiff voluntarily dismissed the action. Within a month thereafter, claiming that the assessments were illegal and that certain of them were barred by the statute of limitations, Vaughan asked plaintiff for a hearing, which plaintiff denied, asserting that the statute of limitations defense had been waived, and Vaughan did not pursue the matter further. In April, 1984 plaintiff filed this action to collect assessments for the years 1974, 1975, 1976, 1978, 1980, 1981, 1982, and 1983 from the original defendants, all of whom own land in the Hertford County part of the district. By their answer defendants asserted, *inter alia*, that the assessments were void because the statutes under which the district was formed are unconstitutional for various reasons and because plaintiff did not comply with the open meetings law and other statutes. With the court's approval Vaughan and three other Hertford County landowners intervened as defendants and as-

serted the same defenses as the original defendants, and Vaughan counterclaimed for the assessments he paid in the prior proceeding.

After a trial without a jury the court entered judgment to the following effect: (1) The provisions in G.S. 156-81(a) and (i) granting the Clerk of Superior Court of Northampton County authority to either appoint the drainage district commissioners or provide for their election by the district landowners violate defendants' due process rights under both the state and federal constitutions because it is an improper delegation of legislative authority, and violate their equal protection rights under both constitutions because they cannot vote for the Clerk of Superior Court of Northampton County, whereas district members who live in Northampton County can, and plaintiff was enjoined from levying any further assessments, but was permitted to collect the assessments already levied except as noted below; (2) by levying assessments at meetings that were neither publicly scheduled nor announced plaintiff violated defendants' due process rights under both constitutions as well as the open meetings law, G.S. 143-318.9, *et seq.*; (3) the assessments for 1974 and 1983 were void because they were not levied on or before the first Monday in September of those years as G.S. 156-105 requires; (4) the ten-year statute of limitations barred plaintiff from collecting the assessments for 1968 and 1969 from intervenor defendant Vaughan and a refund of those payments was ordered; and (5) defendants were entitled to recover their costs, including attorneys' fees, which by a subsequent order were set at $4,900 for the original defendants and $5,300 for the intervenor defendants.

Frank M. Wooten, Jr. and Browning, Sams, Poole & Hill, by Robert R. Browning, for plaintiff appellant.

Baker, Jenkins & Jones, by Ronald G. Baker and Charles J. Vaughan, for defendant and intervenor defendant appellees.

Geo. Thomas Davis, Jr. for Hyde County Drainage District #7, amicus curiae.

Mayo & Mayo, by William P. Mayo, for Beaufort County Drainage District Number One (Pantego Creek Drainage District), Beaufort County Drainage District Number Two (Broad Creek Drainage District), Beaufort County Drainage District Number Five (Albemarle Drainage District) and Beaufort County Pungo Drainage District Number One (Pungo River Drainage District), amicus curiae.

Attorney General Thornburg, by Special Deputy Attorney General Daniel C. Oakley and Assistant Attorney General Philip A. Telfer, for the State of North Carolina, amicus curiae.

PHILLIPS, Judge.

All the foregoing rulings by the court are challenged by plaintiff's appeal and we will discuss them in the order stated.

I.

[1] We see no constitutional infirmity in G.S. 156-81(a) and (i) permitting the Clerk of Superior Court of Northampton County to either appoint the commissioners of this two-county drainage district or provide for their election by the landowners as he sees fit, and the court's ruling to the contrary is reversed and the injunction against plaintiff levying assessments in the future is dissolved. The General Assembly has inherent authority to delegate a portion of its prerogative to subordinate political subdivisions. *Adams v. Department of Natural and Economic Resources*, 295 N.C. 683, 249 S.E. 2d 402 (1978). Permitting the Clerk of Superior Court to establish a drainage district is not an unconstitutional delegation of legislative authority, as the Clerk's function in such matters is quasi-judicial in nature. *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910). Nor is it improper to delegate the power to a single Clerk of Court when the district includes lands in more than one county. *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 28 L.Ed. 569, 4 S.Ct. 663 (1884). Since the delegation does not burden a suspect class it is enough that it has a rational basis, *White v. Pate*, 308 N.C. 759, 304 S.E. 2d 199 (1983); which it clearly does, since the tedious, time consuming, unremunerative position of drainage district commissioner is not one that is likely to always be filled by the electoral process. And as to the right to vote: In this instance, the right that has constitutional protection is not the right to vote *per se*, but the *equal* right to vote, and

the relevant jurisdiction is not the county or counties involved, but the drainage district itself. Since under the present arrangement no one in either county can vote for the commissioners and if the Clerk calls for an election the persons that are enfranchised to vote for the commissioners under G.S. 156-79 and G.S. 156-81(a) are the *landowners* of the district, not the *residents* of the counties within the district, defendants' claim that they are treated unequally has no basis. *White v. Pate*, 308 N.C. 759, 304 S.E. 2d 199 (1983).

II.

[2] Though plaintiff contends otherwise, as a political subdivision of the State organized pursuant to the provisions of G.S. 156-54 with quasi-judicial and administrative authority, plaintiff is subject to the open meetings requirements of G.S. 143-318.10; but its failure to notify defendants of its meetings at which the assessments were levied did not deprive them of due process, as the court held. For under G.S. 143-318.10 and G.S. 143-318.16A(b) defendants had a right within 45 days after plaintiff's action was disclosed to seek a declaratory judgment voiding the disputed action, as well as a prospective injunction against its repetition, but took neither step. Having failed to avail themselves of an adequate remedy that the law provided their argument that their due process rights were abridged has no foundation. Furthermore, the assessments were levied to cover routine maintenance costs of the drainage district; they were not taxes, duties, or imposts, the levying of which had met due process and equal protection requirements, *Drainage Commissioners of Mattamuskeet District v. Davis*, 182 N.C. 140, 108 S.E. 506 (1921); and since they were in the same ratio as for the costs of construction and installation notice was not required. G.S. 156-138.3, G.S. 156-93.1. This ruling necessarily overrules defendants' cross-appeal on this question.

III.

[3] Plaintiff's failure to levy the annual assessments for 1974 and 1983 by the first Monday in September of those years did not bar the collection of the assessments for those years, as the court held. G.S. 156-105 provides that assessments shall be collected "in the same manner and by the same officers as the State and county taxes are collected," and G.S. 105-394(3) provides that "[t]he

failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law" is an immaterial irregularity that does not affect the validity of the assessment.

IV.

[4] The court's holding that the statute of limitations was available to the defendant intervenors is erroneous. Statutes of limitations prescribe the periods in which actions may be brought. G.S. 1-46. As such they are affirmative defenses available only to persons against whom an action is brought; they are not available to volunteers who intervene to assert some claimed right of their own. The statute of limitations relates only to the remedy and a defendant may not rely upon it until the plaintiff seeks his remedy. *Berry v. Corpening*, 90 N.C. 395 (1884). In this case plaintiff has sought no remedy at all against the intervenors. Furthermore, defendant intervenor Vaughan waived his right to plead the statute of limitations as a matter of law by failing to assert that defense in the former action in which he paid the assessments that he now claims are barred, *Nationwide Mutual Insurance Co. v. Edwards*, 67 N.C. App. 1, 312 S.E. 2d 656 (1984), and the judgment in his favor is vacated.

V.

[5] The taxing of attorneys fees against plaintiff was also error. G.S. 6-21(8) authorizes the court in its discretion to award fees, as part of the costs, "[i]n all proceedings under the Chapter entitled Drainage, *except as therein otherwise provided.*" (Emphasis added.) In the Chapter entitled Drainage, after providing by G.S. 156-105 for the assessments to be collected in the same manner and by the same officers as State and county taxes, it is otherwise provided by G.S. 105-374(i) that as to costs in such collection proceedings:

> The word "costs," as used in this subsection (i), shall be construed to include one reasonable attorney's fee for the *plaintiff* in such amount as the court shall, in its discretion, determine and allow. When a taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs *an attorney's fee for the defendant* unit in such amount as the court shall, in its discretion, determine and allow. (Emphasis supplied.)

Since this specific provision takes precedence over the general one in G.S. 6-21, the award of attorneys fees to the defendant and intervenor property owners has no statutory authority, and is therefore vacated.

As to plaintiff's appeal the judgment is affirmed in part, reversed and vacated in part, and remanded for further proceedings in accord with this opinion.

As to defendants' cross-appeal the judgment is affirmed.

Judge COZORT concurs in the result.

Judge BECTON dissents.

Judge BECTON dissenting.

In my view, the facts of this case sufficiently differ from those of *White v. Pate* so as to keep *White* from being dispositive of defendants' equal protection claim.

In *White*, the drainage district was located entirely within Craven County; its commissioners were appointed by the Clerk of the Superior Court of that county. 308 N.C. at 761, 304 S.E. 2d at 201. In contrast, the drainage district in this case encompasses land in both Northampton and Hertford Counties, but it is the Clerk of Court of Northampton County alone who appoints the commissioners. Although none of the landowners in the drainage district may elect the commissioners, the landowners in Northampton County may vote for the Clerk who appoints those commissioners. The Hertford County landowners, on the other hand, have no voice in selecting the Clerk.

The rationale upon which the *White* court determined that the plaintiff landowners were not a suspect class nor suffered a burden upon their fundamental right to vote does not apply with similar persuasiveness to the present case. I find merit in the equal protection argument raised by the defendants. Believing, therefore, that this case turns on facts that adequately distinguish it from those upon which our Supreme Court decided the equal protection claim in *White*, I dissent.

STATE OF NORTH CAROLINA v. IDELLA KING, IZELLA KING, DEFENDANTS

No. 8826SC258

(Filed 15 November 1988)

1. **Searches and Seizures § 24— search warrant—confidential informant—sufficiency of affidavit**

An affidavit contained sufficient information for a magistrate to find probable cause to issue a search warrant where it stated that a confidential informant had been to defendants' residence within the past forty-eight hours and had personally observed a named person who resided there in possession of cocaine, that the informant was familiar with the appearance of cocaine prepared for sale, and that the informant was known to the affiants for periods of six months to one and one-half years and had provided reliable information which resulted in numerous drug arrests.

2. **Searches and Seizures § 44— affidavit for search warrant—unlawfully obtained information—remand for determination**

Defendants' motion to suppress evidence is remanded to the trial court for a determination of whether information used to establish probable cause for issuance of a search warrant was unlawfully obtained where defendants contended in their motion to suppress that the State's informant may have acquired information used to secure the warrant in a break-in of their residence while he was acting as the State's agent and asked that the identity of the informant be revealed, the trial judge deferred a ruling on this request until he could conduct an in-camera examination of the informant, this examination was never conducted, and it cannot be determined from the record whether the informant legally obtained the information which he gave to the affiants.

APPEAL by the State from *Sherrill (W. Terry), Judge.* Order entered 11 November 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 September 1988.

Defendants were indicted for the felonious possession of cocaine, a violation of G.S. 90-95(h). Defendants subsequently filed a motion to suppress evidence seized at their residence pursuant to the execution of a search warrant. The search warrant was issued on information provided by a confidential informant. Defendants contended that (1) the application for the search warrant failed to establish probable cause; (2) an *in camera* examination of the informant should be conducted to determine if the information contained in the application was true; (3) the informant was paid by the State and gained his information by virtue of an illegal break-in at defendants' residence; and (4) the informant's identity should be revealed because the informant is an essential witness in de-

fendants' cases. At the 21 October 1987 hearing on the motion to suppress, evidence was received which showed that defendants reported to police a break-in at their residence within the 48-hour period immediately preceding the issuance and execution of the search warrant. This break-in occurred during the same period of time in which the State's confidential informant allegedly observed the cocaine in defendants' house. The trial court deferred ruling on defendants' motion until an *in camera* examination of the informant could be conducted. For reasons not revealed by the record, this examination was never held. On 11 November 1987, the trial court granted defendants' motion to suppress concluding that the search warrant was invalid in that the application was insufficient to establish probable cause and that the "good faith" exception to the exclusionary rule did not apply. The State appeals.

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

Goodman, Carr, Nixon & Laughrun, by Theo X. Nixon, for defendants-appellees.

SMITH, Judge.

The record on appeal reveals that on 30 June 1987, officers Kearney, Hazelton and Sennett of the Charlotte Police Department obtained a warrant to search defendants' residence at 1509 Luther Street and any occupant at the residence including Bo King, defendants' brother and a suspected drug dealer. The affidavit accompanying the application stated:

> We, Officers C. B. Kearney, G. P. Sennett and T. R. Hazelton, have received information from a confidential and reliable informant that B/M, Bo King, is residing at 1509 Luther Street and is possessing cocaine for the purpose of sale at 1509 Luther Street. This informant has been to 1509 Luther Street within the past 48 hours and has observed Bo King possessing cocaine. This informant is familiar with cocaine and how it is packaged for street use. These affiants have known this informant for approximately 1½ years and 6 months, respectively and during this time this informant's information has led to the arrests and convictions of many people for violations of the North Carolina Controlled Sub-

> stances Act. Based on the information contained in this application we request a search warrant be issued for 1509 Luther Street, Charlotte, North Carolina, Mecklenburg County, USA.; and a black male, Bo King, and any other occupants.

After receiving sworn testimony from the officers that the information in the affidavit was true, the magistrate issued the warrant. The officers executed the warrant on 30 June 1987. Defendants were present at the residence during the search. The officers seized approximately 84 grams of a white powdery substance later identified as cocaine, currency and drug paraphernalia. Defendants were arrested. Bo King was not at the residence during the search although officers found letters addressed to him bearing the Luther Street address.

The State brings forward as its sole assignment of error the trial court's order granting defendants' motion to suppress evidence seized pursuant to the warrant. Specifically, the State contends that the facts set forth in the affidavit support a finding of probable cause and alternatively that the items seized are admissible under the "good faith" exception to the exclusionary rule.

An application for a search warrant must be made in writing under oath or affirmation and contain, in part, the following information:

> (2) A statement that there is probable cause to believe that items subject to seizure . . . 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.

G.S. 15A-244. To establish probable cause, an affidavit for a search warrant must set forth such facts that "a reasonably discreet and prudent person would rely upon . . . before they will be held to provide probable cause justifying the issuance of a search warrant." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E. 2d 254, 256 (1984). "[An] 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." *Id.*

To determine whether a warrant is based on probable cause, our Supreme Court, in *State v. Arrington, supra,* adopted the "totality of the circumstances" test set forth in *Illinois v. Gates,* 462 U.S. 213, 76 L.Ed. 2d 527, 103 S.Ct. 2317, *reh'g denied,* 463 U.S. 1237, 77 L.Ed. 2d 1453, 104 S.Ct. 33 (1983). In *Gates,* the Court stated:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238, 76 L.Ed. 2d at 548, 103 S.Ct. at 2332.

[1] Defendants contend and the lower court found that the affidavit lacked sufficient details to support the informant's credibility, general knowledge of drugs or specific knowledge about the drugs involved in this case. We do not agree. An affidavit for a search warrant need only provide the magistrate with a reasonable basis to believe that the proposed search would reveal the presence of the items sought in the place named. *See Arrington, supra.* The affidavit here contains information that establishes that the informant had been to defendants' residence within 48 hours before the application for the warrant was presented to the magistrate and had personally observed Bo King in possession of cocaine. The affidavit further reveals that the informant was familiar with the appearance of cocaine prepared for sale. Additionally, the informant was known to the affiants for a period of six months to one and one-half years and had provided reliable information which had resulted in numerous drug arrests. "If [an] informant had stated to the affiant that recently he *personally had seen* the [drugs] in defendant's possession at his residence, the affidavit would clearly suffice." *State v. Whitely,* 58 N.C. App. 539, 543, 293 S.E. 2d 838, 841, *review denied, appeal dismissed,* 306 N.C. 750, 295 S.E. 2d 763 (1982) (emphasis original). Further, our Supreme Court has held that a statement that an informant

had previously provided information which led to arrests was sufficient to show reliability. *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976). We conclude that the affidavit in this case contains sufficient information for a magistrate to find probable cause to issue a search warrant. *See State v. Graham*, 90 N.C. App. 564, 369 S.E. 2d 615 (1988) (affidavit establishing that informant had seen cocaine in defendant's house within past 48 hours, was familiar with cocaine packaged for sale, had provided information in the past resulting in arrests, had used cocaine before and had known applicant for three weeks found sufficient to show probable cause for search warrant); *State v. White*, 87 N.C. App. 311, 361 S.E. 2d 301 (1987), *aff'd in part, vacated in part, rev'd in part*, 322 N.C. 770, 370 S.E. 2d 390 (1988) (affidavit establishing that informant had first-hand knowledge of the presence of contraband in defendant's home and that the information implicated the informant found sufficient to show probable cause for search warrants); *State v. Edwards and State v. Jones*, 85 N.C. App. 145, 354 S.E. 2d 344, *cert. denied*, 320 N.C. 172, 358 S.E. 2d 58 (1987) (affidavit establishing that informant had personal knowledge of marijuana being sold from defendant's residence, had made drug buys from defendant's residence and had provided information in the past leading to five drug-related arrests held sufficient to show probable cause for search warrant); *State v. Walker*, 70 N.C. App. 403, 320 S.E. 2d 31 (1984) (affidavit establishing that informant saw marijuana in defendant's house within past 48 hours, had previously made police-supervised drug buys, had known affiant for five months and had provided reliable information about drug dealers in the past held sufficient to show probable cause for search warrant).

[2] While we hold that there was probable cause to issue the search warrant, we are unable to determine from the record whether the court erred in granting defendants' motion to suppress. Defendants contended in their motion and at the suppression hearing that the State's informant may have been connected to the break-in at defendants' residence and requested that the State be required to reveal the identity of the informant. This break-in occurred within the 48-hour period immediately prior to the issuance and execution of the search warrant and was within the time the informant allegedly observed the drugs in defendants' home. Defendants further alleged that the State's informant

was paid and was thus acting as an agent of the State. Defendants argued that if the information provided by the informant was obtained as a result of an illegal entry into defendants' house, the evidence seized pursuant to the warrant would be inadmissible at trial. At the conclusion of the suppression hearing the trial judge deferred ruling on the motion until he could conduct an *in camera* examination of the informant. This examination was never conducted. This court is unable to determine from the record whether the information furnished by the informant and used to establish probable cause for the issuance of the search warrant was lawfully obtained and whether the evidence seized pursuant to the search warrant is admissible. We remand this case to the trial court to determine whether the informant's information was lawfully obtained and whether the evidence seized is otherwise admissible. *See State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982).

Based on the foregoing, this case is

Reversed in part and remanded.

Judges ORR and GREENE concur.

STATE OF NORTH CAROLINA v. DAVID FULTZ

No. 8818SC123

(Filed 15 November 1988)

1. **Rape and Allied Offenses § 19— taking indecent liberties—indictment—sufficient**

The indictments in a prosecution for taking indecent liberties with a child were sufficient where there was nearly identical language to the indictments in *State v. Singleton*, 85 N.C. App. 123.

2. **Criminal Law § 92.4— taking indecent liberties—five counts—joinder proper**

The trial court did not err by joining five charges of taking indecent liberties with children for trial where each of the offenses occurred in a Boy Scout environment; defendant was each victim's scoutmaster during the entire period; three of the offenses occurred at a single campsite; and the remaining offenses occurred at the troop's meeting place. N.C.G.S. § 15A-926(a).

3. Criminal Law § 86— taking indecent liberties with children—evidence of defendant's bad temper and use of profanity—admission not prejudicial

There was no prejudicial error in a prosecution for taking indecent liberties with children from the admission of evidence of defendant's use of profanity and bad temper in light of the more than eighteen character witnesses defendant called on his behalf who testified as to defendant's excellent reputation for truthfulness and moral character. N.C.G.S. § 15A-1443(a).

4. Criminal Law § 85— indecent liberties with children—evidence of general character excluded—no error

The trial court did not err in a prosecution for taking indecent liberties with children by excluding evidence of defendant's general character and reputation. N.C.G.S. § 8C-1, Rule 404(a).

5. Criminal Law § 34.8— indecent liberties—other offenses—admissible

The trial court did not err in a prosecution for taking indecent liberties with children by allowing the State to introduce into evidence acts of unprosecuted misconduct by defendant which occurred more than ten years earlier, despite the lack of a determination under N.C.G.S. § 8C-1, Rule 403, that the evidence was more probative than prejudicial, because defendant opened the door. N.C.G.S. § 8C-1, Rule 404.

APPEAL by defendant from *DeRamus, Judge*. Judgments entered 4 September 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 September 1988.

In five separate indictments the Guilford County grand jury charged defendant, David Fultz, with taking indecent liberties with children, a violation of G.S. 14-202.1. The defendant was a Boy Scout troop leader and each of the three victims were members of defendant's troop at the time of the alleged misconduct. The indictments concerned events spanning an eleven month period.

Defendant moved to dismiss the indictments before trial stating that they did not sufficiently apprise him of the nature of the offenses charged. The trial court denied the motion. Upon the State's motion, and over defendant's objection, the trial court joined the offenses for a single trial. A jury found defendant guilty of each of the five charges. In 86CRS66646 and 86CRS66647 the trial court sentenced defendant to two consecutive five year prison terms. For the remaining offenses the trial court sentenced defendant to five years, suspended for five years, with supervised probation for five years to begin at the expiration of the active prison terms. From the judgment entered, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General Philip A. Telfer, for the State.

Tharrington, Smith & Hargrove, by Roger W. Smith, Wade M. Smith and Melissa H. Hill, for defendant-appellant.

EAGLES, Judge.

Defendant brings forward five issues on appeal. He argues that these convictions should be reversed because the indictments were insufficient to inform him of the nature of the charges against him. Alternatively, he contends that this court should grant him a new trial because the trial court erred in joining all of the offenses for trial, admitted certain incompetent evidence, and excluded competent evidence offered by the defense. After a careful review of the record, we hold that defendant received a fair trial free from prejudicial error.

[1] Defendant contends that the trial court erred in refusing to dismiss the case because the indictments were insufficient to notify him of the acts constituting the charged offenses so that he could properly prepare his defense. In making his argument, defendant concedes that this court in *State v. Singleton*, 85 N.C. App. 123, 354 S.E. 2d 259, *disc. rev. denied and appeal dismissed*, 320 N.C. 516, 358 S.E. 2d 530 (1987), approved "language nearly identical" to these indictments. Our holding in *Singleton* controls here. If defendant needed additional or more specific information to adequately prepare or conduct his defense, he could have moved for a bill of particulars pursuant to G.S. 15A-925. *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983). We overrule this assignment of error.

[2] Defendant further argues that the trial court erred in joining the five offenses charged for a single trial. Joinder decisions are in the sound discretion of the trial court. We find no abuse of discretion here.

G.S. 15A-926 allows joinder of two or more offenses when they "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." G.S. 15A-926(a). Our courts have interpreted this statute as not allowing joinder of offenses solely because the offenses charged were the same type of acts unless

there is also a "transactional connection." *State v. Greene*, 294 N.C. 418, 421, 241 S.E. 2d 662, 664 (1978). While a motion for joinder of offenses is addressed to the trial court's discretion, *State v. Williams*, 74 N.C. App. 695, 329 S.E. 2d 705 (1985), the test we apply on review is "whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Corbett*, 309 N.C. 382, 389, 307 S.E. 2d 139, 144 (1983).

Here each of the offenses charged occurred in a Boy Scout environment. Defendant was each victim's scoutmaster during the entire period. Three of the offenses occurred at a single campsite and the remaining offenses occurred at the troop's meeting place. We find that these circumstances are not so distinct as to render consolidation unjust. Furthermore, the evidence demonstrates a scheme or plan in which the defendant used his position as troop leader to commit these acts. We overrule this assignment of error.

[3] Defendant assigns as error the State's introduction of evidence showing that defendant had a bad temper and used profanity. We agree that evidence of profanity and temper are irrelevant to the charges tried, but defendant has failed to demonstrate how he was prejudiced by their introduction. G.S. 15A-1443(a); *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). Defendant argues that this evidence prejudiced him in the jury's assessment of his credibility. In light of the more than eighteen character witnesses defendant called on his behalf who each testified as to defendant's excellent reputation for truthfulness and moral character, we find the error here to be harmless.

[4] Defendant argues that the trial court erred in not allowing evidence of defendant's general character and reputation. The trial court limited the character evidence introduced by defendant to evidence directed to pertinent character traits. The State argues that Rule 404(a) of the North Carolina Rules of Evidence requires that character evidence is admissible only when it addresses pertinent character traits. Our Supreme Court in *State v. Squire*, 321 N.C. 541, 546, 364 S.E. 2d 354, 357 (1988), held that "an accused may no longer offer evidence of undifferentiated 'good character' . . .; he must tailor the evidence to a particular trait that is relevant to an issue in the case." The trial court's ruling was proper and the assignment of error is overruled.

[5] Finally, defendant contends that the trial court erred in allowing the State, during rebuttal, to introduce into evidence acts of unprosecuted misconduct by defendant which occurred more than ten years earlier. The State argues that the evidence was proper rebuttal testimony and was admissible pursuant to Rule 404(b) of the North Carolina Rules of Evidence. We hold that because defendant opened the door, the State's rebuttal evidence was properly admitted here.

The State elicited the complained of testimony from Joseph Johnson, a rebuttal witness. He told of three specific sexually related incidents which occurred between defendant and him in 1976 while he was a member of the same scout troop. During this time defendant was the assistant troop leader. Johnson testified that on two occasions when he was alone with the defendant, defendant told him to masturbate as his initiation into the troop. The first incident occurred while the troop was on a camping trip. The second incident occurred in Chapel Hill where defendant took Johnson to a football game. After the game defendant and Johnson went up into the bell tower and defendant told him to masturbate again. During this second incident, defendant also tickled Johnson's genitals. Johnson testified that the third incident was when defendant bought him a Playboy magazine. Johnson was in the troop from 1975 until 1977.

Rule 404(b) provides that while evidence of other wrongs or acts committed by defendant is not admissible to prove defendant's character, this evidence is admissible to prove motive, opportunity, or plan. G.S. 8C-1, Rule 404(b); *State v. Boyd*, 321 N.C. 574, 364 S.E. 2d 118 (1988). To be admitted the evidence must not be too remote in time from the incidents for which the defendant is being tried. *State v. Scott*, 318 N.C. 237, 347 S.E. 2d 414 (1986). In sex offense cases our courts have liberally allowed evidence of similar sex offenses committed by the defendant, *State v. Gordon*, 316 N.C. 497, 342 S.E. 2d 509 (1986), including evidence of sexual assaults by the defendant against persons other than the victims. *Id.*

Once the trial court establishes that it will admit the evidence pursuant to Rule 404(b), the court must then determine whether the evidence is more probative than prejudicial under Rule 403. *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350

(1986). This record does not reveal that the trial court made any Rule 403 determination. The State argues that, in any event, the evidence was admissible here because the defendant opened the door. We agree.

Our courts will allow the State to introduce evidence, even when it is not otherwise admissible, if it is "offered to explain or rebut evidence elicited by the defendant himself." *State v. Albert*, 303 N.C. 173, 177, 277 S.E. 2d 439, 441 (1981); *see also State v. Teeter*, 85 N.C. App. 624, 355 S.E. 2d 804, *disc. rev. denied and appeal dismissed*, 320 N.C. 175, 358 S.E. 2d 66 (1987). On direct examination the defendant testified to the following:

> Q. Have you ever fondled a boy's private parts or touched him in any improper way?
>
> A. No, sir, I have not.
>
> * * *
>
> Q. Did you ever touch [the victims] in any improper way or fondle them?
>
> A. I never touched any boy in my troop in an improper way.

Defendant explicitly testified that he had never touched or fondled a member of his scout troop. Johnson's testimony, then, was proper rebuttal testimony. Furthermore, defendant had previously called Jeffrey Edward Berthold as a witness and questioned him concerning events while Berthold was a member of the troop from 1977 until 1981. Accordingly, we hold that defendant opened the door to testimony about this remote time period. Defendant having opened the door, we find no prejudicial error in admitting the complained of evidence.

Our review of the record convinces us that defendant has received a fair trial free from prejudicial error.

No error.

Judges PHILLIPS and PARKER concur.

CRYSTAL SMITH POLK v. WALTER JUNIOR BILES AND THE TOWN OF NORWOOD

No. 8720SC763

(Filed 15 November 1988)

1. **Automobiles and Other Vehicles § 50.4— collision between garbage truck and automobile—evidence of injury—sufficient**

The trial court did not err in an action arising from a collision between a garbage truck and an automobile by denying defendants' motions for a directed verdict and judgment n.o.v. where defendants argued that the evidence did not show that plaintiff was injured, but the evidence taken in the light most favorable to plaintiff and disregarding disputed testimony of a more serious injury showed that plaintiff had a numb head and sore body and was examined and X-rayed at a hospital immediately after the accident.

2. **Evidence § 50.4; Appeal and Error § 30.2; Trial § 15— automobile accident—medical testimony as to injuries—properly admitted**

In an action arising from a collision between an automobile and a garbage truck, defendants' arguments concerning portions of plaintiff's doctor's testimony were without foundation because defendants' assignments of error did not state the basis upon which error was assigned and because substantially the same testimony was admitted elsewhere without objection. Moreover, defendants' arguments are without merit in that the doctor merely stated his findings in examining and treating plaintiff and, even if the testimony is characterized as opinion, it does not have to be expressed in terms of reasonable probability or certainty. Furthermore, an orthopedic specialist is qualified to conclude whether a patient's reactions to tests are genuine or feigned. North Carolina Rules of App. Procedure, Rule 10(c), N.C.G.S. § 8C-1, Rules 702 and 703.

3. **Automobiles and Other Vehicles § 90.4— automobile collision—instruction on damages—proper**

The trial court did not err in an action arising from the collision of an automobile with a garbage truck by instructing the jury that it could consider future pain and suffering, future medical expenses, and loss of use of part of plaintiff's body on the damages issue where there was testimony that plaintiff's condition would probably not improve any further, that she would have a degree of pain for the rest of her life, and that she would have to be trained to adjust to that reality.

APPEAL by defendants from *Walker, Russell G., Jr., Judge.* Judgment entered 26 May 1987 in Superior Court, STANLY County. Heard in the Court of Appeals 6 January 1988.

In this action to recover for personal injuries allegedly sustained in a collision between an automobile driven by plaintiff and

a garbage truck driven by the individual defendant, an employee of defendant municipality, the jury found that plaintiff was injured by the negligence of the defendants, that plaintiff was not contributorily negligent, and was entitled to recover $60,000. The court, with plaintiff's consent, reduced the damages to $24,537.35 and entered judgment accordingly.

Plaintiff's evidence, viewed in its most favorable light, was to the following effect: While her car was stopped at an intersection waiting to make a left turn, it was hit by defendant's loaded garbage truck and knocked approximately thirty feet off the road into a field. In the collision she was thrown forward; immediately afterward she had glass in her hair, the top of her head was numb, she felt "shook up" and sore, and was taken to the hospital where she was examined, X-rayed, released, and charged $99. "A couple of days later," upon awakening she could not move, her neck was "real stiff," and there was a "twisting knife stabbing pain" in her neck and back. She was examined and treated by several different doctors, who prescribed anti-inflammatory medications, analgesics and various therapies. Her condition did not materially improve and the pain she felt three days after the accident was still as bad three years later as it was when it first occurred. Before the collision plaintiff's health was generally good and she had no back or neck pain; since the accident she has not been able to do several household chores that she did before. Dr. Wassel, who examined plaintiff in April of 1985 and treated her through the end of 1986, diagnosed her as having chronic cervical strain, prescribed physical therapy to reduce her inflammation and spasm, and administered various medications with only minimal improvement. He testified, *inter alia*, that: He found evidence of muscle spasms in the muscles of plaintiff's neck and shoulder, a reduced range of motion in the neck, and no evidence that she was malingering; and he expressed the opinion that plaintiff's condition was consistent with being injured in the accident described, that she would not improve anymore, would continue to have a degree of pain in the future, and would have to be trained to adjust to it.

Taylor and Bower, by H. P. Taylor, Jr., for plaintiff appellee.

Caudle & Spears, by Thad A. Throneburg and Lloyd C. Caudle, for defendant appellants.

PHILLIPS, Judge.

[1] The first question we resolve, the second argued, is whether the court erred in denying defendants' motions for a directed verdict and judgment notwithstanding the verdict. The basis for the motions was not that the defendants were not negligent in driving their garbage truck into plaintiff's car, but that the evidence does not indicate that she was injured as a consequence. Injury, damage, or loss is, of course, a requisite of any negligence action. But the injury, damage or loss does not have to be either extensive, permanent, serious or substantial; it only has to be actual. Prosser, Law of Torts Sec. 30 (3rd ed. 1964). Thus, the question is not whether the evidence is sufficient to show that plaintiff was seriously or permanently injured, though some of defendants' argument is along that line, but only whether it is sufficient to show that she was actually injured and damaged at all. Obviously the evidence is sufficient to show that. In arguing otherwise defendants do not address plaintiff's evidence in the light that we must view it, but they dwell upon inconsistencies and contradictions in her evidence and upon testimony by Dr. Wassel that they contend was inadmissible. These arguments are irrelevant to this question for three obvious reasons: First, on a motion for directed verdict conflicts in the evidence unfavorable to the plaintiff must be disregarded. *Chandler v. Moreland Chemical Co.*, 270 N.C. 395, 154 S.E. 2d 502 (1967). Second, in determining the sufficiency of evidence to withstand a motion for a directed verdict all evidence received, whether competent or not, must be considered. *Dixon v. Edwards*, 265 N.C. 470, 144 S.E. 2d 408 (1965); *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972). Third, leaving aside Dr. Wassel's testimony, the evidence that plaintiff had a numb head and sore body (for which she was examined at the hospital and X-rayed at a cost of $99) immediately after defendant's garbage truck knocked her car into the field is clearly sufficient to support the inference that she was actually injured and damaged to some extent by the collision.

[2] Two other questions defendants argue—whether the court erred in permitting Dr. Wassel to testify that the neck pain and other symptoms and signs plaintiff reported and manifested were "not unusual" in light of her history and were "consistent with" being in the kind of accident reported, and that in examining and treating her he detected nothing to indicate she was malingering

and did not think she was—have no proper foundation, because none of the assignments of error relied upon states the "basis upon which error" was assigned as Rule 10(c), N.C. Rules of Appellate Procedure requires. Thus, these assignments are overruled. Furthermore, defendants waived the exceptions involved when Dr. Wassel testified to substantially the same effect on other occasions without objection. *Glace v. The Town of Pilot Mountain*, 265 N.C. 181, 143 S.E. 2d 78 (1965). In any event the arguments made are without merit. Defendants' main argument against the admissibility of each segment of medical testimony stated above is that it was not expressed in terms of "reasonable probability or certainty," but it did not have to be so couched. The testimony objected to simply stated what the doctor did and did not find in examining and treating plaintiff and is no more objectionable than would be testimony that he found her heartbeat to be normal and her blood pressure to be high; for all medical findings necessarily involve comparisons with norms of some kind. And if the testimony is characterized as opinion, it is clearly authorized by Rules 702 and 703, N.C. Rules of Evidence, without being in the stereotyped form argued for. *Cherry v. Harrell*, 84 N.C. App. 598, 353 S.E. 2d 433, *disc. rev. denied*, 320 N.C. 167, 358 S.E. 2d 49 (1987). Another argument made against the admissibility of Dr. Wassel's testimony that he saw nothing in his examination and treatment of the plaintiff to indicate that she was malingering is that he was not qualified to so testify because he is neither a psychiatrist nor a psychologist. No authority is cited for this argument and so far as we can ascertain none exists. Which is not surprising, since it would seem that an orthopedic specialist who daily tests the ability of patients to move their muscles and joints without pain is qualified, if anyone is, to conclude whether a patient's reactions to the tests are genuine or feigned.

[3] Defendants' final contention—other than one addressed to the court's discretion, under Rule 59, N.C. Rules of Civil Procedure, in failing to order a new trial, which requires no discussion—is that the court erred in instructing the jury that on the damages issue it could consider future pain and suffering, future medical expenses, and loss of use of part of her body. The instruction was not erroneous; it was based upon Dr. Wassel's testimony that plaintiff's condition would probably not improve any further,

that she would probably have a degree of pain for the rest of her life, and would have to be trained to adjust to that reality.

No error.

Judges JOHNSON and ORR concur.

TELEPHONE SERVICES, INC. v. GENERAL TELEPHONE COMPANY OF THE SOUTH

No. 8814SC339

(Filed 15 November 1988)

Unfair Competition § 1— telephone company—refusal to deal with competitor—12(b)(6) dismissal improper

The trial court properly granted defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of plaintiff's claim for unfair trade practices based upon defendant's refusal to deal with plaintiff as a labor service contractor merely because plaintiff is defendant's competitor in the customer premise equipment market, thereby allegedly unfairly using its monopoly status as a public utility to attempt to force plaintiff to abandon either its labor service opportunities or its customer premise sales market. Defendant is not a regulated utility in either the market in which the parties compete, customer premise sales, or the areas of service plaintiff wishes to provide for defendant, installation and repair services.

APPEAL by plaintiff from *Stephens (Donald W.), Judge.* Order entered 22 January 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 October 1988.

Plaintiff's complaint alleged an unfair trade practice by defendant in violation of G.S. 75-1.1. The trial court concluded that plaintiff's complaint failed to state a claim upon which relief could be granted and allowed defendant's motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). Plaintiff appeals.

Mount White Hutson & Carden, P.A., by James H. Hughes and Graham H. Kidner, for plaintiff-appellant.

Faison & Brown, by O. William Faison and A. Vann Irvin, for defendant-appellee.

SMITH, Judge.

In its complaint plaintiff Telephone Services, Inc. alleges that it is a Florida corporation doing business in North Carolina providing telephone services including installation and repair service, installation of central office equipment and sale of customer premise equipment. Defendant General Telephone Company of the South, a telecommunications common carrier with a service franchise regulated by the North Carolina Utilities Commission, also leases and sells customer premise equipment. Defendant contracts for installation and repair service from independent contractors. The complaint alleges that plaintiff provided installation and repair services to defendant's corporate predecessor from October 1971 to September 1982 and that plaintiff provided no installation and repair services to anyone from October 1982 to September 1984. Defendant notified plaintiff on 30 June 1983 that it was removing plaintiff from defendant's list of labor contractors for installation and repair services. Defendant's letter stated in part: "In an effort to reduce administrative functions, those firms that have not performed a significant amount of work in the last year are being removed from the active file and placed in the inactive file." During 1984 and 1985, plaintiff's requests for reinstatement as an active contract service provider were denied. On 23 August 1985, defendant's General Service Director, in answer to a request on plaintiff's behalf that plaintiff be reinstated as an active contract service provider, wrote:

> In reviewing your company, it has been brought to my attention that you are actively involved in the marketing, installation, and maintenance of telephone terminal equipment. As you know, we are actively engaged in the same business. We do not believe it is in our best interest to subsidize our direct competitors.

In its complaint, plaintiff alleged that the effect of not allowing it to provide installation and repair services has been to eliminate plaintiff from defendant's labor market and thereby increase the cost of telephone service to the consumer. Plaintiff claims lost revenues of $1,668,777.05 resulting in lost profits in excess of $10,000.00 and requests reinstatement as a contract service provider and monetary damages.

The trial court granted defendant's motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). Plaintiff appeals assigning error to the trial court's conclusion that it failed to state a claim upon which relief could be granted. Defendant assigns error to the trial court's determinations that the complaint was timely filed within the period of the applicable statute of limitations and that plaintiff had pled special damages with sufficient specificity. We hold that plaintiff has failed to state a claim for relief under G.S. 75-1.1 and affirm the trial court's order. In light of this holding, it is unnecessary to address defendant's cross-assignments of error.

The issue on appeal is whether the trial court properly granted defendant's motion to dismiss. A complaint is sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted if no insurmountable bar to recovery appears from the face of the complaint and the allegations give notice of the nature of the claim. *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E. 2d 757 (1987). In determining whether the complaint is sufficient, the factual allegations of the complaint must be viewed as admitted, *State of Tennessee v. Environmental Management Comm.*, 78 N.C. App. 763, 338 S.E. 2d 781 (1986), and must be liberally construed. *Dixon v. Stuart, supra.* "A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim or the disclosure of some fact which will necessarily defeat the claim." *State of Tennessee v. Environmental Management Comm.*, 78 N.C. App. at 765, 338 S.E. 2d at 782.

G.S. 75-1.1 makes unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980). "Practices are deceptive which have the capacity or tendency to deceive; proof of actual deception is not required." *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 686, 340 S.E. 2d 755, 760, *cert. denied*, 317 N.C. 333, 346 S.E. 2d 137 (1986). Whether an act or practice is unfair or deceptive in violation of G.S. 75-1.1 is a question of law for the court. *Dull v. Mut. of Omaha Ins. Co.*, 85 N.C. App. 310, 354 S.E. 2d 752, *disc. rev. denied*, 320 N.C. 512, 358 S.E. 2d 518 (1987).

Plaintiff claims that defendant's refusal to reinstate plaintiff to the list of labor service contractors is an unfair trade practice in violation of G.S. 75-1.1. The complaint alleges that defendant refused to deal with plaintiff merely because plaintiff is defendant's competitor in the customer premise equipment market. Plaintiff contends that defendant's monopoly status as a public utility gives defendant power and position in the franchised area and that defendant's name recognition and marketing and sales offices give defendant a significant competitive advantage. Thus, plaintiff reasons, defendant is unfairly using its position of power by attempting to force plaintiff to abandon either its labor service opportunities or its customer premise equipment sales market. We disagree.

"In the absence of conspiracy or monopoly, one may deal with whom he pleases." *Records v. Tape Corp.*, 19 N.C. App. 207, 214, 198 S.E. 2d 452, 457 (1973). This principle is based on *United States v. Colgate & Co.*, 250 U.S. 300, 63 L.Ed. 992, 39 S.Ct. 465 (1919), in which the Supreme Court held that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.* at 307, 63 L.Ed. at 997, 39 S.Ct. at 468. Plaintiff contends the *Colgate* rule is inapplicable to the facts of this case as defendant is not an entirely private business but is a regulated utility. However, defendant is not a regulated utility in either the market in which the parties compete, customer premise equipment sales, or the areas of service plaintiff wishes to provide for defendant, installation and repair services. Thus, defendant's election not to use plaintiff to perform its installation and repair service is not an unfair assertion of any power or position defendant might enjoy as a regulated utility. We hold that it is not unfair for defendant to refuse to employ its competitor. Plaintiff also contends the *Colgate* rule does not apply as the purposes of the Sherman Act and Chapter 75 are different. Plaintiff cites *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973); *ITCO Corp. v. Michelin Tire Corp., Com. Div.*, 722 F. 2d 42 (4th Cir. 1983), *cert. denied*, 469 U.S. 1215, 84 L.Ed. 2d 337, 105 S.Ct. 1191 (1985); and *Bostick Oil Co. v. Michelin Tire Corp., Com. Div.*, 702 F. 2d 1207 (4th Cir. 1983), *cert. denied*, 464 U.S. 894, 78 L.Ed. 2d 232, 104

S.Ct. 242 (1983), to demonstrate that the state statute has been read broadly to prohibit unfair trade practices, including anti-competitive practices, not prohibited by Federal Law. Even accepting plaintiff's interpretation of the North Carolina statute as correct, we hold that it is not an unfair trade practice for defendant to refuse to employ its competitor under the facts as alleged in this case.

Affirmed.

Judges ORR and GREENE concur.

STATE OF NORTH CAROLINA v. ROBERT MARK BARNHARDT

No. 8819SC303

(Filed 15 November 1988)

Searches and Seizures § 21— trafficking in cocaine—search warrant—probable cause

An affidavit was sufficient to provide probable cause for a search warrant even though it was based on hearsay from an unfamiliar confidential informant where the informant specifically identified the place to be searched and the evidence to be seized, stated that cocaine had been seen within the past twenty-four hours, and the affiant detective verified the detailed description of the house and that the truck parked at the house was registered to the suspect named by the informer. The affidavit provided timely information, exact details of the premises to be searched, described the informant's ability to identify cocaine, and, with the officer's credentials and experience, amounted to a substantial basis for the magistrate's determination that probable cause existed.

APPEAL by defendant from *Collier, Judge.* Judgment entered 14 January 1988 in Superior Court, ROWAN County. Heard in the Court of Appeals 25 October 1988.

On 2 August 1987, a detective of the Rowan County Sheriff's Department received information from a confidential informant that within the last twenty-four hours the informant had personally observed cocaine inside the defendant's house. The informant gave precise directions to the house and a detailed description of its exterior appearance. The detective went to the house de-

scribed and found the directions and the description to be correct. A call to the Department of Motor Vehicles revealed that the truck parked in the driveway of the house was registered to the defendant at the address given by the informant.

The detective put this information into an affidavit and presented a search warrant application to a magistrate who issued a search warrant. During the warranted search 40.9 grams of cocaine and 95 grams of marijuana were seized.

Defendant was indicted for trafficking in cocaine and possession of marijuana with intent to sell and deliver on 9 November 1987. Defendant filed a motion to suppress evidence. The parties agreed pursuant to G.S. 15A-974 that the motion to suppress be heard before trial. It was also agreed that, if the motion to suppress were denied, the defendant would enter a negotiated plea of guilty, and the defendant would appeal the denial of the motion to suppress. The motion to suppress was denied. Defendant was sentenced to five years. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General L. Darlene Graham, for the State.

Robert Vance Somers for defendant appellant.

ARNOLD, Judge.

Defendant argues that the evidence in this case should have been suppressed because the warrant issued lacked probable cause. We disagree.

The affidavit offered in support of probable cause presents this issue: Is an affidavit based on information from an unfamiliar confidential informant who specifically identifies the place to be searched, the evidence to be seized, and a statement that cocaine was seen within the past twenty-four hours sufficient to support a showing of probable cause when the affiant detective verifies the detailed description of the house, and that the truck parked at the house is registered to the suspect named by the informer?

Though the affiant in this case has relied on hearsay information of an informant unfamiliar to the affiant, we conclude that the showing is sufficient to meet the "totality of the circumstances" test established in *Illinois v. Gates*, 462 U.S. 213, 103

S.Ct. 2317, 76 L.Ed. 2d 527 (1983), and adopted in *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984):

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

Gates at 238-39, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548. (Citations omitted.) The *Arrington* court explained that the *Gates* decision changes the law in probable cause cases in this important way: "[u]nder the totality of the circumstances test, the two prongs of *Aguilar* and *Spinelli*—veracity and basis of knowledge—are still relevant, but are not to be accorded independent status." *Arrington* at 638, 319 S.E. 2d at 257.

The following discussion of probable cause and search warrants guides us in our evaluation of the affidavit relied on in this case:

Courts have accorded a preference to the warrant process because it provides an orderly procedure involving judicial impartiality whereby "a neutral and detached magistrate" can make "informed and deliberate determinations" on the issue of probable cause. *U.S. v. Ventresca*, 380 U.S. 102, 105, 85 S.Ct. 741, 744, 13 L.Ed. 2d 684, 687 (1965). As a result, in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. *Ventresca* at 106, 85 S.Ct. at 744, 13 L.Ed. 2d at 687. Further, appellate court review of a magistrate's probable cause decision is not subject to a technical *de novo* review, but is limited to whether "the evidence as a whole provided a substantial basis for a finding of probable cause . . . ." *Arrington* at 640, 319 S.E. 2d at 258.

"Probable cause is a flexible, common-sense standard. It does not demand a showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required." *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E. 2d 140, 146 (1984).

Probable cause to search exists if a person of ordinary caution would be justified in believing that what is sought will be found in the place to be searched. LeFave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 3.1(b) n.26 (1987), *accord State v. Goforth*, 65 N.C. App. 302, 309 S.E. 2d 488 (1983). The experience and expertise of the affiant officer may be taken into account in the probable cause determination, so long as the officer can justify his belief to an objective third party. *LeFave* § 3.2(c) *citing United States v. Davis*, 458 F. 2d 819 (D.C. Cir. 1972); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

Timely information tied to the specific premises to be searched can support a finding of probable cause. *See Goforth* at 307, 309 S.E. 2d at 492-93 (1983), *accord LeFave* § 3.1(b). Concerning the reliability of the informant's information *Gates* teaches that "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." *Gates* at 234, 103 S.Ct. at 2330, 76 L.Ed. 2d at 545.

With these rules in mind we consider the affidavit before us. The first paragraph of the affidavit sets forth the credentials of the affiant, a detective who "personally participated in drug investigations that involved arrests and convictions." He further stated that he "was familiar with the practices and methods of persons dealing in illegal controlled substances in this area, and knows the typical activities and practices of drug dealers."

The following three paragraphs of the affidavit state:

> On August 2, 1987 a confidential informant stated they had personally observed a large amount of cocaine at the residence of Mark Barnhardt at 914 S. Carolina Ave., Spencer, NC. This cocaine was seen in the residence located at 914 South Carolina Ave. by the confidential informant within the past 24 hours. The confidential informer stated that Mark Barnhardt's house was a yellow wood frame house, single story residence trimmed in white and brown. The confidential informer stated that if you turn off 8th St. Spencer, NC and go south toward 11th St., Spencer, NC, that this house sits on the right back off the road approximately 50 yards.

> This confidential informer knows what cocaine looks like. This confidential informant has used cocaine in the past and has bought cocaine in the past.
>
> This confidential informer has never given any information to me before. This confidential informer expressed a desire to help law enforcement officers . . . with drug traffic in Rowan County. This confidential informer fears for their safety if their identify [sic] becomes known.

The remaining paragraphs of the affidavit describe the detective's trip to the described house and his call to the Department of Motor Vehicles to determine the name of the owner of the vehicle parked at 914 South Carolina Avenue.

Defendant's argument that the affidavit in this case "looks like" it was copied from the flawed affidavit in *State v. Newcomb*, 84 N.C. App. 92, 351 S.E. 2d 565 (1987), is without merit. The affidavit in *Newcomb* gave no details "from which one could conclude that the [informant] had current knowledge of details," or that the informant knew how to identify marijuana plants. *Id.* at 93, 351 S.E. 2d at 567.

The affidavit in this case provided timely information, exact detail of the premises to be searched, and it described the informant's ability to identify cocaine. These circumstances, supplemented by the officer's credentials and experience, amount to a substantial basis for the magistrate's determination that probable cause existed. The trial court did not err in denying the motion to suppress. Therefore the order of the trial court is

Affirmed.

Judges WELLS and COZORT concur.

Freeman v. Monroe

PEGGY HUTCHINS FREEMAN, PLAINTIFF v. DR. JOHN H. MONROE, M.D., FORSYTH GYNECOLOGIC ASSOCIATES, P.A., DR. ROBERT L. MEANS, M.D., FORSYTH SURGICAL ASSOCIATES, P.A., DR. JOHN C. FARIS, M.D., BREAST CLINIC, INC., DEFENDANTS

No. 8821SC26

(Filed 15 November 1988)

Trial § 3.1— denial of motion to continue summary judgment hearing—abuse of discretion

The trial court in a medical malpractice action abused its discretion by denying plaintiff's motion to continue a summary judgment hearing where there was no reason whatever for refusing the continuance and a compelling reason for granting it.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 13 July 1987, *nunc pro tunc* 9 July 1987, in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 May 1988.

Plaintiff sued all the above defendants for negligence which allegedly contributed to the loss of her right breast due to cancer. The appeal concerns only the dismissal by summary judgment of her claims against Dr. John C. Faris and the Breast Clinic, Inc. In pertinent part the depositions, interrogatories, and other materials recorded show the following: On 18 January 1984 plaintiff telephoned her gynecologist that the night before she had discovered a grape-sized lump protruding from her right breast and he arranged for her to be examined by a surgeon two days later, by which time the lump had receded into the surrounding tissue. The surgeon referred her to defendant Breast Clinic where she was examined on 31 January by a technician, who felt the mass and took mammograms, consisting of xerograms and sonograms, of both breasts, that were read and interpreted by defendant Dr. Faris, a radiologist. In reporting his interpretation to the referring surgeon Dr. Faris stated that though the mammograms revealed a prominent duct pattern they did not show any mass, either solid or cystic, or any other significant abnormality. Within five months the lump was diagnosed as an invasive carcinoma that involved the surrounding lymph nodes and plaintiff underwent a radical mastectomy and chemotherapy. The gist of her claim against Dr. Faris and the Breast Clinic is that her condition as indicated by the lump and mammograms required them to con-

vey that information to the referring surgeon and to do further, more specific mammographic studies.

Defendants first sought to have their motions for summary judgment heard on 14 May 1987, though the discovery period was not scheduled to expire until 30 June 1987, and defendants had not complied with plaintiff's request, made four months earlier, to produce their xerograms of her breast. Judge Wood declined to hear the motions, noting that plaintiff's motion to compel the delivery of the xerograms was pending and that she could not respond to defendants' motions until her expert evaluated the xerograms and other records, and he entered an order continuing the hearing until after discovery was completed and directing defendant appellees to deliver the xerograms. The xerograms, delivered as ordered, were the main subject of Dr. Faris' deposition taken eleven days before discovery expired, and the deposition of Dr. Choplin, a specialist in radiology, taken the day before discovery expired. Dr. Choplin's testimony, though replete with contradictions and inconsistencies, when viewed in its most favorable light for the plaintiff, was to the effect that: The xerograms showed a suspicious area just below the nipple of the right breast, the area later found upon surgery to be cancerous; this information, along with the technician's feeling of the lump, should have been reported to the referring surgeon and further, more definite mammographic studies should have been done. Meanwhile, defendant appellees had their motions re-calendared for hearing during the week of 6 July 1987. By a verified motion, filed on 1 July 1987, plaintiff moved that the hearing be continued on the ground that her medical expert, a Harvard Medical School professor, was on vacation and could not examine the affidavit that counsel had sent to him until he returned on 10 July 1987. In a hearing on 9 July 1987 the court denied plaintiff's motion to continue and granted defendant appellees' motions for summary judgment.

Kenneth Clayton Dawson and Billy R. Craig for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant appellee Dr. John C. Faris.

Tuggle Duggins Meschan & Elrod, by Sally A. Lawing, for defendant appellee Breast Clinic, Inc.

PHILLIPS, Judge.

The first of two questions raised by this appeal is whether the denial of plaintiff's motion to continue the summary judgment hearing was an abuse of the court's discretion. We hold that it was. Though the refusal of a continuance is within the sound discretion of the trial court and ordinarily will not be interfered with on appeal, *State v. Rhodes*, 202 N.C. 101, 161 S.E. 722 (1932), any discretionary ruling that is "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985), is an abuse of discretion and subject to reversal; and the record in this case shows no reason whatever for refusing the continuance and a compelling reason for granting it. In our jurisprudence it is fundamental that each litigant must have a fair opportunity to present his side of the case to the deciding tribunal; but in this case plaintiff was deprived of the opportunity to present to the court the most important part of her evidentiary forecast because the court was unwilling for no manifest reason to delay the summary judgment hearing even for a few days. Nothing in the record supports the ruling. There is no indication that the affidavit could or should have been obtained earlier; or that the failure to get it was due to any fault of plaintiff or the expert; or that plaintiff had been dilatory either during or after discovery. As Judge Wood found earlier, plaintiff's case against defendant appellees largely depends upon the opinion testimony of her expert witness concerning the xerograms; testimony that the court could not have reasonably expected to receive immediately after discovery ended even if the witness had not been on vacation. For under the circumstances the witness could not be expected to formulate his opinions before examining the belatedly delivered xerograms and the depositions concerning them, and mailing an affidavit to Massachusetts and getting it back requires time. Nor is there any indication that the few days' delay plaintiff requested could have adversely affected either the defendants' rights or the proper administration of justice; the indication rather is that the delay would have enabled plaintiff to fully respond to defendants' motions and would have permitted the court to have before it the complete evidentiary forecasts of all the parties before ruling on plaintiff's right to pursue her action further. Though undue delay in the processing of cases is to be avoided, not all delay is undue; and the court's primary duty in

the instance recorded was not to avoid delay, but to rule judiciously in light of the circumstances that made it impossible for plaintiff, through no fault of hers, to fairly present her side of the case at the time scheduled, and that was not done.

Because of the foregoing determination the other question argued—whether the above described evidence, including the testimony of Dr. Choplin, when viewed in its most favorable light for the plaintiff as our law requires, *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972), raises an issue of fact as to the negligence of the defendant appellees—need not be determined.

Vacated and remanded.

Judges JOHNSON and SMITH concur.

STATE OF NORTH CAROLINA v. JOHNNY RAY PARKER

No. 8818SC116

(Filed 15 November 1988)

1. **Criminal Law § 138.29— guilty plea to indecent liberties—sex offense as aggravating factor**

The trial court could properly find as an aggravating factor for taking indecent liberties with a minor to which defendant pled guilty that defendant actually penetrated the victim's sex organ with his finger and that this was a prima facie showing of a first degree sex offense in light of their ages. N.C.G.S. § 15A-1340.4(a)(1).

2. **Criminal Law §§ 138.35, 138.42— indecent liberties—belief victim was sixteen—immaturity of defendant—findings in mitigation not required**

The trial court was not required to find as a mitigating factor for taking indecent liberties with a minor that defendant believed the victim was sixteen years old since the evidence bearing thereon was not undisputed. Furthermore, the trial court did not abuse its discretion in failing to find that defendant's immaturity significantly reduced his culpability for the crime.

3. **Criminal Law § 138.29— aggravating factor—defendant unremorseful—insufficient evidence**

The trial court's finding as an aggravating factor for taking indecent liberties with a minor that defendant is unremorseful was not supported by evidence that defendant laughed during the sentencing hearing while the prosecutor was reading the police report and that defendant told the court that he laughed because the statements read were mostly lies.

State v. Parker

APPEAL by defendant from *Albright, Judge.* Judgment entered 16 November 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 September 1988.

Defendant, then sixteen years old and indicted for a first degree sexual offense, in a bargain with the State pled guilty to taking indecent liberties with a child ten years of age in violation of G.S. 14-202.1. The State's evidence tended to show that: The victim was a friend of defendant's sister and often visited in their home; on such a visit he stuck his hand under her shorts and inserted his finger into her vagina, but stopped after she told him to. After being charged defendant admitted the above to the authorities, but told the officers and testified that the victim, who was approximately 5′ 8″ tall and weighed approximately 120 pounds, initiated the encounter and told him she was sixteen years old. During the sentencing hearing while the prosecutor was reading the police report the defendant laughed, and when the court asked him what was funny he responded, "Because most of this is lies." The court cautioned him that this was a serious matter and if he laughed again he would "take a dim view of it." In sentencing defendant to a maximum term of ten years as a committed youthful offender the court found (a) as factors in aggravation that defendant actually penetrated the victim's sex organ with his finger and that this was a *prima facie* showing of first degree sex offense in light of their ages; and that "the defendant exhibited a casual, indifferent and manifestly unremorseful attitude toward the entire proceedings by laughing visibly within the view and observation of the Court, requiring a reprimand by the Court"; (b) as mitigating factors that defendant had no prior criminal record and had made a statement; and (c) that the aggravating factors outweighed the mitigating factors.

Attorney General Thornburg, by Assistant Attorney General David R. Minges, for the State.

Assistant Public Defender Mathias P. Hunoval for defendant appellant.

PHILLIPS, Judge.

Defendant's appeal questions only the process by which he was sentenced to a prison term of ten years. The errors that he contends the court made were in finding the two aggravating fac-

tors and in not finding in mitigation that (1) he reasonably believed the victim was sixteen years old and his conduct was legal and (2) his immaturity significantly reduced his culpability. The contentions concerning the aggravating factor involving penetration and the court's failure to find additional factors in mitigation clearly have no merit and can be quickly disposed of; but the contention concerning the other factor in aggravation is well founded and defendant must be resentenced.

[1] Contrary to defendant's contention, evidence of vaginal penetration was not necessary to prove the offense that he pled guilty to and was sentenced for, taking indecent liberties with a child, *see* G.S. 14-202.1; and the finding that his conduct indicated he was guilty of the greater offense charged was therefore not forbidden by G.S. 15A-1340.4(a)(1). The finding is authorized, though, by *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983), which defendant implicitly recognized by arguing not that *Melton* does not apply, but that it is fundamentally and constitutionally unfair and a deterrent to good faith plea bargaining because it permits a defendant to be punished for an offense that has been dismissed by accepting a lesser plea. Though the argument is interesting it would be fruitless for us to address it for an obvious reason.

[2] As to the two factors in mitigation that the court declined to find it is enough to say that: The court was not required to find that defendant believed the victim was sixteen years old since the evidence bearing thereon was not undisputed, *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983); whether defendant's immaturity significantly reduced his culpability was a factual question for the court to determine in its discretion after receiving the evidence and observing defendant, *State v. Moore*, 317 N.C. 275, 345 S.E. 2d 217 (1986), and no abuse is indicated.

[3] But the factor in aggravation as to defendant's lack of remorse for his crime was erroneously found. This nonstatutory factor, that a defendant after having had the opportunity to reflect on his criminal deed is without remorse for the crime committed, if supported by evidence, is authorized by *State v. Parker*, 315 N.C. 249, 337 S.E. 2d 497 (1985). The only evidence recorded in support of the court's finding that defendant is unremorseful is that during the sentencing proceeding defendant laughed while the prosecutor was reading statements elicited by the police that

were contradicted by his testimony as to how the sexual encounter started, and his statement that he laughed because the statements read were mostly lies. Thus, the only support for the court's finding that defendant had no remorse is the laugh itself and defendant's statement that he laughed for another reason. While this evidence warrants the reprimand that the court administered it does not support the court's conclusion that the defendant was without remorse; the only finding that it could support is that he laughed because some of the statements were false. If he did not laugh for that reason, why he laughed is entirely speculative so far as the evidence shows. Some of the many possibilities are that he laughed out of mere nervousness or meanness, or because he was an immature adolescent in the toils of the law for the first time, or because he had no remorse for his crime. One thing that is not speculative, though, but known to everyone that has spent much time in court is that defendants and other witnesses often laugh or smile at being contradicted.

The judgment sentencing defendant is vacated and the case is remanded to the Superior Court for resentencing.

Vacated and remanded.

Judges EAGLES and PARKER concur.

ERNIE G. MILAM v. LINDA MILAM

No. 884DC328

(Filed 15 November 1988)

Divorce and Alimony § 21.9— equitable distribution—military pension—definition of vesting

The trial court erred in an equitable distribution action by holding that plaintiff's retirement rights had not vested and that plaintiff's military pension was separate property where plaintiff had nineteen years and five months of service at the time of separation and had retired with twenty years' service at the time of judgment. Under 10 U.S.C. § 564(a)(2) (1983), plaintiff was guaranteed the right to continue in active duty for the remaining time necessary to complete twenty years of service; under the definition of vesting in *In re Marriage of Grubb*, 745 P. 2d 661, adopted by the Court of Appeals, vesting occurs when an employee has completed the minimum terms of

employment necessary to be entitled to receive retirement pay at some point in the future.

APPEAL by defendant from *Kimble, Wayne G., Jr., Judge.* Judgment entered 23 December 1987 in ONSLOW County District Court. Heard in the Court of Appeals 25 October 1988.

Defendant appeals from a judgment of equitable distribution classifying as separate property the plaintiff's military retirement income from his pension plan. Plaintiff and defendant were married on 2 November 1968 and were separated on 1 December 1985. At the date of separation plaintiff had nineteen years and five months of creditable military service with the United States Marine Corps. After twenty years' service, he retired on 1 August 1986 at the rank of CWO2, and at the time of the judgment he received $1,022.00 per month in military retirement pay. The trial court held that his military retirement rights had not vested at the time of separation for the purposes of equitable distribution.

From a judgment of equitable distribution declaring the plaintiff's retirement income to be his separate property, defendant appeals.

Cameron and Coleman, by W. M. Cameron, III, for plaintiff-appellee.

Lana S. Warlick for defendant-appellant.

WELLS, Judge.

Defendant assigns error to the trial court's classification of plaintiff's military pension as separate property based upon its finding that it had not vested as of the date of separation. 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." N.C. Gen. Stat. § 50-20(b)(1) (1987). While our equitable distribution statute specifically refers to "vested" pension and retirement rights, the statute does not define the term "vested" and apparently no decision of the North Carolina courts has defined the term "vested" in the context of equitable distribution. We adopt the definition followed by the Colorado courts: " '[v]est-

ing' occurs when an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future. . . ." *In re Marriage of Grubb*, 745 P. 2d 661 (Colo. 1987).

We are aware that in *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E. 2d 504 (1986), *affirmed*, 319 N.C. 367, 354 S.E. 2d 506 (1987), this Court, citing 10 U.S.C. § 3911 (1959), stated that vesting of a commissioned officer's military pension does not occur until the officer has served for twenty years. There are two aspects of *Seifert*, however, that are of critical significance in the context of the case now before us. First, vesting was not at issue in *Seifert*, only evaluation of a pension assumed to be vested. Second, the provisions of 10 U.S.C. § 3911 (1959), which authorize the retirement of a commissioned officer, upon his request, after twenty years of service, must, under the facts of this case, be construed together with the provisions of 10 U.S.C. § 564(a)(2) (1983).

Although the Secretary of the Army is authorized to retire commissioned officers upon their request after twenty years of service, in evaluating defendant's argument we must nevertheless consider whether the plaintiff was so assured of eventually receiving his military pension at the time the parties separated as to necessitate classifying it as vested for purposes of equitable distribution. 10 U.S.C. § 564(a)(2) (1983) provides:

> (a) Unless retired or separated under some other provision of law, a permanent regular warrant officer who has twice failed of selection for promotion to the next higher permanent regular warrant officer grade shall—
>
> . . .
>
> (2) if he has at least 18 but not more than 20 years of such active service on (A) the date when the Secretary concerned approves the report of the board under section 560(g) of this title, (B) the date when his name was removed from the recommended list under section 562(a) of this title, or (C) the date prescribed by the Secretary concerned under section 557(b) of this title, whichever applies, be retired 60 days after the date upon which he completes 20 years of active service, except as provided by section 8301 of title 5, with retired

> pay computed under section 1401 of this title, unless he is selected for promotion to the next higher permanent regular grade before that date . . . .

This statute guarantees permanent regular warrant officers with at least eighteen years of service, who are twice passed over for promotion, the right to remain in service for up to two additional years until they qualify for retirement.

At the time of the parties' separation plaintiff was guaranteed, against the possibility of dismissal after twice being passed over for promotion, the right to continue in active duty for the remaining time necessary to complete twenty years of service. 10 U.S.C. § 564(a)(2) (1983). He served through the protected period and retired before the judgment of equitable distribution. Under the *In re Marriage of Grubb* rule we have adopted, the guarantee of additional time for plaintiff to complete his twenty-year period results in his military pension being vested for purposes of equitable distribution, at the time the parties separated.

Because the trial court's erroneous classification of plaintiff's military pension as separate property affected the subsequent distribution, we must remand the case for a new order of equitable distribution in which the trial court must consider this factor in making its award.

Reversed and remanded.

Judges ARNOLD and COZORT concur.

Freeman v. Johnson

WILLIAM H. FREEMAN, PETITIONER v. AARON J. JOHNSON, SECRETARY OF THE N.C. DEPARTMENT OF CORRECTION; JOHN PATSEAVOURAS, DIRECTOR OF THE DIVISION OF PRISONS; BRUCE B. BRIGGS, CHAIRMAN OF THE N.C. PAROLE COMMISSION; ERNEST R. SUTTON, SUPERINTENDENT OF THE WASHINGTON COUNTY PRISON UNIT, RESPONDENTS

No. 882SC392

(Filed 15 November 1988)

Habeas Corpus § 2.1— revocation of parole contracts—habeas corpus not appropriate

The trial court did not err by denying petitioner's petition for writ of habeas corpus where petitioner had initially been selected to participate in the mutual agreement parole program but his M.A.P.P. contract was rescinded after the membership of the Parole Commission changed. The M.A.P.P. program is entirely an administrative function and the revocation of his contract was an administrative decision. N.C.G.S. § 17-33(2) (1983).

APPEAL by petitioner from *Winberry, Charles B., Jr., Judge.* Order entered 11 January 1988 in MARTIN County Superior Court. Heard in the Court of Appeals 26 October 1988.

Petitioner was convicted of second-degree sexual offense on 5 November 1980 and was sentenced to a term of forty years. He became eligible for parole in May 1985 and was selected to participate in the Mutual Agreement Parole Program (M.A.P.P.). This contract parole program was established in the mid 1970's by the North Carolina Division of Prisons and the North Carolina Parole Commission.

Petitioner's M.A.P.P. agreement provided that if he submitted an approved work release plan, avoided convictions for prison infractions, and provided a suitable employment or school plan and a residence plan, he would be released on or about 30 April 1987. Membership of the Parole Commission subsequently changed and petitioner was notified on 6 January 1986 that the Commission had rescinded his M.A.P.P. contract. He filed a Petition for Writ of Habeas Corpus in Wake County Superior Court but the writ was denied on 15 May 1987 on jurisdictional grounds. This Court vacated the order of 15 May 1987 and remanded the cause to Martin County Superior Court for an evidentiary hearing and ruling on the merits of petitioner's Petition for Writ of Habeas Corpus. Petitioner filed in the Court of Appeals a Motion for Correction of Order to have the case remanded to Wake County Superior

Court. This Court entered an order striking its earlier order and denied the Petition for Writ of Certiorari without prejudice to the petitioner to file a new petition for a Writ of Habeas Corpus in Martin County Superior Court.

Petitioner filed a Petition for Writ of Habeas Corpus on 1 September 1987. The trial court (Judge Winberry presiding) denied the petition. It held that the Writ of Habeas Corpus was inappropriate for challenging the validity of an administrative decision of the Parole Commission. The trial court addressed the merits of petitioner's claim in the alternative, holding that even if the writ was proper and petitioner had exhausted all administrative remedies, he did not have a vested right to obtain his release under the M.A.P.P. agreement.

Petitioner filed a Petition for Writ of Certiorari in this Court on 27 January 1988. The petition was allowed 11 February 1988.

North Carolina Prisoner Legal Services, Inc., by Richard E. Giroux, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Lucien Capone III, for the State.

WELLS, Judge.

Petitioner assigns error to the trial court's holding that the Writ of Habeas Corpus was an inappropriate procedure for challenging the rescission of his M.A.P.P. contract. The Writ of Habeas Corpus, described by this Court as "critically significant to American jurisprudence," *In re Stevens*, 28 N.C. App. 471, 221 S.E. 2d 839 (1976), provides a method for the judiciary to ensure that personal liberties are not restrained or compromised by illegal imprisonment. *See In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962).

An individual whose initial imprisonment was lawful may nevertheless obtain his release under the writ, "Where, . . . by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged." N.C. Gen. Stat. § 17-33(2) (1983). Petitioner contends that entering the M.A.P.P. agreement with the North Carolina Division of Prisons and the North Carolina Parole Commission constituted such an act or event. The difficulty with petitioner's position lies in the fact that

the M.A.P.P. program is entirely an administrative function, and that the revocation of his contract was an administrative decision.

This Court confronted a similar issue in *In re Stevens, supra,* where a prisoner who had been recommended for parole sought habeas corpus relief in connection with the State Department of Correction's decision to lower his correctional status grade, thus diminishing his chances to obtain a conditional release. We held that because this was an administrative determination the Writ of Habeas Corpus was not appropriate. "Thus, the difficult problems of when a person should be released and under what circumstances turn on analysis of internal correction policy, and rightfully lie within the sole administrative jurisdiction of our State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny." *Id.* (*citing Goble v. Bounds*, 281 N.C. 307, 188 S.E. 2d 347 (1972)).

Petitioner's relief for rescission of his M.A.P.P. contract must come through administrative procedures before the Division of Prisons and the Parole Commission. Habeas Corpus is not an appropriate vehicle for obtaining judicial review of the Parole Commission's decision, absent a clear violation of constitutional rights. Because no such violation appears in this case, we hold that the trial court correctly denied the Petition for Writ of Habeas Corpus. We overrule this assignment of error.

Because of our disposition of this issue we do not reach petitioner's other assignments of error.

Affirmed.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. JAMES ALLEN SUGGS

No. 888SC567

(Filed 15 November 1988)

Criminal Law § 142.2— modification of probation conditions—written notice required

A purported modification of the conditions of defendant's probation was of no effect where defendant was not given written notice of the modification even though he received oral notice in open court and from his probation officer. N.C.G.S. § 15A-1343(c).

ON writ of certiorari from *Currin, Judge.* Judgment entered 29 October 1987 in Superior Court, WAYNE County. Heard in the Court of Appeals 24 October 1988.

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

Barnes, Braswell, Haithcock & Warren, by R. Gene Braswell and Glenn A. Barfield, for defendant appellant.

PHILLIPS, Judge.

Following defendant's conviction of contributing to the delinquency of a minor he was placed on special supervised probation, one of the express conditions of which was that he not be in the company of the victim. Subsequently, he was charged with violating that probation condition and following a hearing Judge James R. Strickland found that the violation occurred; but he continued defendant's probation and modified the terms to add as a special condition that defendant surrender his driver's license and not operate a motor vehicle on a public highway for a period of six months. A written statement setting forth the terms of this new condition of probation was not given to defendant; and upon being charged with violating that condition by driving an automobile on a public highway on six different occasions defendant moved to dismiss the charge because he had not received a written copy of the modification. Following a hearing Judge Currin denied the motion and revoked his probation upon findings that defendant received oral notice of the modification in open court and later from his probation officer.

G.S. 15A-1343(c), which provides as follows, requires that the order be set aside:

> Statement of Conditions.—A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

Obviously, the provision requiring written notice of any modifications made in the terms of probation is mandatory, and we have no authority to rule otherwise. The State's argument that oral notice was a satisfactory substitute for the written statement that the statute requires cannot be accepted, because to do so would render the statute nugatory. Since the statutory mandate as to written notice was not complied with the purported modification of the probation terms was of no effect and the order holding to the contrary is vacated.

Vacated.

Judges BECTON and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 NOVEMBER 1988

BRANNON v. BRANNON No. 8821DC478	Forsyth (84CVD4649)	Affirmed in part; reversed in part and remanded
BURNS v. BURNS No. 8828DC636	Buncombe (87CVD2488)	Appeal Dismissed
CARR v. JOHNSON No. 884DC719	Sampson (84CVD334)	Appeal Dismissed
EATMAN v. HARTIS No. 888SC411	Lenoir (86CVS358)	Appeal Dismissed
GIRARD v. GIRARD No. 8821DC730	Forsyth (87CVD5639)	Appeal Dismissed
IN RE APPROVAL OF A CERTIFICATE OF NEED FOR QUALITY CARE HOME HEALTH No. 8810DHR302	Dept. Human Resources (No. 6-2548-86) (No. 86CHR262)	Appeal Dismissed
NICHOLSON v. LILES No. 8721DC1157	Forsyth (87CVD772) (87CVD878)	Affirmed
STATE v. BRINSON No. 884SC304	Onslow (87CRS1653) (87CRS1654) (87CRS1650) (87CRS1652)	Affirmed
STATE v. BYERS No. 8821SC645	Forsyth (87CRS26752) (87CRS26718)	Affirmed
STATE v. DEAVER No. 8830SC232	Haywood (87CRS816)	No Error
STATE v. DODD No. 8818SC608	Guilford (87CRS24255)	No Error
STATE v. HACKETT No. 8818SC595	Guilford (86CRS82406)	No Error
STATE v. HALL No. 8812SC668	Cumberland (87CRS14161)	No Error

STATE v. HARRELSON No. 8818SC687	Guilford (87CRS44858)	No Error
STATE v. McKOY No. 8812SC644	Cumberland (87CRS8949)	Appeal Dismissed
STATE v. SANTIAGO No. 884SC551	Onslow (87CRS5701) (87CRS5702) (87CRS5703)	No Error
STATE v. SPELLMAN No. 8820SC659	Union (87CRS5762)	No Error
STATE v. STROUD No. 888SC605	Lenoir (87CRS7706)	Affirmed
STATE v. UTLEY No. 8812SC724	Cumberland (87CRS19208)	No Error
TART v. BARBOUR No. 885SC571	New Hanover (87CVS3099)	Vacated & Remanded
WEAVER v. EARLY No. 8718SC559	Guilford (86CVS1328)	Affirmed in part, reversed in part and remanded

FRANCES LEE NANCE McIVER v. GARY CALVIN McIVER

No. 8822DC343

(Filed 6 December 1988)

1. **Divorce and Alimony § 30— equitable distribution—claim filed before divorce action**

The district court had jurisdiction over a wife's equitable distribution claim even though a divorce action was not pending at the time the claim was asserted where the couple separated; the wife brought an action for alimony without divorce and equitable distribution; the husband subsequently filed a separate action for absolute divorce based on one year's separation; the divorce was granted; and the wife thereafter pursued her equitable distribution claim. The provisions of N.C.G.S. § 50-20(k) (Supp. 1981), N.C.G.S. § 50-21(a) (Supp. 1981), and N.C.G.S. § 50-11(e) as they read at all times relevant to this appeal are interpreted to mean that the right to an equitable distribution is an inchoate right exercisable only in a divorce action and that the actual distribution of property must follow a divorce decree, not that the right to assert an equitable distribution claim is triggered by the filing of a divorce action or that the right to equitable distribution was destroyed by the divorce decree because the wife failed to assert that right anew after the husband filed the divorce action. Moreover, recent amendments provide that the rights of the parties vest at the time of the parties' separation, so that, had the equitable distribution claim and divorce action been filed after the effective date of the amendments, the husband's argument would have been dismissed summarily.

2. **Divorce and Alimony § 30— equitable distribution—consideration of premarital relationship**

There was no prejudice in an equitable distribution action where the court's recitation in the findings of the extramarital nature of the parties' premarital relationship suggests that the trial judge may have improperly considered fault in making the distribution because the extramarital relationship involved these two parties and there was nothing to indicate that the husband was prejudiced by this consideration.

3. **Divorce and Alimony § 30— equitable distribution—premarital contributions**

The trial judge did not err by considering the parties' premarital contributions in an equitable distribution proceeding because premarital contributions are relevant in an equitable distribution proceeding to the extent those contributions constitute separate property, entitling the contributing spouse to credit where property of mixed marital and separate character is distributed.

4. **Divorce and Alimony § 30— equitable distribution—property acquired during premarital cohabitation**

The trial judge in an equitable distribution action improperly relied upon the parties' premarital relationship in classifying certain property as marital. Only married persons are afforded the protections of our equitable distribution statute.

5. Divorce and Alimony § 30— equitable distribution—marital property—improper classification

The trial court erred in an equitable distribution action by classifying certain property as marital property where there was evidence that some property consisted entirely of separate interests while other property consisted of marital and separate property and there was no accounting for the husband's interest existing before marriage.

6. Divorce and Alimony § 30— equitable distribution—classification of property—insufficient findings

The trial court erred in an equitable distribution action by making erroneous and insufficient findings of fact and conclusions of law regarding classification of property as marital or separate where the court erroneously classified certain property, tainting the findings and conclusions regarding evaluation and distribution; the method of valuing the marital portion of a lakefront home was inadequate to support the award to the wife; and the findings provided insufficient support for the division of the property.

APPEAL by defendant from *George T. Fuller, Judge.* Order entered 3 March 1988 in District Court, IREDELL County. Heard in the Court of Appeals 25 October 1988.

No brief filed for plaintiff-appellee.

William L. Durham for defendant-appellant.

BECTON, Judge.

This equitable distribution action is before our court a second time. Defendant, Gary Calvin McIver, appeals an equitable distribution order awarding $17,091.50, representing a one-half interest in certain items deemed marital property, to the plaintiff, Frances Lee Nance McIver. We reverse and remand the case.

I

A. *Facts*

The parties were married 19 April 1980. They began seeing each other in 1975, when each was still married to another person. In 1978, two years before they were married, Gary McIver financed the purchase of a lakefront lot and mobile home, making a down payment with funds from the sale of a home owned by him and his first wife. The parties lived together at the lakefront home off and on until they were married.

The record reveals no direct financial contribution by Frances McIver toward purchase of the home during the period preceding their marriage. However, she performed housekeeping chores, helped with the upkeep of the property, and assisted in building a seawall along the shore. The parties continued to live at the lakefront home and made improvements to it after they were married and until their separation in December 1981.

B. *Procedural History*

Frances McIver ("the wife") brought the present action in May 1982 seeking alimony without divorce and an equitable distribution. Gary McIver ("the husband") subsequently filed a separate action for absolute divorce based on one year's separation. The divorce was granted on 8 February 1983. The wife thereafter pursued her equitable distribution claim and, in September 1984, was awarded title to certain personal property and a one-half interest in the lakefront home.

The husband appealed the 1984 equitable distribution order to this court. We vacated that order on the ground that the trial judge failed to find as a fact that an absolute divorce judgment had been entered before the equitable distribution matter was decided.

The wife's equitable distribution claim was heard again in district court. On 3 March 1988, the trial judge ordered the husband to pay the wife $17,091.50, representing "her one-half interest in the net value of the marital properties. . . ." From this order, the husband appeals.

C. *Assignments of Error*

The husband alleges that the trial judge erred by: (1) deciding the equitable distribution action in the first instance since, he argues, the court lacked jurisdiction to hear it; (2) considering the parties' premarital relationship and premarital contribution to certain property when making the distribution; (3) improperly classifying certain property as marital; and (4) making erroneous or insufficient findings of fact and conclusions of law. We address these contentions in order.

II

[1] The husband first contends that certain provisions of the North Carolina Equitable Distribution Act invalidate the equitable distribution order entered in the present case. He maintains that the district court never had jurisdiction over the wife's equitable distribution claim because a divorce action was not pending at the time she asserted the claim. He further argues that the wife was barred from obtaining a distribution of property because she did not raise anew her right to equitable distribution in the separate divorce action prior to entry of the divorce decree. We disagree.

A. *"Vesting" of Right to Equitable Distribution*

The husband relies heavily on the language in Section 50-20 (k) in making his argument. At all times relevant to this appeal, that section provided:

> The rights of the parties to an equitable distribution of marital property are a species of common ownership, the *rights* of the respective parties *vesting at the time of filing the divorce action.*

N.C. Gen. Stat. Sec. 50-20(k) (Supp. 1981) (emphasis added).

He interprets this section to mean that the wife's right to equitable distribution could not be asserted until a divorce action was filed. He argues that because she asserted her claim prior to the husband's action for divorce, she stated no cause of action, and thus, the court lacked jurisdiction to enter an order of equitable distribution.

We interpret Section 50-20(k) differently. This section does not provide that the right to *assert* an equitable distribution claim is triggered by the filing of a divorce action. Nor does it provide that an equitable distribution claim is void if asserted prior to filing an action for divorce. Instead, we read this section to mean that the *right* to equitable distribution is an inchoate right exercisable only in a divorce action. Thus, for example, absent a consent judgment, the right to equitable property distribution cannot be effectuated during the one-year separation period that necessarily precedes a filing for absolute divorce; this does not mean that a claim for equitable distribution cannot be made

during that period. Our interpretation meshes with N.C. Gen. Stat. Secs. 50-21(a) and 50-11(e), and with recent amendments to the statute, discussed below.

B. *Sequence of Divorce and Equitable Distribution Judgments*

The husband finds further support for his argument in his reading of Section 50-21(a). At all times relevant to this appeal, that section provided in part:

> [1] *Upon application of a party to an action for divorce,* an equitable distribution of property *shall follow* a decree of absolute divorce. [2] A party may file a cross action for equitable distribution in a suit for an absolute divorce, or *may file a separate action* instituted for the purpose of securing an order of equitable distribution. . . . [3] The *equitable distribution may not precede a decree of absolute divorce.* . . .

N.C. Gen. Stat. Sec. 50-21(a) (Supp. 1981) (emphasis added) (bracketed numerals added). The husband relies only on the first quoted sentence to conclude that one must be a party to an existing divorce action before an equitable distribution claim may be asserted. We reject his argument.

Nothing in this section mandates the precise time that application for equitable distribution must be made; it merely provides that the actual distribution of property must follow a divorce decree. We believe that the first sentence speaks only to the proper *sequence* of *judgments* when a party to a divorce action also asserts a claim for equitable distribution in the same action. Furthermore, the second quoted sentence makes it clear that alternative means of requesting equitable distribution exist, specifically permitting a party to assert the right in a *separate action,* as occurred in the case before us. Finally, the third quoted sentence establishes a parallel rule for the sequence of divorce and equitable distribution judgments when the equitable distribution claim is asserted in a separate action.

C. *Right to Equitable Distribution Asserted Prior to Divorce*

Finally, the husband relies upon Section 50-11(e), which provided that:

> *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. . . .*

N.C. Gen. Stat. Sec. 50-11(e) (Supp. 1981) (1987) (emphasis added). He argues that the right to equitable distribution was destroyed by the entry of the divorce decree because the wife failed to assert that right anew after he filed the divorce action.

The husband incorrectly assumes that the wife's claim for equitable distribution was of no effect because it was asserted before he filed the action for divorce. For the reasons above, we find that contention without merit. Furthermore, we accord great weight to the language, ". . . unless the right is *asserted prior to judgment of absolute divorce.*" This section merely requires an equitable distribution claim to be asserted *at any time prior to judgment,* and does not prohibit a claim asserted before a divorce action is filed.

D. *Recent Amendments*

Our interpretation is consistent with recent amendments made to Sections 50-20(k) and 50-21(a). Section 50-11(e) was not amended.

Section 50-20(k) now provides that "[t]he rights of the parties to an equitable distribution of marital property . . . [vest] *at the time of the parties' separation.*" N.C. Gen. Stat. Sec. 50-20(k) (1987) (amended effective 1 October 1987) (emphasis added).

Section 50-21(a) now provides:

> *At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed,* either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes . . . . A judgment for an equitable distribution shall not be entered prior to entry of a decree of absolute divorce, except for a consent judgment, which may be entered at any time during the pendency of the action . . . .

N.C. Gen. Stat. Sec. 50-21(a) (1987) (amended effective 1 October 1987) (emphasis added). *See also Hearings on H.B. 1106 Before the N.C. House Judiciary III Committee* (6 August 1987).

The amendments do not alter our analysis. We simply note that had the equitable distribution claim and divorce action been

filed after the effective date of the amendments, the husband's argument would have been dismissed summarily.

We reject the husband's reading of the original version of the statutes and hold that the wife's claim for equitable distribution was valid and appropriate for determination by the district court judge.

III

The husband assigns as error the trial judge's consideration of the parties' premarital relationship in classifying and distributing property. He first asserts that the judge improperly considered fault in making the distribution. He next argues that contributions before the marriage toward acquisition of property should never be considered in an equitable distribution proceeding. Finally, he contends that the judge erred in classifying certain property acquired in part before marriage as marital property. We find merit only in the husband's last contention.

A. *Findings of Fact and Conclusions of Law*

The trial judge made the following findings of fact pertinent to this appeal:

> [1] That plaintiff and defendant began a relationship in 1975 and saw each other on a regular basis; that they began engaging in a sexual relationship about November 1975, and continued in that type of relationship until the date of separation; that during the early years of the parties' relationship the defendant was married to another woman.
>
> [2] That plaintiff and defendant discussed marriage and contemplated marriage, and that in contemplation of marriage the parties looked for a home to purchase; that by deed dated May 16, 1978, [the lakefront lot and mobile home were] conveyed to Gary Calvin McIver . . .; that . . . Gary Calvin McIver, individually, executed a note and deed of trust in favor of Piedmont Bank and Trust Company, in the original amount of $24,750.00. . . .
>
> [3] That subsequent to said purchase, the parties lived together and that plaintiff helped keep said property cleaned up and made improvements to the property, and the parties maintained said property jointly as a home.

. . .

[9] That the Court finds the following properties are marital properties, with values as of the date of separation as follows: Lot No. 67, Lake Norman, and the mobile home thereon, at a value of $55,000 subject to a maximum loan of $24,750 with a net value of $30,250; a 1981 Toyota automobile with a value of $1,027; 1974 Ford van with a value of $1,100; a U.S. Savings Bond with a value of $106; a pontoon boat and motor with a value of $1,000; a Kenmore washer with a value of $250; a Whirlpool dryer with a value of $200; and a microwave oven with a value of $250.

. . .

[11] That plaintiff and defendant were both employed during the years of their relationship, and the court finds that payments have been made since 1978 on the loan [on the lakefront lot and mobile home], from the earnings of both of the parties hereto; however, the Court cannot find from the evidence the balance due as of the date of separation . . . and therefore finds that the maximum indebtedness could not be more than the original amount of the loan, which was $24,750.

Based on the findings of fact, the judge made the following conclusions of law:

That the following properties are marital properties and subject to equitable distribution: Lot No. 67 of Lake Norman and the mobile home located thereon, the 1981 Toyota automobile, the 1974 van, a U.S. Savings Bond, pontoon boat and motor, Kenmore washer, Whirlpool dryer, and microwave oven; that the net value of said marital properties as of the date of separation in December, 1981, was $34,183, and that an equal division of the net value of marital properties should be made.

The husband was ordered to pay the wife $17,091.50.

B. *Fault is an Improper Consideration*

[2] We first address the husband's contention that the judge erred in considering the parties' fault in making the distribution.

The North Carolina equitable distribution statute, N.C. Gen. Stat. Sec. 50-20, requires the trial judge to follow a three-step pro-

cedure in deciding equitable distribution matters: (1) all property must be classified as marital or separate, and when property has dual character, the component interests of the marital and separate estates must be identified; (2) the net value of marital property must be determined; and (3) marital property must then be distributed equally or, if equal division would be inequitable, distributed according to the equitable factors set out in N.C. Gen. Stat. Sec. 50-20(c). *See generally, Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E. 2d 765, 767 (1985), *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 856 (1985). Misconduct not related to the economic condition of the marriage is not an appropriate consideration under the third step. *See Smith v. Smith*, 314 N.C. 80, 81, 331 S.E. 2d 682, 687 (1985).

Here, recitation in the findings of the extramarital nature of the parties' premarital relationship suggests that the trial judge may have improperly considered fault in making the distribution. However, the husband does not assert, and we see nothing to indicate, that the husband was prejudiced by this consideration. After all, the extramarital relationship involved these two parties. Therefore, we find the error, if any, to be harmless.

C. *Premarital Contributions to Acquisition of Property*

[3] The husband next urges us to hold that a trial judge hearing an equitable distribution action may never consider premarital contributions to separate or marital property. This we cannot do.

North Carolina has adopted the "source of funds" rule in determining whether property is marital or separate. Under the source of funds analysis, property is "acquired" as it is paid for, and thus may include both marital and separate ownership interests. *McLeod v. McLeod*, 74 N.C. App. 144, 148, 327 S.E. 2d 910, 913 (1985), *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985). Under the rule, property acquired with separate funds prior to marriage remains separate, and is not converted to marital property merely because it was purchased in anticipation of marriage. *Tiryakian v. Tiryakian*, 91 N.C. App. 128, 135, 370 S.E. 2d 852, 856.

In applying the source of funds rule, the financial or other contributions by the marital and separate estates toward the acquisition of property must be identified and accounted for. As we

stated in *Wade v. Wade*, "when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property." 72 N.C. App. 372, 382, 325 S.E. 2d 260, 269 (1985), *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985) (citations omitted).

Thus, premarital contributions *are* relevant in an equitable distribution proceeding, to the extent those contributions constitute separate property, entitling the contributing spouse to credit when property of mixed marital and separate character is distributed. *See Tiryakian*, 91 N.C. App. at 136, 370 S.E. 2d at 856; *Willis v. Willis*, 86 N.C. App. 546, 549, 358 S.E. 2d 571, 573 (1987); *Lawrence v. Lawrence*, 75 N.C. App. 592, 595-96, 331 S.E. 2d at 186, 188 (1985), *disc. rev. denied*, 314 N.C. 541, 335 S.E. 2d 18 (1985). Therefore, it was not error for the trial judge to consider the parties' premarital contributions in this proceeding.

D. *Property Acquired During Cohabitation is not Marital Property*

[4] It appears from the record, as the husband maintains, that the trial judge improperly relied upon the parties' premarital relationship—in particular, the fact that they lived together—in classifying certain property as marital. In doing so, the judge operated under a misapprehension of the law.

Only married persons are afforded the protections of our equitable distribution statute. That statute is unambiguous: property must be acquired *during marriage* to be classified as marital property, and only marital property is subject to distribution. N.C. Gen. Stat. Sec. 50-20(b)(1), (2) (1987); *see Wade*, 72 N.C. App. at 378, 325 S.E. 2d at 267. We decline to expand the Legislature's clear definition of marital property to include property acquired prior to marriage. *Cf. Rolle v. Rolle*, 219 N.J. Super. 528, 530 A. 2d 847 (1987); *Mangone v. Mangone*, 202 N.J. Super. 505, 495 A. 2d 469 (1985); *Grishman v. Grishman*, 407 A. 2d 9 (Me. 1979) (all declining to classify property acquired during premarital cohabitation as marital property).

The record shows that the wife's premarital contributions to what later became the marital home consisted of services in the form of housekeeping, upkeep of the property, and helping to con-

struct a seawall. Though we do not decide whether a spouse may have other remedies for services provided before marriage, the potential availability of equitable remedies—such as constructive trust, resulting trust, recovery in *quantum meruit* or quasi-contract—does not transform property acquired before marriage into marital property subject to equitable distribution under Section 50-20. *See Rolle*, 219 N.J. Super. at 534-35, 530 A. 2d at 850-51.

Accordingly, we conclude that it was error for the trial judge to classify as marital any interest in property acquired before the parties were married but while they lived together.

E. *Erroneous Classification of "Marital Property"*

[5] The husband next contends that the trial judge erred in classifying certain property as marital property. We agree.

We are mindful that the task of the trial judge in the present case was made difficult by the limited evidence the parties put before him. Even so, the record shows that there was evidence that the lakefront home and pontoon boat consisted of both marital and separate interests. Each of these items was acquired in part with the husband's separate funds while the parties lived together, and the record reflects that loan payments were made from marital funds after the parties were married. It was thus error to classify them as marital property without accounting for the husband's interest existing before marriage. In addition, the microwave oven and clothes dryer, consisting entirely of separate interests, also were erroneously classified as marital property.

As to the remaining items of property classified as marital property and distributed equally—specifically, the 1981 Toyota automobile, the 1974 Ford van, a U.S. Savings Bond, and the Kenmore washer—the order appears to be correct. However, as will be discussed below, because the findings of fact do not support the distribution of any of the property, we reverse the entire order.

IV

[6] The substance of the husband's remaining assignments of error is that the trial judge made erroneous and insufficient findings of fact and conclusions of law. We agree.

Classification of property must be supported by the evidence and by appropriate findings of fact. *See Alexander v. Alexander*, 68 N.C. App. 548, 550, 315 S.E. 2d 772, 775 (1984). And in all equitable distribution cases, findings must "support the determination that the marital property has been equitably divided." N.C. Gen. Stat. Sec. 50-20(j) (1987); *see Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E. 2d 595, 599 (1988). As our Supreme Court stated in *Armstrong*, "[w]hen the findings and conclusions are inadequate, appellate review is effectively precluded." 322 N.C. at 405, 368 S.E. 2d at 600. That is the situation in the case before us.

The findings fail in a number of respects. First, the classification of certain property as marital was erroneous, and as a result tainted the findings and conclusions regarding valuation and distribution. Second, apart from the effect of erroneous classification, the method of valuing the marital portion of the lakefront home was inadequate to support the award to the wife. The judge simply subtracted the lakefront home's "maximum [amount of] indebtedness" from its fair market value at the time of separation to arrive at the value of the marital interest in the property. There were no findings as to the amount of the husband's equity in the property at the time of the marriage. Nor were there findings regarding the contributions to that equity during marriage, nor as to the value of improvements made to the property during the marriage. Likewise, no findings were made as to any remaining unsatisfied debt. Thus, we find it impossible to determine from the findings the value of the marital interest in the lakefront home as of the date of separation.

Finally, the findings of fact provide insufficient support for the division of the property. Although the trial judge concluded that an equal distribution should be made, the ordered distribution was not equal since some of the property classified as marital and divided in half was actually the husband's separate property.

In determining whether a particular distribution will be equitable, the judge must consider the statutory equitable factors set out in Section 50-20(c). *See Smith*, 314 N.C. at 86, 331 S.E. 2d at 686. If evidence of one or more of the factors listed in 50-20(c) is presented, the findings must reflect that the trial judge considered those factors, whether the judge ultimately orders an

equal or an unequal distribution. *See Armstrong*, 322 N.C. at 405, 368 S.E. 2d at 600.

In the case before us, we cannot tell from the findings whether the distribution was equitable, or whether the trial judge even considered the factors listed in Section 50-20(c). As a result, we divine no basis in the findings to support the particular division made by the judge. Accordingly, we hold that the findings of fact did not support the conclusions of law, and therefore that the $17,091.50 award to the wife must be reversed. We remand the case with the following instructions.

V

On remand, the trial judge should take additional evidence and make appropriate findings, in line with the source of funds rule, regarding the respective contributions of the marital estate and the separate estates of both the husband and wife toward acquisition of the lakefront home, pontoon boat, and any other property found to have marital and separate components. Only those contributions to acquisition of property contributed subsequent to marriage may be deemed marital property.

Further, the trial judge should apportion the value of the properties based on the proportion invested by the marital and separate estates, so that each estate may be awarded a proportionate return on its investment. If evidence of any of the equitable factors in 50-20(c) is presented, the judge must articulate which of those factors led to the ordered distribution, whether the distribution is equal or unequal.

Reversed and remanded.

Judges EAGLES and GREENE concur.

RUFFIN WOODY AND ASSOCIATES, INC. v. PERSON COUNTY AND AMERICAN ARBITRATION ASSOCIATION

No. 889SC279

(Filed 6 December 1988)

1. **Arbitration and Award § 1— plaintiff's limited participation in arbitration—no waiver of right to object to arbitrability**

Plaintiff's limited participation in arbitration did not operate as a waiver of its right to object to the arbitrability of defendant's claims where plaintiff raised its objection before the hearing on the merits and before the selection of arbitrators was complete, N.C.G.S. § 1-567.3; nor was plaintiff bound by the admission in its initial answer that the claims were subject to arbitration, since plaintiff, by filing its amended answer to which defendant did not object, raised the issue of arbitrability.

2. **Arbitration and Award § 1— finality of architect's decision—clause controlling over arbitration clause**

Though there was conflicting language in the various documents which comprised the parties' construction contract, General Condition 35 of the U. S. Dept. of Commerce Economic Development Administration providing that the architect's decisions were final and conclusive took precedence over the AID documents which provided that most of the decisions of the architect were subject to arbitration.

3. **Arbitration and Award § 5— architect's performance—disputes arbitrable**

Though the parties' contract made the architect's decisions final as between the owner and the contractor, the contract was silent as to disputes concerning the architect's performance, and such disputes were therefore arbitrable. Defendant raised such arbitrable issues where it alleged that the architect failed to prepare change orders, properly to inspect the work, and to make periodic visits to the site.

4. **Arbitration and Award § 9— application to vacate award—ninety day period allowed—motion to confirm award before ninety days expire**

N.C.G.S. § 1-567.13(b) provides that, in most cases, an application to vacate an arbitration award must be made within ninety days after a copy of the award has been delivered to the applicant, but the statute does not require the trial court to defer its ruling on a motion to confirm the award for the entire ninety day period even though a motion to vacate has already been filed.

5. **Arbitration and Award § 9— arbitrator's business dealings with defendant—failure to disclose—dealings remote**

Though a neutral arbitrator was under an affirmative duty to disclose any prior dealings with defendant, the trial court did not err in denying plaintiff's motion to depose the arbitrators or alternatively to vacate the award, since the two structural design projects which the arbitrator's firm completed for defendant were done in 1965 and 1968 and were remote enough in time to dissipate any partiality on the arbitrator's part; the consulting work performed

for defendant by the arbitrator in 1979 and 1980 did not appear to be substantial, the fee for such services being $797.29; and the exhibits to plaintiff's motion permitted the inference that plaintiff had at least constructive knowledge of the arbitrator's prior contacts with defendant.

APPEAL by plaintiff from *Hobgood (Robert H.), Judge*, and *Clark (Giles R.), Judge*. Order entered 10 June 1986 and Order and Judgment entered 11 November 1987 in Superior Court, PERSON County. Heard in the Court of Appeals 27 September 1988.

This appeal arises out of an arbitration proceeding. Plaintiff contracted with defendant Person County (hereinafter "defendant") to build an addition to the Person County Courthouse. The parties executed a written agreement on 12 December 1977. The agreement consisted of a standard form contract issued by the American Institute of Architects (AIA Document A107), another AIA document entitled "General Conditions of the Contract for Construction," and additional "General Conditions" issued by the U.S. Department of Commerce Economic Development Administration (EDA). Both AIA documents included provisions for the arbitration of substantially all claims arising out of the contract. The EDA General Conditions, however, contained no provisions regarding arbitration and provided that the architect's decisions regarding the acceptability of the work performed by the contractor were final and conclusive. A separate agreement between defendant and the architect provided for arbitration of all claims arising out of the agreement.

Plaintiff completed the project and the architect issued a certificate of substantial completion on 11 May 1979. On 15 July 1979, the architect issued a final acceptance report stating that the contract was acceptable "except for minor cleanup and corrective work."

Defendant filed a demand for arbitration with the American Arbitration Association (AAA) on 6 May 1985 and then filed an amended statement of claim dated 7 October 1985. Defendant alleged that both plaintiff and the architect had breached their contracts and demanded a consolidated arbitration against both parties. Defendant further alleged that there were several defects in the completed building and that these defects were the result of faulty workmanship and defective design.

Plaintiff filed an answer, counterclaim, and crossclaim dated 25 October 1985. In its answer, plaintiff admitted that defendant's claims were proper subjects for arbitration by the AAA. Plaintiff also submitted a $500 administrative fee to the AAA. On 31 October 1985, the AAA commenced the process of selecting arbitrators. At the request of defendant, arbitration proceedings were postponed on 27 November 1985 until repairs on the building could be completed. On 16 May 1986, plaintiff filed an amended answer which included a denial of the AAA's jurisdiction on the grounds that the contract conditions provided that the architect's decisions concerning the acceptability of the work were final and conclusive.

In a letter dated 29 May 1986, the AAA informed the parties that "an issue of arbitrability exists which could be decided by an arbitrator" and the matter would proceed to arbitration in the absence of a restraining order. On 6 June 1986, plaintiff obtained a temporary restraining order in Person County Superior Court. The order enjoined any further arbitration proceedings pending a hearing to determine whether the order should be converted to a preliminary injunction. On 10 June 1986, the court entered an order denying plaintiff's motion for a preliminary injunction, dissolving the temporary restraining order, and staying the civil action pending arbitration and award.

On 9 October 1987, the arbitrators entered an award against plaintiff in the amount of $63,000 and against the architect in the amount of $32,000. On 19 October 1987, defendant filed a motion in Superior Court to lift the stay of the civil action and confirm the award. Plaintiff, on 28 October 1987, filed a motion to depose the arbitrators and, alternatively, to vacate the award. On 11 November 1987, the trial court entered an order denying plaintiff's motions, confirming the award, and entering judgment for defendant. Plaintiff appeals.

Jackson, Hicks & Fitzgerald, by Alan S. Hicks, for plaintiff-appellant.

George K. Freeman, Jr.; and Tolin & Long, by James W. Tolin, Jr., for defendant-appellee Person County.

PARKER, Judge.

Plaintiff first assigns error to the trial court's denial of its motion to enjoin the arbitration on the grounds that there was no valid agreement to arbitrate. Plaintiff next assigns error to the trial court's granting of defendant's motion to confirm the award prior to the expiration of the ninety-day period prescribed in G.S. 1-567.13(b). Plaintiff's third and fourth assignments of error are that the trial court erred in denying plaintiff's motion to depose the arbitrators or alternatively to vacate the award on the grounds that the neutral arbitrator failed to disclose prior business dealings with defendant.

[1] Before considering plaintiff's argument in support of its first assignment of error, we must address defendant's contention that plaintiff waived its right to challenge the arbitrability of defendant's claims by participating in the arbitration. One who participates in an arbitration hearing without objection may not raise an objection after the award is entered. *McNeal v. Black*, 61 N.C. App. 305, 300 S.E. 2d 575 (1983). In this case, however, plaintiff's objection was filed before the hearing was commenced. Moreover, plaintiff followed the correct procedure by applying for a court order to stay the arbitration proceeding. G.S. 1-567.3. Once the trial court refused to enjoin the arbitration, plaintiff had no choice but to participate in the proceeding. The specific instances in which an appeal may be taken from an arbitration order are set out in G.S. 1-567.18, and the statute does not permit an appeal to be taken from the denial of an application to stay arbitration.

Defendant contends that plaintiff's limited participation in the arbitration before it filed its amended answer was sufficient to operate as a waiver of its right to object. General Statute 1-567.3(b) provides, however, that, upon a showing that there is no agreement to arbitrate, "the court may stay an arbitration proceeding commenced or threatened." This provision clearly contemplates that objections to arbitration proceedings may be raised after the institution of the proceedings. Plaintiff in this case raised its objection before the hearing on the merits and before the selection of arbitrators was complete. Therefore, the objection was timely.

Defendant also contends that plaintiff should be bound by the admission in its initial answer that the claims were subject to ar-

bitration. This argument is without merit. By filing its amended answer, plaintiff raised the issue of arbitrability. Nothing in the record indicates that defendant objected to the filing of the amended answer, and both the AAA and the trial court considered the merits of the issue. Accordingly, we hold that plaintiff has not waived its right to object to arbitration on the grounds that there was no agreement to arbitrate.

[2] Plaintiff contends that defendant's claims are not arbitrable because the terms of the contract provide that the architect's decision as to the acceptability of the work is binding and conclusive. The determination of whether a particular claim is arbitrable is controlled by the language of the parties' agreement. *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23-24, 331 S.E. 2d 726, 731 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E. 2d 29 (1986). Plaintiff relies on the following provision of the EDA General Conditions:

> 35. ARCHITECT/ENGINEER AUTHORITY
>
> The Architect/Engineer shall give all orders and directions contemplated under this contract and specifications relative to the execution of the work. The Architect/Engineer shall determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this contract and shall decide all questions which may arise in relation to said work and the construction thereof. The Architect/Engineer's estimates and decisions shall be final and conclusive, except as herein otherwise expressly provided. In case any question shall arise between the parties hereto relative to said contract or specifications, the determination or decision of the Architect/Engineer shall be a condition precedent to the right of the Contractor to receive any money or payment for work under this contract affected in any manner or to any extent by such question.

General Condition 35 clearly designates the architect as the final authority on questions concerning the work performed by the contractor. Our courts have held that such a provision is binding on the parties to a construction contract. *Heating Co. v. Board of Education*, 268 N.C. 85, 150 S.E. 2d 65 (1966); *Elec-Trol, Inc. v. Contractors, Inc.*, 54 N.C. App. 626, 284 S.E. 2d 119 (1981), *disc. rev. denied*, 305 N.C. 298, 290 S.E. 2d 701 (1982).

Article 14 of AIA Document A107, however, provides:

> All claims or disputes arising out of this Contract or the breach thereof shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. . . .

Article 8 of Document A107 includes the following provision:

> 8.5 The Architect will be, in the first instance, the interpreter of the requirements of the Contract Documents. He will make decisions on all claims and disputes between the Owner and the Contractor. All his decisions are subject to arbitration.

The additional AIA General Conditions further provide:

> 2.2.12 Any claim, dispute or other matter in question between the Contractor and the Owner referred to the Architect, except those relating to artistic effect as provided in Subparagraph 2.2.11 and except those which have been waived by the making or acceptance of final payment as provided in Subparagraphs 9.9.4 and 9.9.5, shall be subject to arbitration upon the written demand of either party. . . .

Thus, there is a clear conflict between EDA General Condition 35 which provides that the architect's decisions are final and conclusive, and the AIA documents, which provide that most decisions of the architect are subject to arbitration.

Plaintiff contends that General Condition 35 is controlling because EDA General Condition 41 states: "Any provision in any of the contract documents which may be in conflict or inconsistent with any of the paragraphs in these General Conditions shall be void to the extent of such conflict or inconsistency." Plaintiff argues that this condition overrides the AIA provisions for arbitration of the architect's decisions. Defendant, however, contends that the AIA provisions should be given effect because General Condition 35 states that the architect's decisions are final and conclusive "except as herein otherwise expressly provided." Defendant argues that the AIA provisions come within this exception. Plaintiff's counter-argument is that the word "herein" in the exception indicates that the exception was intended only to

include other provisions in the EDA general conditions and not other documents incorporated into the contract.

We agree with plaintiff's interpretation of the contract. The EDA general conditions are set out in a separate, self-contained document. Although separate documents forming a single contract are normally construed as a single instrument, such a construction should not operate to avoid essential contract terms. *See Trust Co. v. Processing Co.*, 242 N.C. 370, 377, 88 S.E. 2d 233, 238 (1955) (quoting *Howell v. Howell*, 29 N.C. 491, 494 (1847)). The word "herein" in General Condition 35 clearly refers to the other EDA general conditions as opposed to any additional contract documents. If the provisions in the AIA documents are given effect, then only those decisions of the architect regarding "artistic effect" would remain conclusive and General Condition 35 would be rendered meaningless. Because General Condition 41 expressly provides that the EDA conditions should take precedence over any other contract documents, the AIA arbitration provisions are not effective to the extent that they conflict with General Condition 35.

In support of this construction, we note that the Appellate Court of Illinois reached the same result when construing a contract which contained provisions identical to those at issue in this case. *Roosevelt Univ. v. Mayfair Constr. Co.*, 28 Ill. App. 3d 1045, 1057-61, 331 N.E. 2d 835, 844-48 (1975). The *Roosevelt* court concluded that matters within the scope of General Condition 35 were not arbitrable. *Id.*

[3] Although we agree with the contract interpretation urged by plaintiff and adopted in *Roosevelt, supra*, other considerations require us to hold that, under the facts of this case, defendant's claims against plaintiff are arbitrable. General Condition 35 makes the architect's decisions final as between the owner and the contractor, but the EDA general conditions are silent as to disputes concerning the architect's performance.

Even where the contract provides that the decisions of the architect are conclusive, his decisions may be attacked if there is evidence of fraud or failure to exercise honest judgment. Our Supreme Court has stated the rule as follows:

> [W]here the parties stipulate, expressly or in necessary effect, that the determination of the architect or engineer shall

> be final and conclusive, both parties are bound by his determination of those matters which he is authorized to determine, except in case of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment.

Heating Co. v. Board of Education, 268 N.C. at 90, 150 S.E. 2d at 68 (quoting 13 Am. Jur. 2d *Building and Construction Contracts* § 34 (1964)). In the present case, defendant did not allege fraud on the part of the architect, but defendant's amended statement of claim did allege that the architect's designs were faulty in several respects and the architect breached his contract with the owner in that:

> A) He failed to prepare change orders.
>
> B) He failed to properly inspect, or test, the work and reject work which did not conform to the contract documents.
>
> C) He failed to make periodic visits to the site so as to monitor and inspect the construction and thereby guard the Owner against defects and deficiencies in the work.
>
> D) He accepted work which was not performed in accordance with the contract documents and approved payment therefor.

Both the architect's contract with defendant and the agreement between defendant and plaintiff require the architect to make periodic inspections in order to guard the owner against defects and deficiencies in the work of the contractor.

In our view, defendant's allegations at least raised an issue as to whether the architect failed to exercise honest judgment in reaching his decisions. Although there is nothing in the record before us to enable us to gauge the truth of the allegations, we do know that the arbitrators entered an award against the architect, thereby indicating some fault on his part. In *Paschen Contractors, Inc. v. John J. Calnan Co.*, 13 Ill. App. 3d 485, 300 N.E. 2d 795 (1973), cited with approval in *Roosevelt, supra*, the court held that certain claims pertaining to the architect's decisions were not excluded from a general arbitration clause even though they were within the scope of the language of General Condition 35:

> [General Condition 35] does not in our considered opinion, give the architect the power to pass upon his own errors and omissions, and to require a subcontractor to perform extra work and to furnish materials not encompassed in the architect's own deficient plans and specifications, all without compensation. To permit this would be an outrageous result not contemplated by the parties, and one not compelled by the language of the contract.

13 Ill. App. 3d at 490, 300 N.E. 2d at 799.

This reasoning is pertinent to the present case. Defendant's amended statement of claim included the following paragraph:

> Because the claims made herein are so interrelated that complete and fair relief may not be obtained unless the arbitration involves all three parties (The Owner, the architect and the Contractor) the Owner hereby demands a consolidated arbitration against the Architect and the Contractor. A principal issue to be resolved in the arbitration is the question of responsibility for certain defects in the building and whether such defects are design or construction defects.

This paragraph raises the issue of whether the architect or the contractor was responsible for defects in the work. Plaintiff also raised this issue by asserting a crossclaim against the architect.

Although there is no provision in the contract documents which specifically addresses the resolution of such a dispute, the general arbitration clause in the contract calls for arbitration of "[a]ll claims or disputes arising out of this Contract or the breach thereof . . . ." This and other contract provisions calling for arbitration cannot be ignored in considering whether to except a claim from the operation of General Condition 35. In making this determination, public policy requires us to resolve any doubts in favor of arbitration. *See Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 546, 342 S.E. 2d 853, 855 (1986). The contract construed as a whole manifests the parties' intention to submit all disputes to arbitration unless there was an express provision to the contrary. *See Robbins v. Trading Post*, 253 N.C. 474, 477, 117 S.E. 2d 438, 440-41 (1960). In this case, the contract does not contain a specific provision governing the settlement of the dispute at issue involving the performance of both the ar-

chitect and the contractor. We find, therefore, that such a dispute comes within the scope of the general arbitration clause, and that the trial court did not err in refusing to stay the arbitration proceedings in this case.

[4] Plaintiff next contends that the trial court erred in granting defendant's motion to confirm the arbitration award prior to the expiration of the ninety-day period prescribed in G.S. 1-567.13(b). This contention is without merit.

The award in this case was entered 9 October 1987, defendant filed a motion to confirm the award 19 October 1987, plaintiff filed a motion to depose arbitrators or vacate the award 28 October 1987, and the trial court denied plaintiff's motion and confirmed the award on 11 November 1987. General Statute 1-567.13(b) provides that, in most cases, an application to vacate an arbitration award must be made within ninety days after a copy of the award has been delivered to the applicant. Plaintiff would have us rule that the statute requires the trial court to defer its ruling for the entire ninety-day period even though a motion to vacate has already been filed. There is no support in statutory or case law for plaintiff's position. Moreover, the record shows that plaintiff had the opportunity to be heard on its motion to vacate the award. The assignment of error is overruled.

[5] Plaintiff's last two assignments of error both concern the failure of the neutral arbitrator, W. H. Gardner, Jr., to disclose prior business dealings with defendant. Plaintiff contends that the failure to disclose these dealings was sufficient grounds either to depose the arbitrators or vacate the award.

The panel of three arbitrators in this case consisted of one arbitrator appointed by each of the parties and a third, neutral arbitrator who was selected by the first two. The parties were given the opportunity to object to and request disclosure from the arbitrators. Plaintiff requested the arbitrators to disclose any past associations they may have had with certain expert witnesses expected to appear at the arbitration, and Mr. Gardner complied with this request. Plaintiff made no further requests or objections. Plaintiff's motion to depose or vacate stated that it did not learn of Gardner's dealings with defendant until after the award was entered.

Although plaintiff did not specifically request Gardner to disclose any prior dealings with defendant, Gardner signed a Notice of Appointment which stated:

> It is most important that the parties have complete confidence in the Arbitrator's impartiality. Therefore, please disclose any past or present relationship with the parties or their counsel, direct or indirect, whether financial, professional, social or other kind. Any doubt should be resolved in favor of disclosure.

In addition, the AAA Code of Ethics for Arbitrators in Commercial Disputes requires complete disclosure of any relationships with the parties. Thus, Gardner was under an affirmative duty to disclose any prior dealings with defendant.

In support of its motion to depose or vacate, plaintiff submitted exhibits showing that Gardner's firm did structural designs for a high school in defendant Person County in 1965 and for a library owned by defendant in 1968, and that Gardner worked as a consultant for an architect retained by defendant in 1979 and 1980 to inspect the County Courthouse and another building owned by defendant. Unquestionably, Gardner should have disclosed these transactions before serving as a neutral arbitrator. We must determine, therefore, whether his failure to disclose entitled plaintiff to depose the arbitrators or required the trial court to vacate the award.

An arbitration award may be vacated where there is "evident partiality by an arbitrator appointed as a neutral." G.S. 1-567.13(a)(2). No North Carolina case directly addresses the issue of an arbitrator's duty to disclose prior dealings with a party. Our Supreme Court has held that depositions of arbitrators may be taken and admitted in a proceeding to vacate an award where "an objective basis exists for a reasonable belief that misconduct has occurred." *Fashion Exhibitors v. Gunter*, 291 N.C. 208, 219, 230 S.E. 2d 380, 388 (1976). In *Gunter*, however, the Court was considering the conduct of the arbitrators with regard to the arbitration process itself rather than previous dealings with a party. In *Turner v. Nicholson Properties, Inc.*, 80 N.C. App. 208, 341 S.E. 2d 42, *disc. rev. denied*, 317 N.C. 714, 347 S.E. 2d 457 (1986), this Court held that a party had no right to depose an arbitrator on the grounds that the arbitrator had appeared as an expert wit-

ness for clients of the opposing counsel's former law firm. In *Turner*, however, the prior association had been disclosed and the AAA had ruled that it did not disqualify the arbitrator. *Turner*, 80 N.C. App. at 211, 341 S.E. 2d at 44.

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1968), the United States Supreme Court held that the failure of a neutral arbitrator to disclose prior business dealings with a party required vacation of an award. *Commonwealth Coatings* was decided under the Federal Arbitration Act, which, like G.S. 1-567.13(a)(2), authorizes vacation of an award in the event of "evident partiality" on the part of the arbitrators. *Commonwealth Coatings Corp.*, 393 U.S. at 147, 89 S.Ct. at 338, 21 L.Ed. 2d at 303-04 (citing 9 U.S.C. § 10). The neutral arbitrator in *Commonwealth Coatings* had worked periodically for one of the parties as an engineering consultant over a period of four or five years, had received fees of approximately $12,000, and had rendered services on the projects involved in the lawsuit. *Id.* at 146, 89 S.Ct. at 338, 21 L.Ed. 2d at 303. In a plurality opinion, Justice Black held that an award must be vacated if the arbitrator fails to disclose "any dealings that might create an impression of possible bias." *Id.* at 149, 89 S.Ct. at 339, 21 L.Ed. 2d at 305. However, Justice White, in a concurring opinion joined by Justice Marshall, refused to adopt a rule that would require disqualification where the undisclosed relationship is "trivial," though he found the relationship in the case at bar to be "substantial." *Id.* at 150-52, 89 S.Ct. at 340-41, 21 L.Ed. 2d at 305-06.

Subsequent federal decisions have not adopted the strict standard enunciated by Justice Black. *See, e.g., Morelite Constr. Corp. v. New York City Dist. Council Carpenters*, 748 F. 2d 79, 82-83 (2d Cir. 1984). Other jurisdictions that have considered the issue favor disclosure, but the majority view appears to be that an award will not be disturbed where the undisclosed relationship is not substantial. *See* Annotation, *Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrators*, 56 A.L.R. 3d 697 (1974 & Supp. 1988).

Under the facts of this case, we find the undisclosed transactions to be insufficient to require either vacation of the award or deposition of the arbitrators. The two structural design projects which Gardner's firm completed were done in 1965 and 1968 and

are remote enough in time to dissipate any partiality on Gardner's part. The consulting work performed by Gardner in 1979 and 1980 does not appear to be substantial, and the record shows that the fee for these services was $797.29. Further, the exhibits to plaintiff's motion permit the inference that plaintiff had at least constructive knowledge of Gardner's prior contacts with defendant.

An arbitration award is presumed valid and the party attacking it has the burden of proving adequate grounds to vacate the award. *Thomas v. Howard*, 51 N.C. App. 350, 353, 276 S.E. 2d 743, 745 (1981). Plaintiff here has not alleged that Gardner was in fact impartial, but relies solely on Gardner's failure to disclose the past transactions. Because arbitrators are experts in their fields, it is unrealistic to expect that they have absolutely no prior contacts with the parties. *See Morelite Constr. Corp. v. New York City Dist. Council Carpenters*, 748 F. 2d at 83. Although disclosure of such contacts is preferred, to permit a party to attack an award or depose the arbitrators whenever any prior transaction is not disclosed would frustrate the parties' intent to avoid litigation and obtain a swift resolution of their dispute. *See Turner v. Nicholson Properties, Inc.*, 80 N.C. App. at 211, 341 S.E. 2d at 44-45. Therefore, the trial court did not err in denying plaintiff's motion to depose the arbitrators or alternatively to vacate the award.

For the foregoing reasons, the trial court's order of 10 June 1986 denying plaintiff's motion for a preliminary injunction and the order of 11 November 1987 confirming the arbitration award and entering judgment thereon are affirmed in all respects.

Affirmed.

Judges PHILLIPS and EAGLES concur.

BARNEY H. HINNANT, ADMINISTRATOR OF THE ESTATE OF SANDRA LEIGH HINNANT, DECEASED v. JAMES NEAL HOLLAND AND JAMES WILLIAM HOLLAND

No. 8811SC491

(Filed 6 December 1988)

1. **Automobiles and Other Vehicles § 51— death of passenger—negligence of driver as jury issue—directed verdict and judgment n.o.v. properly denied**

In an action for wrongful death of an automobile passenger, the trial court properly denied plaintiff's motions for directed verdict and judgment n.o.v. where reasonable minds could differ as to whether the accident which led to the passenger's death was proximately caused by defendant driver's negligence, particularly since defendant's evidence suggested other causes for the accident; moreover, defendant driver's negligence was not established as a matter of law by his statement at trial to the effect that, on hindsight, he "was traveling a little bit too fast for the curve."

2. **Automobiles and Other Vehicles § 90.10— peremptory instruction on negligence requested—denial proper**

The trial court in a wrongful death action properly refused to give a requested peremptory instruction on negligence where defendant's evidence regarding the composition of the roadway, the absence of warning signs, the locking of the wheel, the vehicle's tendency to overturn, and his driving at or below the speed limit all permitted more than the single inference that defendant was negligent.

3. **Automobiles and Other Vehicles § 90.1— violation of N.C.G.S. § 20-141(a)—failure to instruct that violation was negligence per se—no error**

The plaintiff in a wrongful death action was not prejudiced by the court's instruction that a violation of N.C.G.S. § 20-141(a) is negligence rather than negligence per se, since the practical effect of an instruction on negligence and negligence per se in regard to this statute would have been identical.

4. **Automobiles and Other Vehicles § 90.9— duty to decrease speed—failure to instruct—reversible error**

The trial court in a wrongful death action committed reversible error in refusing to instruct the jury regarding the duty to decrease speed under N.C.G.S. § 20-141(m).

5. **Automobiles and Other Vehicles § 45.1; Trial § 18.2— wrongful death action—defendant driver's testimony as to no criminal record—character evidence inadmissible**

The trial court in a wrongful death action erred in admitting defendant driver's testimony that he had never been convicted of a crime or traffic offense, since Rule 404 of the N.C. Rules of Evidence prohibits character evidence even of such "non-acts" as a good driving record; evidence which bolsters or corroborates a civil party's credibility is inadmissible unless his credibility has first been challenged, and defendant driver's credibility had not

been assailed; and a danger exists that the jury in a civil action will give undue weight to evidence that the defendant was never criminally charged or convicted for his role in the incident at issue.

6. Evidence § 22.1— wrongful death action—testimony at criminal trial by subsequently unavailable witness—testimony inadmissible

The trial court in a wrongful death action properly excluded the former testimony of an unavailable witness who had testified at defendant driver's criminal trial concerning other accidents at the curve where the fatal accident in question occurred, since Rule of Evidence 804(b)(1) requires exclusion of such testimony unless the party against whom the former testimony is offered, or a predecessor in interest, had an opportunity to develop the testimony by direct, cross, or redirect examination, but plaintiff, father of deceased passenger, was not a party to the criminal proceeding and had no opportunity to cross-examine the witness.

APPEAL by plaintiff from *Coy E. Brewer, Jr., Judge.* Judgment entered 2 March 1988 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 27 October 1988.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for plaintiff-appellant.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and R. Bradley Miller, for defendant-appellees.

BECTON, Judge.

This wrongful death action arose from a one-car accident in which a passenger was killed. From judgment entered on a jury verdict in favor of defendants, plaintiff appeals. For the reasons set out below, we reverse the judgment and remand for a new trial.

I

On 19 December 1985, defendant James Neal Holland ("Neal"), age 16, drove his high school classmates to the home of a needy family to deliver Christmas presents as part of a school project. Neal drove a Chevrolet Blazer owned by his father, the defendant James William Holland. On the trip back to school, Sandra Leigh Hinnant and another student rode with Neal. Sandra sat in the back seat. The Blazer overturned at a curve in the road, and Sandra was killed. The plaintiff, Barney Hinnant ("Sandra's father"), brought this action for wrongful death of his daughter, alleging that Neal's negligence resulted in her death.

The evidence presented at trial showed the following. The accident happened on a clear day on a dry road composed of clay and sand. The road was 20 feet wide, had no shoulders, and was bounded by shallow ditches. The center of the road was hard and compacted; the sides were softer and sandy. No signs warned of the upcoming curve, but Neal's view of it was unobstructed. He drove well within the speed limit of 55 m.p.h., and he applied his brakes when he realized the curve was sharper than he first thought. The right front wheel "locked" in the sand, the Blazer went into a skid and flipped twice. The fiberglass portion of the roof, directly over the backseat, was torn off as the Blazer rolled.

Neal's father testified that, due to its short wheelbase, a Blazer does not "corner" well and is subject to overturning. He also testified that the road was paved the week following the accident. The former testimony of an unavailable witness, to the effect that four accidents had occurred at the same curve in as many years, was excluded as hearsay not within an exception.

Sandra's father appeals from a jury verdict finding Neal not negligent. He assigns error to (1) the denial of his motions for directed verdict and judgment notwithstanding the verdict; (2) the judge's refusal to give certain instructions to the jury; and (3) the admission of testimony on direct examination that Neal had no criminal convictions. Neal makes a cross-assignment of error to the exclusion of the unavailable witness' former testimony. We address these contentions in order.

II

[1] Sandra's father first contends that denial of his motions for directed verdict and judgment notwithstanding the verdict was error, since, he argues, the evidence at trial established Neal's negligence as a matter of law. We disagree.

A motion for directed verdict, like a motion for judgment notwithstanding the verdict, challenges whether evidence presented at trial is legally sufficient to go to the jury. *See Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E. 2d 796, 799 (1987). A directed verdict or judgment notwithstanding the verdict may properly be entered in a negligence action "[o]nly in exceptional cases." *Id.* at 734, 360 S.E. 2d at 799. "Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because applica-

tion of the prudent man test . . . is generally for the jury." *Id.* (citations omitted). Courts are even more reluctant to grant the motion when, as here, the moving party bears the burden of proof.

A party with the burden of proof may be granted a directed verdict "when the credibility of the movant's evidence is *manifest as a matter of law.*" *Murdock v. Ratliff*, 310 N.C. 652, 659, 314 S.E. 2d 518, 522 (1984) (emphasis added). The evidence "must so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn." *Id.* " 'Needless to say, the instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury.' " *Id.* at 660, 314 S.E. 2d at 522 (emphasis removed) (quoting *North Carolina National Bank v. Burnette*, 297 N.C. 524, 538, 256 S.E. 2d 388, 396 (1979)). This is not one of those rare cases.

To be entitled to a directed verdict or judgment notwithstanding the verdict, Sandra's father had to prove as a matter of law that Neal was negligent, and that his negligence was the proximate cause of the accident. *See id.* at 662-63, 314 S.E. 2d at 524. Sandra's father asserts that this burden was satisfied when Neal made the following statement at trial:

> Looking back at it now, yes sir, I do think I was travelling a little bit too fast for the curve.

The father, quoting language from *Burnette*, argues that the evidence of Neal's negligence was "manifestly credible" since Neal "admitt[ed] the truth of the basic facts upon which the [negligence] claim rested." He further argues that any doubts regarding the testimony were "only latent doubts," and therefore that he was entitled to judgment in his favor as a matter of law.

In our view, reasonable minds could differ as to whether the accident that led to Sandra's death was proximately caused by Neal's negligence, particularly since the defendants' evidence, viewed in a light most favorable to Neal, suggested other causes for the accident. Giving Neal the benefit of all reasonable inferences to be drawn from the evidence, we cannot conclude that his negligence was established as a matter of law. *See Taylor*, 320 N.C. at 734, 360 S.E. 2d at 799; *Kennedy v. K-Mart Corp.*, 84 N.C. App. 453, 454-55, 352 S.E. 2d 876, 877 (1987). Accordingly, we hold

that the case was properly submitted to the jury and that the trial judge did not err in denying the father's motions for directed verdict and judgment notwithstanding the verdict.

III

Sandra's father next contends that the trial judge committed reversible error in refusing to give certain requested jury instructions.

A. *Peremptory Instruction on Negligence*

[2] The trial judge declined to give a peremptory instruction tendered by Sandra's father which stated in relevant part: "*All of the evidence* tends to show that James Neal Holland was negligent, and that his negligence was a proximate cause of [Sandra's] death. . . . [T]here is *no evidence to the contrary* . . . ." (Emphasis added.) Sandra's father contends that failure to give this instruction entitled him to a new trial. We reject that contention.

As we stated in *Dobson v. Honeycutt*, "[w]hen *all the evidence* suffices, if true, to establish the controverted fact, the [c]ourt may give a peremptory instruction—that is, if the jury finds the facts to be as *all the evidence* tends to show, it will answer the inquiry in an indicated manner." 78 N.C. App. 709, 712, 338 S.E. 2d 605, 606-07 (1986) (citations omitted) (emphasis added). A peremptory instruction is proper only "when *all evidence* points in the same direction with but a single inference to be drawn." *Catoe v. Helms Constr. & Concrete Co.*, 91 N.C. App. 492, 372 S.E. 2d 331, 335 (1988) (emphasis added).

In the case before us, the trial judge properly refused to give the requested instruction because that instruction was not supported by all the evidence presented at trial. *See Property Shop, Inc. v. Mountain City Inv. Co.*, 56 N.C. App. 644, 649, 290 S.E. 2d 222, 225 (1982). Neal's evidence regarding the composition of the roadway, the absence of warning signs, the locking of the wheel, the Blazer's tendency to overturn, and evidence that Neal drove at or below the speed limit, all permitted more than the single inference that Neal was negligent.

B. *Instruction on Negligence Per Se*

[3] The trial judge instructed the jury in part that North Carolina's motor vehicle law prohibits a motorist to drive a vehicle "at

a speed greater than is reasonable and prudent under the conditions then existing." The instruction tracked verbatim the language in N.C. Gen. Stat. Sec. 20-141(a) (1987). The judge further instructed the jury that violation of that law is negligence. Sandra's father contends that the judge erred in failing to instruct the jury that violation of the statute is negligence *per se*, and he further contends that this failure entitled him to a new trial. We disagree.

When a statute sets a standard of care for the protection of others, violation of that statute is negligence *per se*. *See generally Gore v. George J. Ball, Inc.*, 279 N.C. 192, 198, 182 S.E. 2d 389, 392 (1971); *Federated Mutual Insurance Co. v. Hardin*, 67 N.C. App. 487, 489, 313 S.E. 2d 801, 802-03 (1984). But in the absence of a safety statute, conduct is judged by the "reasonably prudent person" standard, a violation of which is negligence. *Foy v. Bremson*, 30 N.C. App. 662, 667, 228 S.E. 2d 88, 91 (1976).

It is technically true that violation of Section 20-141(a)'s "reasonable and prudent" standard is negligence *per se*. *See Cassetta v. Compton*, 256 N.C. 71, 74, 123 S.E. 2d 222, 224 (1961). Even so, we hold that the trial judge did not commit prejudicial error in instructing the jury that violation of the statute was negligence, since the practical effect of an instruction on negligence and negligence *per se* in regard to this statute would have been identical. In either case, the jury would be required to determine what was "reasonable and prudent" under the circumstances. *See Foy*, 30 N.C. App. at 666-67, 228 S.E. 2d at 91 ("The judge, in effect, [would have] said that negligence is negligence.").

C. *Instruction on Duty to Decrease Speed*

[4] Sandra's father next contends that the trial judge erred in failing to instruct the jury regarding the duty to decrease speed, and that as a result he should have been granted a new trial. For the reasons that follow, we agree.

The trial judge instructed the jury in accordance with subsection (a) of N.C. Gen. Stat. Sec. 20-141, but declined to instruct them as to subsection (m). Section 20-141(a) of the General Statutes provides:

> No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is *reasonable and prudent* under the conditions then existing.

N.C. Gen. Stat. Sec. 20-141(a) (Supp. 1987) (emphasis added). Subsection (m) of 20-141 provides:

> The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the *duty to decrease speed* as may be necessary to avoid . . . injury to any person or property.

N.C. Gen. Stat. Sec. 20-141(m) (1987) (emphasis added).

Subsection (m), enacted in 1977, is substantially a recodification of former subsection (c), which was not specifically reincorporated in Section 20-141 when the statute was amended in 1973. Subsection (c) established the duty to decrease speed, and listed specific instances in which a reduction in speed was necessary, including "when approaching and going around a curve." N.C. Gen. Stat. Sec. 20-141(c) (1965). During the short period (between omission of (c) in 1973 and enactment of (m) in 1977) when there was no statutory duty to decrease speed, our Supreme Court held that the duty to drive at a reasonable and prudent speed under subsection (a) necessarily encompassed former subsection (c)'s duty to decrease speed. *State v. Gainey*, 292 N.C. 627, 630, 234 S.E. 2d 610, 613 (1977).

Neal argues that any error in omitting reference to the duty to decrease speed was harmless, since that duty is part of the duty to drive at a reasonable and prudent speed. He further argues that the instructions given by the judge were sufficient because, based on common sense and common experience, jurors understand that the duty to drive at a reasonable and prudent speed of necessity also requires a driver to reduce his speed when, under the conditions existing, the speed at which he travels ceases to be reasonable and prudent. Although we find this argument persuasive, we are constrained by precedent established in *Pittman v. Swanson*, 255 N.C. 681, 122 S.E. 2d 814 (1961), and accordingly we reject Neal's argument.

In *Pittman*, a teenager's car overturned at a sandy curve in the road, injuring a passenger. The jury found the teenager not negligent. There, as in the case before us, evidence showed that

the teenager drove within the 55 m.p.h. speed limit. And there, as here, the trial judge instructed the jury that, notwithstanding the posted speed limit, a person may not drive at a speed greater than is reasonable and prudent under the conditions existing, the conditions including features of the roadway, such as whether it curved. Our Supreme Court held that the trial judge committed reversible error in failing to instruct the jury regarding the additional statutory duty to decrease speed:

> The court in its charge quoted almost verbatim the provisions of G.S. Sec. 20-141(a), but neither charged nor explained in form or substance, nor made any reference to, the provisions of G.S. Sec. 20-141(c) [now (m)] in any part of the charge. This affected a substantive right of plaintiff, and is prejudicial error. . . .

Id. at 685, 122 S.E. 2d at 817. A new trial was ordered.

In light of *Pittman*, we hold that the trial judge committed reversible error in refusing to instruct the jury regarding the duty to decrease speed under N.C. Gen. Stat. Sec. 20-141(m). Therefore, Sandra's father is entitled to a new trial.

IV

[5] Prior to this suit, Neal was criminally convicted in district court of reckless driving and death by motor vehicle for his role in the accident. He was found not guilty upon appeal to superior court. Sandra's father now assigns error to admission of Neal's testimony on direct examination that Neal had no criminal convictions, even for traffic offenses.

We believe the testimony was elicited for one of the following purposes: (1) to suggest that Neal drove safely the day of the accident, since he had no previous traffic convictions; (2) to bolster Neal's credibility; or (3) to imply to the jury either that no criminal charges were brought against Neal or that he was acquitted of charges, thereby suggesting that he had once been—and should again be—found not at fault for the accident. For the reasons that follow, we hold that the evidence was not admissible for any of these purposes.

First, under Rule 404 of the North Carolina Rules of Evidence, evidence of prior crimes, wrongs, or acts is not admissible

to prove the character of a party to show that he acted in conformity therewith on a particular occasion. N.C. Gen. Stat. Sec. 8C-1, R. Evid. 404(a), (b) (1988). Rule 404 prohibits character evidence even of such "non-acts" as a good driving record. *See Wentz v. Unifi*, 89 N.C. App. 33, 39, 365 S.E. 2d 198, 201 (1988), *disc. rev. denied*, 322 N.C. 610, 370 S.E. 2d 257 (1988). The stated exceptions to the rule are not relevant here. *See* R. Evid. 404.

Second, evidence that bolsters or corroborates a civil party's credibility is inadmissible unless his credibility has first been challenged. *See Holiday v. Cutchin*, 311 N.C. 277, 280, 316 S.E. 2d 55, 58 (1984); *State v. Johnson*, 282 N.C. 1, 26, 191 S.E. 2d 641, 658 (1972). *Accord* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 608(a) (1988); Brandis, 1 *Brandis on North Carolina Evidence*, Sec. 50 (3d ed. 1988). *Cf.*, in criminal context, *State v. Dellinger*, 308 N.C. 288, 302 S.E. 2d 194 (1983); *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E. 2d 920 (1984); 1 *Brandis*, Sec. 104 (defendant in criminal case may testify on direct examination to his own good character and absence of convictions). Furthermore, while specific instances of conduct may be inquired into to support (or impeach) a witness' credibility, the inquiry may be made *only* during cross-examination and *only* if the conduct relates to the witness' truthfulness or untruthfulness. *See* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 608(b) (1988); *State v. Morgan*, 315 N.C. 626, 634, 340 S.E. 2d 84, 89-90 (1986). Here, the evidence that Neal had no traffic or other criminal convictions was inadmissible to corroborate his testimony because (1) his credibility had not been assailed; (2) the evidence was elicited on direct examination; and (3) the evidence had nothing to do with his veracity.

Third, a danger exists that the jury in a civil action will give undue weight to evidence that the defendant was never criminally charged or convicted for his role in the incident at issue. *See Beanblossom v. Thomas*, 266 N.C. 181, 185-86, 146 S.E. 2d 36, 40 (1966). It is error to admit such evidence since it is "incompetent . . . to exonerate [the defendant] of negligence in [a] civil action." *Id.* at 186, 146 S.E. 2d at 40. *Accord Durham Bank & Trust Co. v. Pollard*, 256 N.C. 77, 79, 123 S.E. 2d 104, 106 (1961) ("evidence of . . . an acquittal, rendered in a criminal prosecution, is not admissible in evidence in a purely civil action to establish the truth of the facts on which . . . acquittal was rendered. . . ."); *Fowler-Barham Ford, Inc. v. Indiana Lumbermens Mut. Ins. Co.*, 45 N.C.

App. 625, 630, 263 S.E. 2d 825, 829 (1980), *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980) (evidence of a criminal conviction for acts constituting the basis of liability in a civil suit is not admissible unless the conviction was entered on a guilty plea).

In light of the foregoing, we conclude that the trial judge erred in admitting Neal's testimony that he had never been convicted of a crime or traffic offense.

V

[6] We now reach Neal's contention that the trial judge erred in excluding the former testimony of the unavailable witness who testified at Neal's criminal trial regarding other accidents at that curve.

Rule 804(b)(1) of the Rules of Evidence provides that the former testimony of an unavailable witness will be excluded under the hearsay rule unless the party against whom the former testimony is offered, or a predecessor in interest, "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." N.C. Gen. Stat. Sec. 8C-1 R. Evid. 804(b)(1) (1988); *cf. Parrish v. Bryant*, 237 N.C. 256, 258, 74 S.E. 2d 726, 727-28 (1953) (excluding testimony from criminal trial in civil action for negligence). We find persuasive the asserted rationale behind the federal rule, identical to our own rule, that " 'it is . . . unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party.' " 4 *Weinstein's Evidence* para. 804(b)(1) [04] (1985) (quoting H.R. Rep. No. 93-650, 93d Cong., 1st Sess. at 15 (1973)).

Sandra's father was not a party to the criminal proceeding, and had no opportunity to cross-examine the witness. Although it is arguable that the prosecuting attorney had a "similar motive to develop the testimony," he was not a predecessor in interest to Sandra's estate. Therefore, exclusion of the former testimony was correct.

VI

We conclude that the errors in admitting Neal's testimony that he had never been convicted of a crime and in the charge to the jury entitle the appellant, Barney Hinnant, to a new trial.

New trial.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. GREGORY COLVIN

No. 8813SC268

(Filed 6 December 1988)

1. **Criminal Law § 92.3— assault, robbery and conspiracy—motion to sever charges denied—no error**

The trial court did not err by denying defendant's pretrial motion to sever charges of assault from charges of robbery and conspiracy where defendant did not renew his pretrial motion before or after the close of all the evidence and thereby waived any right to a severance; moreover, defendant did not show that the court abused its discretion. N.C.G.S. § 15A-927(a)(2).

2. **Grand Jury § 3.3; Criminal Law § 91.1— denial of continuance—investigation of racial discrimination of grand juries in Bladen County—no error**

The trial court did not err in a prosecution for conspiracy, robbery, and assault by denying defendant's motion for a continuance to investigate the constitutionality of the indictment in Bladen County based on the information and belief that grand juries in Bladen County have had only one black foreman in the last forty years. Although it is unclear whether the court treated this as a motion for a continuance or as a challenge to the indictment, in either case the motion was not timely made. N.C.G.S. § 15A-952.

3. **Indictment and Warrant § 12.2— unsigned indictment—State permitted to amend—no error**

The trial court did not err in a prosecution for conspiracy, armed robbery, and assault by permitting the State to amend an unsigned indictment by the addition of the signature of the grand jury foreman.

4. **Criminal Law § 75— incriminating written statement—properly admitted**

The trial court did not err in a prosecution for conspiracy, robbery, and assault by denying defendant's motion to suppress an incriminating written statement on the grounds that it was obtained under duress, that the statement was not in the words of defendant, and that the defendant did not initial the bottom of each page.

5. **Criminal Law §§ 73.3, 34.8— testimony concerning prior offense—admissible**

The trial court did not err in a prosecution for conspiracy, robbery, and assault by denying defendant's objections to testimony concerning a prior bank robbery where the evidence was relevant because defendant's statement indicated that money from the robbery was used to buy walkie-talkies, ski masks

and shotguns for the robbery in this case, and because of the similarities in the robberies.

6. Criminal Law § 73.2— testimony of investigator—not hearsay

In a prosecution for conspiracy, robbery, and assault, the testimony of a sheriff's department investigator as to why he returned to the vicinity of the crime scene with another participant in the crimes was a statement of fact and did not amount to hearsay.

7. Searches and Seizures § 23— search warrant—affidavit sufficient to provide probable cause—items not specifically described in warrant

The trial court did not err in a prosecution for conspiracy, robbery, and assault by denying defendant's motion to suppress tangible evidence because the affidavit supporting the search warrant did not provide probable cause and the items seized were not specifically set out in the warrant where the affidavit clearly stated that the residence to be searched was occupied by defendant and his brothers, that witnesses had identified one of defendant's brothers, and that a reliable informant had stated that a shotgun was at the residence; and the only piece of evidence seized pursuant to the warrant and introduced at trial was a "green zip up bag," where the warrant had specified a "green bank bag" and defendant conceded that the bags are "similar." Moreover, the bag was properly seized as an instrumentality of the crime found during a lawful search.

8. Criminal Law § 101.4— jury deliberations—request to review evidence—communication by court by means of notes to jury—no prejudice

There was no prejudice in a prosecution for conspiracy, robbery and assault from the trial court's communicating with the jury by means of notes where the jury had sent notes to the trial judge requesting certain evidence to review. The judge did not communicate with less than all of the jurors, so that there was no constitutional violation, and defendant did not meet his burden of showing that, absent error, there was a reasonable possibility that a different result would have been reached. Art. I, § 24 of the North Carolina Constitution, N.C.G.S. § 15A-1233(a), N.C.G.S. § 15A-1443(a).

9. Criminal Law § 138.30— mitigating factors not found—no error

The trial court did not err in a prosecution for conspiracy, robbery, and assault by not finding the mitigating factors of passive participation in the crimes, age and immaturity, caution exercised to avoid bodily harm, and voluntary acknowledgment of wrongdoing where the evidence clearly showed that defendant was more than a passive participant in the crimes in that he was actually the leader of the operation; age alone is not adequate to show that immaturity sufficiently reduced culpability; defendant's failure to shoot officers when he had the opportunity does not amount to caution exercised to avoid bodily harm; and defendant's contention that he acknowledged wrongdoing at an early stage of the criminal process was not raised at the sentencing hearing and the trial court did not abuse its discretion in not finding the factor because defendant only admitted wrongdoing after his arrest.

10. Criminal Law §§ 138, 138.2— refusal to continue sentencing hearing—consecutive sentences—sentences within statutory maximum—not cruel and unusual punishment

The trial court did not abuse its discretion, and defendant's sentences for conspiracy, robbery, and assault were not cruel and unusual, where the trial court refused to defer sentencing and imposed consecutive sentences following another prison term for another armed robbery conviction.

APPEAL by defendant from *Hight, Judge.* Judgments entered 29 October 1987 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 24 October 1988.

This is a criminal action wherein defendant was charged in proper bills of indictment with (1) conspiracy to commit robbery with a dangerous weapon, (2) robbery with a dangerous weapon of United Carolina Bank of Tarheel, in violation of G.S. 14-87, (3) assault with a deadly weapon on R. H. Herring, a law enforcement officer, in violation of G.S. 14-34.2, (4) assault with a deadly weapon on M. W. Lowder, a law enforcement officer, in violation of G.S. 14-34.2, and (5) assault with a deadly weapon on Phillip Little, a law enforcement officer, in violation of G.S. 14-34.2.

Evidence offered at trial tends to show: On 24 February 1986, two men with their faces covered and with sawed-off shotguns entered United Carolina Bank in Tarheel. One of the employees of the bank recognized the voice of one of the men as that of Sam Colvin, defendant's brother. Before the robbery, a bank employee had noticed a green car driving slowly up and down on the road behind the bank.

When investigators went to the residence of defendant, they observed a green car in the yard. On 25 February, the police arrested John Carthens in connection with the robbery. He admitted his involvement in the robbery and told the police that defendant had told him and Sam Colvin how and when they were to rob the bank. Defendant had taken them to an unoccupied house behind the bank and then told them when to enter the bank by communication with a walkie-talkie.

Detective Little of the Bladen County Sheriff's Department arrested defendant at his residence. While in custody at the police station, defendant executed a waiver of rights form and made an inculpatory statement to Detective Little. Detective Little wrote down the statement, and after reading it, defendant signed

it. Detective Little and State Bureau of Investigation Agent M. W. Lowder then took defendant to his residence. Two deputies were also present at defendant's residence. Defendant led the officers to an abandoned car where he pulled a walkie-talkie out from under a wheel well. He told the officers it was used in the robbery. He then reached under the wheel well and pulled out a .22 caliber pistol which he pointed at the officers. A scuffle ensued, and Agent Lowder shot defendant twice in his right elbow.

Defendant was found guilty as charged on all offenses and appealed from judgments imposing consecutive terms of 10 years for conspiracy, 40 years for robbery with a dangerous weapon, and 5 years for each assault with a deadly weapon on a law enforcement officer. Defendant appealed.

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

Harold G. Pope for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to the trial court's denial of his pretrial motion to sever the charges of assault from the charges of robbery and conspiracy. Because defendant did not renew this pretrial motion before or at the close of all evidence as required by G.S. 15A-927(a)(2), he waived any right to severance. *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981). Even if defendant had renewed his motion for severance, he cites no authority for his contention, arguing only that the consolidation of charges was unfairly prejudicial. Review of the trial court's decision is limited to whether the trial court abused its discretion at the time of its decision. *State v. Albert*, 312 N.C. 567, 324 S.E. 2d 233 (1985). We hold defendant has not shown any abuse of discretion in this case on the part of the trial court. This assignment of error is overruled.

[2] Defendant argues in his second assignment of error that the trial court erred in "denying defendant's motion based on *State v. Cofield*, 320 N.C. 297 (1987), requesting a continuance to allow time to investigate the constitutionality of the indictment of the defendant in Bladen County based on the information and belief of the defendant" that the grand juries in Bladen County have had only one black foreman in the past 40 years.

This assignment of error purports to be based on an exception to the denial of defendant's motion requesting "expenses necessary to obtain and examine records of the jury and jury formen [sic] selection process" and "sufficient opportunity after the requested records have been made available to examine them. . . ." This motion was made after defendant had entered pleas of not guilty, and the trial court denied the motion stating that the motion was "not timely."

Although defendant refers to this motion as a motion for a continuance, it is unclear whether the trial court treated it as such or treated it as a challenge to the indictment. Ordinarily motions challenging bills of indictment must be made at or before the time of arraignment under G.S. 15A-952(b) and (c). In the present case, defendant waived arraignment and entered pleas of not guilty on 18 August 1986 and 10 November 1986. It was not until 14 October 1987 that defendant made the motion which is the subject of this assignment of error. The trial judge did not err in ruling that the motion was not timely made, and he properly dismissed the motion. Even if the motion were considered a motion for a continuance, it would not be timely. G.S. 15A-952 requires a motion for continuance to be filed prior to arraignment unless the trial court allows otherwise. A denial of a motion for a continuance is not subject to review absent an abuse of discretion, and the requirement that defendant show this abuse of discretion is applied with even greater vigor when the motion is not timely. *State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982). Upon reviewing the record, we find that the trial court did not abuse its discretion in denying defendant's motion. This argument has no merit.

[3] Defendant next contends by his third assignment of error that the trial court erred in permitting the State to amend the unsigned indictment in case 87CRS3375. Again, defendant made no motion challenging the indictment prior to his waiver of arraignment, contrary to the provisions of G.S. 15A-952. Even so, the omission of a signature on one of the bills of indictment does not affect the substance of the bill. It is a mere clerical error, and since the other four bills were properly signed on the same day it is an oversight which is clearly not prejudicial to defendant. Under the facts of this case, the trial court did not err in amending the bill of indictment by adding the signature of the grand jury

foreman. *See* G.S. 15-153; *State v. Spinks*, 24 N.C. App. 548, 211 S.E. 2d 476 (1975).

[4] Defendant next argues the trial court erred in the denial of his motion to suppress an incriminating written statement given by him on the grounds that it "was obtained under duress, coercion and physical abuse . . .," that the written statement was not in the words of defendant, and that defendant did not initial the bottom of each page. We first note that defendant failed to file an affidavit containing facts supporting his motion as required by G.S. 15A-977, and for that reason the motion could have been summarily denied. The trial court conducted a hearing on the motion, however, and denied the motion after making findings of fact. We have reviewed the evidence and hold that the trial court's findings of fact and conclusion that the statement was voluntary is supported by competent evidence.

Defendant's contention that the statement should have been suppressed because it was not in defendant's own words is likewise without merit. Defendant did not raise this issue in his motion to suppress, but did raise it at trial. Even if defendant followed the proper procedures, there is no merit to his argument. "The summary statement of an accused reduced to writing by another person, where it was freely and voluntarily made, and where it was read to or by the accused and signed or otherwise admitted by him as correct shall be admissible against him." *State v. Boykin*, 298 N.C. 687, 693, 259 S.E. 2d 883, 887 (1979), *cert. denied*, 446 U.S. 911 (1980). The evidence in this case is sufficient to show that although the statement was not in defendant's own words, it was made freely and voluntarily, and was signed by defendant.

Defendant also contends the way in which he initialed the pages of the statement, and his failure to initial one page is evidence that he was not allowed to read the statement and that he did not freely admit it as correct. Again, defendant did not raise this issue in his motion to suppress. Even if it were properly raised at trial, defendant cites no cases which support his contentions that such defects should make the statement inadmissible. His argument is without merit.

[5] Defendant further argues the trial court erred in denying his objections to certain testimony which he contends was either ir-

relevant or inadmissible hearsay. Evidence of a prior robbery of Wachovia Bank in Dublin was admitted at trial. Such evidence was relevant because defendant's statement indicated money from the robbery was used to buy walkie-talkies, ski masks and shotguns for the robbery in this case, and because of the similarities in the robberies. Defendant argues no other grounds for his contention that the evidence was inadmissible, and his argument has no merit.

[6] There is likewise no merit to defendant's contention that the testimony of Steve Bunn, an investigator with the Bladen County Sheriff's Department, was inadmissible hearsay. When asked by the prosecutor why he went back to the vicinity of the crime scene with John Carthens, Bunn said he went back to "search for further evidence, with Mr. Carthens' assistance." This in no way amounts to hearsay, but is merely a statement of fact. This argument borders on the frivolous.

[7] Defendant also argues the trial court erred in denying his motion to suppress tangible evidence because the affidavit in support of the search warrant was insufficient to provide probable cause and because the items seized and introduced at trial were not specifically set out in the warrant. We disagree. The affidavit clearly stated that the residence to be searched was occupied by defendant and his brothers, that witnesses had identified one of defendant's brothers, and that a reliable informant had stated a shotgun was at the residence. A warrant is properly issued if the affidavit discloses sufficient information for a reviewing magistrate to determine practically and with common sense that there is a fair probability contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213 (1983). Under this totality of circumstances test adopted in *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984), we hold the trial court properly denied defendant's motion to suppress the evidence since there was probable cause.

Likewise, defendant's argument that the items seized were not specifically set out in the warrant is without merit. The only piece of evidence introduced at trial and seized pursuant to the warrant was a "green zip up bag." The warrant specified a "green bank bag," and defendant concedes the bags are "similar." This similarity is sufficient, and even if it were not, the bag was prop-

erly seized as an instrumentality of the crime found during a lawful search. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967). This assignment of error has no merit.

[8] Defendant next argues the trial court erred "in communicating with the jury regarding requests by the jury to review certain evidence by means of notes to and from the jury . . . rather than addressing the jury as a whole in open court as required by G.S. 15A-1233(a)." We disagree. Article I, Section 24 of the North Carolina Constitution requires a trial judge to give explanatory instructions to all jurors because to do otherwise would violate a defendant's right to a unanimous verdict of a jury in open court. *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985); *State v. McLaughlin*, 320 N.C. 564, 359 S.E. 2d 768 (1987). G.S. 15A-1233(a) further requires that "jurors must be conducted to the courtroom" if, after retiring for deliberation, they request a review of evidence.

In this case, the jury sent three notes to the trial judge requesting evidence to review. On each occasion, the bailiff took the notes to the judge and then delivered the judge's reply to the jury. Although this is error as to the requirements of G.S. 15A-1233(a), it is not a constitutional violation nor is it prejudicial to defendant. Unlike *Ashe*, in this case the judge did not communicate with less than all jurors since his notes were delivered by the bailiff to the jury as a whole. There was therefore no violation of the North Carolina Constitution. *See State v. McLaughlin*, 320 N.C. 564, 359 S.E. 2d 768 (1987). Defendant has also not met his burden of showing the trial court's error was such that there was a reasonable possibility that absent the error a different result would have been reached. G.S. 15A-1443(a). This argument is without merit.

Defendant further contends the trial court erred in denying his motions for a directed verdict, to set aside the verdict and for a new trial. Defendant bases his argument on his previous assignments of error, and in light of our holdings concerning them, we hold this argument is meritless.

[9] In defendant's next assignment of error he argues the trial court erred by not finding any mitigating factors to be considered in sentencing. These factors, defendant contends, are his passive participation in the crime, his age and immaturity, the caution he

exercised to avoid bodily harm, and his voluntary acknowledgment of wrongdoing at an early stage of the criminal process. A defendant has the burden of showing the evidence compels the finding and that no contrary inference can reasonably be drawn. *State v. Freeman*, 313 N.C. 539, 330 S.E. 2d 465 (1985). In this case, defendant has failed to meet his burden. The evidence clearly shows defendant was more than a passive participant in the crime and that he was actually the leader of the operation. Evidence is likewise lacking to show immaturity because age alone is not adequate to show that his immaturity significantly reduced his culpability. *State v. Vanstory*, 84 N.C. App. 535, 353 S.E. 2d 236 (1987). There is also no evidence defendant exercised caution to avoid bodily harm. His failure to shoot the officers when he had the opportunity does not amount to such caution since the fact that a defendant does not take an opportunity to commit a greater offense does not qualify as caution. *State v. Arnette*, 85 N.C. App. 492, 355 S.E. 2d 498 (1987). Defendant's contention that he acknowledged wrongdoing at an early stage in the criminal process was not raised at the sentencing hearing. However, because it is a statutory mitigating factor, the trial court was required to find it if it was proved by a preponderance of the evidence. *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984). We hold that the trial court did not abuse its discretion in not finding such a factor because defendant only admitted wrongdoing after his arrest. *State v. Thompson*, 314 N.C. 618, 336 S.E. 2d 78 (1985). Defendant's arguments are meritless.

[10] Finally, defendant contends the trial court erred by not deferring sentencing and by imposing his sentences consecutively following another prison term for another armed robbery conviction. A motion to continue a sentencing hearing is addressed to the discretion of the trial judge who may grant it for good cause. *State v. Blandford*, 66 N.C. App. 348, 311 S.E. 2d 338 (1984). We find no abuse of discretion in this case. Further, sentences within the maximum set by statute are not cruel and unusual punishment absent constitutional defect in the statute. *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985). Likewise, the imposition of consecutive sentences, standing alone, is not cruel and unusual punishment. *State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436 (1983). "A defendant may be convicted of and sentenced for each specific criminal act which he commits." *Id.* at 786, 309 S.E. 2d at 441.

We hold that defendant had a fair trial, free from prejudicial error.

No error.

Judges JOHNSON and PARKER concur.

F. KENNETH IVERSON, MARTHA M. IVERSON, MURRAY D. McGARRY, KATHRYN B. McGARRY AND PELLYN WOOD LAKE SITE, INC. v. TM ONE, INC.

No. 8826SC239

(Filed 6 December 1988)

1. **Courts § 9.4— dismissal of complaint—overruling of another judge's summary judgment denial**

The trial judge's pretrial dismissal of plaintiffs' complaint on the ground that there was no disputed issue of fact for the jury or the court to resolve had the effect of overruling another judge's prior denial of defendant's motion for summary judgment and must be vacated.

2. **Appeal and Error § 6.2— summary judgment denial—nonappealable order**

The denial of a motion for summary judgment is a nonappealable interlocutory order.

3. **Appeal and Error § 45.1— assignment of error—failure to state each question separately—failure to argue in brief**

Defendant's assignment of error to the granting of a preliminary injunction is deemed abandoned where defendant failed to set out the question relating to the preliminary injunction separately and did not offer any argument in its brief to support this assignment of error. Appellate Rule 28(b)(5).

4. **Injunctions § 16; Rules of Civil Procedure § 65— preliminary injunction—amount of bond—findings and conclusions required**

The trial court erred in failing to make findings of fact and conclusions of law, after defendant so requested, on the amount of the bond it required for issuance of a preliminary injunction.

APPEAL by plaintiffs and cross-appeal by defendant from *Snepp (Frank W., Jr.), Judge.* Judgment entered 16 November 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 September 1988.

Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett and Mark W. Merritt, for plaintiff-appellants.

Caudle & Spears, P.A., by Harold C. Spears and Lloyd C. Caudle, for defendant-appellee.

GREENE, Judge.

In this civil action plaintiffs seek a permanent injunction to prevent defendant's use of certain properties. Superior Court Judge Claude S. Sitton denied defendant's motion for summary judgment and granted plaintiffs' motion for a preliminary injunction. At trial, Superior Court Judge Frank W. Snepp, Jr. dismissed the complaint and dissolved the injunction. Both plaintiffs and defendant appeal.

Plaintiffs, landowners in a subdivision known as Pellyn Wood in Charlotte, brought this action seeking a permanent injunction to prevent the defendant, TM One, Inc. (hereinafter "TM One" or "defendant") from violating an alleged negative easement on property owned by TM One. Specifically, the complaint sought to prevent TM One from constructing a road across a one-foot strip of land between Pellyn Wood and a subdivision being developed by TM One adjacent to Pellyn Wood. Plaintiffs contend the strip of land is encumbered by a negative easement for their benefit and prevents the property from being used as a roadway. The defendant denied that the strip of land in issue was encumbered by an easement.

The defendant filed a motion for summary judgment. The plaintiffs thereafter filed a motion for a preliminary injunction to prevent defendant from building a roadway across the one-foot strip to its new subdivision. The motions were heard by Judge Sitton who on 25 February 1987 granted plaintiffs' motion for preliminary injunction and denied defendant's motion for summary judgment. In the trial court's denial of summary judgment, the court found that "there are genuine issues of material fact that preclude the granting of a motion for summary judgment." In the order granting the preliminary injunction, Judge Sitton set a bond in the amount of $20,000 "to protect the rights of the defendant." On 30 January 1987, prior to the entry of the preliminary injunction, the defendant requested in writing, the trial court make findings of fact as to the amount of the bond. On 25

February 1987, the defendant requested the amount of the bond be increased from $20,000 to $170,000 and again requested the trial court make findings of fact as to the amount of the bond. In support of his request for an increased bond, defendant presented an affidavit averring among other things that defendant "will incur losses over a one-year period of at least $170,830.95." In the alternative, the defendant requested the posting of an additional bond of $14,000 for every month between the issuance of the preliminary injunction and the date of the trial. Judge Sitton denied defendant's request for findings of fact as to the amount of the bond and refused to increase the amount of the bond.

On 9 July 1987, before Judge Snepp, the defendant again moved for an increase in the amount of the bond. Accompanying the motion for the increase in bond was an affidavit averring that the defendant had incurred $81,860.42 in interest expense between the date of issuance of the bond and 1 June 1987, which it was averred constituted "losses which defendant would not have suffered but for the entry of the preliminary injunction." Judge Snepp, on 17 August 1987, denied the motion to increase the bond.

On 2 November 1987, the case came on for trial before Judge Snepp. During a pretrial conference, defendant made a motion *in limine* and contended "there were no facts to be found by the jury in view of the admissions and applicable law." The plaintiffs in their pleadings had requested a jury trial. Without a waiver of the jury trial, the court conducted "a hearing to determine if there was any issue of fact for the jury to consider, and if not, to decide the issues before it as a matter of law." After conducting a hearing in the absence of a jury, and considering "documents and evidence presented, the pleadings, admissions, applicable law and arguments of counsel," the court found certain facts, one of which was that there was "no disputed issue of fact for the jury to consider or for the Court to resolve" and ordered the preliminary injunction be dissolved and the plaintiffs' complaint be dismissed with prejudice. Plaintiffs appeal the dismissal of their complaint and the defendant cross-appeals Judge Sitton's denial of its motion for summary judgment, Judge Sitton's issuance of the preliminary injunction, and the failure of Judge Sitton to make findings of fact and conclusions of law to support the $20,000 injunction bond.

The issues presented are: I) whether the denial of defendant's summary judgment motion by Judge Sitton on 25 February 1987 precluded the dismissal of the complaint by Judge Snepp on 16 November 1987; II) whether Judge Sitton erred in denying defendant's motion for summary judgment; III) whether Judge Sitton erred in granting the preliminary injunction; and IV) whether Judge Sitton erred in failing to make findings of fact, as requested, as to the amount of the injunction bond.

Plaintiffs' Appeal

I

[1] The general rule is that one trial judge "may not modify, overrule, or change the judgment of another . . . previously made in the same action." *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E. 2d 111, 113 (1987) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484, 488 (1972)). However, a trial judge has the power to modify or change an interlocutory order "where (1) the order was discretionary, and (2) there has been a change of circumstances." *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E. 2d 108, 110 (1984); *see also State v. Duvall*, 304 N.C. 557, 562-63, 284 S.E. 2d 495, 499 (1981) (judge can overrule a denial of a motion for special jury venire, a discretionary motion, previously entered by another judge if "*new* evidence" is presented). Although the denial of a motion for summary judgment is an interlocutory order, it is not a discretionary order so as to give a second judge the power to modify or change it even where there has been a change of circumstances. *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 633, 272 S.E. 2d 374, 376 (1980), *disc. rev. denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981) (summary judgment is an issue of law and not of discretion). Thus, one trial judge "may not reconsider and grant a motion for summary judgment previously denied by another judge." *Smithwick*, 87 N.C. App. at 377, 361 S.E. 2d at 113. Here Judge Snepp conducted, at a pretrial conference, a hearing in the absence of the jury to determine whether a material issue of fact existed. This was the issue which had previously been presented to and decided by Judge Sitton. As the same legal issue was presented to both trial judges, it is immaterial that the second judge, Judge Snepp, may have had before him evidence not available to Judge

Sitton. *Carr*, 49 N.C. App. at 634, 272 S.E. 2d at 377; *see also Fleming v. Mann*, 23 N.C. App. 418, 422-23, 209 S.E. 2d 366, 369 (1974) (trial judge has authority to grant defendants' Rule 12(b)(6) motion previously denied by another judge where plaintiff's complaint is supplemented because judge is not passing upon same legal issue previously decided). While the defendant did not label its motion to Judge Snepp as one for summary judgment, that nonetheless was the essence of the request. TM One contended in the face of plaintiffs' request for a jury trial that "there were no facts to be found by the jury." Judge Snepp after conducting the hearing made findings of fact and conclusions of law. He found there was "no disputed issue of fact for the jury to consider or for the Court to resolve." The procedure utilized by Judge Snepp, while not labeled a hearing on summary judgment, was exactly that. *See Smithwick*, 87 N.C. App. at 377, 361 S.E. 2d at 113 (the fact that proceeding before second judge was denominated a trial did not change its essential nature of constituting a "rehearing of Defendant's motion for summary judgment" because the same legal question was decided in both). A summary judgment procedure provides an "expeditious method for determining whether any [issue of fact] . . . actually exist[s]," *Patterson v. Reid*, 10 N.C. App. 22, 28, 178 S.E. 2d 1, 5 (1970) and we therefore consider the judgment of Judge Snepp as one for summary judgment.

Therefore, Judge Snepp's judgment dismissing the complaint had the effect of overruling Judge Sitton's denial of defendant's motion for summary judgment and must be vacated. As Judge Sitton had previously determined there existed a genuine issue of material fact and as plaintiffs had requested a jury trial, this matter must be remanded to the Superior Court of Mecklenburg County for trial on the issues presented in the complaint.

Because of our holding on this issue, we find it unnecessary to address the assignments of error raised by the plaintiffs.

Defendant's Appeal

II

[2] The defendant in its cross-appeal argues that Judge Sitton committed error in denying its original motion for summary judgment. We do not address this assignment of error as "the denial of a motion for summary judgment is a non-appealable interlocu-

tory order." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E. 2d 223, 230 (1985).

III

[3] The defendant next argues that Judge Sitton erred in granting the plaintiffs' motion for preliminary injunction. We do not consider this assignment of error as the defendant has not complied with Rule 28(b) of the North Carolina Rules of Appellate Procedure. Rule 28(b)(5) specifically requires the appellant in his brief to state each question separately. App. R. 28(b)(5). Furthermore, Rule 28(b)(5) requires the assignment of error be supported in the brief with argument. *Id.* Here the defendant failed to set out the question relating to the preliminary injunction separately and furthermore did not offer any argument in its brief to support this assignment of error. Accordingly, this assignment of error is deemed abandoned. App. R. 28(b)(5). *In re Appeal from Environmental Management Comm'n*, 80 N.C. App. 1, 18, 341 S.E. 2d 588, 598, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 139 (1986) (Rule 28 "has been interpreted by our Courts to require that a question purportedly raised by an assignment of error or exception be presented *and argued* in the brief in order to obtain appellate review") (emphasis in original).

IV

[4] Defendant finally argues that Judge Sitton erred in failing to make findings of fact and conclusions of law, after defendant so requested, to support the $20,000 injunction bond. We agree.

Rule 52(a)(2) of the North Carolina Rules of Civil Procedure specifically requires, upon request by a party, the trial judge to enter "findings of facts and conclusions of law" when "granting or denying . . . a preliminary injunction." N.C.G.S. Sec. 1A-1, Rule 52(a)(2) (1983). An integral part of a preliminary injunction is whether security is required and if so the amount of that security. *Keith v. Day*, 60 N.C. App. 559, 560, 299 S.E. 2d 296, 297 (1983). While the trial judge "has the discretion to determine what amount of security, if any, is necessary to protect the enjoined party's interests," *id.* at 561, 299 S.E. 2d at 297, findings and conclusions, upon request are nonetheless required. *See Andrews v. Peters*, 318 N.C. 133, 138, 347 S.E. 2d 409, 413 (1986) (Rule 52(a)(2) "does not except from its terms orders made within the trial court's discretion").

Here the order of Judge Sitton setting the injunction bond at $20,000 contained no findings of fact or conclusions of law relating to the amount of the bond. When the trial court fails to make required findings and conclusions, this court may on remand " 'allow additional evidence to be heard by the trial court or leave it to the trial court to decide whether further findings should be on the basis of the existing record or on the record as supplemented.' " *Harris v. North Carolina Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E. 2d 700, 702 (1988) (quoting C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2577 at 698 (1971)). If the facts are not in dispute and "if only one inference can be drawn from the undisputed facts" a remand is not necessary. *Id.*

From our review of the record, we conclude the facts are in dispute as to the amount of damages which the defendant may incur in the event it is determined injunction was wrongfully issued. *See* N.C.G.S. Sec. 1A-1, Rule 65(c) (1983) (security for injunction must be "in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained"). Accordingly, this matter must be remanded in order to allow the trial court to make findings and conclusions on the issue of the amount of the injunction bond. If the parties desire to present new evidence, the trial court should consider that evidence. *See Harris*, 91 N.C. App. at 150, 370 S.E. 2d at 702. On remand, the trial court may in its discretion modify the amount of the bond but in any event, the determination as to the amount of the bond must be supported by adequate findings of fact and conclusions of law. *Id.*

We have reviewed the defendant's remaining assignments of error and find each of them to be without merit.

V

In summary, the judgment of Judge Snepp dismissing the complaint and dissolving the injunction is vacated and the matter is remanded for trial. The order of Judge Sitton entering a preliminary injunction and a bond of $20,000 is remanded for the limited purpose of making findings of fact as to the amount of the security bond in a manner consistent with this opinion.

Vacated and remanded in part and remanded in part.

Judges ORR and SMITH concur.

STATE OF NORTH CAROLINA v. VINCENT BRADY ALLEN, DEFENDANT

No. 8820SC458

(Filed 6 December 1988)

1. **Rape and Allied Offenses § 4.1— first degree rape of nine-year-old—evidence of other sexual acts against victim admissible**

In a prosecution of defendant for first degree rape of a nine-year-old girl and taking indecent liberties with a child, evidence of other sexual acts committed by defendant against the victim was clearly admissible under Rule 404(b) of the N.C. Rules of Evidence to show motive, opportunity, intent, plan, or identity.

2. **Criminal Law § 99.6— rape of child—trial court's questions of eleven-year-old for clarification—no expression of opinion**

The trial judge's questions to an eleven-year-old rape and indecent liberties victim were asked merely to clarify the child's answers and in no way amounted to an expression of opinion as to the witness's credibility or defendant's guilt.

3. **Criminal Law § 99.4— questions as to prosecuting witness's prior inconsistent statement—court's rulings not expression of opinion**

There was no merit to defendant's contention that nine rulings of the trial court sustaining the State's objections to questions propounded to the prosecuting witness concerning her prior statements gave the jury the impression that whether the witness had made prior inconsistent statements under oath was unimportant, since it was the duty of the trial court to supervise and control the trial to prevent injustice to either party.

4. **Criminal Law § 114.3— reference to prosecuting witness as victim—instructions not prejudicial**

Defendant in a rape case failed to show any material prejudice where the trial judge referred to the prosecuting witness as a "victim" in his charge to the jury.

5. **Rape and Allied Offenses § 5— evidence as to vaginal intercourse—sufficiency of child's testimony**

Though the eleven-year-old prosecuting witness did not identify with scientific accuracy the portions of her anatomy and that of defendant involved in the assault, her testimony was nevertheless sufficient to prove vaginal intercourse.

6. Rape and Allied Offenses § 19— taking indecent liberties with child—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for taking indecent liberties with a child.

7. Criminal Law § 117.1— prior inconsistent statements—instructions proper

The trial court's instructions with regard to prior inconsistent statements were proper.

APPEAL by defendant from *Briggs, Judge.* Judgment entered 9 December 1987 in Superior Court, ANSON County. Heard in the Court of Appeals 2 November 1988.

Defendant was charged in proper bills of indictment with the first degree rape of a nine-year-old girl, in violation of G.S. 14-27.2(a)(1), and with taking indecent liberties with a child in violation of G.S. 14-202.1. Defendant was found guilty as charged. From judgments imposing sentences of life imprisonment for first degree rape and three years imprisonment for taking indecent liberties with a child, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Henry T. Drake for defendant, appellant.

HEDRICK, Chief Judge.

By his first argument, defendant contends the "court erred in admitting testimony as to alleged criminal conduct by the defendant without any limitations as to time and place, and by failing to instruct the jury on corroborative evidence and failure to instruct the jury that in order to convict the defendant of first degree rape the jury must believe the events occurred on August 29, 1986, after being requested to do so."

[1] Evidence of other sexual acts committed by defendant against the victim is clearly admissible under Rule 404 of the North Carolina Rules of Evidence. Rule 404(b) allows the admission of evidence of other crimes, wrongs or acts to show motive, opportunity, intent, plan or identity. *See* G.S. 8C-1, Rule 404(b); *State v. Gordon,* 316 N.C. 497, 342 S.E. 2d 509 (1986). Our Supreme Court has stated that "North Carolina is quite liberal in admitting evidence of other sex offenses when those offenses involve the same victim as the victim in the crime for which the de-

fendant is on trial." *State v. Miller*, 321 N.C. 445, 454, 364 S.E. 2d 387, 392 (1988). Assuming *arguendo* the court in the present case committed error in not giving the instructions requested by defendant with respect to "corroborative evidence," such error was not prejudicial because the evidence clearly shows that defendant engaged in sexual acts with the child on more than one occasion, the last time occurring on Friday, 29 August 1986, two days after she started school. The State focused the child's testimony on the last incident and made it clear defendant was charged for committing the act on 29 August 1986. Also, the jury was charged solely as to the last incident. We find no possible prejudicial error; therefore, these assignments of error have no merit.

[2] By Assignment of Error No. 3, defendant contends the trial court "erred and commented on the evidence by the Court's Direct Examination of the prosecuting witness." The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. *State v. Fuller*, 48 N.C. App. 418, 268 S.E. 2d 879, *disc. rev. denied*, 301 N.C. 403, 273 S.E. 2d 448 (1980). Such questions are not expressions of opinions "unless a jury could reasonably infer that the questions intimated the court's opinion as to the witness' credibility, the defendant's guilt, or as to a factual controversy to be resolved by the jury." *State v. Yellorday*, 297 N.C. 574, 581, 256 S.E. 2d 205, 210 (1979).

The prosecuting witness in this case was eleven years old at the time of trial. The questions asked the child by the judge and objected to by defendant were asked merely to clarify the child's answers. The record clearly reveals that the victim was confused by questions of both the district attorney and the defendant's attorney. In each instance the judge questioned the victim in an attempt to clear up her confusing testimony. These questions propounded by the judge in no way expressed any opinion as to the witness' credibility, the defendant's guilt, or as to a factual controversy that was to be resolved by the jury. This assignment of error is meritless.

[3] Defendant next contends that the court "erred and thereby commented on the evidence in sustaining objections to questions concerning prior statements given under oath." Defendant takes exception to nine rulings of the trial court sustaining the State's

objections to questions propounded to the prosecuting witness during cross-examination and recross-examination. Defendant takes exception to these rulings, not because the evidence elicited by the testimony was incompetent but because he contends the trial court's rulings gave the jury the impression that whether the witness had made prior inconsistent statements under oath was unimportant.

Our Supreme Court stated in *State v. McDougall*, 308 N.C. 1, 22, 301 S.E. 2d 308, 321, *cert. denied*, 464 U.S. 865 (1983):

> It is the duty of the trial judge to supervise and control the trial to prevent injustice to either party. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960). The court has the power and duty to control the examination and cross-examination of the witnesses. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *Greer, supra.* The trial judge may ban unduly repetitious and argumentative questions as well as inquiry into matters of tenuous relevance. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973).

This assignment of error is overruled.

[4] Defendant next contends the trial judge commented on the evidence by twice referring to the prosecuting witness as a "victim" in his charge to the jury. This argument is devoid of merit.

By his use of the term "victim," the trial judge was not intimating that defendant had committed any crime. The judge properly instructed the jury that it had to find that defendant committed all the elements of the offenses charged before they could find defendant guilty, regardless of whether the child was referred to as the "victim," the prosecuting witness, or by any other term. In order for defendant to be entitled to a new trial, he must show not only that an instruction was erroneously given, but also that the instructions as given materially prejudiced him. *State v. Tillman*, 36 N.C. App. 141, 242 S.E. 2d 898 (1978). Assuming *arguendo* that the instructions were erroneous, defendant has not shown any material prejudice.

[5] By Assignment of Error No. 4, defendant contends the court erred in failing to dismiss the charge of first degree rape. Defend-

ant argues the victim's testimony was insufficient to prove vaginal intercourse.

On direct examination the victim testified as follows:

Q. And when you went back to the room, what happened?

A. Vincent Allen put his private parts in my private parts.

MR. DRAKE: Motion to strike.

COURT: Motion denied.

Q. When you are talking about his private part, do you have any other name for that?

A. Yes.

Q. What other name do you have for it?

A. Penis.

Q. And when you're talking about your private parts, what do you mean by that?

A. (No verbal response)

Q. Could you point to your private parts? Could you just stand up and point to that area for us?

A. Yes.

Q. Would you stand up and do that for us, please?

(Witness complies.)

A. Down between my legs.

Q. And what did he do with your private parts?

A. (No verbal response)

Q. Is that where you use the bathroom?

A. Yes.

Q. Were you standing up or were you sitting or what? How were you positioned?

MR. DRAKE: Objection.

COURT: Overruled.

A. Are you talking about the last time?

Q. Yes.

A. Laying down.

MR. DRAKE: Move to strike.

COURT: Motion denied.

Q. And after you say Vincent Allen put his private parts into your private parts, what did he do then?

A. Moved me back and forth.

It is well-settled that the State's evidence will not be held deficient simply because a child witness, who is the victim of a sexual offense, does not "identify with scientific accuracy the portions of her anatomy and that of the defendant involved in the assault. . . ." *State v. Shaw*, 293 N.C. 616, 622, 239 S.E. 2d 439, 443 (1977) (*overruled on other grounds*, 306 N.C. 629, 295 S.E. 2d 375 (1982)). The evidence in the present case, when viewed in the light most favorable to the State, is clearly sufficient to support the charge of first degree rape.

[6] Defendant next contends by Assignment of Error No. 5 that the court erred in failing to dismiss the charge of taking indecent liberties with a child. In his two-sentence argument, defendant contends "that the statements by the prosecuting witness were so fraught with inconsistencies as to times, places and dates as to constitute a fatal variance between the allegations and proof." Defendant fails to identify the inconsistencies or the variance of the allegations and the proof which he argues to be fatal.

The indictment for the charge in question alleged that defendant committed the offense on 29 August 1986 and further states:

> The defendant . . . unlawfully, willfully and feloniously did take immoral, improper, and indecent liberties with [the victim], a female child of less than sixteen years of age, for the purpose of arousing or gratifying sexual desire, and the said Vincent Brady Allen, being a male person more than sixteen years of age and more than five years older than the said [victim].

Evidence of the age of both the victim and defendant was presented at trial. The victim testified as to the date of the offense as discussed earlier, and she also testified that defendant "put his private parts in my private parts." There is plenary evidence in the record as to each of the essential elements of the offense of taking indecent liberties with a child. We note that these elements are different from the essential elements of first degree rape, and therefore taking indecent liberties with a child is not a lesser included offense of first degree rape. Thus, defendant's conviction of first degree rape will not preclude his conviction of this offense. *See State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982) (*overruling State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977)). This assignment of error is without merit.

[7] Defendant last contends the trial court erred in failing to instruct the jury "that prior statements made under oath are to be considered as true, and if the jury cannot determine if the prior statement under oath is consistent with statements under oath at this trial, they must find the defendant not guilty."

The law is well-settled in North Carolina that prior inconsistent statements are not admissible as substantive evidence, "but may be introduced for the jury's consideration in determining the witness's credibility." *State v. Erby*, 56 N.C. App. 358, 361, 289 S.E. 2d 86, 88 (1982). We have reviewed the instructions given in the present case in light of defendant's arguments and find them to be fair, complete and adequate in all respects.

Defendant had a fair trial free from prejudicial error.

No error.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. BYNUM H. PARSONS

No. 8825SC363

(Filed 6 December 1988)

Criminal Law § 26.7— death of unborn child—indictment for manslaughter—second indictment barred by collateral estoppel

Collateral estoppel applied to require dismissal of a manslaughter indictment against defendant where (1) the issue to be concluded under the first indictment, whether defendant was guilty of the manslaughter of a fetus, was the same as the issue to be concluded under the second indictment, even if the victim was described in the second indictment as an unborn child; (2) the issue of whether the indictment stated a crime which amounted to manslaughter was litigated, since the judge, in his order dismissing the first indictment, specifically stated that an element of the crime of manslaughter, the death of a human being, was missing from the first indictment; and (3) the issue was material and relevant to the disposition of the first indictment. N.C.G.S. § 15A-954(a)(7).

APPEAL by the State from *Sitton, Judge.* Judgment entered 11 November 1987 in Superior Court, CALDWELL County. Heard in the Court of Appeals 1 November 1988.

On 27 October 1986, Bynum Parsons was indicted in case 86CRS9062 for the manslaughter of "a nameless living female fetus which was in the body of its mother Brenda Watson Greer, and due to be delivered on or about November 6, 1986." The State alleged that the fetus died as a result of a car accident which occurred on 19 October 1986.

Mrs. Greer, eight months pregnant, was driving her car on a public highway when it was struck head-on by a vehicle driven by the defendant. It is alleged that the defendant was speeding, on the wrong side of the road, and had an elevated blood alcohol level when the accident happened. Immediately following the accident, Mrs. Greer was taken to the hospital. Ten hours later she delivered a stillborn baby girl. The State alleges that the cause of death was the separation of the umbilical cord from the placenta as a result of the collision.

By order dated 20 January 1987, Superior Court Judge W. Terry Sherrill dismissed the indictment. The contents of the order are set out in the opinion below. The State appealed from the dismissal of the indictment. On 11 June 1987, the State filed a

notice of dismissal in the Court of Appeals and the appeal was dismissed.

On 10 August 1987, the State issued a new indictment in 87CRS5116 against Bynum Parsons for manslaughter alleging that Parsons did "kill and slay a living human being, Kandy Renae Greer, a viable but unborn female child." On 4 September 1987, the defendant moved to dismiss the second indictment arguing that Judge Sherrill's order of 20 January 1987 "ruled as a matter of law in *State v. Bynum H. Parsons* (86CRS9062), a case arising out of the same factual circumstances, that an indictment for manslaughter based on essentially the same factual allegations be dismissed with prejudice . . . ."

Judge Claude S. Sitton received briefs from both parties on defendant's motion to dismiss the second indictment. On 11 November 1987, Judge Sitton granted Parsons' motion to dismiss finding that the new indictment must be dismissed pursuant to N.C.G.S. § 15A-954(a)(7). The State entered notice of appeal to the Court of Appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Joan H. Byers, for the State, appellant.

Carpenter, Wilson, Cannon & Blair, by Edward H. Blair, Jr., for defendant appellee.

ARNOLD, Judge.

As a preliminary matter it is recognized that the State may appeal a motion to dismiss "when there has been a decision or judgment dismissing criminal charges as to one or more counts." N.C.G.S. § 15A-1445(a)(1).

The State contends that Judge Sitton erred in dismissing the indictment in 87CRS5116 pursuant to N.C.G.S. § 15A-954(a)(7), which requires dismissal of an indictment when the doctrine of collateral estoppel precludes further litigation of an issue essential to a successful prosecution. The State argues that the original indictment was dismissed because of mere technical defects in the indictment. For the reasons set out below we disagree with the State and affirm the order of the trial judge.

In his order to dismiss, Judge Sitton relied on N.C.G.S. § 15A-954(a)(7):

> (a) The court on motion of the defendant must dismiss the charges stated in the criminal pleading if it determines that:
>
> > (7) An issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties.

The statute relied on is a codification of the common law principle of collateral estoppel as it is applied in criminal cases. *See Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970); *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161, 3 A.L.R. 516 (1916). The doctrine of *res judicata* and the related doctrine of collateral estoppel apply in criminal as well as civil cases. *Id. Accord State v. McKenzie*, 292 N.C. 170, 176, 232 S.E. 2d 424, 427 (1977).

Res judicata and collateral estoppel are subsets of the constitutional protection against double jeopardy. *Id.* "[T]he term '*res judicata*' embraces in its entirety the effect of a judgment as preventing the parties and their privies from relitigating in a subsequent proceeding a controversy or issue already decided by a former judgment." 9 A.L.R. 3d 203, 213.

> The rule of collateral estoppel is an aspect of the broader principle of res judicata . . . .
>
> [T]he doctrine of collateral estoppel operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later lawsuit on a different cause of action between the parties to the original action. *Id.* at 213-14.

Simply said, *res judicata* precludes the claim or cause of action, collateral estoppel precludes previously litigated issues of fact or law. *Ashe.* A plea of *res judicata* is waived unless it is properly raised in the trial court. *McKenzie* at 176, 232 S.E. 2d at 428.

This is not a case of collateral estoppel, the State contends, because no issue of law was decided by Judge Sherrill's dismissal of the first indictment. Instead, it is the State's position that the first indictment was dismissed because of a technical defect in the indictment. Justice Holmes faced a similar determination in *Oppenheimer*:

> Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defend-

> ant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another.

Oppenheimer at 87, 37 S.Ct. at 69, 61 L.Ed. at 164. (Defendant had pled the statute of limitations.)

In support of its argument the State has cited several cases in which it was allowed to reindict following a motion to quash. Unlike the situation here, these cases concern indictments which fail to inform the defendant of the charges against him because of "faulty procedure or technical defects in the wording of the indictment." *United States v. Cejas*, 817 F. 2d 595, 600 (9th Cir. 1987); *see, e.g., State v. Ingram*, 271 N.C. 538, 157 S.E. 2d 119 (1967) (general words describing property taken in larceny indictment were insufficient to protect defendant from subsequent prosecutions); *State v. Sealey*, 41 N.C. App. 175, 254 S.E. 2d 238 (1979) (variance was fatal when indictment alleged sale to one person and proof tended to show sale only to another). The State has also been allowed to reindict when the defendant has been able to prove racial discrimination in the selection of a grand jury foreman. *State v. Cofield*, 320 N.C. 297, 309, 357 S.E. 2d 622, 629 (1987).

In *State v. Barnes*, 253 N.C. 711, 117 S.E. 2d 849 (1961), the indictment for obscenity charges lacked detail and was insufficient "to inform defendant of the accusation against him, and to protect him against a subsequent prosecution for the same offense." *Id.* at 718, 117 S.E. 2d at 853. Unlike *Barnes*, we find that the wording of the first indictment is accurate enough to inform the defendant of the charge against him, and precise enough to protect him from a second indictment on what amounts to the same charge. Whether defendant is indicted for manslaughter of a fetus, as the victim is described in the first indictment, or an unborn child, as the victim is described in the second indictment, the crime alleged is the same.

If the doctrine of collateral estoppel is to preclude a second indictment it is necessary to determine if dismissal of the first indictment was based on a substantive issue of law, in this case, a determination that manslaughter of a fetus is not a crime in North Carolina. "A dismissal of an indictment on the merits . . .

precludes a trial on a reindictment for the same charge." *Cejas* at 600.

The North Carolina Supreme Court has set out a test for whether collateral estoppel applies to a specific issue:

> (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). *See McKenzie* at 176, 232 S.E. 2d at 427-28.

Applying the *King* test we find that the issue to be concluded under the first indictment, whether Parsons is guilty of the manslaughter of the fetus is the same as the issue to be concluded under the second indictment. Second, we find that the issue of whether the indictment stated a crime which amounted to manslaughter was litigated. Third, the issue is material and relevant to the disposition of the first indictment.

This case turns on the last part of the test which requires a finding that the issue was "necessarily" determined by Judge Sherrill as the basis for his order dismissing the first indictment. A similar problem arose in *McKenzie* where the court found that the trial court was precluded in a manslaughter case from submitting instructions to the jury concerning defendant's alleged operation of a motor vehicle with an elevated blood alcohol content when the defendant had earlier been acquitted of that charge. In its analysis of the collateral estoppel issue the *McKenzie* court stated:

> It seems to us that the acquittal of a defendant even in district court precludes the state from relitigating in a subsequent prosecution any issue *necessarily* decided in favor of the defendant in the former acquittal. Sometimes it is difficult to ascertain whether on a general verdict the issue in question was necessarily decided in favor of defendant. As the Supreme Court in *Ashe* noted, it may require an ex-

amination of the entire record of the earlier proceeding. (Emphasis in original.)

McKenzie at 175, 232 S.E. 2d at 428.

Our examination includes a review of the record of the hearing and Judge Sherrill's 20 January 1987 order to dismiss. That order states:

> The allegations of the October 27, 1986 Bill of Indictment fails to sufficiently set out a charge of manslaughter against this defendant in that the alleged victim was "a nameless living female fetus which was in the body of its mother, Brenda Watson Greer, and due to be delivered on or about November 6, 1986."
>
> Said Bill of Indictment fails, as a matter of law, to allege a material element of the crime of manslaughter, that is, that the defendant did kill another living human being.

A review of the record shows that after Judge Sherrill heard arguments on whether manslaughter of a fetus is a crime he concluded that the defendant was correct:

> Well, the law in this state, the statute with respect to this particular issue is as it seems, that you suggest, (Defendant), and that (Prosecutor), . . . apparently concedes it to be. I am bound to apply the law as it exist [sic] at the present time. Despite anything else, really despite the facts that I heard [regarding the facts of the accident] and looking at the indictment, the face of the indictment, which is alleging that the victim was a nameless living female fetus in the body of its mother, Brenda Watson Greer, and due to be delivered on or about November 6, 1986. On the face of the indictment itself the court concludes that it does fail to allege a crime, recognized as a crime in this state.

Foremost in Judge Sherrill's reasoning was that the indictment failed to allege a North Carolina crime. In his order, he specifically states that an element of the crime of manslaughter, the death of a human being, was missing from the first indictment. The State's attempt to recast the description of the victim in the second indictment cannot change the fact that Judge Sherrill made a final determination on the merits of the first indictment.

Therefore the State is precluded from bringing a second indictment.

The *Ashe* court notes at its conclusion that the State in its brief conceded that it treated the first trial as no more than a "dry run" for the second prosecution:

> "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.

Ashe at 447, 90 S.Ct. at 1189, 25 L.Ed. 2d at 477. The quoted text aptly fits the situation here.

This case deals entirely with the subject of collateral estoppel. We make no judgment of how this Court would have ruled had the State pursued its first appeal of Judge Sherrill's order, rather than Judge Sitton's order.

The order of the trial court is

Affirmed.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. JAMES GORDON PARKS

No. 8821SC634

(Filed 6 December 1988)

1. Jury § 6.3— prospective jurors—questions concerning feelings—erroneous disallowance

The trial court in a murder prosecution abused its discretion in refusing to permit defense counsel to ask prospective jurors during *voir dire* whether any of them "felt" defendant had to be guilty of some offense simply because he fired a gun which resulted in the death of another person, and to ask one prospective juror whether she "felt" that she would uphold her service as a juror equally well by returning a verdict of not guilty if she had a reasonable doubt as she would by returning a verdict of guilty if she were satisfied beyond a reasonable doubt. The questions did not stake out the jurors, call for speculation, or seek answers to legal questions, and the trial court's

disallowance of the questions prevented defendant from ascertaining whether a challenge for cause existed and from intelligently exercising his peremptory challenges.

2. Criminal Law § 114.2— statement of evidence—no expression of opinion

The trial court's statement while applying the law of involuntary manslaughter to the evidence that defendant fired a .22 rifle into the darkness was a fair summary of the evidence and did not constitute an expression of opinion on the evidence.

Judge COZORT concurs in part and dissents in part.

APPEAL by defendant from *Julius A. Rousseau, Judge.* Judgment entered 15 January 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 November 1988.

Attorney General Lacy H. Thornburg, by Debbie K. Wright, for the State.

Harrell Powell, Jr. and Garry Whitaker for the defendant-appellant.

BECTON, Judge.

From the imposition of a 15-year prison sentence following his conviction of second degree murder, defendant appeals. For the reasons that follow, we grant a new trial.

I

After meeting Gloria Wherry in a lounge in Kernersville, the defendant, James Gordon Parks, agreed to take Ms. Wherry and her two children to Welcome, North Carolina. When defendant and Ms. Wherry arrived at her apartment, defendant was introduced to Robert Graham, who, although he was introduced as Ms. Wherry's brother, was actually her former husband and current boyfriend. After Ms. Wherry, Mr. Graham, and the two minor children got into defendant's automobile, a dispute arose as to where they were going. At some point, according to defendant, defendant drove to his own home and asked the passengers to leave. Defendant went inside his house, and then came out with a .22 rifle. As Ms. Wherry, Mr. Graham, and the children walked down the road in front of defendant's house, defendant fired the rifle. A shot hit Ms. Wherry in the head. She later died.

Mr. Graham testified that, although it was dark outside, defendant could be seen plainly because an outside light was on at the time. Defendant testified, however, that he could not see Ms. Wherry or Graham, and that he fired a warning shot into the ground at a 40 degree angle from where he heard voices.

II

[1] In defendant's first two assignments of error, he contends the trial judge erred by not allowing certain questions to be asked of jurors during *voir dire*. Defendant's first assignment of error relates to the following colloquy.

> MR. POWELL: My question is: Is there anyone on the jury who *feels* that because the defendant had a gun in his hand, no matter what the circumstances might be, that if that—if he pulled the trigger to that gun and that person met their death as a result of that, that simply on those facts alone that he must be guilty of something?
>
> COURT: All right. Sustain to that.
>
> MR. POWELL: I'd like the record to show that even though the Court sustained the objection, that I believe Mr. Doomy raised his hand and said that would affect him.
>
> MR. BARRETT: Objection, Your Honor.
>
> COURT: Well, I sustained the question. I don't know what Mr. Barrett said or somebody else said.

Defendant's second assignment of error relates to the question contained in the following colloquy:

> MR. POWELL: Let me ask this question of all jurors. Well, let me stick with Ms. Hinton with one more question. Ms. Hinton, as a juror, *do you feel* that you would have upheld your service as a juror equally as well by returning a verdict of not guilty if you had a reasonable doubt as you would of returning a verdict of guilty if you were satisfied beyond a reasonable doubt?
>
> MR. BARRETT: Objection.
>
> COURT: Sustained.

MR. POWELL: Ms. Hinton, do you have any question [sic]? You said that from what you'd seen and what you'd heard you'd tend to favor the enforcement of the law. . . .

The judge sustained the State's objections to these questions. Defendant contends that the judge, by so doing, prevented him from ascertaining whether a challenge for cause existed, prevented him from exercising his peremptory challenges intelligently, prevented him from selecting an impartial jury, and was an abuse of discretion. We agree.

The purpose of *voir dire* is to secure an impartial jury. *State v. Bracey*, 303 N.C. 112, 227 S.E. 2d 390 (1981). Although the trial judge has broad discretion in regulating jury *voir dire*, *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985), we hold, in the case *sub judice*, that harmful error occurred. The trial judge, in sustaining objections to the proffered questions, operated under a misapprehension of the law. We specifically reject the State's argument: (1) that defense counsel impermissibly sought to "stake out" jurors as to what their decision would be under a given set of facts, *State v. Williams*, 41 N.C. App. 287, 291, 254 S.E. 2d 649, 653 (1974), *disc. rev. denied*, 297 N.C. 699, 259 S.E. 2d 297 (1979); (2) that the proffered questions had no bearing on the juror's ability to sit and hear the evidence since "the jurors could only speculate"; and (3) that defense counsel impermissibly sought answers to legal questions before the trial judge had instructed the jurors on the applicable legal principles.

Voir dire is a time for lawyers to evaluate jurors. It is not necessarily the time for jurors to evaluate themselves. One way lawyers evaluate jurors is to delve into their attitudes. This can best be accomplished by inquiries into beliefs, feelings, and actions. "How" and "why" questions elicit information so that lawyers are in a position to evaluate jurors. Asking jurors "Do you feel" questions is qualitatively different from asking jurors "What would you do" questions. Questions dealing with feelings neither stake out, call for speculations, nor require answers to legal questions.

Significantly, the critical inquiry of the first question proffered by defense counsel was whether any of the jurors *felt* defendant had to be guilty of some offense simply because he fired a

gun which resulted in the death of another person. This question seems indistinguishable from questions generally allowed on *voir dire*—e.g., "Do you think the defendant must be guilty simply because he is charged with a crime?" or, "Do you feel that a driver is at fault simply because his car strikes a pedestrian?" In our view, the excluded question could have elicited responses from jurors which would tend to show which jurors would be more or less inclined to fairly consider defenses such as accident. Indeed, as the quoted colloquy suggests, one juror may have felt that a person who fires a gun which results in the death of another person has to be guilty of something. In our view, the disallowance of the proper *voir dire* question prevented counsel from inquiring further into the attitudes of jurors and from exercising intelligently peremptory challenges allowed by law.

The critical import of the second question proffered by defense counsel was whether the juror's attitude about conviction or acquittal would adversely affect her in the deliberation process. Had Ms. Hinton answered, "No, I do not feel I would have upheld my service as a juror equally as well by returning a verdict of not guilty if I had a reasonable doubt, as I would of returning a verdict of guilty if I were satisfied beyond a reasonable doubt," defense counsel could have inquired whether a greater quantum of truth was necessary for her to acquit than to convict or whether she thought the defendant had some burden of proving his innocence. After all, as the colloquy above suggests, Ms. Hinton had already indicated to defense counsel that she would "tend to favor the enforcement of law."

Finally, with regard to jury selection issues, we do not deem it fatal to defendant's argument that the record does not reflect whether defendant successfully challenged jurors for cause or whether defendant exercised all of his peremptory challenges. By disallowing the excepted-to *voir dire* questions, the trial judge prevented defendant from ascertaining whether a challenge for cause existed and further prevented defendant from intelligently exercising his peremptory challenges.

III

[2] In his final assignment of error, defendant contends the trial court's factual summary during instruction to the jury, that defendant fired into the darkness, constitutes reversible error. De-

fendant argues the trial court violated N.C. Gen. Stat. Sec. 15A-1232 by giving unequal stress to the State's contentions in summarizing the evidence.

In instructing the jury, the trial judge must not express an opinion as to whether a fact has been proven. N.C. Gen. Stat. 15A-1232. The trial judge need only summarize the evidence to the extent necessary to explain the application of the law to the evidence. *Id.* In this case, the trial judge was explaining the law of involuntary manslaughter and applying the evidence to that law when he stated, "that it was dark . . .; and that the defendant fired a .22 rifle into the darkness . . . ." We have reviewed the record and find that this is a fair summary of the evidence. Defendant himself contended it was too dark for him to see when he fired his gun. The State actually presented evidence that there was enough light for defendant to see what he was doing. Even if the summary was not a fair assessment of the evidence, defendant has not shown how he was unduly prejudiced since this summary applied to the involuntary manslaughter instruction only. This assignment of error is without merit.

Based on errors committed during the jury *voir dire*, defendant is entitled to a

New trial.

Judge PHILLIPS concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT dissenting in part.

I concur with the majority's holding that the trial court's instructions to the jury did not constitute error. As to the majority's holding that the defendant is entitled to a new trial because the trial court sustained the State's objections to two of defendant's proposed questions during jury selection, I dissent.

As I read the transcript, it was apparent that the two questions under review were designed to enable defense counsel to evaluate whether the jurors completely understood the law and their obligations in terms of: (1) the State's burden of proof as to the specific offense charged, and (2) the element of reasonable

doubt. My reading of the transcript convinces me that these areas were sufficiently explored by other questions asked of the potential jurors. For that reason, I do not believe the trial court erred in sustaining objections to the two specific questions at issue on this appeal. I believe the defendant's trial was free of prejudicial error.

BARBARA TERRY RAMSEY, PLAINTIFF v. KEEVER'S USED CARS AND MORGAN MOTORS, INC., DEFENDANTS

No. 8814SC310

(Filed 6 December 1988)

1. **Fraud § 12— sale of used car—no misrepresentation by seller—no knowledge of accident history by seller—summary judgment for seller proper**

In an action for fraud in the sale of a used car, the trial court properly entered summary judgment for defendant where defendant came forth with substantial evidence that it made no misrepresentation regarding the prior accident and repair history of the car in question and that it had no knowledge of the vehicle's prior history, but plaintiff presented no evidence, by affidavit or otherwise, that defendant knew or should have known such history.

2. **Unfair Competition § 1— sale of used car—no knowledge of accident history by seller—no obligation to conduct title search—no unfair or deceptive trade practice**

Plaintiff could not prevail on her claim for unfair or deceptive trade practices in the sale of a used car where she did not allege, and the evidence did not show, that defendant knew the vehicle in question had previously been declared a total loss and rebuilt, and defendant's failure to conduct a complete title search of the vehicle and to apprise plaintiff of the results did not constitute an unfair trade practice. N.C.G.S. § 75-1.1.

3. **Rules of Civil Procedure § 56— summary judgment entered before discovery—no error**

There was no merit to plaintiff's contention that she was prejudiced by the trial court's ruling on defendant's motion for summary judgment before she obtained service of process on the other defendant or served discovery on either defendant, since plaintiff had ample time to conduct discovery with defendant but failed to do so, and plaintiff failed to demonstrate that her inability to serve one defendant was excusable or that it prejudiced her case against the other defendant.

APPEAL by plaintiff from *Barnette, Henry V., Jr., Judge.* Order filed 4 November 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 October 1988.

Fisher & Constantinou, by C. Douglas Fisher, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Patricia L. Holland, for defendant-appellee Morgan Motors, Inc.

JOHNSON, Judge.

Plaintiff instituted this civil action against defendants Morgan Motors, Inc. (Morgan Motors) and Keever's Used Cars on 28 July 1987. Her complaint alleged that she is entitled to damages arising out of her purchase of a used 1984 Chevrolet Camaro automobile from Morgan Motors on 15 October 1985, pursuant to theories of common law fraud, or in the alternative, unfair and deceptive trade practices. Summons was issued for defendant Morgan Motors on 28 July 1987 and subsequently served. Plaintiff has been unsuccessful in either locating or serving defendant Keever's Used Cars. Keever's Used Cars accordingly is not a party to this appeal.

On 28 September 1987 Morgan Motors filed its answer and moved to dismiss pursuant to G.S. sec. 1A-1, Rule 12(b)(6). On the same date Morgan Motors moved for summary judgment, pursuant to G.S. sec. 1A-1, Rule 56, and supported that motion with affidavits from two of its employees, one of whom was involved in Morgan Motors' purchase of the automobile in question, and the other in its subsequent sale to plaintiff. Morgan Motors also served plaintiff with notice of a hearing on its motions, which was scheduled for 2 November 1987 in Durham County Superior Court. At that hearing, the trial judge granted Morgan Motors' motion for summary judgment and dismissed plaintiff's complaint with prejudice in an order filed 4 November 1987. On 16 November 1987, plaintiff filed notice of appeal.

After purchasing the 1984 Chevrolet Camaro from Morgan Motors on 15 October 1985, plaintiff immediately experienced mechanical difficulties with various parts of the vehicle and frequently had to return it to Morgan Motors for repair. Because of all the problems she encountered, plaintiff obtained a history of the Camaro (Plaintiff's Exhibit A) from the North Carolina Division of Motor Vehicles. The agency's letter indicated that the vehicle was first purchased new by a party in Charlotte, North Carolina on 29 June 1984. Title was assigned to Aetna Insurance

Company on 9 April 1985 after the total loss of the vehicle, and Aetna obtained a salvage certificate of title. On 3 May 1985 Aetna sold the vehicle to Shuford Salvage & Disposal which in turn sold it to codefendant Keever's Used Cars in Lincolnton, North Carolina on 20 May 1985.

Exhibits and affidavits attached to defendant Morgan Motors' responsive pleadings indicated that Keever's Used Cars repaired the Camaro, and sold it to Morgan Motors at the High Point Auto Auction on 8 October 1985. Morgan Motors received a clean title with no "R" designation. An "R" indicates that a vehicle has been rebuilt or reconstructed. This designation is issued only when repair costs exceed 35% of the average wholesale value of a vehicle.

Plaintiff argues that the trial court erred in granting Morgan Motors' motion for summary judgment. We do not agree and therefore we affirm the order of the trial court.

In ruling upon a motion for summary judgment a trial court must determine whether, on the basis of the materials properly before it, there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E. 2d 252, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978). The burden is on the movant to establish clearly the lack of any genuine issue of material fact. *Seay v. Allstate Insurance Co.*, 59 N.C. App. 220, 296 S.E. 2d 30 (1982). If the movant satisfies this burden and presents evidence which, if considered alone, would entitle him to judgment as a matter of law, then the burden shifts to the nonmoving party to present a forecast of the evidence which shows a triable issue of fact and which supports his claim to relief. *Cone v. Cone*, 50 N.C. App. 343, 274 S.E. 2d 341, *disc. rev. denied*, 302 N.C. 629, 280 S.E. 2d 440 (1981) (citations omitted). The nonmovant may not rely on the mere allegations of his pleadings. *Cockerham v. Ward*, 44 N.C. App. 615, 262 S.E. 2d 651, *disc. rev. denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980).

The elements essential for an action based on fraud are the following:

(1) material misrepresentation of a past or existing fact;

(2) the representation must be definite and specific;

(3) made with knowledge of its falsity or in culpable ignorance of its truth;

(4) that the misrepresentation was made with intention that it should be acted upon;

(5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and

(6) that there resulted in damage to the injured party.

Rosenthal v. Perkins, 42 N.C. App. 449, 451-52, 257 S.E. 2d 63, 65 (1979) (citations omitted).

In order for Morgan Motors to prevail as a matter of law, it need not negate every element of fraud. If defendant effectively refutes even one element, summary judgment is proper. *Russo v. Mountain High, Inc.*, 38 N.C. App. 159, 247 S.E. 2d 654 (1978).

[1] In attempting to show that plaintiff cannot make out a case for fraud, Morgan Motors first asserts that it made no misrepresentation regarding the prior history of the Camaro and that its salesman who dealt with plaintiff so swears in his affidavit. Morgan Motors further states that this is an undisputed fact since plaintiff does not claim in her complaint or elsewhere that defendant made any statement about the vehicle's prior accident. This is not a complete defense to this element since it is well-established that *concealment* of a material fact known to the seller and not known to the buyer may constitute a misrepresentation. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). However, defendant could not, of course, be liable for concealing a fact of which it was unaware.

On this issue of whether defendant knew or had reason to know that the Camaro automobile had previously been declared a total loss, defendant presents evidence which, if considered alone, would entitle it to judgment as a matter of law. First, Morgan Motors presents the affidavits of its two employees who state that they had no knowledge that the vehicle was previously involved in an accident. It also introduces the title it received from Keever's Used Cars which contains no "R" designation. Further, defendant's bill of sale from the High Point Auto Auction has no indication that the vehicle had been rebuilt. Morgan Motors' employees also attest that it is not common practice for used

vehicle dealers to conduct a title search of automobiles they purchase.

After Morgan Motors has come forth with substantial evidence that it had no knowledge of the Camaro's accident history, the burden shifts to plaintiff to prove that defendant knew or had reason to know the vehicle's history. However, plaintiff presents absolutely no evidence, by affidavit or otherwise, that defendant knew or should have known the history, and has not even forecast that she could produce such evidence at trial. Plaintiff also does not even allege in her complaint that defendant knew or should have known of the history. We must therefore hold that there is no genuine issue regarding Morgan Motors' knowledge and that summary judgment was correct as to the charge of fraud.

Plaintiff argues that there is a discrepancy between her bill of sale and the affidavit of the salesman she dealt with, and that this discrepancy casts doubt on the affiant's motives, making summary judgment inappropriate. We do not believe there is a conflict, but assuming that there is, it is not material to plaintiff's cause of action.

[2] We turn now to plaintiff's unfair or deceptive trade practices claim. Our Supreme Court has held that a plaintiff need not show fraud, bad faith, or actual deception to prevail on a G.S. sec. 75-1.1 claim. However, a plaintiff must show that defendant's acts possessed the tendency or capacity to mislead, or created the likelihood of deception. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981). The Court in *Marshall* also stated that whether a trade practice violates G.S. sec. 75-1.1 depends on the facts of each case and the impact that the practice has in the marketplace.

Plaintiff does not allege, nor does the evidence show, that Morgan Motors knew the vehicle in question had previously been declared a total loss and rebuilt. Therefore, the issue becomes whether defendant's failure to conduct a complete title search of the vehicle and to apprise plaintiff of the results constitutes an unfair trade practice. This is an unrealistic burden to place on a seller. We believe that defendant's dealings with plaintiff were in line with common practice in the used vehicle industry, do not offend established public policy, and were not unfair or deceptive to plaintiff.

[3] Lastly, plaintiff argues that she was prejudiced by the trial court's ruling on defendant's motion for summary judgment before she obtained service of process on defendant Keever's Used Cars or served discovery on either defendant. We believe this argument is without merit.

"Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed." Rule 8, General Rules of Practice for the Superior and District Courts, effective 1 July 1970. Plaintiff filed her complaint on 28 July 1987. She did not serve Morgan Motors with discovery at that time or in the sixty days which elapsed before defendant Morgan Motors filed its answer. Plaintiff also did not pursue discovery during the thirty-five day period between Morgan Motors' motion for summary judgment and the hearing set for that motion. Further, the record does not reflect that plaintiff moved for a continuance at the hearing. Plaintiff had ample time to conduct discovery with Morgan Motors and failed to do so.

It is unfortunate for plaintiff that she has been unable to locate or serve defendant Keever's Used Cars. However, plaintiff has failed to demonstrate that her inability to serve Keever's was excusable, or that it prejudiced her case against Morgan Motors and constitutes grounds for reversing the summary judgment as to Morgan Motors.

For the reasons stated, the order of the trial court granting summary judgment for defendant Morgan Motors is

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

BRUCE McKINNON MEYERS v. DEPARTMENT OF HUMAN RESOURCES

No. 8710SC1193

(Filed 6 December 1988)

1. **State § 12— employee's demotion—prior administrative warnings not required**

There was no basis in N.C.G.S. § 126-35 or relevant regulations to conclude that lawful procedure required that petitioner be given any administrative warnings before his demotion.

2. **State § 12— employee's demotion—insufficient notice of acts**

Though respondent's original October 1983 notice clearly stated the specific acts underlying its decision to take a particular disciplinary action, i.e., dismissal, the Secretary's August 1984 notice that her decision to demote petitioner was "based upon the information presented" was not an adequate statement of the specific acts or omissions underlying her decision to take a different disciplinary action, i.e., demotion, as required by N.C.G.S. § 126-35, and petitioner's right to appeal to the State Personnel Commission and to the Court of Appeals was thus prejudiced.

APPEAL by petitioner from *Hight (Henry W.), Judge.* Judgment entered 25 June 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 10 May 1988.

David P. Voerman, P.A., by David P. Voerman, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Ann Reed, for respondent-appellee.

GREENE, Judge.

This appeal arises from petitioner's demotion as a supervisor with the Department of Social Services, a division of the North Carolina Department of Human Resources (collectively, the "Department"). The record tends to show petitioner was notified in October 1983 that he was being dismissed from his position as a supervisor with the Department. Petitioner appealed this notice of dismissal and departmental hearings were held in June 1984. Based upon his proposed findings and conclusions, the Department hearing officer recommended petitioner be reinstated with back pay. However, the Secretary of the Department concluded petitioner demonstrated "performance deficiencies as supervisor of the New Bern Office [which] were such that his continuation in

that role could no longer be tolerated." The Secretary's letter stated this conclusion was "based upon the information presented . . . ." The Secretary rejected the hearing officer's recommendation and demoted petitioner to a lower level non-supervisory position in the Department's child support enforcement program.

Petitioner appealed the Secretary's decision to the State Personnel Commission (the "Commission"). The Commission's hearing officer recommended that the Secretary's decision be left undisturbed. The full Commission adopted its hearing officer's recommendations and upheld petitioner's demotion. In January 1986, petitioner sought judicial review. After the superior court affirmed the Commission's decision, plaintiff appealed to this Court.

The issues presented in petitioner's brief are: I) whether the relevant statutes or regulations required petitioner be given administrative "warnings" prior to his demotion; and II) whether the Department furnished petitioner with a written statement of the reasons for his demotion sufficient to comply with relevant statutes and regulations.

As these proceedings commenced before 1 January 1986 and as the North Carolina Administrative Procedure Act is the exclusive procedure for judicial review of the Commission's decision, the scope of our review is governed by former Section 150A-51. N.C.G.S. Sec. 150A-51 (1984) (codified 1 January 1986 as N.C.G.S. Sec. 150B-51). Although petitioner appeals the superior court's conclusion that the Department's disciplinary action violated none of the six specific grounds set forth in Section 150A-51, the gravamen of petitioner's contentions is that the Department demoted him without complying with certain procedures allegedly required by statute, regulation and the federal constitution. *Cf. In re Appeal of North Carolina Savings and Loan League*, 302 N.C. 458, 465, 276 S.E. 2d 404, 409 (1981) (apply standard of review under Section 150A-51 dealing most directly with "gravamen" of complaint). As noted below, we need not address petitioner's constitutional objections to the Department's actions. Thus, the dispositive issue is whether the Department's disciplinary action complied with those procedures required by relevant statutes and regulations.

I

[1] Section 126-35 provides in part:

> No permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the department . . .

N.C.G.S. Sec. 126-35 (1986). Petitioner contends Section 126-35 and the regulations in effect at the time of his demotion required the Secretary give him several written administrative "warnings" before his demotion. We disagree.

On its face, Section 126-35 simply requires a permanent employee be given a list of the specific acts or omissions which are the bases for the Department's decision to take a particular disciplinary action such as dismissal, suspension or demotion. Delivery of this statement of reasons commences a fifteen-day period during which the employee must appeal the Department's decision to take action: the list of reasons under Section 126-35 is thus not itself a prior administrative "warning" that the employee may be subject to future disciplinary action unless the specified acts or omissions are corrected. The list is instead simply a notice which enables the employee to prepare any administrative or judicial challenge to the Department's decision to take disciplinary action. *See Employment Security Comm'n of North Carolina v. Wells*, 50 N.C. App. 389, 393, 274 S.E. 2d 256, 259 (1981); *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 351, 342 S.E. 2d 914, 922-23, *cert. denied*, 318 N.C. 507, 349 S.E. 2d 862 (1986). Even then, the statute specifically provides that in certain cases the employee may be temporarily suspended before the statutory statement of reasons is delivered. Sec. 126-35 (may suspend employee for personal conduct pending delivery of statement).

It is true that regulations adopted in connection with Section 126-35 require three prior administrative warnings and counsel-

ling be given a permanent employee before he is "dismissed" for "unsatisfactory performance of his duties." 25 N.C. Adm. Code 1J.0605; *see also Jones v. Dept. of Human Resources*, 300 N.C. 687, 690-91, 268 S.E. 2d 500, 502-03 (1980) (three warnings before dismissal for job performance also required under prior version of regulation). No regulation requires any administrative warnings be given prior to dismissing a permanent employee for "personal conduct detrimental to state service." 25 N.C. Adm. Code 1J.0608. More important, no regulation at the time of petitioner's demotion mentions any administrative warnings prior to "demotion" as opposed to "dismissal."

Thus, we find no basis in Section 126-35 or relevant regulations to conclude lawful procedure required petitioner be given any administrative warnings before his demotion. Although petitioner has not asserted in his brief a constitutional basis for prior administrative warnings (as opposed to notice under Section 126-35), we note a federal district court has rejected petitioner's claim that federal due process requires administrative warnings before demotion. *Myers v. Dept. of Human Resources of the State of North Carolina*, No. 86-124-CIV-4 (E.D.N.C. 15 April 1987). We further note that the Commission has subsequently promulgated regulations requiring administrative warnings prior to demotion in certain circumstances. 25 N.C. Adm. Code 1J.0611(a)(1) (two warnings when demotion for unsatisfactory job performance); 25 N.C. Adm. Code 1J.0611(a)(2) (no warnings if demoted for personal conduct).

II

[2] Irrespective of any prior warnings, petitioner argues he in any event did not receive under Section 126-35 a written statement of the "specific acts or omissions" that were the reasons for his demotion. We agree. Neither the Secretary's 14 August 1984 letter of demotion nor any prior written communications adequately stated the specific acts or omissions which the Secretary concluded required petitioner's demotion.

On 19 October 1983, petitioner received a letter of dismissal effective immediately. This letter set forth with great detail and in numerical order eleven specific acts and omissions allegedly supporting the Department's decision to dismiss petitioner. Petitioner appealed that notification to an interdepartmental hearing

officer. The hearing officer concluded management presented evidence sufficient to support three of the eleven original allegations. The hearing officer nonetheless recommended that plaintiff be reinstated with back pay "because the Department had not provided the plaintiff with adequate notice of his [performance] deficiencies." However, the Secretary's 14 August 1984 demotion letter stated that, "based on a review of the information presented" to her, she concluded that: (1) petitioner had not received sufficient notice to be dismissed, but (2) petitioner "demonstrated performance deficiencies . . . that . . . could no longer be tolerated." The Secretary thus decided to demote petitioner rather than dismiss him.

As the Secretary was not bound by the hearing officer's recommendations, it is not clear whether her conclusion that plaintiff's behavior demonstrated intolerable performance deficiencies was based on any or all of the hearing officer's findings, upon other acts or omissions noted in the Department's original notice of dismissal, or upon other possible acts or omissions the Secretary discovered during her review of the record. Section 126-35 refers to three separate disciplinary "actions": (1) discharge; (2) suspension; or (3) reduction in pay or position. The Department's original October 1983 notice clearly stated the specific acts underlying its decision to take a particular disciplinary action, i.e. dismissal. However, the Secretary's August 1984 notice that her decision to demote petitioner was "based upon the information presented" is not an adequate statement of the specific acts or omissions underlying her decision to take a different disciplinary action, i.e. demotion. *See Wells*, 50 N.C. App. at 393, 274 S.E. 2d at 259 (incidents must be described with particularity to allow effective appeal). As stated earlier, the purpose of a written list of the employee's acts or omissions under Section 126-35 is to enable the employee to conduct an effective appeal of the disciplinary action taken by the Department by notifying him of the reasons for the disciplinary action and advising him of his right to appeal. *Luck v. Employment Security Comm'n of North Carolina*, 50 N.C. App. 192, 194, 272 S.E. 2d 607, 608 (1980). The statute is designed to prevent the Department from summarily taking disciplinary action and then searching for reasons to justify that action. *See Leiphart*, 80 N.C. App. at 351, 342 S.E. 2d at 922-23. The Secretary's letter is not specific enough to safeguard against the

danger of arbitrary disciplinary action noted in *Leiphart.* Petitioner's right to appeal to the Commission and to this Court was thus prejudiced by the Secretary's failure to specify the acts or omissions justifying her decision to demote petitioner.

As we hold the Department failed to comply with the statutory notice procedures enacted in Section 126-35, we need not address petitioner's constitutional objections to the Secretary's notice of demotion. Accordingly, we reverse and remand the order of the Superior Court with instructions that the matter be remanded to the Commission with instructions that the action be dismissed due to lack of proper notice under Section 126-35. *See Wells*, 50 N.C. App. at 393-94, 274 S.E. 2d at 259 (remanding for dismissal where notice was inadequate).

Reversed and remanded.

Judges ARNOLD and ORR concur.

ERNEST A. SHAW v. LANOTTE, INC. AND THE NETHERLANDS INSURANCE COMPANY

No. 8821SC365

(Filed 6 December 1988)

Judgments § 35.1— agreement to purchase restaurant assets—prior suit for three payments in default—present suit for balance—issues different—no res judicata

Where a prior suit between the parties involved only adjudication of whether plaintiff was in default for three payments under an agreement to purchase assets of a restaurant, and this suit addressed the issue of whether plaintiff had paid the total amount which he agreed to pay, issues in the two actions were not the same, and res judicata therefore did not preclude defendant's counterclaim to collect the balance which plaintiff admitted was left owing under the agreement.

APPEAL by plaintiff from *Walker (Ralph A.), Judge.* Judgment entered 14 December 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 October 1988.

David F. Tamer and Nifong, Ferguson & Sinal, by Paul A. Sinal, for plaintiff-appellant.

Richard D. Ramsey for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from a judgment of the superior court ordering him to pay defendant the sum of $10,500 plus interest, the balance due under an asset purchase agreement executed by the parties regarding restaurant equipment.

On or about 4 September 1984, plaintiff Ernest A. Shaw (hereinafter "Shaw"), entered into an asset purchase agreement, security agreement, and deed of trust with defendant LaNotte, Inc., wherein he agreed to purchase the assets and restaurant equipment of defendant's business for the sum of $20,500 plus interest of twelve percent per annum. Under the terms of the transaction, the sum of $500 was to be paid on or before the date of closing and the balance of $20,000 was to be paid in seventeen equal monthly installments of $500 which were to be applied first to the payment of interest on the outstanding balance and then to the principal. The remaining balance of principal and interest was due in a balloon payment on or before 4 March 1986. The first payment was due on 4 October 1984. In the event of default, LaNotte, Inc. had the option to demand the entire balance of principal and accumulated interest be paid in full immediately.

Prior to the filing of the complaint herein, the parties were involved in litigation arising out of the same asset purchase agreement, security agreement, and deed of trust. LaNotte, Inc. filed the prior lawsuit on 9 September 1985 alleging that Ernest A. Shaw was in default by failing to make monthly installments for the months of June, July, and August 1985. Based on the alleged default, LaNotte, Inc. sought to accelerate the entire balance due under the agreement. Pursuant to the security agreement, LaNotte, Inc. sought and obtained an Order of Claim and Delivery for the restaurant equipment involved. LaNotte, Inc. filed an amended complaint on 15 October 1985 setting forth two additional claims for relief pertaining to a promissory note executed in connection with the asset purchase agreement and an alleged lease assumption by Shaw.

Upon the trial of the prior lawsuit, Shaw was granted a directed verdict at the close of LaNotte's evidence and the action was dismissed with prejudice by an order of 22 September 1986. The order further provided that "plaintiff take nothing from the defendant."

Shaw thereafter filed this action against LaNotte, Inc. and its surety, the Netherlands Insurance Company for damages incurred as a result of the alleged wrongful seizure and detention of the restaurant equipment made pursuant to the aforementioned Order of Claim and Delivery. Defendant LaNotte, Inc. answered, denied the allegations and filed a counterclaim wherein it sought to recover $10,500, the balance due and owing since 4 March 1986 under the terms of the asset purchase agreement. Plaintiff's reply denied the allegations of the counterclaim and set forth as an affirmative defense a plea of *res judicata* based upon the actions of the prior civil suit.

The plaintiff voluntarily dismissed his complaint with prejudice on 2 December 1987, thereby resolving all the claims contained in the complaint. Defendant made a motion for summary judgment on its counterclaim which came on for hearing on 11 December 1987. Plaintiff agreed to and admitted the following factual stipulations for purposes of evidence at the summary judgment hearing:

> 1. That the voluntary dismissal with prejudice taken by the plaintiff on December 2, 1987, was with respect to any and all claims alleged by plaintiff in his Complaint.
>
> 2. That the restaurant equipment referred to in this action had been returned to the plaintiff Shaw on or about January 5, 1987.
>
> 3. That on or about September 4, 1984, plaintiff, Ernest A. Shaw executed the Asset Purchase Agreement and Security [a]greement in favor of the defendant Lanotte, Inc. whereby the plaintiff Shaw purchased from Lanotte, Inc. the assets and restaurant equipment which is the subject of this lawsuit.
>
> 4. That the purchase price pursuant to the Asset Purchase Agreement and Security Agreement was a total sum of $20,500.00 together with interest thereon at the rate of 12%,

and that the full purchase price of $20,500.00 was to be paid on or before March 4, 1986, according to the aforesaid Agreements.

5. That the plaintiff Ernest A. Shaw has paid to defendant Lanotte, Inc., the total sum of $10,000.00 under the aforesaid Asset Purchase Agreement and Security Agreement as of the date of the Summary Judgment hearing on December 11, 1987, and said total payments of $10,000.00 under the aforesaid agreements were made by the plaintiff Shaw to the defendant Lanotte, prior to March 4, 1986.

6. That the plaintiff Shaw paid no further sums under the aforesaid agreements other than the $10,000.00 referred to above, and has made no payments under said agreements since March 4, 1986.

After considering the evidence offered by the parties, including the stipulations, and arguments of counsel, the trial court granted summary judgment in favor of the defendant on its counterclaim and plaintiff appeals.

The sole issue presented for review is whether the doctrine of *res judicata* applies to this case so as to preclude summary judgment for the defendant on his counterclaim.

Plaintiff's sole defense to defendant's counterclaim is a plea of *res judicata*. Shaw contends that resolution of the prior lawsuit in his favor in which LaNotte, Inc. sued for default and acceleration of the entire balance due bars LaNotte's counterclaim in this case. We disagree.

The plea of *res judicata* may be maintained only where there has been "a prior adjudication on the merits of an action involving the same parties and issues as the action in which the defense of *res judicata* is asserted." *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 712, 306 S.E. 2d 513, 515 (1983). It is undisputed that the parties involved in this action are the same as those involved in the prior lawsuit. Likewise, it is undisputed that the prior action which was dismissed with prejudice was adjudicated upon the merits. *See* N.C.G.S. Sec. 1A-1, Rule 41(b) (1983) (a dismissal operates as an adjudication upon the merits unless the court otherwise specifies or if the dismissal was for "lack of jurisdiction, for

improper venue, or for failure to join a necessary party"); *see also Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E. 2d 203, 205 (1974) (a dismissal with prejudice precludes subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication). Whether or not *res judicata* applies to this case turns on the question of whether the same issues involved in the prior action are involved herein.

Although in the prior action LaNotte, Inc. sought to accelerate the entire sum due under the asset purchase agreement, the issue was whether plaintiff was in default for three particular installment payments. Under the terms of the deed of trust executed simultaneously with the agreement, acceleration of the entire amount due would occur only at the option of LaNotte, Inc. "in the case of non-payment of any installments of principal or of interest thereon, when due as provided, or of default in the performance of any of the agreements or conditions of the Deed of Trust." A similar provision was included in the security agreement. *See generally Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 625, 224 S.E. 2d 580, 584 (1976) (North Carolina has approved the use of an acceleration clause in a mortgage, a note secured by a mortgage, and an unsecured note); *see also* 69 Am. Jur. 2d, Secured Transactions, Sec. 322, p. 157-58 (under the Uniform Commercial Code, a security agreement may contain a provision accelerating the indebtedness upon the happening of an event of default). As it was determined that Shaw was not in default for the three payments, LaNotte, Inc. had no right to accelerate the full indebtedness. Therefore, as the issue involved in the prior action was not whether Shaw had defaulted on the entire amount due under the agreement but whether he had defaulted on three particular payments, acceleration of the entire debt was never an issue in the first case.

LaNotte's counterclaim herein involves the issue of whether Shaw paid the total amount due under the asset purchase agreement by the date required. Shaw stipulated to the fact that "the full purchase price of $20,500 was to be paid on or before March 4, 1986 . . . ." Shaw further stipulated he has paid LaNotte, Inc. the total sum of $10,000 as of 4 March 1986 and has made no further payments since that time. Despite these stipulations, Shaw asserts he does not owe the balance of the purchase price because he was found not in default for three monthly installments by rea-

son of the prior suit. As the prior suit only involved adjudication of whether Shaw was in default for three payments and this suit addresses the issue of whether Shaw has paid the total amount that he agreed to pay, less payments made, we conclude the issues are not the same. Therefore, *res judicata* does not preclude LaNotte's counterclaim to collect the balance Shaw admits is left owing under the agreement as of 4 March 1986.

Accordingly, the judgment of the trial court is

Affirmed.

Judges ORR and SMITH concur.

STATE OF NORTH CAROLINA v. JEAN NICOLAS JOSEPH

No. 8812SC244

(Filed 6 December 1988)

Criminal Law § 148— motion to dismiss based on claim of double jeopardy—denial of motion not appealable

Defendant's appeal from the denial of his motion to dismiss based on his claim of double jeopardy was an attempt to appeal a non-appealable interlocutory order rendered in a criminal proceeding, and defendant could not appeal pursuant to N.C.G.S. § 1-277, which permits appeals of interlocutory orders which affect a substantial right, because N.C.G.S. § 15A-1444(d) limits criminal appeal procedures to those specified in N.C.G.S. § 15A-1441 *et seq.*, Chapter 7A, and the Rules of Appellate Procedure.

APPEAL by defendant from *Stephens (Donald W.), Judge.* Judgment entered 20 October 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 28 September 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

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

GREENE, Judge.

Defendant was originally tried in superior court on counts of trafficking in cocaine and carrying a concealed weapon. On 10

September 1987, the trial court granted defendant's motion for a mistrial based upon a witness's reference to a statement by defendant which the trial court had previously suppressed. The trial court subsequently ordered the matter set for retrial; however, defendant moved to dismiss any retrial based upon his constitutional right to avoid double jeopardy. The trial court determined defendant was not entitled to dismissal of the charges based upon the prosecutor's conduct or otherwise and denied defendant's motion to dismiss. Defendant appeals the denial of his motion to dismiss based on his claim of double jeopardy. However, we dismiss defendant's appeal as an attempt to appeal a nonappealable interlocutory order rendered in a criminal proceeding.

The trial court's denial of defendant's motion to dismiss was not a final judgment since it did not "dispose . . . of [the case] as to the State and the defendant, leaving nothing to be judicially determined between them in the trial court." *State v. Childs*, 265 N.C. 575, 578, 144 S.E. 2d 653, 655 (1965) (per curiam); *see also* N.C.G.S. Sec. 15A-101(4)(a) (1988) (providing "judgment" is entered when sentence is pronounced); *Berman v. United States*, 302 U.S. 211, 212-13, 82 L.Ed. 204, 205 (1937) ("final judgment" in criminal case means "sentence"). The right to appeal from a criminal proceeding is not derived from the federal constitution but is instead a creature of statute. *Abney v. United States*, 431 U.S. 651, 656, 52 L.Ed. 2d 651, 657-58, 97 S.Ct. 2034 (1977) (holding right to appeal was not constitutional but allowing appeal of double jeopardy claim as collateral order under federal statute permitting appeal of final judgment or "decision"). Our own Supreme Court has similarly held that the right to appeal in this state is purely statutory. *State v. Blades*, 209 N.C. 56, 182 S.E. 714 (1935) (holding no right to appeal interlocutory order in criminal proceeding).

Unlike the federal statute permitting appeal of final "decisions" in *Abney*, we are aware of no statute in this state which provides for appeal of an interlocutory order rendered in a criminal proceeding under these circumstances. Section 15A-1444(d) states that the procedure for criminal appeals to the appellate division is that permitted by our own Rules of Appellate Procedure, Chapter 7A and Section 15A-1441 *et seq.* N.C.G.S. Sec. 15A-1444(d) (1988). Rule 3(a) of the North Carolina Rules of Appellate Procedure merely provides for appeal by "any party entitled by law to appeal from a judgment or order of a superior

court rendered in a criminal action." Section 7A-27 provides for appeal in criminal proceedings only from final judgments. N.C.G.S. Sec. 7A-27(a), (b) (1988) (providing for appeal of life and death sentences and from any "final judgment" of a superior court).

With one exception, Chapter 15A also only allows a defendant to appeal after a "final judgment." Sec. 15A-1444(a) (if plead not guilty, may appeal conviction as matter of right); Sec. 15A-1444(a1) (can only appeal sentence as matter of right if exceeds presumptive term). A recent amendment to Section 15A-1432(d) does permit a defendant to maintain an interlocutory appeal of a superior court's reversal of a district court's dismissal of criminal charges. N.C.G.S. Sec. 15A-1432(d) (1988) (effective 1 October 1987). However, this statute is not applicable to defendant's appeal since by its terms Section 15A-1432(d) only applies to instances where the superior court reverses a dismissal of criminal charges by the district court: in this case, the superior court simply declared a mistrial requiring another trial in superior court.

Thus, there is under these circumstances no statutory right for defendant to conduct an interlocutory appeal of the superior court's denying his motion to dismiss these charges based on double jeopardy. We note some confusion in recent decisions of this court as to the relevance of Section 1-277 which permits appeals of interlocutory orders which affect a substantial right "from every judicial order or determination of a judge of a superior or district court . . . ." N.C.G.S. Sec. 1-277(a) (1983); *see, e.g., State v. Major*, 84 N.C. App. 421, 422, 352 S.E. 2d 862, 863 (1987); *State v. Montalbano*, 73 N.C. App. 259, 260, 326 S.E. 2d 634, 635, *disc. rev. denied*, 313 N.C. 608, 332 S.E. 2d 182 (1985); *State v. Jones*, 67 N.C. App. 413, 415, 313 S.E. 2d 264, 266 (1984) (holding denial of defendant's motion to dismiss on double jeopardy ground did not affect a substantial right); *but see State v. Black*, 7 N.C. App. 324, 172 S.E. 2d 217 (1970) (no statutory right to interlocutory criminal appeal).

The source of this confusion is an earlier pair of decisions by our Supreme Court which have since been superseded by the enactment of Section 15A-1444(d) and by more recent Supreme Court decisions. In *Childs*, our Supreme Court applied Section

1-277 in holding an appeal from a motion to dismiss a criminal proceeding did not affect a substantial right. 265 N.C. at 578, 144 S.E. 2d at 653. The Court subsequently determined an interlocutory appeal from a preliminary adjudication of the obscenity of materials seized by police in *State v. Bryant*, 280 N.C. 407, 185 S.E. 2d 854 (1972). Although the *Bryant* Court cited the *Childs* proposition that an interlocutory appeal would lie if defendant's substantial right was impaired, it noted defendant could also appeal the lower court's lack of personal and subject matter jurisdiction and in fact based its decision on that lack of jurisdiction. *Id.*

While the denial of defendant's double jeopardy claim would presumably affect a "substantial right" under *Abney*, the enactment of Section 15A-1444(d) subsequent to *Childs* and *Bryant* precludes defendant's resort to any "substantial right" analysis under Section 1-277 since Section 15A-1444(d) limits criminal appeal procedures to those specified in Section 15A-1441 *et seq.*, Chapter 7A and the Rules of Appellate Procedure. Despite its earlier decisions in *Childs* and *Bryant*, our Supreme Court now limits its analysis of the appeal of interlocutory criminal orders to those sources of appellate rights set forth in Section 15A-1444(d). *E.g., State v. Henry*, 318 N.C. 408, 348 S.E. 2d 593 (1986) (dismissing interlocutory criminal appeal as nonappealable under Chapter 7A and Chapter 15A). We note Section 7A-27(e) does permit an appeal "from any other order or judgment of the superior court from which an appeal is authorized by statute." It may be argued Section 7A-27(e) thus permits resort to a "substantial right" analysis under Section 1-277(a). However, except as the Legislature has amended Section 15A-1432(d) since *Henry* was decided, we are bound by the *Henry* Court's unqualified statement that "there is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case." 318 N.C. at 409, 348 S.E. 2d at 593.

Thus, in light of the Legislature's subsequent enactment of Section 15A-1444(d) and our Supreme Court's decision in *Henry*, we conclude the statutory basis for the holding in *Childs* and the dictum in *Bryant*—Section 1-277—is no longer relevant to the appeal of interlocutory orders in criminal proceedings. Accordingly, we decline to follow *Jones*, *Major* and *Montalbano* insofar as they might allow interlocutory appeals in criminal proceedings based on *Childs*, *Bryant* or Section 1-277. We therefore dismiss defend-

ant's appeal as an attempt to appeal an interlocutory order entered in a criminal proceeding where such appeal is not permitted by statute.

Appeal dismissed.

Judges ORR and SMITH concur.

MICHAEL ALLEN CLARK AND CELESTE IZZELL CLARK, INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR DUSTIN MICHAEL CLARK v. SHERRY A. DICKSTEIN, STUART J. ABRAHAMS, STEVEN R. FORE, DANIEL L. GOTTSEGEN, RICHARD D. KAPLAN, GREENSBORO GYNECOLOGY ASSOCIATES, P.A., JAMES L. RANSOM, RICHARD L. WEAVER, VIVIAN DENISE EVERETT, LESLIE GAINS, MOSES H. CONE MEMORIAL HOSPITAL, A CORPORATION, AND JOHN DOE(S)

No. 8818SC402

(Filed 6 December 1988)

1. **Trial § 5— recesses during trial—plaintiffs not prejudiced**

There was no merit to plaintiffs' contention in a medical malpractice case that the trial court committed reversible error by fragmenting and extending the two month trial by recessing court several times during the presentation of their evidence, since plaintiffs demonstrated no prejudicial effect from the recesses.

2. **Trial § 35.1— malpractice—instructions—jury's inability "to determine where the truth lies"**

The trial court in a medical malpractice case did not err in instructing the jury that it should answer an issue against the plaintiffs "if you are unable to determine where the truth lies."

APPEAL by plaintiffs from *Cornelius, Judge.* Judgment entered 19 January 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 October 1988.

Plaintiffs instituted this medical malpractice action seeking damages for their son's permanent brain damage and condition as a spastic quadraplegic, which they argue resulted from a negligently performed delivery.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., Kenneth B. Oettinger and William R. Hamilton, for plaintiff-appellants.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Walter F. Brinkley and Stephen W. Coles, for defendant-appellee Dickstein.

Tuggle Duggins Meschan & Elrod, P.A., by Joseph E. Elrod III, J. Reed Johnston, Jr., and Sally A. Lawing, for defendant-appellees Leslie Gains and Moses H. Cone Memorial Hospital.

JOHNSON, Judge.

Plaintiff Celeste Clark was a patient of defendant Greensboro Gynecology Associates for several years and continued to employ their services after becoming pregnant in late 1983. Her pregnancy progressed without complications for the entire period of gestation. Celeste Clark spontaneously entered labor on 11 July 1984 and was admitted to Moses H. Cone Memorial Hospital on that morning. Her attending physician was Sherry Dickstein. Leslie Gains was responsible for assessing the fetal heart rate during the delivery process through auscultation, the act of listening for sounds within the body, which may be performed with or without a stethoscope.

During the latter portion of labor, complications developed; infant Dustin Clark's fetal heart rate dropped and did not return to normal. Defendant Dickstein performed a rotation of the fetal head and forceps delivery. Plaintiff Dustin Clark remained hospitalized for over one month following delivery and was discharged on 19 August 1984. He is presently institutionalized due to his family's financial inability to provide home care. He is a spastic quadraplegic who is thought to be both blind and deaf and requires constant care. His condition has been diagnosed as irreversible, and his life expectancy is around fifteen years.

At the trial of this matter the issue of causation was stringently challenged. Plaintiffs presented twenty-five witnesses in support of their case, and defendants presented ten witnesses. The trial was conducted over a period of two months. Jury selection was commenced on 3 November 1986 and defendants rested their case on 2 January 1987.

During the course of trial, the presiding judge recessed court on several different occasions for numerous reasons, including the observance of holidays, i.e., Veterans Day, Thanksgiving, Christmas and New Year's, and for the purpose of allowing counsel for both sides to attend a Continuing Legal Education Seminar. The trial judge also took a personal recess.

The jury was charged on 7 January 1987, and returned a verdict of no negligence on all issues as to all defendants after approximately one hour of deliberation. Judgment was entered accordingly on 19 January 1987 and plaintiffs gave notice of appeal.

[1] On appeal, plaintiffs first contend that the trial court committed reversible error by fragmenting and extending the trial by recessing court several times during the presentation of their evidence. They essentially argue that the lengthy recesses entitle them to a mistrial because they were disruptive and caused their case to be remote in the minds of the jury. We cannot agree, as plaintiffs have demonstrated no prejudicial effect from the recesses.

In the administration of justice in this jurisdiction it is a recognized procedural rule that the basic manner in which a trial is conducted rests in the discretion of the trial judge. *Shute v. Fisher*, 270 N.C. 247, 154 S.E. 2d 75 (1967). Our Supreme Court has stated that

> [i]t is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case. Unexpected developments . . . frequently occur. When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his discretion in the interest of efficiency, practicality and justice.

Id. at 253, 154 S.E. 2d at 79.

Plaintiffs have failed to demonstrate that the recesses taken amounted to an abuse of discretion by the trial judge or resulted in prejudice to their case. When complicated issues are involved, it is not unusual for a trial to continue for several months. A jury consisting of astute members of our general population is not in-

herently incapable of following the presentation of the issues over a lengthy period of time.

[2] Plaintiffs next assign error to the trial court's charge to the jury and contend that the instructions were conflicting, misleading and confusing. We do not agree.

The portion of the jury charge to which plaintiffs object appears as follows:

> If you are not so persuaded, *or if you are unable to determine where the truth lies*, then it would be your duty to answer the issue against the plaintiffs; that is, you would answer the issue you are considering in favor of the defendant, or defendants, as the case may be. (Emphasis added.)

We find that plaintiffs have erroneously relied upon *Willis v. R. R.*, 122 N.C. 905, 29 S.E. 941 (1898), which properly refused the following instruction: "When the minds of the jury are in doubt (whether there was negligence or not) they must find for the defendant." *Id.* at 908, 29 S.E. at 943.

Although the Court in *Billings v. Renegar*, 241 N.C. 17, 84 S.E. 2d 268 (1954) admonished against the use of the phrase "if you are unable to make up your minds about how the thing occurred," the Court also found this phrase clearly distinguishable from that used in *Willis*. *Id.* at 22, 84 S.E. 2d at 271. We have a similar set of instructions before us in the instant case.

The North Carolina Pattern Jury Instructions Civil 809.00 and 809.03 (1984) conform in all substantial respects to the instruction given by the trial judge. We acknowledge the 1987 revision of this instruction which deleted the protested language and substituted the following:

> If, on the other hand, you fail to so find [by the greater weight of the evidence, that the defendant health care provider was negligent and that such negligence was a proximate cause of the injury], then it would be your duty to answer this issue "No" in favor of the defendant (health care provider).

N.C.P.I.—Civil 809.00, 809.03 (1987).

However, we do not believe that the instruction given in this case when "considered contextually as a whole," *Jones v. Development*

Co., 16 N.C. App. 80, 86, 191 S.E. 2d 435, 439, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 194 (1972), contained the potential defects which the Conference of Judges sought to cure by revising the pattern instruction.

It is for these reasons that in the trial of this case we find

No error.

Chief Judge HEDRICK and Judge PARKER concur.

THE AETNA CASUALTY & SURETY COMPANY v. ANNE STUART WELCH AND DEBORAH MORELAND THACKER

No. 8826SC292

(Filed 6 December 1988)

Insurance § 103— automobile liability insurance—failure of driver to forward all suit papers to insurer—coverage not voided

Where an automobile owner sued the driver for injuries sustained while a passenger in her own automobile, the owner's policy covered the driver at the time of the accident, the driver allegedly mailed a copy of the complaint to plaintiff insurer, and a default judgment for $200,000 was entered against the driver, the driver's failure to forward to plaintiff insurer the notice of entry of default and the notice of hearing on default and inquiry would not constitute a violation of the insurance contract which voided coverage above the compulsory amount, since the insurer, upon being notified of the pending action, is in a better position to take necessary action to ensure that it receives all subsequent legal documents. However, the trial court erred in entering sum mary judgment for plaintiff insurer in a declaratory judgment action to determine its liability under the policy where there was a genuine issue of material fact as to whether the driver notified plaintiff of the suit by the owner-passenger.

APPEAL by defendant Welch from *Snepp, Judge.* Judgment entered 30 October 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 September 1988.

This is a declaratory judgment action by plaintiff Aetna Casualty & Surety Company (Aetna) to determine its duties and responsibilities under its automobile insurance policy with defendant Anne Stuart Welch (Welch).

On 8 May 1984 defendant Welch and defendant Deborah Moreland Thacker (Thacker) were involved in a single car accident in Charlotte. Defendant Thacker was driving defendant Welch's car when it struck a telephone pole resulting in both defendants sustaining injuries. At the time of the accident a motor vehicle liability policy issued by Aetna covered defendant Welch and her vehicle. The policy limited personal injury liability to a maximum of $100,000 for each person and a maximum of $300,000 for each accident.

On 18 July 1986 defendant Welch filed a complaint against defendant Thacker for damages arising from the accident. Defendant Thacker failed to respond and an entry of default was entered against her. On 27 October 1986 the trial court conducted a hearing and entered a default judgment for $200,000 against defendant Thacker. Defendant Thacker did not appear at that hearing either.

In this declaratory judgment action, Aetna's motion for summary judgment was granted. The trial court concluded that plaintiff was not obligated to defend defendant Thacker, operator of defendant Welch's vehicle, and that plaintiff was liable to defendant Welch in the total amount of $25,000. Defendant Welch appeals.

Underwood, Kinsey & Warren, by C. Ralph Kinsey, Jr. and Kenneth S. Cannaday, for plaintiff-appellee.

Collie and Wood, by James F. Wood, III, for defendant-appellant.

EAGLES, Judge.

The sole issue on appeal is whether the trial court properly granted plaintiff's summary judgment motion. We hold that there is a genuine issue of material fact and, accordingly, we vacate the trial court's summary judgment and remand for trial.

The standard of review for summary judgment is whether there is any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). An issue is material if "the facts alleged would constitute a legal defense or would affect the result of the action." *Bank v. Gillespie*, 291 N.C.

303, 310, 230 S.E. 2d 375, 379 (1976). Further, we must view the record in the light most favorable to the non-movant, *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979), and draw all reasonable inferences in the non-movant's favor. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975).

Viewed in the light most favorable to defendant Welch, the facts here show the following. After being injured while riding as a passenger in her own car, defendant Welch sued defendant Thacker, the driver of the car, for damages. Welch's insurance policy covered Thacker at the time of the accident. Defendant Welch issued a civil summons against defendant Thacker notifying Thacker of the complaint against her. Defendant Thacker asserts that she mailed a copy of the complaint to Aetna, but never talked to any of their agents. Defendant Thacker never filed an answer nor did anyone on her behalf. Consequently, the clerk of court made an entry of default against her. After notice of the hearing on default and inquiry was sent by Welch to Thacker, the trial court conducted a hearing on the issue of damages. Again, neither defendant Thacker nor anyone on her behalf appeared. The trial court granted defendant Welch a default judgment for $200,000. In her deposition defendant Thacker admits that though she mailed a copy of Welch's complaint against her to Aetna, she never forwarded any other legal documents to them.

Plaintiff here argues that by operation of its insurance policy with defendant Welch and G.S. 20-279.21, the trial court's summary judgment order was proper. We disagree.

The insurance policy states that its insured has the following general duties:

A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

Aetna argues that Thacker's failure to send them the entry of default notice and the notice of hearing on default and inquiry prejudiced their rights as against Welch. Plaintiff relies on *Swain v. Insurance Co.*, 253 N.C. 120, 116 S.E. 2d 482 (1960), and *Jones v.*

Insurance Co., 270 N.C. 454, 155 S.E. 2d 118 (1967), for the proposition that if an insured fails to give his insurer notice of any legal document, then the insurer is only liable to third parties in the amount of the compulsory coverage. We disagree.

In *Swain* our Supreme Court stated that G.S. 20-279.21 provided that a violation of the insurance policy on the part of the insured could not be used by the insurer to void the compulsory coverage required by the State. *Swain* at 127-128, 116 S.E. 2d at 488. The *Jones* court applied the *Swain* rationale to assigned risk policyholders. *Jones* at 464, 155 S.E. 2d at 125. In both of these cases the insured failed to forward copies of the complaint to their insurer. This court recognizes the validity of provisions requiring the "prompt forwarding of legal process as a condition precedent to recovery on the policy." *Poultry Corp. v. Insurance Co.*, 34 N.C. App. 224, 226, 237 S.E. 2d 564, 566 (1977).

In her deposition defendant Thacker asserted that she sent a copy of defendant Welch's complaint against her to Aetna. She admits that she never sent a copy of the entry of default notice or any other legal document that she subsequently received. Aetna argues that this admitted failure to forward copies of other notices and legal papers constitutes a violation of its contract and voids any coverage on behalf of the insured above the compulsory amount. We disagree.

In an effort to reduce their liability, plaintiff's argument would allow an insurer, in effect, to "count" the legal documents forwarded from their insured and if *any* document had not been forwarded, to void the coverage. This is not the law of North Carolina. Once the insurer is notified of the pending action, the insurer is in the better position to take whatever action is necessary and appropriate to ensure that it receives all subsequent legal documents. Since the parties' testimony conflicts as to whether or not defendant Thacker notified Aetna of Welch's suit, there is a genuine issue of material fact. Accordingly, we vacate the trial court's summary judgment and remand for trial.

Vacate and remand.

Judges PHILLIPS and PARKER concur.

Sutton v. Ward

RUFUS J. SUTTON, PLAINTIFF v. JOE WARD AND THE COUNTY OF HAYWOOD, A BODY POLITIC, BY AND THROUGH ITS COMMISSIONERS, TEDDY ROGERS, ROGER AMMONS, EDWIN RUSSELL, RUBYE BRYSON AND GLEN NOLAND, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. GEORGE MICHAEL MEDFORD, THIRD-PARTY DEFENDANT

No. 8830SC317

(Filed 6 December 1988)

1. **Master and Servant § 49— participant in CETA program—"employee" within meaning of Workers' Compensation Act—common law action for negligence barred**

In a personal injury action brought by plaintiff, a participant in the federally funded CETA program, against a county and the driver of a county sanitation truck in which plaintiff was a passenger, the trial court properly entered summary judgment in favor of defendants because the county exercised control over plaintiff while he worked; an employer-employee relationship thus existed; and plaintiff was therefore employed under a "contract of hire" so that his common law action for negligence was barred by N.C.G.S. § 97-10.1, his exclusive remedy being pursuant to the Workers' Compensation Act.

2. **Master and Servant § 49— participant in CETA program—"employee" within meaning of Workers' Compensation Act**

Plaintiff, a CETA program participant, qualified as an "apprentice" to defendant county and accordingly was an employee under the Workers' Compensation Act where defendant county agreed with the CETA program administering agency to take on plaintiff and train him, and plaintiff received training to enable him better to compete in the job market while the county received the benefit of his labor.

APPEAL by plaintiff from *Hyatt, Judge.* Order entered 24 November 1987 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 3 October 1988.

This is a personal injury action brought by plaintiff, a participant in the federally funded Comprehensive Employment and Training Act (CETA) Program, who was allegedly injured while riding in a Haywood County Sanitation Department truck. Plaintiff had been assigned by Mountain Projects, Inc., the administering agency, to work for Haywood County in the sanitation department. The truck was driven by an employee of the county, defendant Ward, who was plaintiff's job supervisor for the day. Pursuant to federal law, Mountain Projects paid plaintiff's salary out of federal funds, withheld federal and state taxes and social security contributions, and filed plaintiff's withholding forms.

Haywood County employees provided day-to-day supervision, kept plaintiff's time sheets, and had the authority to terminate plaintiff for unsatisfactory work.

The truck in which plaintiff was a passenger was involved in a collision. Plaintiff filed suit against Ward for negligence and against the county on the theory of *respondeat superior*. Defendants filed a third party action against the driver of the other vehicle involved in the accident.

Defendants moved for summary judgment asserting that plaintiff's action was barred because his exclusive remedy was under the Workers' Compensation Act. G.S. 97-10.1. The trial court granted summary judgment for defendants; plaintiff appeals.

McLean and Dickson, by Russell L. McLean, III, and Timothy L. Finger, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, by Roy W. Davis, Jr. and Michelle Rippon, and Alley, Hyler, Killian, Kersten, Davis and Smathers, by Robert J. Lopez, for defendant-appellees.

EAGLES, Judge.

Where a motion for summary judgment is granted, the critical question for determination on appeal is whether, on the basis of the material 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, 271 S.E. 2d 399 (1980). On the undisputed facts before us, we hold that summary judgment was appropriate.

G.S. 97-10.1 provides that the rights and remedies granted an employee under the Workers' Compensation Act exclude all other rights and remedies against the employer for negligently inflicted injury. In addition, fellow-employees are excluded from common law liability. *See Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), *cert. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982). In order for the exclusivity clause to apply to bar plaintiff's civil action, however, the claimant must qualify as an "employee" under the Act. The plaintiff here qualifies in two ways.

The statutory definition of employee includes "every person engaged in an employment under any appointment or contract of

hire or apprenticeship. . . ." G.S. 97-2(2). Plaintiff qualifies both as a person "under any appointment or contract of hire" and as an apprentice.

[1] Whether one is an employee under an "appointment or contract of hire" of a particular employer within the Workers' Compensation Act is a question to be determined by applying the common law test for finding an employer-employee relationship. *See Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944); *Carter v. Frank Shelton, Inc.*, 62 N.C. App. 378, 303 S.E. 2d 184 (1983). The right to control the worker determines who is the employer. *Barrington v. Employment Security Commission*, 55 N.C. App. 638, 286 S.E. 2d 576, *disc. rev. denied*, 305 N.C. 584, 292 S.E. 2d 569 (1982); *Lucas v. Li'l General Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976). Indicia of control over a worker includes authority to set work hours, assign duties, and establish a manner of performance. *Barrington*, 55 N.C. App. at 642. Although the question of whether this control exists is generally a matter of fact to be decided by the jury, if the inference is clear that there is an employer-employee relationship, the decision may be made by the court as a matter of law. Restatement (Second) of Agency section 220 comment c (1958). Where, as here, the facts are not in controversy, the rights of the parties upon the facts are questions of law, and the court may enter judgment without intervention of a jury. *Peoples v. United States Fire Ins. Co.*, 248 N.C. 303, 103 S.E. 2d 381 (1958); *Keith v. Reddick, Inc.*, 15 N.C. App. 94, 189 S.E. 2d 775 (1972).

Here there is uncontroverted evidence that Haywood County, through its sanitation department employees, exercised control over the plaintiff while he worked. The county had authority to terminate plaintiff if his performance was unsatisfactory. The county assigned plaintiff to work with certain individuals on a day-to-day basis and those individuals were plaintiff's immediate supervisors for the day. Plaintiff's own deposition testimony was that he did what the sanitation department employees told him to do. Although the county did not pay the plaintiff, it controlled and directed all of his work activities, kept records of his work hours, and indirectly controlled his wages. *See City of Franklin v. Department for Human Resources*, 581 S.W. 2d 358 (Ky. App. 1979) (user agency primarily responsible for CETA employee's workers' compensation benefits). The trial court correctly granted

summary judgment in favor of the defendants because plaintiff is employed under a "contract of hire" and his common law action for negligence is barred by G.S. 97-10.1.

[2] Alternatively, plaintiff qualifies as an "apprentice" to the county and accordingly is an employee under the Act. There is no statutory definition of apprentice in the Workers' Compensation Act. "Apprentice" is defined as "one who is learning by practical experience. . . ." Webster's New Collegiate Dictionary (1980). The undeniable purpose of the CETA program is to provide federally funded job training for the economically disadvantaged. Comprehensive Employment and Training Act section 2, 29 U.S.C. section 801 et seq. (1973). *See also Jackson Housing Authority v. Auto-Owners Ins. Co.*, 686 S.W. 2d 917 (Tenn. App. 1984) (CETA program participant is statutory employee of both program administrator and user agency). Haywood County agreed with Mountain Projects to take on plaintiff and train him. This was an arrangement for mutual benefit and both Haywood County and plaintiff profited. Plaintiff received training to enable him to better compete in the job market and Haywood County received the benefit of his labor. Accordingly, we hold that plaintiff was an apprentice to Haywood County and therefore an employee under the Act.

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

Affirmed.

Judges PHILLIPS and PARKER concur.

DOROTHY H. COCKERHAM, PLAINTIFF-APPELLANT v. PILOT LIFE INSURANCE COMPANY, INC., DEFENDANT-APPELLEE

No. 8823SC130

(Filed 6 December 1988)

Insurance § 18.1— life insurance—ambiguous questions in application—yes or no answer called for—answer not false or material as matter of law

An answer to an ambiguous question in an application for life insurance which calls for a yes or no answer cannot be false as a matter of law, and the question in the application here, whether insured had within the preceding two

years "consulted or been treated by a physician for any condition other than a routine physical examination," was ambiguous and required a yes or no answer; furthermore, the answer, even if false, was not material as a matter of law where it was not certain that defendant would have refused the application or charged more for the policy if it had known that during the period from fifteen to twenty-four months before the policy was issued, the insured had a lingering cold or minor respiratory illness which neither endangered his life nor restricted his activities or work. The trial court erred in directing verdict for defendant on the ground that the evidence established its right to void the life insurance policy as a matter of law because deceased answered an insurability question falsely on its application for the policy. N.C.G.S. § 58-30.

APPEAL by plaintiff from *Mills, Judge.* Judgment entered 1 December 1987 in Superior Court, WILKES County. Heard in the Court of Appeals 8 June 1988.

Edward Jennings for plaintiff appellant.

W. G. Mitchell for defendant appellee.

PHILLIPS, Judge.

When Richard Walter Cockerham, plaintiff's late husband, died of an acute myocardial infarction on 28 August 1985, his life was insured by a policy of defendant's for $10,000. Defendant refused to honor the policy on the ground that in applying for it Cockerham answered an insurability question falsely; and this action to recover on the policy was dismissed at the close of plaintiff's evidence by a directed verdict on the ground that the evidence established defendant's right to void the policy as a matter of law. The evidence bearing upon that issue, upon which defendant, of course, had the burden of proof, was to the following effect:

In 1973 defendant insured Cockerham's life for $5,000 and the policy was still in effect in April 1984 when defendant notified him that since inflation had eroded its value it was pleased to present him a special opportunity to increase his "protection by $10,000," and that all he had to do to apply for this insurance was "answer the two 'insurability' questions on the application below and sign it." One question is irrelevant to the appeal; the other called for a yes or no answer and read: "Have you within the past two years consulted or been treated by a physician for any condition other than a routine physical examination?" Cockerham answered the question "no," signed the application, and the

policy, naming plaintiff as beneficiary, was issued 1 July 1984. Cockerham had consulted Dr. Hal Stuart on June 21, July 9, November 8, and December 2 of 1982 and on February 24, March 7, March 24, and April 13 of 1983 for a lingering cold or respiratory infection of unknown origin, and according to Dr. Stuart's testimony he was examined, treated and diagnosed as follows: Cockerham's main complaint was congestion and coughing at night, for which he prescribed medications to ease the cold symptoms and a chest X-ray which contained no evidence of cardiac disease except for a mild enlargement of the heart when compared with X-rays taken in 1982; Cockerham had mild obstructive disease of the lung, a very common condition that probably every smoker in his forties has or will have; the ailment was not life threatening, no cautionary instructions were necessary, and he did not restrict Cockerham's activities; the tests done were standard diagnostic procedures for mild respiratory ailments; he had been Cockerham's doctor for many years; "his visits were not of a strictly routine nature," as he was not one to come for routine checks as a rule, but came only when he had a problem.

The validity of the judgment dismissing plaintiff's action is governed by G.S. 58-30, which provides as follows:

> All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy.

This statute, so our Supreme Court has held many times, entitles an insurer to void a life insurance policy when in applying for it the applicant made a false statement as to his health that was either material or fraudulent. *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E. 496 (1937). Fraud not being claimed in this case the question before us is whether Cockerham's written answer to the application question stated above was both false and material as a matter of law. In our opinion it was neither, as both the falsity and materiality of the statement are questions of fact for a jury.

An answer to a question in an application for life insurance that is ambiguous and calls for a yes or no answer cannot be false as a matter of law. 1A J. Appleman, Insurance Law and Practice

Sec. 272, pp. 221-222 (1981). And the question in the application here—whether Cockerham had within the preceding two years "consulted or been treated by a physician for any condition other than a routine physical examination?"—is ambiguous and required a yes or no answer. The question, though seemingly simple at first blush, has several difficulties: One is that a routine physical examination is not a "condition" that leads either to medical consultation or treatment; another is that it does not specify the kind of routine physical examination that was not being asked about; and still another is that it required the applicant to characterize the examination made, as well as the condition that prompted him to consult the doctor, and the treatments received. Dr. Stuart's testimony indicates, as is commonly known in any event, that there are standard examinations and treatment for minor respiratory ailments such as Cockerham had, and that there are other routine physical examinations for other minor ailments is also commonly known. Thus, the question does not necessarily mean, as the court ruled, that the only consultation, examination, or treatment that was not asked about was a routine annual or other periodic physical examination. The question can also be construed, in our opinion, to exclude routine physical examinations and treatments for temporary and harmless ailments such as coughs and colds. *See*, 7 *Couch on Insurance* 2d Secs. 35:131, 35:136 (rev. ed. 1985). Dr. Stuart's testimony that Cockerham's visits were not of a strictly "routine" nature is neither decisive nor material; for the issue is not what the question meant to the doctor, but what it meant to Cockerham. If he reasonably interpreted the question as not applying to routine examinations and treatments for his cold the answer was not false; if he interpreted it as applying to such examinations and treatments it was false. For similar questions that have been deemed to be susceptible of more than one interpretation *see* 13 J. Appleman, Insurance Law and Practice Sec. 7401, pp. 197-269 (1976).

Nor was the answer to the question, even if false, material as a matter of law. In a case like this whether the representation was material "depends upon whether it was such as would naturally and reasonably influence the insurance company with respect to the contract or risk." *Wells v. Jefferson Standard Life Insurance Co.*, 211 N.C. 427, 429, 190 S.E. 744, 745 (1937). In that case at 430, 190 S.E. at 745, it was held that the applicant's failure

to inform the insurer about a mild attack of malaria, a more serious malady certainly than the common cold, was not "such a withholding of information as would necessarily have been calculated to influence the action or judgment of the insurance company," and that the materiality of the statement was for the jury to determine, rather than the court. Our ruling in this case is the same; because it is by no means certain, in our opinion, that defendant would have refused the application or charged more for the policy if it had known that during the period from fifteen to twenty-four months before the policy was issued Cockerham had a lingering cold or minor respiratory illness, the most common, routine, and generally harmless illness known to either the public or medical science; an ailment that neither endangered his life nor restricted his activities or work.

Vacated and remanded.

Judges WELLS and BECTON concur.

JAMES A. RICHARDS, EMPLOYEE-PLAINTIFF v. TOWN OF VALDESE, EMPLOYER-DEFENDANT, SELF INSURED TO THE MUNICIPAL TRUST, (ADMINISTERED BY HEWITT, COLEMAN AND ASSOCIATES), CARRIER-DEFENDANT

No. 8810IC368

(Filed 6 December 1988)

1. **Master and Servant § 65.2— workers' compensation—back injury—injury by accident or from specific traumatic incident**

A back injury claimant under the Workers' Compensation Act may proceed under the theory that he was injured by accident, that is, by an unlooked for and untoward event which was not expected or designed by the claimant, or he may prove that his injury arose from a specific traumatic incident.

2. **Master and Servant § 65.2— workers' compensation—back injury—specific traumatic incident—definition—firefighter jumping on and off truck**

Through the 1983 amendment to N.C.G.S. § 97-2(6), the General Assembly did not intend to limit the definition of specific traumatic incident to an instantaneous occurrence; rather, events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature. The Industrial Commission erred in concluding that claimant suffered no injury as a result of a specific traumatic incident where claimant presented evidence that he repeatedly jumped on and off fire trucks

for a fifteen hour period, nine of those hours in full gear; he normally did not have to wear his gear for an extended period or jump on and off trucks; and though claimant could point to no specific instant in time when his back began to hurt, he could point to a series of contemporaneous events which could have caused his injury.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award filed 15 January 1988. Heard in the Court of Appeals 1 November 1988.

On 25 June 1987, Deputy Commissioner Winston L. Page, Jr. entered an opinion and award denying plaintiff's claim for benefits. Plaintiff appealed to the Full Commission.

The evidence presented and the findings of fact adopted by the Full Commission tend to show the following.

On 4 April 1985, and for approximately 15 years prior, plaintiff was a volunteer fireman for the town of Valdese. He was primarily employed as a police officer for the town of Drexel, North Carolina. For approximately twenty years plaintiff had suffered from intermittent lower back pain with pain radiating into his lower extremities. His back pains were usually caused by heavy manual labor.

As a volunteer fireman, plaintiff's duties included riding on the pumper trucks, rolling out and attaching hoses which weighed approximately twenty-five pounds, operating the nozzle of the hose, spraying water, and cleaning up after a fire was extinguished. Plaintiff was also required to roll up the hoses and place them on the trucks after fires were extinguished.

On 4 April 1985, plaintiff was called to fight a quickly spreading woods fire near Valdese. Eventually the fire spread into the town itself and required a prolonged fight. Plaintiff worked at several different fire sites and during the first several hours of his work, he wore full fire gear which included boots, coat, pants, helmet and gloves. Plaintiff continued to fight fires until the early morning hours of 5 April, when he began experiencing back pain and was relieved from duty.

Plaintiff sought medical treatment for his back pain and eventually underwent surgery to remove a herniated disk.

From the Opinion and Award by the Full Commission denying his claim for benefits, plaintiff appeals.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, by C. Scott Whisnant, for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson and Howard M. Widis, for defendant appellee.

ARNOLD, Judge.

[1] N.C.G.S. § 97-2(6), as amended in 1983, defines injury under the Workers' Compensation Act as follows:

> Injury.—"Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

The amendment supplements the original definition of an accident, and provides a back injury claimant two theories on which to proceed. *See Caskie v. R. M. Butler & Co.*, 85 N.C. App. 266, 354 S.E. 2d 242 (1987).

The first option presented a back injury claimant is to prove that he or she was injured by an accident. N.C.G.S. § 97-2(6) (Cum. Supp. 1987). The North Carolina Supreme Court has defined accident as an unlooked for and untoward event, which is not expected or designed by the injured person. *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E. 2d 455, 456 (1983); *Hensly v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289 (1957).

The second option presented to a back injury claimant is to prove that his injury arose from a specific traumatic incident. N.C.G.S. § 97-2(6) (Cum. Supp. 1987); *see Caskie*, 85 N.C. App. 266, 354 S.E. 2d 242 (1987).

[2] The Full Commission adopted the Deputy Commissioner's conclusions that, as a matter of law, Richards sustained a back injury neither as a result of an accident, nor as a result of a specific traumatic injury. The conclusion that Richards suffered no injury

as a result of a specific traumatic injury is error for the reasons stated below, and the judgment must be vacated and the cause remanded. *See Roach v. Lupoli Construction Co.*, 88 N.C. App. 271, 362 S.E. 2d 823 (1987).

The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings. *Adams*, 61 N.C. App. 258, 300 S.E. 2d 455 (1983); *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968). Conclusions of law based on these findings, however, are subject to review by the appellate courts. *Anderson v. A. M. Smyre Mfg. Co.*, 54 N.C. App. 337, 283 S.E. 2d 433 (1981); *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 105 (1980).

The 1983 amendment to N.C.G.S. § 97-2(6) relaxes the requirement that there be some unusual circumstance that accompanies a back injury. *Bradley v. E. B. Sportswear, Inc.*, 77 N.C. App. 450, 452, 335 S.E. 2d 52, 53 (1985). We believe that through the amendment, the General Assembly also recognized the complex nature of back injuries, and did not intend to limit the definition of specific traumatic incident to an instantaneous occurrence. Back injuries that occur gradually, over long periods of time, are not specific traumatic incidents; however, we believe that events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature. *Cf. id.* (where trauma or injury must not have developed gradually, but at a cognizable time).

Richards presented evidence which showed that over a period of ten to fifteen hours, he repeatedly had to jump on and off of fire trucks while fighting the fires of 4 April 1985. He normally fights single, stationary fires which do not require this repeated jumping on and off of the fire trucks.

Richards also presented evidence that he wore full fire gear for approximately nine continuous hours on 4 April 1985. He normally does not have to wear his gear that long. Wearing this full gear could also have exacerbated the effect of jumping on and off the fire trucks.

Richards can point to no specific instant in time when his back began to hurt. He can, however, point to a series of contemporaneous events which could have caused his injury.

On remand, the Commission must make findings based on the evidence, and it must make conclusions of law supported by those findings and consistent with legal precedent. *See Roach*, 88 N.C. App. 271, 362 S.E. 2d 823 (1987). We vacate the Commission's 15 January 1988 order and remand the case to the Full Commission for their determination of whether Richards' repeated jumping on and off of the fire trucks in full gear was the "specific traumatic incident" responsible for his injury.

Vacated and remanded.

Judges WELLS and COZORT concur.

JAMES F. WELLS v. LUCY MARIE WELLS

No. 881DC296

(Filed 6 December 1988)

1. **Husband and Wife § 10— separation agreement—incorporation into divorce judgment—improper acknowledgment—enforcement of alimony provision**

The trial court's authority to incorporate a separation agreement into a divorce judgment did not depend upon the validity of the agreement, and there was no merit to plaintiff's contention that the trial court had no authority to incorporate the separation agreement into the divorce judgment and to find plaintiff in contempt for failing to make alimony payments required by the separation agreement and divorce judgment on the ground that the separation agreement was not properly acknowledged because the notary public taking the acknowledgment was defendant's attorney, was paid a fee by plaintiff, and thus had an interest in the agreement in violation of N.C.G.S. § 52-10.1.

2. **Divorce and Alimony § 21.6— separation agreement in divorce judgment—alimony order—contempt—attorney fees**

A provision in a separation agreement incorporated into a divorce judgment requiring plaintiff to pay defendant $550.00 per month until defendant "remarries or dies" was an alimony order, not a property settlement, and the trial court could properly award attorney fees to defendant in a proceeding to enforce the alimony provision.

APPEAL by plaintiff from *Parker (J. Richard), Judge.* Order entered 22 October 1987 in District Court, CURRITUCK County. Heard in the Court of Appeals 24 October 1988.

After a hearing on defendant's motion to have plaintiff show cause why he should not be held in contempt for failing to comply with a judgment entered 17 March 1986 ordering plaintiff to pay alimony to defendant, the trial judge made findings of fact and conclusions of law which, except as quoted, are summarized as follows:

> Plaintiff and defendant entered into a Deed of Separation which was dated 24 August 1984 and was incorporated into the 17 March 1986 Judgment of Divorce. The Deed of Separation was prepared by plaintiff's attorney and submitted to the court for its entry as the court's judgment "with the consent of both the Plaintiff and the Defendant." The Deed of Separation provides for the payment of $550.00 per month by plaintiff to defendant, "until the Defendant either remarries or dies." Defendant is alive and not remarried and plaintiff is in arrears under the terms of the Deed of Separation in the amount of $2,200.00 as of 1 June 1987. Plaintiff has "the means and ability to comply at the present time." Defendant's attorney has rendered valuable legal services to defendant and these services "have a reasonable value of at least $500."
>
> The Deed of Separation was incorporated into the Final Judgment of Divorce by the consent of both parties thereby becoming a part of the court's final judgment and is therefore subject to enforcement by contempt. The agreement by plaintiff to pay defendant $550.00 per month until defendant remarries or dies is an agreement to pay alimony. Plaintiff's failure "to comply with the Order of this Court with regard to payments by the Plaintiff to the Defendant has been willful and without just cause or excuse, and therefore constitutes contempt of this Court." Defendant is entitled to an award of attorney's fees from plaintiff.

Based on his findings and conclusions, the trial judge found defendant in contempt and stated the following:

> Plaintiff . . . shall remain in custody until such time as he purges himself of contempt of this Court by payment into

the office of the Clerk of Superior Court of Currituck County, the sum of $2,200.00, which amount equals the total amount due to the Defendant as of June 1, 1987, together with the sum of $500 to be paid to the Defendant's Attorney, Van H. Johnson, payable through the office of the Clerk of Superior Court of Currituck County, or until Plaintiff is otherwise released, according to law.

Plaintiff appealed.

Jennette, Morrison, Austin & Halstead, by John S. Morrison, for plaintiff, appellant.

Van H. Johnson for defendant, appellee.

HEDRICK, Chief Judge.

[1] The record discloses that the Deed of Separation described in the findings of fact was prepared by defendant's attorney, and that both plaintiff and defendant acknowledged the Deed of Separation before defendant's attorney who was a notary public. The record further establishes that plaintiff was not represented by counsel at that time, and plaintiff paid defendant's attorney a fee of $600.00 pursuant to the agreement. Plaintiff now argues the Deed of Separation is and always has been "null and void" because it was not properly acknowledged in accordance with the provisions of G.S. 52-10.1. Plaintiff contends the notary public taking the acknowledgment, because he was paid a fee by plaintiff and because of his relationship to defendant as her attorney, had an interest in the matter and was a party to the contract in violation of G.S. 52-10.1. Plaintiff therefore argues the court had no authority to incorporate the Deed of Separation into the Judgment of Divorce and the court had no authority to find plaintiff in contempt for not making the payments prescribed in the separation agreement and the order. We disagree with plaintiff and affirm the order dated 22 October 1987, finding plaintiff in contempt and ordering him to purge himself by making the total payment of $2,700.00.

In *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E. 2d 338 (1983), our Supreme Court stated:

[W]e now establish a rule that whenever the parties bring their separation agreements before the court for the court's

> approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

Our Supreme Court has also stated that "[t]here is a presumption in favor of the regularity and validity of judgments in the lower court, and the burden is upon [an] appellant to show prejudicial error." *London v. London*, 271 N.C. 568, 570, 157 S.E. 2d 90, 92 (1967).

The trial judge's authority to incorporate a deed of separation into a judgment does not depend on the validity of the deed of separation. When the paper writing purporting to be the Deed of Separation was incorporated into the judgment, it merely set out the terms of the judgment. It is not the Deed of Separation that is being enforced in this proceeding; it is the judgment of the court which requires plaintiff to pay defendant $550.00 per month. Plaintiff has launched a collateral attack on the Judgment of Divorce dated 17 March 1986. If the judgment in question was void it could be attacked collaterally, but if it was merely irregular it could only be attacked by a direct appeal. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E. 2d 772 (1987). No appeal was taken from the judgment dated 17 March 1986, incorporating the Deed of Separation into the divorce judgment, which ordered plaintiff to pay alimony to defendant.

[2] Next, plaintiff argues the trial court erred in ordering him to pay attorney's fees in the amount of $500.00. Citing no authority, he argues the court may not order attorney's fees when the contempt proceeding is brought to enforce a property settlement. In effect, plaintiff contends the judgment of 17 March 1986 did not require him to pay alimony but instead constituted a property settlement between the parties. As pointed out above, the Deed of Separation incorporated into the judgment merely set forth the terms of the order. The Deed of Separation clearly provides that plaintiff would pay defendant $550.00 per month until defendant "remarries or dies, whichever event shall occur first." Clearly this is not a property settlement; it is alimony, and as such the order requiring plaintiff to pay attorney's fees is proper.

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT LEE CHAMBERS

No. 888SC76

(Filed 6 December 1988)

1. **Kidnapping § 1.2— separate restraint—release of victim in safe place—sufficiency of evidence**

There was no merit to defendant's contentions in a first degree kidnapping case that: (1) the evidence did not establish a restraint separate and apart from the restraint used in committing the other felony when the kidnapping was based upon a confinement or removal to facilitate the commission of a felony under N.C.G.S. § 14-39(a)(2), since the evidence tended to show that defendant restrained the victim for the kidnapping by firing a gun into the air and threatening to kill her and her brother if they did not stop walking away from the car, and defendant restrained the victim to accomplish the sex offense by jerking her out of the car and, with the help of another, forcing her onto the hood of the car; (2) the degree of the kidnapping conviction should be reduced because the victim was released in a "safe place," since the evidence indicated that she was not released at all, but escaped; and (3) the attempted rape was not proven because the evidence did not show that she resisted while on the hood of the car, since physical resistance was not necessarily required because defendant had a gun and had threatened to use it.

2. **Criminal Law § 75.2— statement by defendant—false confession not procured by officer**

In a prosecution of defendant for first degree kidnapping and attempted second degree rape, the circumstances did not indicate either that an officer procured a false confession or that that was his purpose where the officer discussed with defendant the possibility of the victim's "ass prints" being on the hood of the car, and the officer was properly allowed to testify regarding defendant's statements to him.

3. **Criminal Law § 85.1— witness's opinion that defendant trustworthy—exclusion of evidence not error**

There was no merit to defendant's contention that he was prejudiced because the court erroneously refused to permit a witness to testify that she had always found defendant to be trustworthy, since the witness had made the same point earlier and probably with greater effect by testifying that she had trusted defendant with the care of her children, allowed him to use her car, and "trusted Robert with everything."

4. Kidnapping § 1.2; Rape and Allied Offenses § 5— first degree rape—sexual assault not basis for first degree kidnapping charge—conviction for two offenses proper

There was no merit to defendant's contention that he could not be convicted of both first degree kidnapping and a sexual assault that raised the kidnapping to first degree, since the verdict explicitly showed that what raised the kidnapping charge to first degree was not the sexual assault but was defendant's failure to release the victim in a safe place.

APPEAL by defendant from *Llewellyn, Judge.* Judgments entered 9 October 1987 in Superior Court, LENOIR County. Heard in the Court of Appeals 6 September 1988.

Defendant was convicted of first degree kidnapping in violation of G.S. 14-39 and attempted second degree rape in violation of G.S. 14-27. The State's evidence in pertinent part was that: On the afternoon involved defendant, Ricky Sutton, Semantha Lynn Harmon, her brother Gonzales Harmon, and his friend Milton Rouse went from Kinston to LaGrange in an automobile driven by defendant. After some irrelevant diversions that need not be described Sutton drove the car down a dirt path into a cornfield where he and defendant suggested making love to Semantha, but she rebuffed them and defendant pulled out a handgun. Semantha and her brother got out of the car and began to walk away; defendant fired the gun in the air and told them to stop or he would kill both of them. When they stopped and started back to the car, defendant grabbed her by the neck, and she got back in the car. Defendant then pulled her out of the car, he and Sutton forced her onto the hood of the car and took her pants and panties off, and defendant tried to penetrate her vagina with his penis. Meanwhile, Gonzales Harmon was arguing with Ricky Sutton about their treatment of his sister and Milton Rouse ran from the scene. As defendant continued trying to penetrate the victim, Gonzales Harmon stabbed at defendant with a knife and grabbed his gun; Sutton then advanced toward him and Gonzales shot and killed him. Both Harmons and defendant then ran from the scene.

Attorney General Thornburg, by Associate Attorney General David M. Parker, for the State.

William D. Spence for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's first of several contentions, none of which have merit, is that neither conviction is supported by evidence; and in support thereof he makes three arguments. His first argument is that the evidence did not establish, as *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E. 2d 338, 351 (1978) requires, a restraint separate and apart from the restraint used in committing the other felony when the kidnapping is based upon a confinement or removal to facilitate the commission of a felony under G.S. 14-39(a)(2). But viewing the evidence in its most favorable light for the State it tends to show that defendant restrained Semantha Harmon for the kidnapping by firing a gun in the air and threatening to kill her and her brother if they did not stop walking away from the car; and restrained her to accomplish the sex offense by jerking her out of the car and with Sutton's help forcing her onto the hood of the car. His second argument is that the degree of the kidnapping conviction should be reduced because the victim was released in a "safe place"; but the evidence indicates she was not released at all, but escaped. *State v. Pratt*, 306 N.C. 673, 682, 295 S.E. 2d 462, 468 (1982). His third argument is that the attempted rape was not proven because the evidence does not show that she resisted while on the hood of the car; but physical resistance was not necessarily required since he had a gun and had threatened to use it. *State v. Stanley*, 74 N.C. App. 178, 327 S.E. 2d 902, *disc. rev. denied*, 314 N.C. 546, 335 S.E. 2d 318 (1985).

[2] Defendant next contends that Detective Gosnell was erroneously permitted to testify to a statement of his that was obtained by fraud or trickery. The statement was that Semantha's "ass" prints might be on the hood of the car and with respect thereto Detective Gosnell testified in the *voir dire* hearing as follows:

> [H]e made the statement that him and Semantha were sitting on the hood of the car. I asked him if they were clothed. He said yes. At that point I asked him, I said, "Robert, if you were clothed, then when I process the car for fingerprints, there is no reason I would find the girl's ass print on the car, is there?" He said "Maybe," and I asked him what was he talking about and he said she got off the hood to use the bathroom. I said "Wouldn't her clothes have been back on her when she got back on the hood?" He said, "Well, they were

> down to her knees." I asked if there was any way I would find his ass prints on the hood of the car. He said maybe because of the way he was sitting and indicated from the top part of his tail up from his hip. . . .
>
> At that point he told me that him and the girl were messing around on the hood of the car; that she was letting him.

Gosnell further testified that although he had never had it done he believed that "ass prints" could be processed and the only reason he did not try to process them in this instance was defendant's statement. Deceptive methods by police officers by themselves do not render a confession of guilt inadmissible. The admissibility of a confession depends upon several factors, one of which is "whether the means employed were calculated to procure an untrue confession." *State v. Jackson*, 308 N.C. 549, 574, 304 S.E. 2d 134, 148 (1983). The circumstances here do not indicate either that the officer procured a false confession or that that was his purpose.

[3] Next defendant contends that he was prejudiced because the court erroneously refused to permit Barbara Kinsey to testify that she had always found defendant to be trustworthy. Assuming *arguendo* that the testimony was admissible under the provisions of Rule 404(a)(1), N.C. Rules of Evidence, *State v. Squire*, 321 N.C. 541, 547, 364 S.E. 2d 354, 358 (1988), defendant could not have been prejudiced thereby in our opinion; because the witness had made the same point earlier, *State v. Walden*, 311 N.C. 667, 319 S.E. 2d 577 (1984), and probably with greater effect, by testifying that she had trusted him with the care of her children, allowed him to use her car, and "trusted Robert with everything."

[4] Finally, defendant argues that his convictions for both offenses are forbidden by the holding in *State v. Freeland*, 316 N.C. 13, 23, 340 S.E. 2d 35, 40 (1986) that a defendant cannot be "convicted of both first degree kidnapping and a sexual assault that raised the kidnapping to first degree." But a sexual assault is not the only occurrence that can raise a kidnapping to first degree; G.S. 14-39(b) provides that a kidnapping can also be raised to that degree if the victim "was not released by the defendant in a safe place," and here the verdict explicitly shows that what raised the

kidnapping charge to first degree was not the sexual assault, but that defendant did not release the victim in a safe place.

No error.

Judges EAGLES and PARKER concur.

THE T'AI COMPANY v. MARKET SQUARE LIMITED PARTNERSHIP, PAT WALTERS AND ALBERT HAKIMIAN

No. 8818SC337

(Filed 6 December 1988)

Appeal and Error § 6.2— appeal from summary judgment order—claims not determined—appeal from interlocutory order not affecting substantial right

In an action for breach of contract, wrongful interference with contract, fraud, conversion, and unfair trade practices where defendants counterclaimed for attorney's fees pursuant to N.C.G.S. § 6-21.5 and N.C.G.S. § 75-16.1(2) alleging plaintiff's claims were frivolous, malicious, and without merit, the trial court's entry of summary judgment for defendants on plaintiff's claim was not appealable before the counterclaim for attorney's fees had been adjudicated, since the summary judgment order was interlocutory and did not affect a substantial right. N.C.G.S. §§ 1-277(a), 7A-27(d).

APPEAL by plaintiff from *Rousseau (Julius A.), Judge.* Judgment entered 30 November 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 October 1988.

Stern, Graham & Klepfer, by James W. Miles, Jr., for plaintiff-appellant.

Wyatt, Early, Harris, Wheeler & Hauser, by Frank B. Wyatt and James R. Hundley, for defendant-appellees.

GREENE, Judge.

Plaintiff sued defendants for compensatory and punitive damages alleging breach of contract, wrongful interference with contract, fraud, conversion and unfair trade practices. Defendants, Market Square Limited Partnership and Pat Walters, denied these claims and counterclaimed for attorney's fees pursuant to N.C.G.S. Sec. 6-21.5 (1986) and N.C.G.S. Sec. 75-16.1(2) (1985) alleging plaintiff's claims were frivolous, malicious, and without merit.

Default was entered against defendant, Albert Hakimian, as he had failed to plead in response to the complaint. In response to a motion filed by defendants, Market Square Limited Partnership and Pat Walters, the trial court granted summary judgment in favor of defendants and dismissed the complaint. Plaintiff appeals.

The sole issue before this court is whether summary judgment on the complaint is appealable before the counterclaim for attorney's fees has been adjudicated by the trial court.

North Carolina General Statute Section 7A-27(d) provides for appeal from an interlocutory order or judgment when the action or proceeding "(1) Affects a substantial right, or (2) In effect determines the action and prevents a judgment from which appeal might be taken, or (3) Discontinues the action, or (4) Grants or refuses a new trial . . . ." N.C.G.S. Sec. 7A-27(d) (1986). *Compare* Section 7A-27(d) *with* Section 1-277(a) (1983) (allowing appeal of *any* order or determination meeting identical four criteria of Section 7A-27(d)). As it is clear that Sections (2), (3), and (4), are not here applicable, we need only determine if the interlocutory order involved "affects a substantial right." "With respect to those interlocutory orders which allegedly do affect a substantial right, our Supreme Court has additionally long required that the interlocutory 'ruling or order deprive . . . the appellant of a substantial right *which he would lose if the ruling or order is not reviewed before final judgment.*' " *J. & B. Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E. 2d 812, 815 (1987) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E. 2d 338, 343 (1978)). An interlocutory order is one "made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Slurry*, 88 N.C. App. at 4, 362 S.E. 2d at 814-15 (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 337, 381, *reh'g denied*, 232 N.C. 744, 59 S.E. 2d 429 (1950)). Here, as the counterclaim for attorney's fees has not been adjudicated by the trial court, the summary judgment on the complaint is interlocutory.

An interlocutory order "affects a substantial right" so that it is appealable under N.C.G.S. Sec. 1-277(a) and N.C.G.S. Sec. 7A-27(d)(1) if the right affected is "substantial" and the right will

"be lost, prejudiced, or be less than adequately protected" if the order is not reviewed before final judgment. *Slurry*, 88 N.C. App. at 5, 362 S.E. 2d at 815. *See Waters*, 294 N.C. at 207, 240 S.E. 2d at 343.

The "substantial right" most often addressed is the right to avoid two separate trials on the same issues. *See Slurry*, 88 N.C. App. at 7, 362 S.E. 2d at 816 (the possibility of undergoing a second trial affects a substantial right only when the *same* issues are present in both trials); *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E. 2d 593, 596 (1982) (possibility of second trial affects substantial right if presence of same "issue" in second trial creates possibility party will be prejudiced by different juries rendering inconsistent verdicts on same issue); *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E. 2d 405, 408-09 (1982) (where summary judgment allowed for fewer than all defendants, order was appealable since possibility of inconsistent verdict in other trials on same issue affected substantial right). Avoiding two separate trials on the same issues is "a substantial right" because of the possibility of inconsistent verdicts in the two proceedings. *Slurry*, 88 N.C. App. at 9, 362 S.E. 2d at 817. However, "there is ordinarily no possibility of inconsistent verdicts or other lasting prejudice where trial of defendant's counterclaim before appeal will not determine any issues controlling the potential trial of plaintiff's claims after appeal." *Slurry*, 88 N.C. App. at 8, 362 S.E. 2d at 817. Here, the disposition of the issue raised in the counterclaim is for the trial judge, not the jury, and recovery is permitted on the counterclaim only if defendants prevail as to plaintiff's complaint. N.C.G.S. Sec. 75-16.1(2) (if party instituting the complaint "knew, or should have known, the action was frivolous and malicious," the trial judge may allow a reasonable attorney fee to the attorney representing the prevailing party); N.C.G.S. Sec. 6-21.5 (upon motion of prevailing party, the court may award a reasonable attorney's fee to the prevailing party if there was a "complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading"). There is no possibility of inconsistent results in the complaint and counterclaim because an award for this counterclaim can only be granted if the defendants are the prevailing parties in the plaintiff's action. Therefore, as the parties have not addressed any other substantial right which might be affected, we conclude that no substantial right is in-

volved which will be "lost, prejudiced, or less than adequately protected" if we do not review this appeal before final judgment. This is consistent with the purpose behind the statutes governing appellate procedure which is to "prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Waters*, 294 N.C. at 207, 240 S.E. 2d at 343.

Accordingly, the plaintiff's exception to the entry of the summary judgment on the complaint adequately and without prejudice preserves its appeal which can be perfected after the trial court on remand has ruled on the defendant's request for attorney's fees as asserted in the counterclaim.

Appeal dismissed.

Judges ORR and SMITH concur.

JAMES C. FOWLER, EMPLOYEE, PLAINTIFF v. B. E. & K. CONSTRUCTION, INC., EMPLOYER, AND UNITED STATES FIDELITY & GUARANTY CO., CARRIER, DEFENDANTS

No. 8810IC272

(Filed 6 December 1988)

Master and Servant § 96.1— workers' compensation—competency of doctor's testimony challenged—testimony irrelevant to appeal

Testimony by a doctor in a workers' compensation case as to whether the worker had a general bodily disability due to his musculoskeletal injuries was irrelevant to the appeal where the proceeding below was initiated, conducted, and reviewed to determine only whether the worker's bruised kidney was permanently injured and, if so, whether under the provisions of N.C.G.S. § 97-31(24) any further compensation was due therefor, and no issue was raised as to whether the worker had a general bodily disability.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 19 November 1987. Heard in the Court of Appeals 27 September 1988.

The facts pertinent to the appeal follow: On 29 July 1981, while working for defendant construction company, James Fowler was injured when a 2,000 pound motor control assembly fell on

him. His pelvis, thumb, and several ribs were fractured and one of his kidneys was bruised. He received the compensation required by the Workers' Compensation Act during the several months he was temporarily totally disabled, and upon it being determined later that he had a ten percent permanent disability of the left hand, he received payments therefor ending in October 1982. Thereafter, at periodic intervals blood appeared in his urine and he was treated therefor by Dr. Ronald Glinski, an urologist, until 18 October 1985 when he died due to causes unrelated to the accident. Before Fowler died claim was made to the Industrial Commission that as a consequence of the accident his kidney was permanently injured and further compensation was due therefor under the provisions of G.S. 97-31(24). To facilitate a determination of that issue Deputy Commissioner Angela Bryant ordered that Dr. Glinski's testimony be taken, which was to the effect that: Fowler's kidney had reached maximum improvement; bruised kidneys tend to eventually heal without lasting ill effect; his examinations of Fowler during the preceding six months had detected no blood in his urine; and the outlook for his renal condition was excellent. Over defendants' objections Dr. Glinski also expressed the opinion, based largely upon a history given to him by appellant's lawyer, that Fowler had an unspecified twenty percent permanent partial bodily disability primarily because of his "musculoskeletal" injuries and pain which often followed prolonged activity and strenuous work. After the worker's death his widow replaced him as the party plaintiff.

In the Opinion and Award that followed Dr. Glinski's deposition, Deputy Commissioner Scott Taylor found that Fowler had no permanent injury to his kidney or any other organ or bodily part not provided for in other sections of the Act and thus concluded that no further compensation under G.S. 97-31(24) was due. Following plaintiff's appeal the Opinion and Award was adopted and affirmed by the Full Commission.

Michael W. Willis for plaintiff appellant.

John F. Crossley & Associates, by Douglas F. McIntosh, for defendant appellees.

PHILLIPS, Judge.

Without considering whether Dr. Glinski's testimony as to the worker having a general bodily disability due to his musculoskeletal injuries was competent, we hold that the testimony is irrelevant to the appeal for the reason that in the proceedings below no issue as to Fowler having a general bodily disability was raised. The proceeding below was initiated, conducted and reviewed to determine only whether Fowler's bruised kidney was permanently injured and if so whether under the provisions of G.S. 97-31(24) any further compensation was due therefor. Since an appeal must follow the mold established in the trial court, *Mills v. Dunk*, 263 N.C. 742, 140 S.E. 2d 358 (1965), and the Commission found that the worker's kidney was not permanently injured as a result of the accident, the only question before us is whether that finding is supported by competent evidence. *Moses v. Bartholomew*, 238 N.C. 714, 78 S.E. 2d 923 (1953). Obviously, the finding is supported by Dr. Glinski's competent testimony to the effect that Fowler's renal difficulty had apparently cleared up and that the outlook for his kidney was excellent. Thus, the Opinion and Award is affirmed.

Appellant's argument that the finding is contrary to the greater weight of the evidence is irrelevant. For determining the weight and credibility of evidence in our jurisprudence is the province of the fact finder, which can accept or reject different parts of a witness' testimony as it sees fit, and the fact finder in this instance is the North Carolina Industrial Commission. G.S. 97-86; *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E. 2d 389 (1980).

Furthermore, even if the Commission had found that the worker's kidney was permanently injured compensation would not necessarily be due therefor under G.S. 97-31(24), as the appellant maintains. For G.S. 97-31(24) provides that—

> [i]n case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000);

and has been construed not to require compensation, but to give the Commission discretion to award compensation when the conditions stated exist. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E. 2d 204, 212 (1986).

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. DUARD STOCKTON SWAIN, JR.

No. 882SC202

(Filed 6 December 1988)

Constitutional Law § 13— seat belt law—proper exercise of State's police power

N.C.G.S. § 20-135.2A requiring the wearing of a seat belt is a proper exercise of the police power of the State by the General Assembly, since the statute clearly contributes in a reasonable manner to the safety of travel on the streets and highways of the State in that safety belts help drivers maintain control of their vehicles and also may prevent or reduce injuries to other occupants within the vehicle who may be struck by an unrestrained occupant during an accident, and such law may promote the economic welfare of the State by reducing public costs associated with injuries and deaths due to automobile accidents.

APPEAL by defendant from *Winberry (Charles B.), Judge.* Judgment entered 11 November 1987 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 8 September 1988.

On 2 September 1987, defendant was issued a citation for failure to wear a seat belt in violation of G.S. 20-135.2A. The trial court denied defendant's motion to dismiss the charge against him and, finding him responsible, ordered defendant to pay a fine of $25.00. Defendant appeals.

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

Duard S. Swain, Jr., defendant-appellant, pro se.

PARKER, Judge.

On appeal, defendant challenges the constitutionality of North Carolina's mandatory seat belt law, G.S. 20-135.2A, contending that the statute represents involuntary servitude and slavery in violation of the thirteenth amendment and that it also violates the ninth amendment of the United States Constitution. We find these arguments to be meritless, and we uphold the constitutionality of G.S. 20-135.2A.

General Statute 20-135.2A provides the following in relevant part:

> Each front seat occupant who is 16 years of age or older and each driver of a passenger motor vehicle manufactured with seat safety belts in compliance with Federal Motor Vehicle Safety Standard No. 208 shall have such a safety belt properly fastened about his body at all times when the vehicle is in forward motion on a street or highway in this State. Each driver of a passenger motor vehicle manufactured with seat safety belts in compliance with Federal Motor Vehicle Safety Standard No. 208, who is transporting in the front seat a person who is (1) under 16 years of age and (2) not required to be restrained in accordance with G.S. 20-137.1, shall have the person secured by such a safety belt at all times when the vehicle is operated in forward motion on a street or highway in this State. Persons required to be restrained in accordance with G.S. 20-137.1 shall be secured as required by that section.

In ruling on the constitutionality of a statute, this Court must assume that acts of the General Assembly are constitutional and within the legislative power of that body unless the contrary clearly appears. *State v. Anderson*, 275 N.C. 168, 171, 166 S.E. 2d 49, 50 (1969); *State v. Hales*, 256 N.C. 27, 30, 122 S.E. 2d 768, 770-71, 90 A.L.R. 2d 804, 807 (1961).

The police power of the State may be exercised in the form of State legislation when the enactment is reasonably necessary to achieve a legitimate legislative purpose and is not unduly oppressive or discriminatory. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962). Determination of what is in the interest of public health, safety and welfare is a

legislative matter, and the courts will not interfere if the question of reasonableness is merely debatable. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979). Therefore, the State may do whatever is reasonably necessary to further safety on the public highways. *See Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 360 S.E. 2d 783 (1987).

In *State v. Anderson, supra*, our Supreme Court held that a statute requiring motorcyclists to wear protective helmets was a valid exercise of the police power. The Court based its holding on the grounds that a helmet would protect the motorcyclists from being struck by objects which might cause him to lose control of the vehicle, thereby posing a threat to other vehicles and pedestrians. *State v. Anderson*, 275 N.C. at 174, 166 S.E. 2d at 53. Other jurisdictions have upheld mandatory seat belt laws on similar grounds. For example, in *People v. Kohrig*, 113 Ill. 2d 384, 401, 498 N.E. 2d 1158, 1164 (1986), *cert. denied*, --- U.S. ---, 107 S.Ct. 1264, 94 L.Ed. 2d 126 (1987), the Illinois Supreme Court reasoned that safety belts help drivers maintain control of their vehicles and also may prevent or reduce injuries to other occupants within the vehicle who may be struck by an unrestrained occupant during an accident. *See also Wells v. State*, 134 N.Y. A.D. 2d 874, 521 N.Y.S. 2d 604 (1987); *Richards v. State*, 743 S.W. 2d 747 (Tex. App. Houston [1st Dist.] 1987), *disc. rev. denied*, 757 S.W. 2d 723 (Tex. Crim. App. 1988).

Such laws may also promote the economic welfare of the State by reducing public costs associated with injuries and deaths due to automobile accidents. *People v. Kohrig*, 113 Ill. 2d at 403, 498 N.E. 2d at 1158. Without question, the carnage on our public highways, either directly or indirectly, places a substantial burden on public funds each year. The economic consequences of serious injury or death extend beyond the afflicted individual to his family, employer, and the general public. Studies show that the person wearing a seat belt is less likely to sustain serious injury or be killed in an automobile crash. Thus, the State has a legitimate public interest in minimizing the seriousness of injuries resulting from collisions on the highways. *See* Campbell, *North Carolina Seat Belt Law: Public Safety and Public Policy*, 53 Popular Government 27 (1988).

Defendant has failed to show that G.S. 20-135.2A is an unreasonable, arbitrary, or capricious restriction on the operator or passenger in a passenger vehicle; the statute clearly contributes in a reasonable manner to the safety of travel on the streets and highways of our State. General Statute 20-135.2A is, therefore, a proper exercise of the police power of the State by the General Assembly.

The judgment of the trial court is

Affirmed.

Judges PHILLIPS and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 DECEMBER 1988

BARLOWE v. MATHESON No. 8822DC489	Alexander (87CVD232)	Affirmed
CHAMPION v. HAMRICK DEV. CO. No. 8827SC318	Cleveland (86CVS1189)	No Error
COOPER v. DOUGLAS No. 8814SC293	Durham (86CVS03917)	Affirmed
DIAL v. TART'S INC. No. 8812DC445	Cumberland (88CVD619)	Vacated & Remanded
DICKERSON v. L. RICHARDSON MEMORIAL HOSPITAL No. 8818SC175	Guilford (86CVS5895)	Affirmed
GREAT AM. INS. CO. v. C & D SALVAGE No. 8822SC325	Iredell (86CVS0540)	Affirmed
HAGGERTY v. HAGGERTY No. 8822DC347	Iredell (87CVD641)	Affirmed in part; reversed in part
HUDSPETH v. HUDSPETH No. 8821DC331	Forsyth (77CVD3617)	Affirmed
IN THE MATTER OF ZAMAL R. AND QUASI G. No. 883DC384	Pitt (87J384)	Affirmed
JOHNSON v. JOHNSON No. 883DC403	Craven (82CVD531)	Reversed & Remanded
McCLAMROCK v. ROWAN COUNTY No. 8819SC240	Rowan (87CVS1179)	Affirmed
MIDGETT v. OWENS No. 885SC170	New Hanover (87CVS1518)	Affirmed as to liability; vacated & remanded as to the award
SHORT v. SHORT No. 883DC165	Pitt (86CVD392)	The judgment of the trial court is affirmed.
STATE v. ANDERSON No. 886SC520	Halifax (87CRS4838)	No Error
STATE v. BYRD No. 8827SC221	Lincoln (86CRS1912) (87CRS2264)	No Error

STATE v. COLEMAN No. 8822SC703	Davie (84CRS1634)	Affirmed
STATE v. DANNER No. 8825SC418	Caldwell (85CRS1547)	Appeal Dismissed
STATE v. DAVIS No. 8826SC361	Mecklenburg (86CRS65366)	No Error
STATE v. GIBSON No. 8819SC664	Cabarrus (85CRS17010)	No Error
STATE v. GILLIAM No. 8812SC360	Cumberland (84CRS26134) (84CRS26132)	No Error
STATE v. GRAY No. 884SC427	Onslow (86CRS024750)	No Error
STATE v. HENDERSON No. 8826SC626	Mecklenburg (87CRS39620)	No Error
STATE v. HOWARD No. 8827SC287	Gaston (87CRS14711) (87CRS14712) (87CRS14713) (87CRS14714) (87CRS14720) (87CRS14721) (87CRS14722) (87CRS14723)	We hold that defendants had a fair trial, free of prejudicial error; however, we remand defendant Howard's case for resentencing.
STATE v. RICHARDSON No. 8823SC706	Wilkes (87CRS3187) (87CRS3188) (87CRS4097)	No Error
STATE v. SEITZ No. 8826SC350	Mecklenburg (86CRS1330)	Affirmed
STATE v. STIGALL No. 8826SC46	Mecklenburg (87CRS11253)	No Error
SUTTON v. JEVIC TRANSPORTATION No. 8815SC327	Orange (86CVS1213)	Reversed
WACHOVIA BANK & TRUST CO. v. GADDY No. 8821SC349	Forsyth (86CVS1085)	Affirmed

STATE OF NORTH CAROLINA v. CORNELIUS CANNON AND DAVID LEE REDMOND (REDMAN)

No. 888SC342

(Filed 20 December 1988)

1. **Criminal Law § 138.7— defendants' refusal to plead guilty—court's statement about sentence—sentence based on aggravating factors**

Defendants were not entitled to a new trial or to a new sentencing hearing in an armed robbery case because of the trial court's statement, made to defense counsel after learning that defendants had refused to plea bargain and intended to go to trial, that "They've been put on notice and I hope that both of you gentlemen have indicated to your clients what I have indicated to you would be the penalty in the event of a conviction in this case," where the trial court imposed sentences in excess of the presumptive term based upon its findings of aggravating and mitigating factors and its determination that each defendant's aggravating factors outweighed his mitigating factors.

2. **Constitutional Law § 60; Jury § 7.14— peremptory challenges of black jurors—showing of nondiscriminatory purpose**

The trial court did not err in finding that the State's explanations for its peremptory challenges of six prospective black jurors were sufficient to rebut any prima facie showing of purposeful discrimination so that the peremptory challenges did not violate defendants' rights under either the federal or state constitutions where the State's explanations connected five challenged veniremen or members of their families to a defendant, a member of defendant's family, or a State's witness, and the State explained that the sixth challenged juror could not be impartial to the State because he had recently been fined for a traffic violation for which he said he was innocent; the record does not reflect that the prosecutor made any comments indicating a purpose to discriminate; and the record does not show the racial composition of the jury venire or the jury that convicted defendants.

3. **Criminal Law § 66.20— in-court identification—denial of motion to suppress—sufficiency of evidence and findings**

The evidence at a voir dire hearing supported the trial court's findings, and the findings supported the court's order denying one defendant's motion to suppress an in-court identification on the ground that it was tainted by impermissibly suggestive pretrial procedures.

4. **Criminal Law § 43.5— videotape—foundation for admission**

A proper foundation for the admission of a videotape may be shown by: (1) testimony that the videotape fairly and accurately illustrates the events filmed; (2) proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape; (3) testimony that the pictures introduced at trial were the same as those the witness had inspected immediately after processing; or (4) testimony that the videotape had not been edited and that the picture fairly and accurately recorded the actual appearance of the area videotaped.

5. Criminal Law § 43.5— videotape—foundation for admission

A proper foundation was laid for the admission of a videotape of an armed robbery for either substantive or illustrative purposes where a victim testified that the business that was robbed had installed the camera approximately six weeks before the robbery and that the camera was working properly before and after the night of the robbery, and a detective testified that he had exclusive care and custody of the video film since the night of the robbery.

6. Criminal Law § 43.5— videotape—limiting instruction not required

The trial court did not err in failing to give an instruction limiting the jury's consideration of a videotape to illustrative purposes where the State laid a proper foundation for admission of the videotape for either substantive or illustrative purposes.

7. Robbery § 4.3— armed robbery—defendant as perpetrator

The State's evidence was sufficient for the jury to find that defendant was one of two armed men who robbed a cafe where it tended to show that defendant was found hiding beneath a house in the area to which the robbers ran; defendant matched the description of one of the robbers and was in the company of a codefendant who was positively identified by a victim as one of the robbers; and officers found various items beneath and around the house which were linked to the robbery, including flowered shorts and a silk-type shirt with holes cut in them, two pairs of tennis shoes, a pocketknife, and $305.00.

Judge JOHNSON concurring in part and dissenting in part.

APPEAL by defendants from *Llewellyn, Judge*. Judgments entered 17 December 1987 in Superior Court, LENOIR County. Heard in the Court of Appeals 26 October 1988.

This is a criminal action wherein defendants were charged in proper bills of indictment with the armed robbery of Kim Stocks, Sadina Hall, William Coward and Ralph Uzzell of $350.00. The evidence at trial tends to show that on 1 September 1987, at about 12:15 a.m., two black males entered the Lunch Box Cafe in Kinston. One man wore blue jeans, no shirt, a silk shirt wrapped around his head and face and was carrying a .22 calibre rifle. The second man wore brown pants, tennis shoes, no shirt, a flowered cloth wrapped around his head and face and was carrying a knife. As the men came into the cafe, Kimberly Stocks, the manager, triggered a silent alarm. The man with the knife stood directly over Stocks, who had dropped to the floor. The first man pointed his gun at the safe, then at Stocks and directed her to open the safe. She indicated that the safe was locked. The two cash registers were opened, and the man with the knife took most of the bills out of Stocks' register. The man with the gun took the re-

mainder of the bills from her register. The two men left the premises. Immediately after the robbery, Stocks estimated the registers had contained $350.00. A count at shift's end indicated that $307.00 had been taken. A deputy sheriff and a police officer arrived soon after the men left. Stocks gave the deputy a description of the two men, and a witness told him the two men were headed toward Caswell Street. Stocks identified the man with the gun as "Nick," a regular customer at the Lunch Box. Officers found defendants hiding beneath a house located at 506 East Caswell Street. Defendant Redmond was wearing brown pants and no shirt. Defendant Cannon wore blue jeans and no shirt. Officers found a pair of flowered shorts with holes in them, one pair of tennis shoes, a pocketknife, and $305.00 in U.S. currency beneath the house. A burgundy silk-type shirt with holes in it was found in the driveway beside the residence.

Defendants were found guilty of armed robbery in violation of G.S. 14-87. From judgments imposing sentences of 35 and 30 years respectively, defendants Cannon and Redmond appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robert G. Webb, and Associate Attorney General E. Burke Haywood, for the State.

Assistant Appellate Defender Teresa A. McHugh for defendant, appellant Cannon.

William D. Spence for defendant, appellant Redmond.

HEDRICK, Chief Judge.

[1] Defendants Cannon and Redmond both assign error to the "[t]rial court's determination before trial and before the sentencing hearing of the sentence to be imposed upon defendant[s] in the event of a conviction, on the grounds that such determination was grossly improper and violated defendants' right to due process under the North Carolina Constitution and N.C. Gen. Stat. 15A-1340.3, 1340.4." The record indicates defendants' attorneys and the prosecutor had discussed plea bargains, but that the defendants refused to bargain and insisted on pleading not guilty, whereupon the trial judge made the following statement to the attorneys: "They've been put on notice and I hope that both of you gentlemen have indicated to your clients what I have indicated to

you would be the penalty in the event of a conviction in this case." Citing *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977), defendants seem to argue they are entitled to new sentencing hearings because the judge determined before the trial what the sentences would be. In *Boone*, the record disclosed that the sentence imposed by the trial judge was in part induced by defendant's decision to plead not guilty and to demand a jury trial. The Supreme Court remanded the case for a resentencing hearing and, quoting the Court of Appeals, stated that "[t]he trial judge may have sentenced defendant quite fairly in the case at bar, but there is a clear inference that a greater sentence was imposed because defendant did not accept a lesser plea proffered by the State." *Id.* at 712, 239 S.E. 2d at 465.

While the judge's statement set out in the record may have been inappropriate, we do not award defendants a new trial or a resentencing hearing. The events at the trial in the present case may bear some similarity to the factual situation in *Boone*, but in our opinion, *Boone* has no application here because it was decided before the Fair Sentencing Act took effect. Appellate review of sentences imposed under the Fair Sentencing Act differs from review of pre-Fair Sentencing Act sentences.

G.S. 15A-1444(a1) states:

> A defendant . . . is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term . . . and if the judge was required to make findings as to aggravating or mitigating factors. . . .

Under the Fair Sentencing Act, the trial judge is required to make a record of aggravating and mitigating factors. This gives the reviewing court a means by which to decide whether the sentence is supported by sufficient evidence and whether the judge abused his discretion in weighing aggravating and mitigating factors. Pre-Fair Sentencing Act sentences were reviewed without the benefit of such a record. The following standard of review applied to a trial judge's determination of sentence:

> There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error

amounting to a denial of some substantial right. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play. (Citations omitted.)

State v. Pope, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962).

In *Boone*, once the reviewing court decided that the judge considered improper matter in determining the sentence, it had little choice but to remand for a resentencing hearing. There was no record from which to evaluate the basis for the sentence imposed. Here, the circumstances are different and do not compel the same result. Following the jury's verdict of guilty, the trial judge considered each defendant's aggravating and mitigating factors. Upon finding that each defendant's aggravating factors outweighed his mitigating factors, the judge imposed sentences in excess of the presumptive term. Defendants have shown no abuse of discretion. These assignments of error have no merit.

[2] Defendants assign error to "[t]he exclusion of six (6) black jurors from the jury on the grounds that the court implicitly found the exclusions to be prima facie evidence of a violation of defendant's right to equal protection and the state failed to rebut the prima facie showing; alternatively on the grounds that the exclusions were in fact prima facie evidence of a violation of defendant's right to equal protection." During jury selection, the State exercised a total of six peremptory challenges to members of the jury panel. Each of the six peremptory challenges was used to dismiss a black person. Defendants objected to the State's use of peremptory challenges, arguing that they were denied the right "to have [their] case heard by a representative cross section of the community." The trial judge overruled defendants' objections.

In their briefs, defendants argue they are entitled to a new trial because the State's use of peremptory challenges violated their constitutional right to equal protection of the laws as set out in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.E. 2d 69 (1986) and *State v. Jackson*, 322 N.C. 251, 368 S.E. 2d 838 (1988).

Our Supreme Court in *Jackson* stated:

> In *Batson v. Kentucky* . . . the United States Supreme Court overruled *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965), and held a prima facie case of purposeful discrimination in the selection of a petit jury may be established on evidence concerning the prosecutor's exercise of peremptory challenges at the trial. In order to establish such a prima facie case the defendant must be a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race. The trial court must consider this fact as well as all relevant circumstances in determining whether a prima facie case of discrimination has been created. When the trial court determines that a prima facie case has been made, the prosecution must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group. The prosecutor's explanation need not rise to the level of justifying a challenge for cause. At this point the trial court must determine if the defendant has established purposeful discrimination. Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference. (Citations omitted.)

Id. at 254-55, 368 S.E. 2d at 839-840.

Defendant Cannon also argues in his brief that he is entitled to a new trial because the State's use of peremptory challenges violated his rights under Article I, Section 26 of the North Carolina Constitution which states that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." In *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 364 S.E. 2d 416 (1988), our Supreme Court held that this provision of the State Constitution prohibits the use of peremptory challenges to exclude jurors on the basis of race.

We note at the outset that defendants have provided only a minimal record for review. The transcript shows the defendants' objections to the State's peremptory challenges to six black veniremen and the State's explanations for those challenges.

However, we do not know the racial composition of either the jury venire or the jury that tried and convicted the defendants, nor do we have a transcript of the jury voir dire. The record before us shows that following the State's peremptory challenge to three black veniremen, defendants objected, and without any request from the court, the State offered explanations for dismissing those three veniremen. There is nothing in the record to indicate that the judge found that defendants had made the prima facie showing of purposeful discrimination as to those three veniremen. Following the State's peremptory challenge to three additional black veniremen, defendants again objected, and at this point the court directed the State to explain its reasons for those three dismissals.

Defendants argue that the State's explanations for its use of peremptory challenges are insufficient to rebut the presumption of purposeful discrimination. Defendant Redmond merely argues that all the State's explanations were "frivolous and did not show a non-discriminatory motive." Defendant Cannon contends these explanations were a pretext "to eliminate anyone who regularly walks the streets of the black community, that is, all black persons."

The trial court overruled defendants' objections to the State's challenges to the six black veniremen, finding that the peremptory challenges were not made with a purpose to discriminate. We have reviewed the explanations offered by the State for exercising its peremptory challenges against each of the six veniremen so challenged. The question before us is whether the trial court erred in finding the State's explanations sufficient to rebut any prima facie showing of purposeful discrimination that may have been made by defendants.

After paying special deference to the findings of the trial court as mandated by *Jackson*, we hold the court did not err in finding the State's explanations sufficient to rebut any prima facie showing of purposeful discrimination that may have been made by defendants. First, while the State did not outline a profile or criteria for selecting jurors, it is obvious from the record that it would strike jurors who had connections to the defendants or to a principal State's witness or whom it believed would be prejudicial against the State. For five of the six challenged

veniremen, the State's explanations connected a challenged venireman or a family member of the venireman to a defendant, a member of a defendant's family, or to a State's witness. In the case of the sixth challenged venireman, the State explained that the juror could not be impartial to the State because he had recently been fined for a traffic violation for which he said he was innocent. Second, the record does not reflect that the assistant district attorney made any comments indicating a purpose to discriminate.

Giving deference to the decision of the trial court, and lacking a transcript of the jury's voir dire as well as complete information on the racial composition of the jury venire and the jury, we cannot hold that defendants have shown error in the trial court's decision. The trial judge did not violate defendants' rights under either the federal or state constitutions by overruling their objections to the State's use of peremptory challenges. These assignments of error are meritless.

[3] Defendant Cannon assigns error to the denial of his motion to suppress the testimony of Kimberly Stocks identifying him as one of the perpetrators of the offense charged. He argues the in-court identification of him by the witness "was tainted by impermissibly suggestive pretrial identification procedures." He bases this assignment of error on exceptions to findings of fact made after a voir dire hearing on the motion to suppress and the order denying the motion. These exceptions raise only the questions of whether the findings are supported by competent evidence adduced at the hearing and whether the findings support the order denying the motion to suppress. A trial court's findings on voir dire are conclusive and binding on appeal when supported by competent evidence. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). We have examined the evidence adduced at the voir dire hearing and the exceptions on which this assignment of error is based. We hold the evidence supports the findings made by the trial judge, and the findings support the conclusion to deny the motion to suppress. This assignment of error has no merit.

Defendant Redmond assigns error to the court's admission into evidence of a videotape of the robbery and the court's failure to give a limiting instruction to the jury before allowing them to view the videotape. In his brief, defendant Redmond first argues

the court erred in admitting the videotape into evidence because the State failed to show that the video camera was properly installed and operating at the time of the robbery.

[4] Videotapes are admissible into evidence for both substantive and illustrative purposes. G.S. 8-97. Videotapes should be admissible under the rules and for the purposes of any other photographic evidence. *State v. Johnson*, 18 N.C. App. 606, 197 S.E. 2d 592 (1973). The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed, *Campbell v. Pitt County Memorial Hospital*, 84 N.C. App. 314, 352 S.E. 2d 902, *aff'd*, 321 N.C. 260, 362 S.E. 2d 273 (1987) (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . . ," *State v. Luster*, 306 N.C. 566, 569, 295 S.E. 2d 421, 423 (1982); (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," *State v. Kistle*, 59 N.C. App. 724, 726, 297 S.E. 2d 626, 627 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E. 2d 694 (1983) (substantive purposes); or (4) "testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed,' " *State v. Johnson*, 18 N.C. App. 606, 608, 197 S.E. 2d 592, 594 (1973).

[5] On voir dire Stocks testified that the videotape was a factual representation of the events on the night of the robbery. She also testified that the business had installed the camera approximately six weeks before the robbery and that the camera was working properly before and after the night of the robbery. On voir dire, Larry Williams, a Kinston police department detective, testified that he had exclusive care and custody of the video camera film since the night of the robbery. We hold that there was sufficient evidence for the trial judge to find that the State had laid a proper foundation to introduce the videotape into evidence for either substantive or illustrative purposes. This portion of this assignment of error has no merit.

[6] Defendant Redmond also argues that the judge erred in allowing the jury to view the videotape without first instructing them that it was admissible solely for the purpose of illustrating

Stocks' testimony. Courts have admitted properly-authenticated photographs without limiting instructions when no limiting instruction was requested. *State v. Rupard*, 299 N.C. 515, 263 S.E. 2d 554 (1980). Here, defendant did not request a limiting instruction. Furthermore, since the State laid a proper foundation to introduce the videotape for either substantive or illustrative purposes, no limiting instruction was necessary. Defendant has shown no possible error.

[7] By his last assignment of error, defendant Redmond contends the trial judge erred in denying his motion to dismiss for insufficiency of the evidence to identify him as one of the two armed men who robbed the Lunch Box. Viewing the evidence in the light most favorable to the State, we hold there was plenary evidence in the record linking defendant Redmond to the crime. The State's evidence tends to show that defendant was found hiding beneath a house in the area that the robbers were reported to have run. Defendant matched the description of one of the robbers and was in the company of defendant Cannon, who was positively identified by a victim as one of the robbers. From the area beneath and around the house, law enforcement officers found a pair of flowered shorts and a burgundy silk-type shirt with holes cut in each, two pairs of tennis shoes, a pocketknife, and $305.00, all of which were linked to the robbery. We hold the trial court did not err in submitting the evidence to the jury. This assignment of error, like the others, is without merit.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judge PARKER concurs.

Judge JOHNSON concurs in part; dissents in part.

Judge JOHNSON concurs in part; dissents in part.

I respectfully dissent as to the majority's affirmance of the sentence imposed on defendant Cannon and concur as to the remainder of the opinion. I believe defendant Cannon is entitled to a new sentencing hearing because the trial judge decided before trial the sentence he should receive.

Prior to the start of trial, the trial judge called both defense attorneys and the prosecutor to the bench. Upon learning that defendants had rejected a plea bargain offer and intended to go to trial, the judge said to the defense attorneys in the most vehement language that if defendants determined to go to trial and were convicted, he would give them the maximum sentence.

At a later point during this discussion at the bench, the judge stated that he would sentence defendant Cannon to not less than thirty-five years if convicted. As the majority notes, the judge subsequently stated during trial that he hoped both defense attorneys had advised their clients of the sentences he intended to give if they were convicted. After conviction the judge gave defendant Cannon a thirty-five year sentence, exactly as promised.

In the case of defendant Redmond, the trial judge ultimately handed down a considerably shorter sentence than the forty years he threatened before trial. Therefore, I do not dissent as to defendant Redmond.

In North Carolina a convicted criminal defendant is entitled to a hearing for the purpose of sentencing. G.S. sec. 15A-1334(a). At the hearing the defendant and prosecutor may present witnesses and arguments relevant to sentencing. G.S. sec. 15A-1334(b). It is at this point, when all the evidence of possible aggravating and mitigating factors is presented, that it is appropriate for a trial judge to determine sentence. *See* G.S. sec. 15A-1334.

Our Court has stressed in *State v. McRae*, 70 N.C. App. 779, 320 S.E. 2d 914 (1984), the importance of a convicted criminal defendant's receiving a meaningful sentencing hearing. The trial judge in *McRae* informed the defendant a month before the sentencing hearing of the sentence he would receive. In vacating defendant's sentence and remanding for a new sentencing hearing, this Court indicated that the trial judge had foreclosed defendant's right to have a meaningful sentencing hearing and thereby frustrated the purpose of the Fair Sentencing Act. *Id.*

When the trial judge in the case *sub judice* first told defendant Cannon's attorney that Cannon would receive a thirty-five year sentence, the judge had not heard the evidence at trial and

was aware only of one aggravating factor, a prior conviction. It was not until the sentencing hearing after trial that defendant Cannon offered evidence of a mitigating factor which was accepted by the court. I cannot conclude that the judge arrived at defendant Cannon's sentence *solely* on the basis of weighing the aggravating and mitigating factors since he had predicted the same sentence even before trial. Defendant Cannon may have received a reasonable sentence. However, the process of finding aggravating and mitigating factors under the Fair Sentencing Act should not be used as a means of substantiating a sentence reached in part because of the trial judge's ire directed toward a defendant for exercising his constitutional right to go to trial, as the evidence in this case suggests.

In *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977), our Supreme Court stated that "[n]o other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial." *Id.* at 712, 239 S.E. 2d at 465. In support of this fundamental right, I must respectfully dissent from the majority's affirmance of defendant Cannon's sentence.

MILDRED IRENE CLINE v. HENRY E. TEICH, GUARDIAN FOR HAZEL J. CLINE

No. 8828DC514

(Filed 20 December 1988)

1. **Husband and Wife § 1— husband incompetent—wife's action for support**

The trial court erred by granting defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of an action in which plaintiff sought an award of support from her incompetent husband's estate and permission to live rent free in his home. In the limited instance in which an incompetent's estate is ample to provide for his own care and maintenance, an award of spousal support may properly be charged against the estate.

2. **Insane Persons § 6— incompetent husband—action for support by wife—jurisdiction in superior court**

An action by a wife seeking support from her incompetent husband's estate should have been dismissed under N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of subject matter jurisdiction where the action was filed in district court. superior court is the only proper division to hear matters regarding the administration of incompetents' estates.

Cline v. Teich

APPEAL by plaintiff from *Earl J. Fowler, Jr., Judge.* Order entered 4 April 1988 in District Court, BUNCOMBE County. Heard in the Court of Appeals 27 October 1988.

Winner & Heck, by Dennis J. Winner, for plaintiff-appellant.

Grimes & Teich, by Henry E. Teich, for defendant-appellees.

BECTON, Judge.

Plaintiff, Mildred Cline, brought this action in district court seeking an award of support from her incompetent husband's estate and permission to live rent-free in his home. She appeals from an order dismissing her Complaint for failure to state a claim.

I

Mildred and Hazel Cline were married 2 May 1986. They lived together in Mr. Cline's home until 21 November 1987, when a medical condition left him permanently brain damaged. Mr. Cline was institutionalized as a result, and defendant Henry Teich was appointed his guardian. Teich refused to provide funds from the estate for Mrs. Cline's support, informing her of his belief that, as guardian, he was not authorized by law to do so.

Mildred Cline brought an action against Teich, alleging in the Complaint that she had been supported by her husband until his incompetency, that she now needs reasonable support from his estate, and that the estate is sufficient both to support her in the manner she enjoyed before her husband's incompetency and to permit her to live in her husband's house without paying rent to the guardian.

In his Answer, Teich admitted that Mr. Cline's estate includes certain income-producing property and that Mrs. Cline is in need of support. A premarital agreement entered into by the Clines was raised as a defense, however, and Teich moved to dismiss the Complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The trial judge granted the motion to dismiss.

We decline to address on appeal whether the premarital agreement precludes Mrs. Cline from reaching her husband's

estate for support since that question is not appropriate to our disposition of this case.

Two questions remain for our decision in this appeal. The first is whether Mrs. Cline's Complaint states a claim upon which relief can be granted. If the Complaint states a valid claim, the second question is whether that claim may properly be brought in district court. Although we conclude that the Complaint states a claim for relief, we nonetheless hold that the Complaint should have been dismissed for lack of subject matter jurisdiction because it prayed for relief not available in district court. Accordingly, we vacate the judgment of the district court.

II

A. *Rule 12(b)(6) Standard*

[1] A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure tests the legal sufficiency of a complaint. *See Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E. 2d 611, 615 (1979). A complaint must state the substantive elements of some "legally recognized claim" to withstand a motion to dismiss. *Id.* at 204, 254 S.E. 2d at 626. In ruling on the motion, all factual allegations in the complaint are taken to be true. *See Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E. 2d 743, 745 (1986).

> Dismissal of a complaint under Rule 12(b)(6) is proper [only] when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that *no law supports plaintiff's claim;* (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Jackson, 318 N.C. at 174-75, 347 S.E. 2d at 745 (emphasis added) (citations omitted).

Teich maintains that Mrs. Cline stated no legally recognized claim for relief because, in his view, the law does not authorize disbursement of funds from an incompetent's estate for spousal support.

B. *Action for Spousal Support is a Legally Recognized Claim*

Although no statutory provisions squarely apply to the present situation, there is ample support in North Carolina law for

the conclusion that spousal support may be an appropriate charge against an incompetent's estate.

The common law duty to provide support to a dependent spouse has long been recognized in this State. *See Ritchie v. White*, 225 N.C. 450, 453, 35 S.E. 2d 414, 416 (1945); *Bowling v. Bowling*, 252 N.C. 527, 533, 114 S.E. 2d 228, 232 (1960); *cf. Williams v. Williams*, 299 N.C. 174, 187, 261 S.E. 2d 849, 858 (1980) (even wealthy spouse may be "dependent spouse" entitled to support). This duty "has been enforced even where the husband was incompetent, . . . [and] where the wife was financially capable of providing for her own needs." *North Carolina Baptist Hospitals, Inc. v. Harris*, 319 N.C. 347, 349, 354 S.E. 2d 471, 472 (1987) (citing *Reynolds v. Reynolds*, 208 N.C. 254, 180 S.E. 2d 70 (1935); *Bowling*, 252 N.C. 527, 114 S.E. 2d 228).

The North Carolina cases on point, though old, remain valid precedent. In *Brooks v. Brooks*, 25 N.C. 389, 391 (3 Ired. 1843), quoted with approval in *Ford v. Security National Bank*, 249 N.C. 141, 143-44, 105 S.E. 2d 421, 423-24 (1958), our Supreme Court stated that "[i]t is true that the wife and children of a lunatic are entitled to maintenance out of the estate, according to their circumstances, after properly providing for the lunatic." Similarly, in *In re Hybart*, 119 N.C. 359, 364, 25 S.E. 963, 966 (1896), the court noted that the law "contemplates giving a wife who lives in the mansion house of her [incompetent] husband the right to remain there . . . ." And in *Reynolds v. Reynolds*, the court held that the wife of an incompetent had the right to receive support from the income of her husband's estate when that income exceeded the cost of caring for him. 208 N.C. 254, 265, 180 S.E. 70, 77 (1935). None of these cases have been overruled by our courts or invalidated by our legislature.

Chapter 35A of the General Statutes, which was recently enacted, governs the administration of incompetents' estates. Chapter 35A contemplates a spousal support obligation. Under Section 35A-1307, an incompetent's spouse who is "in needy circumstances" may bring a special proceeding before the clerk of superior court to sell the incompetent's property and apply the proceeds to support. N.C. Gen. Stat. Sec. 35A-1307 (1987). Presumably, resort to sale of an incompetent's property is necessary only when estate income is insufficient to provide support.

Other statutory provisions implicitly recognize that spousal support is a proper charge against an incompetent's estate, whether or not the spouse is destitute. *See, e.g.,* N.C. Gen. Stat. Sec. 35A-1321 (1987) (implying that incompetent's spouse and children should be supported from the estate: "members of [incompetent's] *family*" must be provided with "all the necessaries and suitable comforts of life" before advancements of surplus income may be made to certain of incompetent's relatives, while advancements of surplus income from estate of childless, *unmarried* incompetent may be made to certain other relatives). *See also* N.C. Gen. Stat. Sec. 34-14.1 (1984) (guardian is authorized to pay veterans' benefits to spouse of incompetent veteran).

In light of the foregoing, we conclude that the duty to provide support to a dependent spouse is a continuing obligation, fairly chargeable to the estate of an incompetent. Therefore, Mrs. Cline's Complaint for support stated a legally recognized claim.

C. *Authority to Disburse Estate Funds for Spousal Support*

The guardian asserts that the relief Mrs. Cline is entitled to, if any, is confined exclusively to the statutory special proceeding for sale of the incompetent's property set out in N.C. Gen. Stat. Sec. 35A-1307. We disagree. In the event that the procedure available under Section 35A-1307 is not appropriate to Mrs. Cline's circumstances, as would be the case, for example, if estate income renders sale of Mr. Cline's property unnecessary or undesirable, or Mrs. Cline is not "needy" as contemplated by the statute, we conclude that she may nonetheless be entitled to relief. This relief may come directly from the guardian, or may be pursued independently in superior court.

In most cases, a guardian is empowered under chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; *prior* approval of expenditures is *necessary* only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. *See* N.C. Gen. Stat. Secs. 35A-1251(12), (19); 35A-1301; 35A-1306; 35A-1307; 35A-1310; 35A-1311 (1987). Of course, the guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest, *see* N.C. Gen. Stat. Sec. 35A-1251, and in all cases, the guardian's management of the estate will eventually be subject to judicial scrutiny. *See* N.C.

Gen. Stat. Sec. 35A-1260 *et seq.* (1987) (requiring periodic submission of estate accounts for approval by clerk of superior court). If the guardian questions the propriety of a particular charge against the estate, he may seek prior court approval before making payment by filing a motion in the cause with the superior court clerk. *See* N.C. Gen. Stat. Sec. 35A-1207 (1987). Furthermore, "any interested person"—in the case before us, the spouse—may also seek payment of an obligation from an incompetent's estate by filing a motion in the cause under Section 35A-1207. *Id.*

In the final analysis, whether the issue of spousal support comes before the clerk of superior court upon the motion of Teich or of Mrs. Cline under Section 35A-1207, as a special proceeding under Section 35A-1307, or through an account statement submitted by Teich, we conclude that the clerk of superior court—after first ensuring that the estate is ample to meet the expenses of caring for Mr. Cline—has residual equitable power under chapter 35A to examine the facts and circumstances of the case to determine whether Mrs. Cline should be granted support from her husband's estate and the right to continue to live in his home. *See Coxe v. Charles Stores Co.*, 215 N.C. 380, 382-83, 1 S.E. 2d 848, 849 (1939) (superior court's equitable power over wards' estates may extend beyond those powers specifically conferred by statute). Factors the clerk may consider include the size and condition of the estate, the present and future demands against it, and Mrs. Cline's needs. *See generally,* 24 A.L.R. 3d 863 (1969) (Supp. 1988).

The rule we announce is narrow. We do not hold that the estate of an incompetent may be so depleted in favor of a spouse as to compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge. Rather, we hold that in the limited instance in which an incompetent's estate is ample to provide for his own care and maintenance, an award of spousal support may properly be charged against the estate. Accordingly, we hold that Mrs. Cline stated a claim upon which relief can be granted.

III

[2] The motion to dismiss in the present case was directed to a perceived absence of law to support Mrs. Cline's claim for relief.

In arriving at our conclusion that her Complaint stated a legally recognized claim, we additionally decide that the Complaint should have been dismissed under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction.

As provided in Rule 12(h)(3) of the Rules of Civil Procedure, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court [must] dismiss the action." N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 12(h)(3) (1983). The question of subject matter jurisdiction may properly be raised for the first time on appeal, and this court may raise it on its own motion. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E. 2d 567, 570 (1978), *cert. denied*, 296 N.C. 583, 254 S.E. 2d 32 (1979); *see Jenkins v. Winecoff*, 267 N.C. 639, 641-42, 148 S.E. 2d 577, 578-79 (1966). We hold that the district court was not the proper forum in which to seek spousal support from the estate of an incompetent, and therefore that it had no jurisdiction over the claim.

District court is the proper division for spousal support in the form of *alimony*. *See* N.C. Gen. Stat. Sec. 7A-244 (Supp. 1987). Mrs. Cline does not seek dissolution of her marriage. Nor does she allege fault by her husband, a prerequisite to alimony even in an action for alimony without divorce. *See* N.C. Gen. Stat. Sec. 50-16.2 (1987). Instead, she seeks support from the estate of an incompetent, relief the district court is without jurisdiction to grant.

The superior court is the only proper division to hear matters regarding the administration of incompetents' estates. *See* N.C. Gen. Stat. Sec. 7A-246 (1986); N.C. Gen. Stat. ch. 35A (1987). Mrs. Cline should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to Section 35A-1207, which permits "consideration of any matter pertaining to a guardianship," or as a special proceeding for the sale of her husband's property under Section 35A-1307.

Although the practical consequence of dismissal of a complaint under either Rule 12(b)(6) or 12(b)(1) is the same—the case is dismissed—the legal effect is quite different. As this court stated in *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E. 2d 736, 737 (1978), "[a] motion to dismiss for lack of subject matter

jurisdiction is not viewed in the same manner as a motion to dismiss for failure to state a claim . . . ." The following comparison of the effect of dismissal under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, which are identical to our own rules, is instructive:

> There are two important distinctions between a dismissal pursuant to subdivision b(1) [for lack of subject matter jurisdiction] and one under b(6) for failure to . . . state a claim. First, a *dismissal under b(1) is not on the merits and thus is not given res judicata effect.* Second, the court is not restricted to the face of the pleadings but may review any evidence . . . to resolve factual disputes concerning the existence of jurisdiction to hear the action.

2A Moore's Federal Practice para. 12.07 [2.-1] (1987) (footnotes omitted) (emphasis added). *Accord* Second Restatement of Judgments Sec. 19, comment d (1982) (Supp. 1986).

Rule 41(b) of the North Carolina Rules of Civil Procedure provides the basis for concluding that dismissal under Rule 12(b)(6) is an adjudication on the merits, and therefore that 12(b)(6) dismissal bars subsequent relitigation of the same claim. *See Johnson v. Bollinger*, 86 N.C. App. 1, 8, 356 S.E. 2d 378, 383 (1987). Rule 41(b) provides in relevant part that

> [u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and *any dismissal* not provided for in this rule, *other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join a necessary party *operates as an adjudication upon the merits.*

N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 41(b) (1983) (emphasis added).

Because the district court lacked subject matter jurisdiction over the present case, it had no authority to consider whether the Complaint failed to state a claim. Accordingly, we vacate the order dismissing the Complaint for failure to state a claim upon which relief can be granted.

IV

We hold that Mrs. Cline's Complaint seeking support from her incompetent husband's estate stated a legally recognized claim for relief, but that the claim was asserted in the wrong

forum. We vacate the judgment of the district court, and remand with instructions to enter an order dismissing the Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

Vacated and remanded.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. PETER JOSEPH SPECKMAN, JR.

No. 8826SC394

(Filed 20 December 1988)

1. **Indictment and Warrant § 8.4— embezzlement and false pretense—failure to require election by State—harmless error**

The trial court erred in the denial of defendant's motion to require the State to elect between charges of embezzlement and obtaining property by false pretense where the same $7,500 was involved in both offenses, since the two charges are mutually exclusive. However, defendant was not prejudiced by such error where the jury found defendant guilty of one count of embezzlement and one count of obtaining property by false pretense, and the trial court consolidated the verdicts for judgment and pronounced a single judgment on the verdicts.

2. **Embezzlement § 6— attorney embezzlement—sufficiency of evidence**

The evidence was sufficient to support a verdict of guilty on a charge of embezzlement where it tended to show that defendant attorney was given $7,500 by a client to purchase a share in a waterslide operation for the client and that the client never received the share of the waterslide operation.

3. **False Pretense § 3.1— obtaining money by false pretense—guilt of attorney**

The evidence was sufficient to support a verdict of guilty on a charge of obtaining property by false pretense where it tended to show that defendant attorney falsely represented the financial status of a waterslide operation to a client and that the client gave defendant a check for $7,500 for the purchase of a share in the waterslide operation.

4. **Constitutional Law § 30— discovery—substantial compliance with statutes**

The State substantially complied with discovery statutes with regard to a check written by defendant where the prosecutor failed to provide the check to defense counsel because he was unsure of the status or probative value of the check due to its illegibility, and when a clear copy of the check was obtained, defense counsel was present and was then given the legible copy.

5. Constitutional Law § 30— discovery—substantial compliance with statutes

The State substantially complied with discovery statutes by supplying defendant with a document showing a partnership share breakdown before it was used at trial where the State did not initially intend to use the breakdown but decided to use it after admission of other evidence was denied; the partnership evidence was not material to the preparation of defendant's defense; the same information contained in the document was established by other evidence at trial, including evidence offered by defendant; and the document was made available to defendant for examination at the time the State decided to use it.

6. Criminal Law § 88.4— embezzlement and false pretense—client's money—cross-examination about finances

In a prosecution of an attorney for embezzlement of a client's money and obtaining property from the client by false pretense, the trial court did not err in permitting the State to cross-examine defendant about various financial dealings, his dealings with the client, and his financial status. N.C.G.S. § 8C-1, Rule 611(b) (1988).

7. Embezzlement § 5— relevancy of attorney's testimony

An attorney's testimony about attorney-client relationships, attorney trust accounts and fiduciary relationships was relevant in a prosecution of an attorney for embezzlement of a client's money.

8. False Pretense § 3.2— instruction—time of intent to deceive

The trial court's instruction in a prosecution for obtaining property by false pretense that "the intent to deceive must have been present at the time the statement was made, not when the funds were received" was a correct instruction.

APPEAL by defendant from *Griffin, Kenneth A., Judge.* Judgment entered on the verdict 13 August 1987 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 1 November 1988.

Defendant was indicted on 23 March 1987 on one count of embezzlement and on one count of obtaining property by false pretense. At trial the State's evidence tended to show that defendant was an attorney who was employed by Technetics, a company engaged in the business of constructing waterslides, to arrange a partnership for the purpose of financing a waterslide operation, "Slide-a-Ride," in Tanglewood Park in Winston-Salem. In 1980 defendant met James Schwab who, through the efforts of Technetics, was a general partner in the Slide-a-Ride project. In July 1980 Schwab left Technetics and indicated his desire to sell his 22½ percent general partnership interest. Defendant informed Schwab that he had a purchaser for Schwab's interest;

subsequently, defendant gave Schwab a check for an amount between $5,000 and $6,000. Schwab testified that at the time he sold his interest he (Schwab) believed the partnership was losing money.

The State's evidence also tended to show that Floyd D. Young was a client of defendant in late 1982 and early 1983 and that defendant had discussed various investment opportunities, including Slide-a-Ride, with Young. Defendant indicated that he was a partner in Slide-a-Ride and that it was a good investment. Young gave defendant a check for $7,500 which defendant indicated would be used to purchase the interest of Schwab in the waterslide. Young never received any documentation showing that he was a partner in the waterslide operation. The State's evidence also tended to show that the waterslide partnership had increasing losses for the years 1982-1984 and that as of 1984 records provided by defendant indicated that Schwab was still a general partner. Young was not listed in any of the records or partnership listings. The evidence tended to show that neither Schwab nor Young derived any monetary distribution as a result of holding an interest in the waterslide partnership. The evidence also showed that the value of the waterslide in 1984 following depreciation was about $11,000.

Defendant's evidence tended to show that defendant "had not withheld any material information from Young" and that "Young was a good friend, a client, a co-investor, and a sharp businessman who did not know or care . . ." that he was purchasing the waterslide interest defendant purchased from Schwab. Defendant's evidence further indicated that defendant purchased Schwab's interest on 23 March 1983 and that he sold this interest to Young on 27 January 1984. Defendant placed a notation on Young's check indicating "that the check was for the purchase of a general partnership share in Slide-a-Ride." Defendant's evidence tended to show that defendant "had no intention that Young would lose money through the transaction" and that defendant "did not intend to convert Young's money to his own use. . . ." Defendant testified that he neglected to inform the partnership's accountant of the sale of Schwab's interest to Young. Defendant also testified that he thought Slide-a-Ride would be profitable and that its poor business had been due to bad weather. Defendant testified that Tanglewood Park and the Slide-a-Ride operation had entered into

a new lease agreement in 1986, which contained an option for Tanglewood to purchase the waterslide operation for a sum of $65,000.

At trial, the jury found defendant guilty on both counts. After the cases were consolidated for judgment and sentencing, defendant was sentenced to one year imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General David F. Hoke, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

WELLS, Judge.

[1] Defendant assigns error to the trial court's denial of his motion to require the State to elect between the charges of embezzlement and obtaining property by false pretense.

> In order to convict a defendant of embezzlement under G.S. § 14-90, the State must prove three distinct elements: (1) that the defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity.

State v. Pate, 40 N.C. App. 580, 253 S.E. 2d 266, *cert. denied*, 297 N.C. 616, 257 S.E. 2d 222 (1979).

The charge of obtaining property by false pretense has as its constituent elements, " '(1) a false representation of a 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 one person obtains or attempts to obtain value from another.' " *State v. Davis*, 48 N.C. App. 526, 269 S.E. 2d 291 (1980) (*quoting State v. Cronin*, 299 N.C. 229, 262 S.E. 2d 277 (1980)). Close scrutiny of the elements of embezzlement and obtaining property by false pretense shows that the two charges are inherently

mutually exclusive. In order to be found guilty of embezzlement, a defendant must obtain the property in question *rightfully* in the course of his employment by virtue of his fiduciary or agency relationship with his principal. The defendant must then fraudulently or knowingly misapply or convert the property to his own use in such a way as to be inconsistent with the usage originally intended by the principal. The wrongful act takes place *after* the property is initially rightfully obtained. The charge of obtaining property by false pretense requires the defendant to have wrongfully obtained the property *at the outset* by falsely representing an existing fact or a future fulfillment or event which is calculated and intended to deceive and which does in fact deceive.

The defendant, in the present case, could not therefore have obtained the $7,500 rightfully through his fiduciary relationship with Young and then wrongfully use the money *and* wrongfully obtain, at the outset, the same $7,500 through the false representation of an existing fact or fulfillment of a future event. Our resolution of this issue is controlled by the decision of our Supreme Court in *State v. Meshaw*, 246 N.C. 205, 98 S.E. 2d 13 (1957). In *Meshaw*, the defendant was convicted of larceny of property and also of receiving the same property knowing it to have been stolen. The *Meshaw* court stated: "The verdict here purports to establish that the appellant is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other. He may be guilty of one or of the other, not both." *Meshaw, supra* at 207, 98 S.E. 2d at 15.

As a rule, "[t]he [trial] judge [is] not required to make the State elect between the charges contained in [the indictments], at the beginning of the trial, and before any evidence [has] been introduced." *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972). (Emphasis in the original.) *Accord State v. Hill*, 45 N.C. App. 136, 263 S.E. 2d 14 (1980). However, where the charges involved are clearly mutually exclusive, as in the present case, we are persuaded that the State should be required to make an election between the charges. *See State v. Griffin*, 239 N.C. 41, 79 S.E. 2d 230 (1953). Accordingly, we hold that the trial court's denial of defendant's motion to require the State to elect between the charges of embezzlement and obtaining property by false pretense was in error.

This error was not sufficiently prejudicial to require a new trial for the defendant in this case. Where the verdict is contradictory in nature, as in the present case, it has been established that: "if there is a verdict of 'guilty as charged' and the trial is free from error, or if there is a plea of guilty as charged, *a single judgment* pronounced thereon will be upheld." *Meshaw, supra* at 209-210, 98 S.E. 2d at 16 (emphasis in the original); *State v. Turner*, 8 N.C. App. 541, 174 S.E. 2d 863 (1970). It is considered to be "immaterial" as to which mutually exclusive count the guilty verdict pertains. *Meshaw, supra* at 210, 98 S.E. 2d at 16. "In short, since it has been established that the defendant is guilty of one *or* the other, in either case the judgment is sufficiently supported." *Meshaw, supra.* (Emphasis in the original.) We are presented with a similar situation in the instant case. Defendant was found by the jury to be guilty of one count of embezzlement and one count of obtaining property by false pretense. While these counts, as noted above, are mutually exclusive, the trial court consolidated the verdicts for judgment and sentencing and pronounced a *single judgment* on the verdicts. Therefore, defendant suffered no prejudice as a result of the trial court's denial of his motion to require the State to elect between the charges. Accordingly, defendant is not entitled to a new trial based on these assignments of error.

Defendant contends that there was insufficient evidence to support guilty verdicts on either charge and that the trial court erred in failing to grant defendant's motion to dismiss the charges against the defendant and failing to grant defendant's motion to set aside the verdicts as being against the weight of the evidence. "In considering a motion to dismiss, it is the duty of the court to determine whether there is substantial evidence of each essential element of the offense charged, substantial evidence being such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Earnest*, 64 N.C. App. 162, 306 S.E. 2d 560 (1983). Furthermore, "all of the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference from that evidence." *Id.* at 164, 306 S.E. 2d at 562.

[2] There is substantial evidence in the case at bar to support each element of both of the offenses charged. As to embezzlement, evidence in the record is sufficient to support a conclusion

that defendant was the attorney of Young and as such was placed in a fiduciary relationship with Young. Defendant was given $7,500 by Young to purchase a share in the waterslide operation. Defendant received the money rightfully in the course of his employment as an attorney for Young and by virtue of his fiduciary relationship with Young. Though it is not clear from the record what happened to the $7,500, viewing the evidence in a light most favorable to the State, it is clear that Young never obtained the share of the waterslide operation which was to be purchased with the money. Therefore, there was evidence from which a reasonable inference may be drawn that defendant either fraudulently or knowingly and willfully misapplied his client's funds, or that he secreted such funds with the intent to embezzle or fraudulently or knowingly and willfully misapply them. *See State v. Smithey*, 15 N.C. App. 427, 190 S.E. 2d 369 (1972). In short, the evidence is sufficient to support a verdict of guilty of embezzlement.

[3] The evidence also supports a verdict of guilty of obtaining property by false pretense. The evidence shows that defendant falsely represented the financial status of the waterslide operation to Young. A reasonable inference can be drawn that this false representation was made in a manner that was calculated and intended to deceive Young. Furthermore, defendant obtained value from Young, namely, a check for $7,500. Therefore, there is substantial evidence to support a verdict of guilty of obtaining property by false pretense. The trial court did not err in denying defendant's motions to dismiss for insufficient evidence.

"The decision whether to grant or deny a motion to set aside the verdict is vested in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion." *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). We can discern no manifest abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict.

[4] Defendant contends that the trial court committed error in denying defendant's motions for a mistrial on the grounds of the failure of the State to comply with the discovery statutes. The

documents in question are a copy of a check given by the defendant to Schwab and a document showing the partnership share breakdown of the waterslide operation. Defendant argues that the State improperly held these documents in violation of the discovery statutes. When the State complies voluntarily with a discovery request, "the discovery is deemed to have been made under an order of the court for the purposes of [the discovery statutes]." N.C. Gen. Stat. § 15A-902(b) (1988); *State v. Carson*, 320 N.C. 328, 357 S.E. 2d 662 (1987). As a result, the State must continue to comply with the discovery request and supply discoverable items covered by the statute. As our Supreme Court stated in *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978), "He [the prosecutor] was under a continuing duty to disclose relevant, discoverable information *as he received it.*" (Emphasis added.) Though the check, in the present case, apparently had some exculpatory value, the record on appeal indicates that the State was unsure of the status or the probative value of the check due to its illegibility. The trial court also found the check to be illegible. When a clear copy of the check was obtained by the State, defense counsel was present and was given the legible copy at that time. We hold that the State substantially complied with the requirements of the discovery statutes in regard to defendant's check to Schwab.

[5] As to the partnership breakdown, we also conclude that the State substantially complied with the requirements of the discovery statutes in supplying defendant with a copy of the breakdown before it was used at trial. The record indicates that the State did not intend to use the partnership breakdown initially but decided to use it after admission of other evidence was denied. The evidence does not appear to have been obtained directly from defendant or to belong to defendant. Nor does the partnership evidence appear to have been material to the preparation of defendant's defense. The same substantive information contained in the partnership documents in question was established by other evidence at trial including evidence offered by defendant. At the time the State decided to use the evidence it was made available to defendant for examination. This assignment of error is overruled.

[6] Defendant's assignments of error 5 through 8 deal with evidence which was elicited during cross-examination and rebuttal by the State and admitted by the trial court over objection by

defendant. Defendant contends the trial court erred by allowing the State to cross-examine defendant concerning various financial matters including his own financial status. Defendant contends the cross-examination, "went into inflammatory, irrelevant matters not going to defendant's credibility." Rule 611(b) of the North Carolina Rules of Evidence states: "(b) Scope of cross-examination. —A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. 8C-1, Rule 611(b) (1988). The cross-examination of defendant at issue in the present case related largely to financial dealings by defendant, including those associated with the waterslide operation, defendant's dealings with Young and defendant's financial status. As such the cross-examination of defendant was clearly within the acceptable bounds allowed by the Rules of Evidence. Therefore the trial court did not err in allowing the State to cross-examine defendant on these matters.

[7] Defendant also contends that the trial court erred in allowing the testimony of Marshall Haywood, a Charlotte attorney. Haywood testified for the State on rebuttal about attorney-client relationships, attorney trust accounts and fiduciary relationships. The trial court instructed the jury to apply this evidence to the charge of embezzlement only. Defendant argues that this evidence was irrelevant and along with the testimony elicited from defendant on cross-examination, unfairly prejudicial. Relevant evidence is "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1988). (Emphasis added.) *See also State v. McElrath*, 322 N.C. 1, 366 S.E. 2d 442 (1988). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Wingard*, 317 N.C. 590, 346 S.E. 2d 638 (1986) (citations omitted). "Evidence which is essentially background in nature is universally . . . admitted as an aid to understanding." *Santora, McKay & Ranieri v. Franklin*, 79 N.C. App. 585, 339 S.E. 2d 799 (1986), *citing* official commentary to Rule 401. Applying these standards, we find that Mr. Haywood's testimony was relevant to the charge of embezzlement. This assignment is overruled.

[8] Defendant also contends that the trial court erred in instructing the jury on false pretense and embezzlement. Rule 10(b)2 of the North Carolina Rules of Appellate Procedure states in part:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

Defendant failed to make a timely objection and has not properly preserved his exceptions to the initial jury charge for appeal. A supplemental charge was given to the jury by the trial court which concerned the specific time in which the intent to deceive must have been present to establish that element of the false pretense charge. Defendant excepted to this instruction. The supplemental instruction was as follows: "I charge you the intent to deceive must have been present at the time the statement was made, not when the funds were received." This instruction was correct and this assignment is overruled.

No error.

Judges ARNOLD and COZORT concur.

JANET WALKER ADAMS v. LITZ EDWARD ADAMS

No. 8822DC421

(Filed 20 December 1988)

1. Divorce and Alimony § 16— alimony—adultery during separation

Voluntary sexual intercourse by a spouse with a third party during the period of separation required by N.C.G.S. § 50-6 is adultery as contemplated by N.C.G.S. § 50-16.2(1), and is a ground for alimony. The North Carolina alimony statutes do not call upon the appellate courts to determine on a case by case basis when a spouse may justifiably act upon the other spouse's announcement that reconciliation is impossible; until the State grants them an absolute divorce, a couple continues to be wife and husband even though separated from each other.

2. Divorce and Alimony § 16.8— alimony—findings as to standard of living, value of estates, and defendant's earnings—adequate

The trial court's findings in a divorce action as to defendant's monthly gross income and his reasonable living expenses, coupled with findings as to plaintiff's monthly income and her expenses during the last year of the marriage, satisfy the requirement of N.C.G.S. § 50-16.5(a) for findings regarding the parties' accustomed standard of living; the judge's findings as to the parties' income, their assets, and their earning capacities were adequate findings regarding the parties' estates; and the trial court correctly calculated defendant's earnings.

Judge GREENE concurring.

APPEAL by defendant from *Kimberly T. Harbison, Judge.* Judgment entered 26 May 1987 in District Court, DAVIE County. Heard in the Court of Appeals 1 November 1988.

Morrow, Alexander, Tash, Long and Black by Charles J. Alexander, II, of counsel, and Ronald B. Black, of counsel, for plaintiff-appellee.

Harrell Powell, Jr., and Garry Whitaker for defendant-appellant.

BECTON, Judge.

Defendant appeals from a judgment ordering him to pay $618.34 per month in alimony and mortgage payments and directing that he contribute $2,000 towards plaintiff's attorney fees. We affirm.

Plaintiff, Janet Walker Adams, and defendant, Litz Edward Adams, married on 15 August 1981. They separated on 31 July 1985. The following day, Ms. Adams filed a complaint seeking divorce from bed and board and temporary and permanent alimony. Ms. Adams based her prayer for permanent alimony on alleged indignities and alcohol abuse by her husband. In his answer, Mr. Adams denied those allegations, and he charged Ms. Adams with indignities and with abandonment. On 31 October 1985, Ms. Adams amended her complaint to aver that her husband had "engaged in open and notorious adulterous activities" since the date of their separation.

Ms. Adams' claim for permanent alimony was heard in two phases between January and March 1987. The first phase ended on 2 February when a district court jury returned answers to

seven "issues" addressing, primarily, the fault grounds alleged by both parties. The jury found that Ms. Adams had committed indignities against her husband and had abandoned him without just cause. The jury also found that Mr. Adams had committed adultery as alleged by Ms. Adams. It found that Mr. Adams had not offered indignities against Ms. Adams and had not abused alcohol.

After the verdict, the questions of Ms. Adams' dependency and of the amount of alimony to be awarded her were heard before the district court judge. She entered judgment on 26 May 1987. Included in the judgment were 25 findings of fact. Among other things, the judge found that Mr. Adams was 38-years-old; that he was "essentially the owner, operator, manager and primary beneficiary of the income" of LEA Auto Brokers, Inc.; that LEA had deposits of $1,212,292.78 and expenses of $1,149,195.05 between February 1986 and January 1987; that Mr. Adams' monthly gross income during that year was approximately $5,258; that Mr. Adams had "reasonable and necessary monthly living expenses, exclusive of payments on indebtedness," of $1,714.50; and that Mr. Adams had debts totaling $26,145, not including his obligation to make payments on two mortgages on the marital home. The judge found Mr. Adams to be a supporting spouse under N.C. Gen. Stat. Sec. 50-16.1(4) (1987).

The judge included among her remaining findings that Ms. Adams was 43-years-old; that she had had little income from outside employment during her marriage to Mr. Adams; that she owned a design business called Adams Interiors; that she had an associate's degree in interior design and was pursuing an advanced degree in the subject; that Adams Interiors grossed $86,383 in 1985 and $142,000 in 1986; that Ms. Adams' net monthly income from her business was $611 in 1985 and $853.80 in 1986; that Ms. Adams "ha[d] demonstrated an earning capacity since the separation . . . substantially in excess of her contributions during the mar[riage] . . ."; and that Ms. Adams' "current necessary and reasonable monthly living expenses" were approximately $2,280. The judge further found that Ms. Adams had inadequate financial resources and that she was a dependent spouse within the meaning of Section 50-16.1(3). The judge found also that the jury's determination of the fault issues supported a

reduction, pursuant to Section 50-16.5(b), of the amount of alimony to be awarded Ms. Adams.

The judge ordered Mr. Adams to pay Ms. Adams $400 per month as permanent alimony. She further directed him to contribute $2,000 toward Ms. Adams' attorney fees and that he pay $218.34 per month on the second mortgage on the marital home prior to equitable distribution. Mr. Adams appeals.

I

[1] Mr. Adams argues that because his adulterous conduct did not begin until after he had separated from Ms. Adams, awarding her alimony contravenes the legislative intent behind the North Carolina alimony statutes. He contends that an essential prerequisite for alimony is that the spouse held liable to pay it be the one primarily responsible for the demise of the marriage. In his brief, Mr. Adams states that the evidence presented at trial demonstrated that Ms. Adams had no intention to reconcile with him after she left their home on 31 July 1985. Consequently, Mr. Adams maintains, the adultery he engaged in after the separation "neither caused the marital break-up nor tended to diminish any remote possibility of reconciliation."

To support his argument, Mr. Adams cites our Supreme Court's discussion, in *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980), of marital fault and its relevance to alimony awards. In *Williams*, Justice Carlton wrote that

> . . . [O]ur legislature clearly intended that fault be a consideration in awarding alimony.
>
> In so providing, the legislature implicitly recognized that the dissolution of the family as an economic unit works hardship on both parties. . . . In such cases, the burden of contending with diminished assets should, in all fairness, fall on the party primarily responsible for the break-up of the economic unit.
>
> . . . Sound public policy would dictate that the party who violated th[e] binding [marriage] contract should continue to bear its financial burden where he or she can reasonably do so and where that is necessary to prevent a relatively greater economic hardship on the party without fault.

Id. at 188, 261 S.E. 2d at 858-59 (emphasis omitted). Using *Williams*, Mr. Adams invites us to hold that his post-separation adultery nullifies his fault for alimony purposes, especially in light of the jury's finding that Ms. Adams' misconduct occurred prior to and at the time of separation. We decline to so hold.

The State is a party to every marriage of its citizens, and is, therefore, rightfully concerned about the permanence of their marital status. *See Bruce v. Bruce*, 79 N.C. App. 579, 583, 339 S.E. 2d 855, 858 (1986), *disc. rev. denied*, 317 N.C. 701, 347 S.E. 2d 36 (1986). N.C. Gen. Stat. Sec. 50-6 (1987) requires that a wife and husband live separate and apart for one year before the State will grant them an absolute divorce. This waiting period is designed "to protect the institution of marriage from hasty judgments and casual disruptions since differences may in time be reconciled." *Mayer v. Mayer*, 66 N.C. App. 522, 529, 311 S.E. 2d 659, 665 (1984), *disc. rev. denied*, 311 N.C. 760, 321 S.E. 2d 140 (1984). Only when the parties have lived apart for the statutory length of time will the State recognize that their marriage is not salvageable. *See Bruce*, 79 N.C. App. at 584-85, 339 S.E. 2d at 859.

Until the State grants them an absolute divorce, a couple though separated from each other, continues to be wife and husband. It is for this reason that N.C. Gen. Stat. Sec. 50-16.2 (1987), which sets down the fault grounds for alimony, does not distinguish between pre-separation and post-separation adultery. *See* Section 50-16.2(1). We do not view the failure of the General Assembly to differentiate between these time periods to be an oversight. Rather, defining adultery so as to include any act of voluntary sexual intercourse between a spouse and a third party —the former's separation from the other spouse notwithstanding —is consistent with the policy favoring reconciliation. *See* Lee, *North Carolina Family Law* Sec. 65 (1979) (defining adultery as ". . . voluntary sexual intercourse of a married person with one other than his or her spouse.") Viewed in this way, we do not believe Mr. Adams can claim, as he attempts to do, that he is free from fault concerning the dissolution of his marriage. His conduct diminished prospects for reconciliation with his wife, and it contributed, therefore, to the finality of their break-up.

In cases such as this, the law's drawing of "bright lines" may seem to demonstrate too little regard for the complex emotional

decisions married people make about the state of their relationship. It is our view, however, that the legislature has indicated that such lines exist. Our alimony statutes do not call upon the appellate courts to determine, on a case by case basis, when post-separation adultery is grounds for alimony and when it is not. We are not called upon, in short, to determine when a spouse may justifiably act upon the other spouse's announcement that reconciliation is impossible. Rather, we think it the intent of our legislature, and we so hold, that voluntary sexual intercourse by a spouse with a third party during the period of separation required by Section 50-6 is adultery as contemplated by Section 50-16.2(1), and is a ground for alimony. In so holding, we point out that this case does not involve, and we do not decide, whether any of the other fault-based grounds in the post-separation context affects alimony.

II

[2] Mr. Adams further claims that the trial judge failed to base the alimony award on adequate findings of fact as required by N.C. Gen. Stat. Sec. 50-16.5(a) (1987) and Sec. 1A-1, R. Civ. P. 52(a) (1983). Specifically, Mr. Adams contends the court did not make findings as to the accustomed standard of living of the parties and the total value of their estates. He also claims the court failed to find facts relevant to his earnings. We find no merit in Mr. Adams' arguments.

Rule 52(a) requires the trial court to find "material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E. 2d 653, 657 (1982). If the trial court complies with the mandate of *Quick*, appellate courts are bound by the findings of fact so long as some evidence in the record substantiates them. *See Lyerly v. Malpass*, 82 N.C. App. 224, 225, 346 S.E. 2d 254, 256 (1986), *disc. rev. denied*, 318 N.C. 695, 351 S.E. 2d 748 (1987). The binding effect of the trial judge's factual findings is not attenuated by evidence that might have sustained contrary findings. *Id.* at 225, 346 S.E. 2d at 256.

The judge's findings as to Mr. Adams' monthly gross income and his reasonable living expenses, coupled with the findings as to Ms. Adams' monthly income and her expenses during the last

year of the marriage, satisfied the requirement of Section 50-16.5(a) for findings regarding the Adamses' accustomed standard of living. *See Beaman v. Beaman*, 77 N.C. App. 717, 721-22, 336 S.E. 2d 129, 131-32 (1985). The statute does not require a specifically articulated finding on the subject. *See id.* at 722, 336 S.E. 2d at 132. In *Beaman*, the trial court's failure to make a categorical finding about the parties' accustomed standard of living was not fatal to the validity of the judgment. We said that when the "evidence clearly allows the [reviewing] court to determine the parties' accustomed standard of living . . . [a] specific finding of fact [is] not necessary." *Id.* In this case, a specific finding was not necessary either.

The trial judge also made adequate findings concerning the Adamses' estates. "Estate" refers to the financial worth of each spouse. *See Williams*, 299 N.C. at 183, 261 S.E. 2d at 856. Consideration of the parties' estates is intended to assist the judge in determining their earnings and earning capacities since, generally, "the parties will not be required to deplete their estates to pay alimony or to meet personal expenses." *Beaman*, 77 N.C. App. at 722, 336 S.E. 2d at 132. With this purpose in mind, we view the judge's findings as to the Adamses' income, their assets, and their earning capacities to be adequate findings about the parties' estates. *See id.*

Mr. Adams last argues that the trial court incorrectly calculated his earnings. The judge determined Mr. Adams' monthly gross income from February 1986 through January 1987 by subtracting the expenses of Mr. Adams' business from its deposits and dividing the sum by 12. The figures pertaining to deposits and expenses were furnished by Mr. Adams' own testimony and by his own exhibits. The judge also made a finding as to Mr. Adams' indebtedness in areas unrelated to his business.

After the entry of judgment, Mr. Adams moved, pursuant to Rule 52(b), for amended and additional findings of fact relative to his business' net receipts. He also moved for a new trial under Rules 59(a)(3) and 59(e). Following a hearing, the judge denied Mr. Adams' motions, finding that the additional evidence he sought to introduce had been available to him to present at the hearing on the permanent-alimony issue. The trial court did not err in this respect.

III

Plaintiff's motion to dismiss this appeal is denied.

The judgment of the trial court awarding plaintiff permanent alimony and directing defendant to pay $218.34 per month on the second mortgage on the marital home is

Affirmed.

Judges EAGLES and GREENE concur.

Judge GREENE concurring.

I concur in the majority's decision and agree with the majority's statement that, "voluntary sexual intercourse by a spouse with a third party during the period of separation required by Section 50-6 is adultery as contemplated by Section 50-16.2(1), and is a ground for alimony." I write separately to dispel any implication that such adultery will give rise to an action for alimony even where the parties have executed a valid separation agreement waiving all alimony rights under Section 50-16.6(b) which states, "Alimony, alimony pendente lite, and counsel fees may be barred by an express provision of a valid separation agreement so long as the agreement is performed." N.C.G.S. Sec. 50-16.6(b) (1987); *see Crutchley v. Crutchley*, 306 N.C. 518, 524, 293 S.E. 2d 793, 797 (1982) (approving contractual release of alimony rights).

Section 50-16.6(b) permits spouses to agree privately that any ground for alimony—including adultery occurring before or after their agreement—shall not entitle the non-offending spouse to alimony so long as the agreement is performed. *See generally* S. Sharpe, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. Rev. 819, 844-47 (1981) (adultery will not affect support provisions of separation agreement absent specific contrary provision in agreement); *cf.* N.C.G.S. Sec. 31A-1(a), (b) (1984) (spousal rights in other marital contracts voided by adultery only if adultery has not been "condoned"). Adultery does not itself void a valid alimony waiver since the only possible purpose of Section 50-16.6(b) is to permit alimony waivers where grounds for alimony (such as adultery) may exist. Thus, the waiver provision of Section 50-16.6(b) complements the statutory bar of adultery under Section 50-16.6(a).

Furthermore, an otherwise valid separation agreement barring alimony under Section 50-16.6(b) does not run afoul of the requirement in Section 52-10(a) that all contracts between spouses must "[not] be inconsistent with public policy." N.C.G.S. Sec. 52-10(a) (1984) (may assert valid marital contract as plea in bar in any action). Section 50-16.6(b) is itself another of the Legislature's public policy "bright-lines" noted by the majority in this sensitive area. Section 50-10(a) presumably would *not* permit a plea in bar based on a spousal agreement which actually promoted any of the grounds for alimony specified in Section 50-16.2. N.C.G.S. Sec. 50-16.2(1)-(10) (1987). However, a valid release of one's legal right to alimony no more promotes the grounds giving rise to alimony than does the valid release of a wrongful death claim against a drunken motorist promote drunken driving. To interpret our statutes differently would bar any individual from agreeing to forego civil remedies where the State has enacted criminal sanctions.

Therefore, irrespective of whether the separation agreement is approved by the court, Section 50-16.6(b) and Section 52-10(a) permit the assertion of a valid contractual alimony waiver as a plea in bar in any action concerning alimony. Accordingly, while I agree with the majority's statement as written, I reject any implication that our courts may ignore a valid separation agreement waiving all alimony rights so long as the agreement is performed —even those rights arising from a spouse's predivorce adultery.

STATE OF NORTH CAROLINA v. HATEM HAMAD AND DONALD CLAY WELLS

No. 883SC277

(Filed 20 December 1988)

1. Criminal Law § 88.5— joint trial—recross-examination denied—error

The trial court erred in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine by sustaining defendant Wells' objection to further cross-examination by defendant Hamad where Wells testified, was initially cross-examined by Hamad's counsel, was further cross-examined by the State, and defendant Hamad's counsel was not then allowed to recross-examine defendant Wells. The State's cross-examination elicited testimony concerning several new matters which were not broached in Hamad's initial cross-

examination and the trial court's decision to permit or refuse Hamad's counsel to recross-examine defendant Wells was not discretionary.

2. **Narcotics § 4.5— trafficking in cocaine involving more than 400 grams—instructions on 200 to 400 grams—no prejudice**

There was no prejudice in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine involving more than 400 grams from the trial court's instruction that defendant Wells could be found guilty based on more than 200 but less than 400 grams.

3. **Criminal Law § 138.37— mitigating factors—assistance to law enforcement officers—timeliness of assistance**

The trial court erred when sentencing a defendant for multiple counts of trafficking in cocaine and conspiracy by refusing to consider whether defendant had rendered substantial assistance to law enforcement officers in accordance with N.C.G.S. § 90-95(h)(5) based on testimony from defendant at trial which implicated his codefendant. The trial judge did not exercise his discretion, erroneously ruling as a matter of law that defendant's trial testimony would not be considered based partly on the timeliness of the assistance provided.

Chief Judge HEDRICK dissents.

APPEAL by defendants from *Watts, Thomas S., Judge.* Judgments entered 5 June 1987 in Superior Court, PITT County. Heard in the Court of Appeals 24 October 1988.

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

A. Wayne Harrison and James M. Roberts for defendant-appellant Hatem Hamad.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant-appellant Donald Clay Wells.

JOHNSON, Judge.

Defendants present separate questions for review by this appeal. Hatem Hamad appeals from his convictions of trafficking in cocaine by possession of more than 200 but less than 400 grams, conspiracy to traffic in cocaine by possession of more than 200 but less than 400 grams, and conspiracy to traffic in cocaine by the sale of more than 200 but less than 400 grams, for which he was sentenced to consecutive terms of imprisonment totalling thirty-four years.

Donald Clay Wells appeals from convictions of identical offenses with the addition of a conviction for trafficking in cocaine by the *sale* of more than 200 but less than 400 grams. For these convictions, he was sentenced to two consecutive fourteen-year terms on the trafficking charges, and a concurrent fourteen-year term for the conspiracy conviction. Judgment was arrested on the remaining conspiracy conviction.

The State's evidence tended to show that on 29 September 1986 its witness James Stuart Crandell met with defendant Wells in Raleigh and was informed that Wells had a large quantity of cocaine which he had obtained from a "Cuban connection" and would sell for $40,000 per kilo (1,000 grams). The two men had met around six to eight weeks before when defendant Wells delivered restaurant equipment to Crandell's place of employment and told him at that time that he could make a substantial amount of money purchasing and selling illegal drugs.

Crandell, who had been previously convicted of trafficking in cocaine and rendered substantial assistance to law enforcement officials in that investigation, then called the Drug Enforcement Agency (D.E.A.) in Wilmington on 29 September 1986 and informed an agent of his conversation with Wells. He also telephoned Special Agent Malcolm McLeod of the State Bureau of Investigation (S.B.I.) on 1 October 1986 and informed him of Wells' plans. Later on that day, Wells called Crandell and informed him that he had the cocaine and was ready to execute the deal. Crandell then returned to the S.B.I. office in Greenville, met Agent McLeod, called Wells from the office and arranged a meeting in Tarboro for the same afternoon. At this meeting Wells produced a sample of cocaine which Crandell turned over to Agent McLeod.

Still later that same day at around 7:00 p.m., Crandell and Wells met for a second time. During this meeting Wells agreed to take Crandell to his duplex apartment so he could see the cocaine. While there, and parked outside in his vehicle, Crandell was informed by Wells that his source would not allow him to bring out the cocaine until Crandell produced the money. Crandell then saw defendant Hamad for the first time when he allegedly stepped outside the apartment and informed Wells that he was wasting his time.

On the following day, after several telephone conversations, Wells informed Crandell that he and his wife (referring to Rita Raynor, a friend) would meet him in Greenville to complete the deal. After informing Agent McLeod of the impending meeting, Crandell arrived at a parking lot wearing a concealed transmitter which allowed S.B.I. agents to hear the transaction. Wells arrived in a vehicle being driven by Rita Raynor, with defendant Hamad in the front passenger seat. Wells then got into Crandell's vehicle and was informed that Crandell had the money. Wells then got a brown sack from Hamad, who was still seated in the other vehicle, which contained a package wrapped in silver duct tape. Crandell then tested the cocaine, expressed his approval, and gave Wells the "flash" money which had been supplied by the authorities. Wells then threw the bag of money into his own car. The law enforcement agents who had the area under surveillance then moved in and arrested the participants, Wells, Hamad, and Rita Raynor, the driver.

Rita Raynor testified for the State and was not tried with defendants, although she was charged with the same offenses as defendant Wells. She denied any involvement in the drug transaction. Defendant Hamad testified in his own defense and denied participation in the crimes charged. Defendant Wells also testified in his own behalf and corroborated Crandell's testimony, but explained his participation in the crimes as the result of Crandell's ability to overcome his will which was somewhat weakened by his financial troubles.

Hamad's Appeal

Defendant Hamad presents five questions for review. We find that only two of those issues merit discussion. Insofar as questions one through three are concerned, they are overruled.

[1] In his fourth Assignment of Error, defendant contends that the trial court committed reversible error by sustaining defendant Wells' objection to further cross-examination by defendant Hamad. Hamad argues that at trial when co-defendant Wells testified, after initial cross-examination by Hamad's counsel, and further cross-examination by the State, Hamad's counsel was not then allowed to recross defendant Wells regarding what he contends were new matters elicited by the State. The State argues,

on the other hand, that since Wells' trial counsel did not tender any questions on redirect, Hamad was therefore not entitled to recross-examine his co-defendant.

We find that the semantic designation of the examination of defendant Wells by the State as cross-examination and the absence of redirect examination by Wells' counsel should not operate to abridge defendant Hamad's constitutional right to confront witnesses against him. *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973). This right necessarily encompasses the right to have a reasonable opportunity to face "accusers and witnesses with other testimony." *State v. Garner*, 203 N.C. 361, 166 S.E. 2d 180 (1932), *quoting* N.C. Const. of 1868, Art. I, sec. 11, recodified at Art. I, sec. 23 (1970).

State v. Moorman, 82 N.C. App. 594, 600, 347 S.E. 2d 857, 860 (1986), *rev. on other grounds*, 320 N.C. 387, 358 S.E. 2d 502 (1987), *citing* 1 Brandis on North Carolina Evidence sec. 36 (2d rev. ed. 1982), provides that "after a witness has been cross-examined and reexamined, *unless the redirect examination includes new matter*, it is in the discretion of the judge to permit or refuse a second cross-examination, and counsel cannot demand it as of right." (Emphasis added.) In stating this rule we note that although there was no redirect examination per se, the State's cross-examination elicited testimony concerning several new matters which were not broached in Hamad's initial cross-examination of defendant Wells. These matters include, but are not limited to, several statements which further incriminated defendant Hamad by specifically detailing his alleged participation in the crimes charged.

Wells testified on cross-examination by the State that Hamad carried one kilogram of cocaine in a black bag into Wells' house; that Hamad cut the sample of cocaine which Wells gave to Crandell; that Hamad carried the bag containing the cocaine back to his hotel after his first meeting with Crandell at the duplex apartment; that Hamad cut the rock of cocaine and weighed it after learning that they could sell one-half of the kilogram to Crandell; and that at the scene of the final transaction Hamad was communicating with Wells while Wells consummated the deal with Crandell.

We therefore hold that because these matters were new, the trial court's decision to permit or refuse Hamad's counsel to recross-examine defendant Wells was not discretionary. *Moorman, supra*; 1 Brandis, *supra*. The label attached to the State's examination of defendant Wells is of no importance here because this case involves multiple defendants who could be subjected to two sets of cross-examination; and although the State's inquiry of defendant Wells was labelled cross-examination, it had the same practical import of a redirect examination. Defendant Hamad is therefore entitled to a new trial.

Having determined that the commission of error as to assignment of error number four entitles defendant Hamad to a new trial, we find it unnecessary to review his remaining question.

Wells' Appeal

[2] Defendant Wells presents four questions, two of which merit discussion. Questions one and two are overruled.

By his third Assignment of Error, defendant argues that the trial court erred in overruling his objection to the jury instruction on a lesser included conspiracy offense which he claims was unsupported by the evidence. He contends that the indictment charged him with two conspiracies involving the "possession with intent to sell and deliver" and the "sale and delivery" of in excess of 400 grams of cocaine, and the trial court erroneously instructed the jury that he could be found guilty of conspiracies for trafficking in over 200 but less than 400 grams of cocaine.

We answer that although it was erroneous for the trial court to instruct on the unsupported lesser degrees, *State v. Gray*, 58 N.C. App. 102, 293 S.E. 2d 274, *disc. rev. denied*, 306 N.C. 746, 295 S.E. 2d 482 (1982), such error could not have been prejudicial. *State v. Chase*, 231 N.C. 589, 58 S.E. 2d 364 (1950). In *Chase*, the defendant was charged with robbery with firearms and was ultimately convicted of common law robbery. The Court, on appeal, conceded that the evidence only supported two possible verdicts: guilty of robbery with the use of firearms, or not guilty. However, the Court stated that "[i]t is an error prejudicial to the State, and not to him." *Chase* at 591, 58 S.E. 2d at 365, *quoting*, *State v. Quick*, 150 N.C. 820, 823-24, 64 S.E. 168, 170 (1909).

Similarly in *State v. Mitchell*, 48 N.C. App. 680, 270 S.E. 2d 117 (1980), this Court found no error in the trial of a defendant for armed robbery where the lesser included offense of common law robbery was submitted. The Court stated that

> [i]t is not necessary in this case to determine whether the trial court erred in submitting the lesser offense to the jury because such error, if any, is nonprejudicial. . . .
>
> Although defendant advances an ingenious argument in contending that submission of the lesser included offense prejudiced him by generating sympathy leading to a compromise verdict, we must agree with the overwhelming body of case law on this issue holding that such error is not harmful to defendant.

Mitchell at 684, 270 S.E. 2d at 119 (citations omitted). We therefore overrule the fourth question presented for review.

[3] In his final argument before the Court, defendant assigns error to the trial court's refusal to consider whether he had rendered substantial assistance to law enforcement authorities in accordance with G.S. sec. 90-95(h)(5).

During his sentencing hearing defendant requested a finding of substantial assistance based upon his testimony at trial which further implicated his co-defendant Hatem Hamad. The trial judge specifically stated that, to his knowledge, the provision did not allow the giving of testimony against a co-defendant at a joint trial to support a finding of substantial assistance. "It talks about that, but we certainly did not contemplate that the conviction—he didn't identify accomplices to the police officer; he didn't cause the arrest of the accomplices. It has to be conviction. And that certainly isn't contemplated by testimony in a joint trial."

G.S. sec. 90-95(h)(5) (1985) provides, in pertinent part, as follows:

> [T]he sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, *provided substantial assistance in the identification, arrest, or conviction of any accomplices,*

accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

Our reading of this statute, along with the thorough discussion on its probable legislative intent enunciated in *State v. Baldwin*, 66 N.C. App. 156, 310 S.E. 2d 780, *aff'd*, 310 N.C. 623, 313 S.E. 2d 159 (1984), leads us to a different conclusion than that reached by the trial judge. It is clear to us that the statute is designed to encourage those who have access to the networks involved in the drug "underworld" to reveal their superior knowledge and aid in the ultimate conviction of those involved in illegal drug trafficking.

The statute's clear language includes assistance leading to the conviction of any *co-conspirators*. It therefore is not unforeseeable that substantial assistance could include testimony rendered against a co-conspirator. An erroneous reliance upon the timeliness of the assistance provided appears to have been a motivational element in the trial court's refusal to hear evidence regarding the possible substantial assistance rendered in the case *sub judice*, as it was in *State v. Perkerol*, 77 N.C. App. 292, 335 S.E. 2d 60 (1985). In *Perkerol*, the trial court determined that defendant's offer of substantial assistance, tendered when he entered his plea of guilty, was untimely. This Court stated that "the statutory language 'has rendered such substantial assistance' commonsensically sets no time limit on when such assistance must be rendered." *Id.* at 300, 335 S.E. 2d at 65. Defendant's sentence in *Perkerol* was vacated and the matter was remanded for a new sentencing hearing.

We recognize that whether a trial court finds that a criminal defendant's "aid" amounts to "substantial assistance" is *discretionary*. G.S. sec. 90-95(h)(5). However, in this instance the trial judge did not exercise his discretion, but erroneously ruled as a matter of law that Wells' trial testimony would not be considered as evidence of substantial assistance.

Result

It is for the foregoing reasons that we grant defendant Hatem Hamad a new trial, and defendant Donald Wells a new sentencing hearing.

New trial for defendant Hamad.

New sentencing hearing for defendant Wells.

Judge PARKER concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

I disagree with the majority in awarding defendant Hamad a new trial based on the suggestion that the trial judge erred in not allowing Hamad's counsel to further cross-examine the co-defendant Wells. Hamad did not offer or request to cross-examine Wells for the record in the absence of the jury. Assuming *arguendo*, the trial judge erred in not allowing Hamad's counsel to cross-examine the witness, we cannot determine whether such error was prejudicial because nothing appears in the record from which we could determine whether such error was prejudicial. Furthermore, I am persuaded that any error in not allowing Hamad's counsel to cross-examine the co-defendant after the State had done so is harmless beyond a reasonable doubt. I vote to find no error as to defendant Hamad.

With respect to defendant Wells, I dissent from the part of the majority opinion awarding Wells a new sentencing hearing. In my opinion, the trial judge merely exercised his discretion in not finding the mitigating factor of "substantial assistance" as set forth in G.S. 90-95(h)(5).

EDWARD J. CIESZKO AND WIFE, SUSIE M. CIESZKO, PLAINTIFFS v. ROBERT STEVEN CLARK AND WIFE, GAIL M. CLARK; ROBERT L. CLARK AND WIFE, STELLA R. CLARK, DEFENDANTS

No. 883SC560

(Filed 20 December 1988)

1. Appeal and Error § 24— summary judgment—appropriateness on grounds not stated—cross-assignments not required

Defendant appellees were not required to cross-assign error to the trial court's conclusions pursuant to Appellate Rule 10(d) in order to argue on ap-

peal that summary judgment in their favor was appropriate on grounds other than those stated by the trial court.

2. Limitation of Actions § 12.1; Rules of Civil Procedure § 41.1— voluntary dismissal—reinstitution after more than year—statute of limitations not expired

Plaintiffs' failure to reinstitute this action within one year of a voluntary dismissal under N.C.G.S. § 1A-1, Rule 41(a) did not bar the action where the general statute of limitation has not expired.

3. Easements § 5— easement by necessity in favor of grantor

The law of this State will imply an easement by necessity in favor of a grantor over the land of a grantee where the conveyance leaves the grantor with no other suitable access to the retained lands, and the right to such an easement is not waived because the grantor conveyed by warranty deed without reservation.

4. Easements § 5.3— easement by necessity—sufficiency of complaint

Plaintiff grantors' complaint adequately alleged the two essential elements to support an easement by necessity: (1) the claimed dominant tract and the claimed subservient tract were once held in common ownership that was severed by a conveyance, and (2) the necessity for the easement arose out of the conveyance.

5. Easements § 5; Equity § 2.2— easement by necessity—laches

A claim for an easement by necessity may be barred by the doctrine of laches.

6. Rules of Civil Procedure § 56.5— summary judgment—findings supported by evidence

Findings of fact to support summary judgment will be disregarded on appeal if not supported by evidence in the record, and a party cannot cure its failure to submit appropriate proof by requesting findings based upon arguments to the trial court.

7. Equity § 2— laches—reasonableness of delay—prejudice—issues of fact

The evidence in a summary judgment hearing presented issues of fact as to whether plaintiffs' delay in bringing an action to establish an easement by necessity was unreasonable and whether defendants were prejudiced by the delay where the evidence showed that plaintiffs filed an action in August 1983 to establish an easement by necessity over land they conveyed to defendants in 1974; plaintiffs presented evidence that they did not know of the basis for their claim until 1981 when defendants began to develop their property and had a ditch dug across plaintiffs' prior easement; and plaintiffs also presented evidence that they may be able to obtain access to their land with very little disruption of defendants' development because the path of the easement is located in the center of a street shown on the map of defendants' subdivision.

APPEAL by plaintiffs from *Phillips (Herbert O., III), Judge.* Order entered 10 February 1988 in Superior Court, CRAVEN County. Heard in the Court of Appeals 8 December 1988.

Plaintiffs and defendants own adjoining tracts of land in Craven County. Plaintiffs obtained title to their tract by deed dated 14 May 1964. That deed included a grant of an easement over lands now owned by defendants; the easement provided plaintiffs with access to a public road. By warranty deed dated 22 July 1974, plaintiffs conveyed to defendants and their predecessors in title two parcels of land for the purpose of straightening the boundary between the properties. Part of the subject easement was within the boundaries of one of these parcels. Because the deed contained no reservation or exception for the easement, the conveyance had the effect of cutting off plaintiffs' access to the easement and the public road.

In August 1983, plaintiffs filed an action to gain an easement over the land they had conveyed in 1974. Plaintiffs voluntarily dismissed that action on 26 October 1984. On 11 March 1987, plaintiffs filed the complaint in this action and a notice of lis pendens. Plaintiffs' complaint alleges that, as a result of the conveyance in 1974, they have no access to a public road and they are entitled, therefore, to an easement by necessity over defendants' land. Defendants answered and moved for summary judgment. After a hearing on the motion, the trial court concluded that plaintiffs' action was barred under the doctrine of laches. From the order granting defendants' motion for summary judgment, plaintiffs appeal.

Nelson W. Taylor, III, by Nelson W. Taylor, III and Robert L. Cummings, for plaintiff-appellants.

Lee, Hancock, Lasitter & King, by Moses D. Lasitter, for defendant-appellees.

PARKER, Judge.

As a preliminary matter, we find it necessary to clarify the scope of our review in this appeal. Plaintiffs bring forward nine assignments of error, many of which are directed to findings of fact and conclusions of law made by the trial court in support of its order. The entry of summary judgment presupposes that there

are no issues of material fact; so findings of fact are not required. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E. 2d 162, 165 (1975). Nevertheless, it may be helpful in some cases for the trial court to summarize the undisputed facts which justify its order. *Id.* If findings of fact are needed to resolve a material issue, however, summary judgment is improper and any such findings are disregarded on appeal. *Id.* Accordingly, we must determine whether the trial court's order is supported by the undisputed facts as they appear in the record without regard to the trial court's findings of fact.

[1] In addition to its findings of fact, the trial court made conclusions of law which show that its decision was based upon the doctrine of laches. In their brief, defendants argue that other grounds existed to justify summary judgment in their favor. Plaintiffs have filed a reply brief in which they contend that defendants have not properly raised the issue of whether alternate grounds to support summary judgment exist because defendants have not cross-assigned error to the trial court's conclusions as required by Rule 10(d) of the North Carolina Rules of Appellate Procedure. Plaintiffs argue that the scope of review on this appeal is limited to a determination of whether summary judgment was appropriate on the grounds stated by the trial court. We disagree.

In *Ellis v. Williams*, 319 N.C. 413, 355 S.E. 2d 479 (1987), our Supreme Court held that a party appealing from the entry of summary judgment is not required to list exceptions and assignments of error in the record on appeal. The Court reasoned as follows:

> Thus, although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, . . . summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment . . . .
>
> . . . Exceptions and assignments of error are required in most instances because they aid in sifting through the trial court record and fixing the potential scope of appellate review. *See* Commentary, Drafting Committee Note, N.C.R. App. R. 10(a). We note that the appellate court must carefully

> examine the *entire record* in reviewing a grant of summary judgment. . . . Because this is so, no preliminary "sifting" of the type contemplated by [Rule 10(a)] need be performed. Also, as previously observed, the potential scope of review is already fixed; it is limited to the two questions of law automatically raised by summary judgment.

Ellis v. Williams, 319 N.C. at 415-16, 355 S.E. 2d at 481 (citations omitted). We are of the opinion that the Court's reasoning in *Ellis* is applicable to Rule 10(d) as well as Rule 10(a). It would be incongruous to require an appellee to list cross-assignments of error when the appellant is not required to list assignments of error. Furthermore, trial courts generally do not specify the grounds for summary judgment. Thus, appellees are generally free to argue on appeal any ground to support the judgment. We shall not limit the scope of review on this appeal merely because the trial court specified the grounds for its decision.

In accordance with the Supreme Court's decision in *Ellis*, we must now determine whether, based upon the record before us, the trial court could have properly concluded that (i) no genuine issue of material fact exists and (ii) defendants are entitled to judgment as a matter of law.

[2] We first consider defendants' arguments concerning the alternate grounds to support the judgment. Defendants first argue that summary judgment was proper because, after voluntarily dismissing their first action in 1984, plaintiffs failed to bring their second action within one year of the dismissal. This argument is without merit. Rule 41(a) of the North Carolina Rules of Civil Procedure provides that, following a voluntary dismissal without prejudice, "a new action based on the same claim *may* be commenced within one year after such dismissal . . . ." (Emphasis added.) This Court has held that Rule 41(a) may extend the general statute of limitation but does not limit the time in which a second action may be brought when the general statute of limitation has not expired. *Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 198 S.E. 2d 741 (1973). Plaintiffs' action is not barred by any statute of limitation; therefore, the failure to reinstitute the action within one year of the prior dismissal does not bar the action.

Defendants next contend that plaintiffs are estopped from claiming an easement over land which they themselves conveyed by warranty deed without reservation. In *Sparks v. Choate*, 22 N.C. App. 62, 205 S.E. 2d 624, *cert. denied*, 285 N.C. 662, 207 S.E. 2d 762 (1974), this Court held that one who conveys land by warranty deed without reservation is thereafter estopped from claiming an easement over the land. In *Sparks*, however, the plaintiff's claim was based upon a reservation in a prior deed. The present case is distinguishable because plaintiffs are claiming an easement by necessity.

An easement by necessity is an easement implied by law under certain circumstances. *See Smith v. Moore*, 254 N.C. 186, 190, 118 S.E. 2d 436, 438 (1961). Such easements are most commonly implied in favor of grantees who have no access to their land except over other lands owned by the grantor or a stranger; the law will imply an easement over the grantor's land in such a situation. *See id.; Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E. 2d 393, 397 (1971). The circumstances of the present case present the converse situation: the grantors' only access to their land is over the land of the grantees.

A majority of jurisdictions will imply an easement over the land of a grantee in favor of a grantor where the conveyance leaves the grantor with no other suitable access to the retained lands. 2 G. Thompson, Real Property § 362 (repl. ed. 1980). The right to such an easement is not waived merely because the land was conveyed by warranty deed. *Id.* at 392. Although our courts have not explicitly recognized a grantor's right to an implied easement by necessity, the existence of such a right is strongly supported by prior case law. In *Blankenship v. Dowtin*, 191 N.C. 790, 133 S.E. 199 (1926), the Court quoted with approval from J. Gould, Gould on Waters § 354 (3d ed. 1900):

> "The general rules relating to severance of tenements are that a grant by the owner of a tenement or part of that tenement, as it is then used and enjoyed, passes to the grantee by implication . . . all those easements which the grantor can convey, which are necessary to the reasonable enjoyment of the granted property . . . and that, *except in the case of ways or easements of necessity*, there is no corresponding implication in favor of the grantor . . . ."

Blankenship, 191 N.C. at 793-94, 133 S.E. at 201 (emphasis added). *See also Goldstein v. Trust Co.*, 241 N.C. 583, 588, 86 S.E. 2d 84, 87-88 (1955) (quoting *Blankenship, supra*). In *Herndon v. R.R.*, 161 N.C. 650, 77 S.E. 683 (1913), the plaintiff had granted a right of way to a railroad which divided the plaintiff's lands. The plaintiff brought suit to enforce his right to an underpass providing access from one side of his property to the other. Although the Court decided the case on other grounds, it noted the merit in plaintiff's claim for an implied easement. *Herndon v. R.R.*, 161 N.C. at 657, 77 S.E. at 686. In a concurring opinion, Chief Justice Clark explicitly recognized the grantor's right to an implied easement by necessity:

> If a railroad splits a farm open, whether it acquires its right of way by condemnation or by conveyance, the owner has a reservation, without express words, from necessity and by implication of law. Such passways are necessary to preserve the proper use and enjoyment of the land. The law presumes that a vendor did not intend to convey a portion of his land in such a way as to deprive himself of full use of the remainder.

Id. at 658, 77 S.E. at 686 (Clark, C.J., concurring).

[3] On the weight of the above-cited authority, we hold that, under the appropriate circumstances, the law of this State will imply an easement by necessity in favor of a grantor. Accordingly, plaintiffs in this case are not estopped to claim such an easement over defendants' lands.

[4] Having established that plaintiffs are not estopped to claim an implied easement by necessity, we also hold that their complaint adequately alleges the two essential elements to support such an easement: (i) the claimed dominant tract and the claimed subservient tract were once held in common ownership that was severed by a conveyance and (ii) the necessity for the easement arose out of the conveyance. *Harris v. Greco*, 69 N.C. App. 739, 745, 318 S.E. 2d 335, 339 (1984). As the party moving for summary judgment, defendants carried the burden to establish the lack of any triable issue of fact and their entitlement to judgment as a matter of law. *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980). Defendants presented no evidence to negate the essential elements of plaintiffs' claim.

The only question remaining for our consideration is whether defendants are entitled to summary judgment on the grounds that plaintiffs' claim is barred under the doctrine of laches. Laches is an affirmative defense that must be pled, and the burden of proof is upon the party who pleads it. *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E. 2d 576, 584 (1976). The defense of laches will bar a claim when the plaintiff's delay in seeking a known remedy or right has resulted in a change of condition which would make it unjust to allow the plaintiff to prosecute the claim. *Id.* Defendants in this case properly raised the defense in their answer. They contend that plaintiffs' claim is barred because the conveyance giving rise to the claim occurred in 1974 and, since that time, defendants have begun to develop their land as a residential subdivision.

[5] Plaintiffs contend that laches may not be asserted as a bar to a claim for an easement by necessity. We do not accept this contention. Easements by necessity cannot be lost through mere misuse over a period of time. 2 G. Thompson, Real Property § 368, at 429 (repl. ed. 1980). The doctrine of laches, however, is not based upon mere passage of time; it will not bar a claim unless the delay is (i) unreasonable and (ii) injurious or prejudicial to the party asserting the defense. *Taylor v. City of Raleigh*, 290 N.C. at 622-23, 227 S.E. 2d at 584-85. Whether a delay constitutes laches depends upon the facts and circumstances of each case. *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938). Therefore, we decline to hold that laches may never bar a claim for an easement by necessity. Nevertheless, we do hold that defendants in this case have not met their burden to prove that plaintiffs' claim is barred as a matter of law.

[6] We first note that, although defendants bore the burden of proof both on their motion for summary judgment and on the defense of laches, defendants' only proof appearing of record is the affidavit of their attorney concerning plaintiffs' prior action. The trial court made findings of fact concerning the extent to which defendants have developed their land and certain other matters which are not supported by evidence in the record. Defendants argue in their brief that these findings should be taken as true because they are based on "uncontroverted statements made to the court in argument on summary judgment." This argument is completely without merit. Facts required to support sum-

mary judgment must be established by pleadings, depositions, answers to interrogatories, admissions or affidavits. Rule 56(c), N.C. Rules Civ. Proc. As we have already stated, findings of fact to support summary judgment will be disregarded on appeal if not supported by evidence in the record. Defendants cannot cure their failure to submit appropriate proof by requesting findings based upon their arguments to the trial court.

[7] In opposition to defendants' motion for summary judgment, plaintiffs submitted the affidavit of plaintiff Edward Cieszko. Mr. Cieszko averred that plaintiffs conveyed the lands in 1974 pursuant to the request of defendants and their predecessors to straighten the boundary between the properties; that the deeds were prepared by the grantees; that defendants began developing their property in 1981, at which time a ditch was dug across the path of the easement; and that plaintiffs did not realize that their easement had been cut off until 1981. In determining whether a delay constitutes laches, the court must consider whether the claimant knew of the existence of the grounds for the claim and whether the defendant had knowledge of the claim. *McRorie v. Query*, 32 N.C. App. 311, 323, 232 S.E. 2d 312, 320, *disc. rev. denied*, 292 N.C. 641, 235 S.E. 2d 62 (1977). Here, plaintiffs have offered evidence to show that they did not know of the grounds for their claim until 1981. Defendants had notice of plaintiffs' claim at least as early as 1983, when plaintiffs filed their first action. Plaintiffs' evidence also shows that defendants did not begin developing their land until 1981. Thus, the change of conditions required to support a defense of laches did not exist until that time, and any prejudice to defendants must have occurred, if at all, between 1981 and 1983.

Furthermore, Mr. Cieszko averred that the path of the easement is located on the center of a street shown on the map of defendants' subdivision. Therefore, plaintiffs may be able to obtain access to their land with very little disruption of defendants' development. Under these circumstances, issues of fact remain as to whether plaintiffs' delay in bringing this action was unreasonable and whether defendants were prejudiced by the delay. Accordingly, the trial court erred in granting defendants' motion for summary judgment.

For the foregoing reasons, the trial court's order of summary judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges EAGLES and SMITH concur.

CEOLA LOCKLEAR v. HERMAN LOCKLEAR

No. 8816DC295

(Filed 20 December 1988)

1. **Divorce and Alimony § 30— equitable distribution—valuation of closely-held corporation**

The trial court erred in an equitable distribution order in its valuation of defendant's closely-held corporation, Lumbee Trucking, by failing to place a value on the corporation's goodwill and failing to find a value for the numerous pieces of equipment for the operation of the trucking concern. A mere recitation of the factors the trial court considered in its valuation of the corporation is not sufficient; the court must also indicate the value it attaches to each of the enumerated factors.

2. **Divorce and Alimony § 30— equitable distribution—marital property—stipulation**

The trial court erred in an equitable distribution order in its classification of a 3.9 acre parcel of land as marital property where plaintiff's testimony indicated that the land was a gift to defendant from his mother, plaintiff claims that the parties stipulated that the land was marital property, and there was no evidence in the record of a stipulation or of the required inquiries by the court where the stipulation is not reduced to writing.

3. **Divorce and Alimony § 30— equitable distribution—home improvements—fire insurance proceeds—marital property**

The trial court did not err in an equitable distribution order by classifying home improvements, and thus certain fire insurance proceeds, as marital property where the parties expended marital funds in making the improvements, consequently depleting the marital estate.

4. **Divorce and Alimony § 30— equitable distribution—uneven division of property—*insufficient findings and conclusions***

The trial court's findings of fact and conclusions of law in an equitable distribution order did not support an unequal division of the marital property where the order explicitly stated that the court considered only one factor in determining how the marital assets should be divided. When a party presents

evidence which would allow the trial court to determine that an equal distribution of the marital assets would be inequitable, the trial court must then consider all of the distributional factors listed in N.C.G.S. § 50-20(c).

APPEAL by defendant from *Gardner (John S.), Judge.* Judgment entered 19 August 1987 in District Court, ROBESON County. Heard in the Court of Appeals 3 October 1988.

Plaintiff Ceola Locklear and defendant Herman Locklear were married on 28 December 1958, separated on 2 January 1984 and were divorced on 19 August 1986 based on more than one year's separation.

Throughout the marriage the parties lived in a house owned by defendant's parents. The parties made substantial improvements to the house while they lived there. The parties separated and less than three months later a fire totally destroyed the house. Two insurance policies provided coverage on the house and its contents. The trial court ruled that plaintiff has an equitable interest in the insurance proceeds.

Additionally, defendant is the sole shareholder of a closely held corporation, Lumbee Trucking Company. The company's largest client is Campbell Soup Company. At trial defendant indicated that Campbell Soup's account constitutes approximately ninety-five percent of the corporation's business. Over defendant's objection the court valued the corporation at $237,390. The trial court's equitable distribution order awarded an unequal distribution of marital property. Defendant appeals.

Fred L. Musselwhite for plaintiff-appellee.

Douglas R. Gill; Diehl & Gibson, by Phillip Diehl, for defendant-appellant.

EAGLES, Judge.

Defendant presents four assignments of error. Defendant argues that the trial court erred in classifying certain property as marital property, that the trial court erred in valuing a closely held corporation, and that the trial court's findings of fact and conclusions of law are not adequate to support its unequal distribution of marital property. We hold that the trial court's order is erroneous and, accordingly, we vacate and remand.

[1] Defendant first assigns as error the trial court's valuation of Lumbee Trucking. Primarily, he argues that the court's findings of fact were too vague and conclusory to permit appellate review. We agree.

As this Court observed in *Poore v. Poore*, 75 N.C. App. 414, 331 S.E. 2d 266, *disc. rev. denied*, 314 N.C. 543, 335 S.E. 2d 316 (1985), there are many different ways to value an interest in an ongoing business. Generally so long as the trial court "reasonably approximated the net value" of the business interest, we will not disturb the trial court's judgment. *Id.* at 419, 331 S.E. 2d at 270. However, it is imperative that the trial court "make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied." *Id.* at 422, 331 S.E. 2d at 272. *Poore* involved a professional partnership but this reasoning is also applicable to the valuation of closely held corporations. *Patton v. Patton*, 318 N.C. 404, 348 S.E. 2d 593 (1986).

In determining the value of Lumbee Trucking the trial court stated that it

> took into consideration the value that each party placed on the corporation and excluded the 3.9 acre parcel of land and the metal building in that said property is in the joint names of the parties and is not a corporate asset, deducted corporate debts to Smith International, Liberty Manufacturing, Southern National Bank and Bill Farring, Attorney as corporate debts instead of marital debts and added back in the various marital debts paid by Lumbee Trucking Company as hereinafter set out; took into consideration the corporate assets including numerous pieces of equipment for the operation of the trucking concern, the years that the corporation has been trucking for Campbell Soup and the substantial income of said corporation.

Defendant's testimony demonstrated how important the Campbell Soup Company contract was to the financial well-being of Lumbee Trucking. This particular contract and the type of business relationship Lumbee Trucking and defendant had with Campbell Soup is the essence of corporate goodwill. The trial

court properly recognized its existence, but failed to place a value on the corporation's goodwill. This was error. *Poore, supra; see also Weaver v. Weaver,* 72 N.C. App. 409, 324 S.E. 2d 915 (1985).

Further, the trial court did not find a value for the "numerous pieces of equipment for the operation of the trucking concern." A mere recitation of the factors the trial court considered in its valuation of the corporation is not sufficient; the trial court must also indicate the value it attaches to each of the enumerated factors. *Patton* at 407, 348 S.E. 2d at 595.

[2] Defendant next assigns as error the trial court's classification of a 3.9 acre parcel of land as marital property. Defendant claims that this property was a gift to him from his mother and is, therefore, separate property under G.S. 50-20(b)(2). Plaintiff claims that the parties stipulated that the land was marital property. In the record before us we find no evidence of a stipulation.

In *McIntosh v. McIntosh,* 74 N.C. App. 554, 556, 328 S.E. 2d 600, 602 (1985), we noted that agreements between the parties "should be reduced to writing, duly executed and acknowledged." We further stated that where the stipulations were not reduced to writing, the record must affirmatively demonstrate that the trial court read the stipulation's terms to the parties and that they understood the effects of the agreement. *Id.* No evidence of the required inquiries appears in this record. On the other hand, plaintiff's own testimony indicated that the land was a gift to her husband from his mother. Accordingly, we hold that the trial court's classification of the 3.9 acres as marital property, on this record, was error.

[3] Defendant's third assignment of error questions the classification of certain insurance proceeds as marital property. The question presented here is whether the parties have a marital property interest in the premises owned by defendant's parents arising from the improvements in the property accomplished by the parties during their marriage. We hold that they do.

The uncontradicted evidence shows that sometime in 1959 the parties moved into a house owned by defendant's parents. The parties did not sign a lease nor did they pay rent. With the acquiescence of defendant's parents the parties made substantial

improvements to the house including a swimming pool, a carport, and a significant increase in the size of the house. In fact, the size of the house was more than tripled in living space. All of the improvements occurred prior to the parties' separation and were funded with marital funds. Defendant performed much of the work himself.

Two homeowners' insurance policies covered the house and the improvements. One policy was with Quincy Mutual Fire Insurance Company and the other was with the North Carolina Farm Bureau Mutual Insurance Company. The Quincy policy paid their share of the proceeds to Herman Locklear and his mother; Addie Mae Locklear, while Farm Bureau paid their share of the proceeds to Herman and Ceola Locklear. On 21 March 1984 a fire completely destroyed the house.

Immediately after the fire the two insurance companies negotiated a settlement with defendant as to the total damages suffered as a result of the fire. The settlement established that the value of the household contents was $32,849.64. Further, the insurance companies paid defendant an additional living expense of $2,250.09 and paid $75,000 for loss of the house. The evidence shows that the two companies split the loss pro rata according to their policy limits. Defendant received a check from Quincy in the amount of $60,455.34 in favor of defendant Herman Locklear and Addie Mae Locklear, his mother, representing fifty-five percent of the total claim less a hundred dollar deductible. Farm Bureau issued a check to Herman and Ceola Locklear, the parties here, for $49,545.29 representing the remaining forty-five percent of the claim.

The trial court found that the proceeds for the additional living expenses were defendant's separate property. The court also found that the personal property in the house was marital property valued at $32,849.64. The court placed the value of the house at the time of separation at $75,000.00. Finally, the court stated "[t]hat plaintiff has an equitable interest in the insurance proceeds from the house and the Court finds the parties' interest in said house to be $50,000.00, together with $7900.00 for the pool, for a total of $57,900.00 and plaintiff is entitled an [sic] her equitable interest in the sum of $28,950.00."

Defendant argues that since Addie Mae Locklear was the owner of the house the insurance proceeds belong solely to her and cannot be classified as marital property. We disagree.

While our research reveals no North Carolina equitable distribution case dealing with active appreciation of non-owned real property, we find the Supreme Court's opinion in *Johnson v. Johnson*, 317 N.C. 437, 346 S.E. 2d 430 (1986), instructive. The court addressed the problem of distributing proceeds representing a settlement for personal injuries sustained by the husband in an accident which occurred before the parties' separation. The proceeds were received by the husband after the parties separated. The court distinguished between compensation for economic loss to the marital unit—lost wages, medical and hospital expenses—and compensation for non-economic loss—personal suffering and disability. *Id.* at 448, 346 S.E. 2d at 436; *see also Dunlap v. Dunlap*, 85 N.C. App. 324, 354 S.E. 2d 734 (1987). The court further prescribed that "[o]nly after determining the nature of the asset received by one spouse *after separation*, yet claimed by the other to be 'marital property,' may a classification be made of that asset as between 'marital' or 'separate' property." (Emphasis in original.) *Johnson* at 452, 346 S.E. 2d at 439. We adopt this approach in reviewing the instant case.

Here the trial court found that the insurance proceeds represented four separate and distinct items: additional living expenses, personal property in the home, the house, and the improvements on the house. Defendant excepts only to the trial court's classification of the home improvements as marital property.

We note that the parties expended marital funds in making the home improvements. Consequently, each time the parties improved the property the marital estate was depleted. As in *Johnson* the insurance proceeds here represent an economic loss to the marital estate—the value of the improvements made to the marital residence.

The Equitable Distribution Act requires that each partner in a marriage receive their fair share of the property acquired during the marriage. *See White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). Furthermore, this court stated in *Wade v. Wade*, 72 N.C. App. 372, 379, 325 S.E. 2d 260, 267, *disc. rev. den.*, 313 N.C.

612, 330 S.E. 2d 616 (1985), that "G.S. 50-20 is a remedial statute enacted to ensure a fairer distribution of marital assets than under common law rules" and is to be construed broadly. Since the marriage partnership spent great sums of time and money, at the expense of building their own estate, in making the improvements, we view the improvements as an asset acquired by the parties during the marriage. Accordingly, as between these parties, plaintiff is entitled to her equitable share of that asset. *But see Abernathy v. Abernathy,* 288 S.C. 322, 342 S.E. 2d 595 (1986) (equitable distribution not intended to include marital improvements of non-owned home). We overrule this assignment of error.

[4] In defendant's final assignment of error he argues that the trial court's findings of fact and conclusions of law do not support the trial court's order providing for an unequal division of the marital property. We agree.

Our Supreme Court observed in *Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E. 2d 595 (1988), that:

> In *White v. White,* 312 N.C. 770, 324 S.E. 2d 829 (1985), this Court concluded that an equal division of marital property is mandatory unless the trial court determines that an equal division would be inequitable. *Id.* at 776, 324 S.E. 2d at 832-33. The party seeking an unequal division bears the burden of showing, by a preponderance of evidence, that an equal division would not be equitable. *Id.* at 776, 324 S.E. 2d at 832. "Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally." *Id.* at 776, 324 S.E. 2d at 832-33. When, however, evidence is presented from which a reasonable finder of fact could determine that an equal division would be inequitable, the trial court is required to consider the factors set forth in N.C.G.S. [section] 50-20(c), "but guided always by the public policy expressed . . . [in the Act] favoring an equal division." *Id.* at 777, 324 S.E. 2d at 833. The trial court then must make findings and conclusions which support its division of marital property.

Armstrong at 404, 368 S.E. 2d at 599.

From *Armstrong,* we conclude that when a party presents evidence which would allow the trial court to determine that an

equal distribution of the marital assets would be inequitable, the trial court must then consider all of the distributional factors listed in G.S. 50-20(c), *Smith v. Smith,* 314 N.C. 80, 331 S.E. 2d 682 (1985), and must make sufficient findings as to each statutory factor on which evidence was offered. *Armstrong* at 405, 368 S.E. 2d at 600. Here the trial court's order explicitly states that it considered only one factor in determining how the marital assets should be divided. Because the trial court must consider every statutory factor, this was error.

For the foregoing reasons we vacate the trial court's order of equitable distribution and remand for further proceedings consistent with this opinion.

Vacated and remanded.

Judges PHILLIPS and PARKER concur.

RANDY L. HARWOOD v. AARON J. JOHNSON, SECRETARY OF THE NORTH CAROLINA DEPT. OF CORRECTION, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; BRUCE B. BRIGGS, CHAIRMAN OF THE NORTH CAROLINA PAROLE COMMISSION, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; LOUIS R. COLOMBO, WANDA J. GARRETT, JEFFREY T. LEDBETTER, AND A. LEON STANBACK, JR., MEMBERS OF THE NORTH CAROLINA PAROLE COMMISSION, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; GWEN O. WILLIAMS, PAROLE CASE ANALYST, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES; AND JAMES F. BAME, SUPERINTENDENT OF THE ROWAN COUNTY PRISON UNIT, IN HIS OFFICIAL CAPACITY ONLY

No. 8810SC276

(Filed 20 December 1988)

1. **State § 4.2— negligence and false imprisonment—public officials—sovereign immunity**

There could be no monetary award for negligence and false imprisonment against the Secretary of the Department of Correction, the chairman and members of the Parole Commission, a parole case analyst, and the Superintendent of the Rowan County Prison Unit in their official capacities because the award would in essence be against the State, and the State has not consented to such a suit.

2. **Public Officers § 9— parole case analyst—public employee—liability for negligence, false imprisonment and willful conduct**

A parole case analyst is a public employee rather than a public official and thus may be individually liable for negligence and false imprisonment. Furthermore, the analyst may be liable for willful and deliberate conduct regardless of her status as an employee or an official.

3. Public Officers § 9— public officials—immunity from individual liability

The Secretary of the Department of Correction and the chairman and members of the Parole Commission are public officials and are immune from individual liability for allegedly negligent acts which are within the scope of their authority.

4. Constitutional Law § 17— civil rights action—insufficiency of complaint

The trial court properly dismissed plaintiff's complaint in a 42 U.S.C. sec. 1983 action against the Secretary of the Department of Correction, the chairman and members of the Parole Commission, and the superintendent of his prison unit based upon failure to determine plaintiff's eligibility for early release on parole, since plaintiff failed to show that defendants' actions which allegedly deprived him of a constitutional right constituted more than mere negligence. Furthermore, plaintiff's section 1983 complaint against a parole case analyst based on her alleged willful and deliberate misrepresentation to him of the Parole Commission's actions regarding his parole was properly dismissed because plaintiff failed to show deprivation of a constitutional right through actions of the case analyst.

APPEAL by plaintiff from *Stephens (Donald W.), Judge.* Judgment entered 7 January 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 27 September 1988.

In this case plaintiff Randy Harwood seeks declaratory relief and damages for false imprisonment, negligence, and violation of his state and federal constitutional rights under 42 U.S.C. section 1983. On 27 August 1986 plaintiff, then an inmate in the custody of the North Carolina Department of Correction, petitioned for a writ of habeas corpus in the Superior Court of Rowan County. Plaintiff alleged he was entitled to be considered for release on parole under G.S. 15A-1371(f) on 12 June 1986, and that the Parole Commission had not met to determine his eligibility for early release. On 22 October 1986 the court found the Parole Commission failed to follow the mandates of the statute and that plaintiff's incarceration after 13 June 1986 was unlawful. The trial court ordered the Parole Commission to expedite plaintiff's release on parole. Plaintiff was released from custody on 21 November 1986.

Here, the plaintiff is suing the Secretary of the Department of Correction, the Chairman of the Parole Commission, the members of the Parole Commission, and a parole case analyst, personally and in their official capacities. Also named as a defendant is the Superintendent of the Rowan County Prison Unit, in his official capacity only. Defendants filed a motion to dismiss on

the grounds that the court lacked subject matter jurisdiction, lacked personal jurisdiction, that the complaint failed to state a claim upon which relief can be granted, that the action was barred by sovereign immunity and the Eleventh Amendment, and that the defendants are entitled to quasi-judicial immunity. Defendants' motion to dismiss was granted and plaintiff appeals.

North Carolina Prisoner Legal Services, by Michael S. Hamden, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jacob L. Safron, for defendant-appellees.

EAGLES, Judge.

Plaintiff's sole assignment of error is that the trial court erred in granting defendants' motion to dismiss. For the reasons stated below, we affirm in part and reverse in part.

The trial court's order did not state the basis on which it granted defendants' motion to dismiss. The parties in their briefs have treated the issue as whether plaintiff's complaint states a claim upon which relief can be granted. For the purpose of passing upon a motion to dismiss for failure to state a claim upon which relief can be granted, G.S. 1A-1, Rule 12(b)(6), the factual allegations of the complaint are deemed admitted. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Where 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, dismissal for failure to state a claim upon which relief can be granted is proper. *Alamance County v. N.C. Dept. of Human Resources*, 58 N.C. App. 748, 750, 294 S.E. 2d 377, 378 (1982).

Plaintiff has alleged both a federal claim for relief and state claims for relief. We will discuss those claims separately.

I

State Law Claims
(Negligence and False Imprisonment)

[1] Plaintiff has alleged he was damaged by the defendants' negligence and that he was falsely imprisoned. These are both grounded in our state's common law. Defendants claim the plaintiff is entitled to no relief from them in this action because they

are immune from suit, both in their official capacities and individually.

The doctrine of sovereign immunity—that the State cannot be sued in its own courts, or in any other, without its consent—is firmly established in the common law of North Carolina. *Orange County v. Heath*, 282 N.C. 292, 192 S.E. 2d 308 (1972); *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E. 2d 239 (1971); *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E. 2d 18 (1960); *Schloss v. Highway Commission*, 230 N.C. 489, 53 S.E. 2d 517 (1949). Our Supreme Court has also established that when an action is brought against individual state officers or employees in their official capacities, the action is one against the State for the purposes of applying the doctrine of sovereign immunity. *Insurance Co. v. Unemployment Compensation Comm.*, 217 N.C. 495, 8 S.E. 2d 619 (1940). We hold here that there can be no monetary award against any named defendants in his or her official capacity, because the award would in essence be against the State and the State has not consented to suit in this forum. *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 371 S.E. 2d 503 (1988). *See generally Watson v. N.C. Dept. of Correction*, 47 N.C. App. 718, 268 S.E. 2d 546 (1980) (action brought in Industrial Commission under Tort Claims Act by inmates' executors against department for negligence of its employees); *Ivey v. N.C. Prison Dept.*, 252 N.C. 615, 114 S.E. 2d 812 (1960) (wrongful death action brought in Industrial Commission under Tort Claims Act for death of inmate caused by prison employee's negligence). Therefore, dismissal of plaintiff's state law claims for monetary damages against all defendants in their official capacities was correct and we affirm that part of the trial court's order.

Defendants other than Superintendent Bame are also sued individually. Our courts have made the distinction between public employees and public officers or officials in determining the question of personal liability for negligent acts. "[A] 'public official' is immune from liability for 'mere negligence' in the performance of [his] duties, but he is not shielded from liability if his alleged actions were 'corrupt or malicious' [or] if 'he acted outside of and beyond the scope of his duties.'" *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E. 2d 39, 43 (1985). However, "[a]n employee of a governmental agency . . . is personally liable for his negligence in the performance of his duties proximately caus-

ing injury" to another. *Givens v. Sellars*, 273 N.C. 44, 49, 159 S.E. 2d 530, 534-35 (1968).

[2] Plaintiff's only allegations that rise above mere negligence are directed at the parole case analyst. Plaintiff's allegations against all other defendants allege negligence only. Because plaintiff has alleged that the parole case analyst willfully and deliberately denied his rights, she may be individually liable for those actions, regardless of her status as an employee or official. Further, the claim of negligence on the part of the parole case analyst should not have been dismissed. There is no statutory provision for the creation of the analyst's position, and the record is devoid of any sovereign power she exercises. Therefore, the analyst is a public employee as opposed to an official. Accordingly, the trial court's order dismissing plaintiff's claim against the parole case analyst on grounds of negligence, willful and deliberate conduct, and false imprisonment is reversed.

[3] The individual liability of the other defendants depends upon whether they are public officers or officials rather than employees.

> To constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty. . . . An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power.

State v. Hord, 264 N.C. 149, 155, 141 S.E. 2d 241, 245 (1965).

Defendant Johnson was duly appointed by the Governor to serve as Secretary of the North Carolina Department of Correction. The Secretary is the head of the Department. G.S. 143B-263. The Department is vested with the duty to provide "custody, supervision, and treatment" of criminal offenders. G.S. 143B-261. Clearly Johnson, as Secretary of the Department of Correction, exercises some portion of the sovereign power of the State. Accordingly, defendant Johnson is a public official. We hold that the complaint alleging mere negligence fails to state a claim upon which relief can be granted against Johnson.

Defendant Briggs was the Chairman of the North Carolina Parole Commission. Defendants Colombo, Garrett, Ledbetter, and

Stanback were members of the North Carolina Parole Commission. All were appointed by the Governor. G.S. 143B-267. The Parole Commission has full authority to release inmates and to adopt rules and regulations for determining suitability for parole. G.S. 143B-266. Like the Department Secretary, the members and chairman of the Parole Commission exercise some portion of the sovereign power of the State. Accordingly, they too are public officials, immune from suit for allegedly negligent acts which are within the scope of their authority. We hold plaintiff has failed to state a claim on grounds of negligence and false imprisonment upon which relief can be granted against the chairman and members of the Parole Commission.

II

Federal Law Claims

(42 U.S.C. Section 1983)

[4] Under 42 U.S.C. section 1983, a plaintiff can recover for injuries proximately caused by persons acting under color of state law when their actions deprive the plaintiff of any rights, privileges, or immunities secured by the United States Constitution or other federal law. 42 U.S.C. section 1983 (1979). Section 1983 creates no substantive rights; it only provides for access to the courts to vindicate those rights already guaranteed by the Constitution or other federal statutes. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 61 L.Ed. 2d 433, 442, 99 S.Ct. 2689 (1979). Although this is a federally created cause of action, state courts may exercise concurrent subject matter jurisdiction over claims arising under section 1983. *Maine v. Thiboutot*, 448 U.S. 1, 3 n. 1, 65 L.Ed. 2d 555, 100 S.Ct. 2502 (1980); *Snuggs v. Stanly County Dept. of Public Health*, 310 N.C. 739, 314 S.E. 2d 528 (1984). Here plaintiff alleges that by failing to review his case for parole eligibility the defendants (the Secretary of the Department of Correction and the chairman and members of the Parole Commission) abridged his constitutional rights to due process. Plaintiff also alleges the parole case analyst willfully and deliberately misrepresented to him the Commission's actions regarding his parole. It is unclear on what grounds plaintiff is alleging the Superintendent of his prison unit violated his due process rights; it appears to be based on his false imprisonment claim.

To prevail in a 1983 action the plaintiff must show he was deprived of a life, liberty or property interest which was protected by the Constitution or federal law, and that the defendants were responsible for that deprivation through actions consisting of something more than "mere negligence." *Davidson v. Cannon*, 474 U.S. 344, 88 L.Ed. 2d 677, 106 S.Ct. 668 (1986); *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed. 2d 662, 106 S.Ct. 662 (1986). Here, plaintiff has failed to allege that defendants' (other than the parole case analyst) actions, which allegedly deprived him of a constitutionally protected right, constituted more than mere negligence. For this reason, plaintiff's claim under section 1983 against the Secretary of the Department, the Chairman and Members of the Parole Commission, and the Superintendent of his prison unit was properly dismissed. The plaintiff has alleged that the parole case analyst willfully and deliberately misrepresented to him the actions taken by the Parole Commission. The actions of the parole case analyst did not deprive plaintiff of a constitutional right. The case analyst had no authority to grant or deny parole; she was merely the person through whom the Commission communicated to prisoners. Even taking plaintiff's allegations as true, as we must on a Rule 12(b)(6) motion, he has not shown deprivation of a constitutional right through the actions of the parole case analyst. Therefore, plaintiff's section 1983 claim against the analyst, Ms. Williams, was properly dismissed.

For the reasons discussed, the portion of the trial court's order which dismissed the state law claims against the parole case analyst Gwen Williams is reversed and remanded. In all other respects the order of the trial court is affirmed.

Affirmed in part; reversed and remanded in part.

Judges PARKER and PHILLIPS concur.

W & J RIVES, INC., PLAINTIFF v. KEMPER INSURANCE GROUP D/B/A LUMBERMENS MUTUAL CASUALTY COMPANY, AND AETNA CASUALTY AND SURETY COMPANY, DEFENDANTS

No. 8818SC464

(Filed 20 December 1988)

1. Insurance §§ 143, 6.1— property insurance—excess coverage exclusion—meaning of exclusionary clause

An exclusionary clause in an insurance policy for property damage did not apply where plaintiff Rives provided transportation of unfinished materials and finished garments for one of its largest customers, Polo Fashion, Inc.; Rives purchased from an insurance agency a package of insurance to insure the Polo goods while in Rives' possession; Kemper was the underwriter for the coverage; Aetna issued an excess umbrella policy to Rives as part of a renewed insurance package; Rives' trailer and an entire load of Polo shirts were stolen; Kemper paid only part of the claim; and Aetna refused the claim under an exclusionary clause for property "to the extent that the insured has agreed to provide insurance therefor," claiming that the policy did not apply if Rives had contracted with Kemper to provide coverage. Rives had not agreed with Polo at the time of the theft to provide insurance for the Polo materials and goods; thus, it would seem that a reasonable person in Rives' position would have understood that the Polo goods were covered by Aetna's policy.

2. Insurance § 143— property insurance—coverage distinguished from liability

The trial court did not err in an action for a declaratory judgment against two insurance companies by granting summary judgment against Aetna on a claim that Aetna was to provide excess coverage and a defense. Coverage under an insurance policy and liability to pay are not synonymous terms; although Aetna may ultimately have no liability to pay any excess damages, its policy does include within its scope the type of potential damages claimed by Polo.

3. Insurance § 143— excess insurance—duty to defend—exhaustion of underlying liability

An excess insurer had a duty to defend, despite its contention that a section of the policy clearly stated that the duty to defend arose only after the exhaustion of the underlying limit of liability by "payment of claims," because the duty to defend would otherwise arise only after the need for defense was past.

4. Declaratory Judgment Act § 4.3— insurance—clarification of rights of parties—action proper

A declaratory judgment action by an insured to have the rights and relations between the insured and insurers clarified was proper under N.C.G.S. § 1-254, despite the insurer's argument that a provision of the policy made the action premature.

W & J Rives, Inc. v. Kemper Insurance Group

APPEAL by defendant from *Collier, Judge.* Order entered 3 December 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 November 1988.

Plaintiff (Rives) is a company primarily engaged in cutting, sewing and processing garments to the specifications of its customers using the customers' materials, patterns and labels. Polo Fashion, Inc. (Polo) is one of Rives' largest customers.

In 1982, because of problems associated with Polo's use of common carriers, Rives agreed to undertake the transportation of the unfinished materials from, and the finished garments to Polo. Rives purchased from Jones & Peacock, Inc. (Jones & Peacock), an insurance agency, a package of insurance to insure the Polo goods while in Rives' possession. Kemper Insurance Group (Kemper) was the underwriter for the policy coverage and Kemper was advised, according to Jones & Peacock, that the insured materials and goods were not owned by Rives. However, the initial coverage was for "owned goods" in the amount of $140,000. According to Jones & Peacock, Kemper decided this was the best way to insure the items, even though they were not owned by Rives.

In 1984, because of the purchase of a larger trailer and rig, Rives contacted Jones & Peacock about increasing the amount of policy coverage. Kemper increased the coverage to $300,000, again, with the alleged knowledge that the items insured were bailed, not owned.

Rives decided to "back haul" unrelated items after depositing the finished goods with Polo. Kemper added to the existing policy, coverage for these "non-owned" goods in the amount of $140,000.

On 12 April 1985, the Rives rig and a whole load of finished Polo shirts were stolen. Rives made a claim upon Kemper for the initial estimate of value of the shirts which was $250,000. Kemper honored the claim, but only paid $140,000 asserting that the shirts were "non-owned" goods.

On 3 November 1986, Polo filed an action against Rives in New Jersey for the balance of the damages for the stolen shirts. Polo sued for $184,250 above the $140,000 paid by Kemper.

Aetna Casualty and Surety Company (Aetna), through Jones & Peacock, and as part of the renewed insurance package sold to Rives in September of 1984, issued an excess umbrella policy to Rives. This policy was in effect when the Polo shirts were stolen. Aetna notified Rives that its excess policy did not cover the loss of the Polo shirts because they were bailed goods and excluded under the policy. Aetna further refused to defend Polo's action against Rives.

Rives filed a complaint against Kemper and Aetna seeking, *inter alia*, a declaratory judgment that Kemper is liable to provide coverage to the extent of $300,000 and a defense to the Polo action. Rives also claimed that Aetna is to provide excess coverage to the extent of $5,000,000 and also provide a defense.

Rives included in its complaint a motion for partial summary judgment upon its declaratory judgment claims. On 1 December 1987, the trial court granted Rives' motion against Aetna, but denied its motion against Kemper. From that order granting Rives' motion, Aetna appeals.

Wyatt, Early, Harris, Wheeler & Hauser, by William E. Wheeler and Frederick G. Sawyer, for plaintiff appellee.

Smith, Helms, Mulliss & Moore, by J. Donald Cowan, Jr. and Diane P. Bishop, for defendant appellant.

ARNOLD, Judge.

[1] Aetna first assigns as error the entering of summary judgment by the trial court because Polo's claim falls within an exclusion to the coverage provided by the Aetna policy.

"Coverage" under the policy issued by Aetna to Rives reads as follows:

> 2.1 COVERAGE. The company will pay on behalf of the insured the ultimate net loss in excess of the applicable underlying limit which the insured shall become legally obligated to pay as damages because of
>
> A. Personal Injury.
>
> B. Property Damage, or

C. Advertising Offense

to which this policy applies, caused by an occurrence anywhere in the world, ...

This coverage section is broad and Aetna narrows it with several exclusions.

The exclusion claimed by Aetna to be applicable to Polo's claim is

2.2 EXCLUSIONS. This policy does not apply:

* * * *

(e) to property damage

(1) to any property rented to, used or occupied by or in the care, custody or control of the insured.

(i) to the extent that the insured has agreed to provide insurance therefor; . . . .

Aetna argues that the language "that the insured has agreed to provide insurance therefor" means that if Rives has agreed with Kemper to contract for insurance, then the Aetna policy does not apply. Rives claims, *inter alia*, that this same language means that for the exclusion to apply, Rives must have agreed with Polo to provide insurance which Rives never did.

The basic principle of insurance law is that policies are to be given a reasonable interpretation. *Akzona Inc. v. Am. Credit Indem. Co. of New York*, 71 N.C. App. 498, 322 S.E. 2d 623 (1984). Further, an insurance contract should be construed as a reasonable person in the position of the insured would have understood it. If the language used in the policy is reasonably susceptible to different constructions, it must be given the construction most favorable to the insured. *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978).

Rives originally negotiated with Jones & Peacock to obtain insurance for the items Rives was transporting for Polo. On 1 September 1984, as a part of the renewal of the insurance package, Rives purchased the excess policy from Aetna. It would be difficult to maintain that Rives did not intend for the excess coverage to apply to the goods for which the insurance was pur-

chased. Aetna claims, however, that the Polo goods are excluded focusing on the "agrees to insure" language of § 2.2(e)(1)(i).

The purpose of an exclusionary clause in an insurance contract is to limit the liability of the insurance company. *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 313 S.E. 2d 856, *rev. denied*, 311 N.C. 306, 317 S.E. 2d 682 (1984). Such clauses are not favored by the courts and will be construed against the insurance carrier and in favor of coverage for the insured. *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E. 2d 775 (1984).

The record here shows that Rives began transporting Polo's materials and goods as an ancillary undertaking to its primary business of processing garments. Like any prudent business, Rives sought insurance for these items it was hauling; this was not to protect Polo, although that was the effect, but to protect itself from liability. Rives contacted Jones & Peacock about purchasing insurance for the Polo materials and was sold a package of insurance. In September of 1984, as part of the renewal of that package insurance, Rives purchased the Aetna policy.

Rives had not agreed with Polo, at the time of the theft, to provide insurance for the Polo materials and goods. Thus it would seem that a reasonable person in the position of Rives would have understood that the Polo goods were covered by Aetna's policy. The exclusion clause, therefore, does not apply to the Polo claim.

[2] Aetna next contends that even if the damages sought by Polo are not excluded under the policy, coverage cannot be determined until an adjudication or settlement of Polo's claims against Rives, and issues of fact regarding coverage by Kemper's policy, are resolved.

Coverage under an insurance policy and liability to pay are not synonymous terms. The trial court did not order that Aetna had any liability to pay excess damages. The court simply stated that the Aetna policy covered the claim filed by Polo against Rives.

Coverage is defined as "protection by an insurance policy; an inclusion within the scope of a protective or beneficial plan." Webster's Third New International Dictionary (1968). Although Aetna may ultimately have no liability to pay any excess dam-

ages, its policy does include within its scope the type of potential damages claimed by Polo. Aetna's argument, carried to its logical conclusion, would have coverage under its policy determined only after a final adjudication of the insured's liability.

[3] Aetna claims that even if the damages sought by Polo are not excluded by the policy, Aetna has no duty to defend until Kemper actually pays the amount it is adjudged or settled that Kemper must pay.

Section 2.3 of Aetna policy reads as follows:

> (a) The company shall defend any suit seeking damages which are not payable on behalf of the insured under the terms of the policies of Underlying Insurance described in Section 1 or any other available insurance
>
> (1) because such damages are not covered thereunder, or
>
> (2) because of exhaustion of an underlying limit of liability by payment of claims.

Aetna argues that this section clearly states that the duty to defend arises only after the exhaustion of the underlying limit of liability "by payment of claims." It contends that this is the only logical interpretation when read with § 6.3 of the contract, which states:

> (b) Claim or Suit. When in the judgment of the company an occurrence may involve damages in excess of the applicable underlying limit, the company may elect at any time to participate with the insured and the underlying insurers in the investigation, settlement and defense of all claims and suits in connection therewith. In such event the insured and the company shall cooperate fully.

We read § 6.3(b) as giving Aetna the right to enter into a defense of Rives before it is apparent that there may be excess liability.

If this Court were to accept Aetna's argument, then the duty to defend under this contract would arise only after Rives' need for defense was past.

Under a liability type contract, an insurance company contracts to do two things: first, it contracts to pay, and secondly it

contracts to defend. *Insurance Co. v. Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513 (1966).

> It will be observed that the first of these undertakings requires the [insurance] company to step into the shoes of [its insured] and pay a sum for the payment of which he became liable. The second undertaking is not of that nature. In the performance of it the company does not step into the shoes of the policyholder. Its liability under that undertaking is not contingent upon the existence of a liability on his part, and its performance of that undertaking does not impose any liability upon him. That undertaking is absolute.

Id. at 361, 152 S.E. 2d at 516.

Concerning the duty to defend, the Supreme Court has stated:

> When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. . . .
>
> Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage.

Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E. 2d 374, 377, *reh. denied*, 316 N.C. 386, 346 S.E. 2d 134 (1986) (citations omitted).

The duty to defend is an important part of any insurance contract. To claim that the duty arises only after final adjudication of liability does not comport with the law of defense duty. *See Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513. Therefore, we conclude that Aetna does have a duty to defend against Polo's claims.

[4] Finally, Aetna's argument that Rives' action is premature under the terms of the policy is also unacceptable.

Section 6.6 of the Aetna policy reads in part:

> Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured

shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured the claimant and the company.

Under § 1-254 of the North Carolina Declaratory Judgments Act, any person under a contract may have determined any question of construction or validity arising under the instrument and may obtain a declaration of rights, status or other legal relations. N.C.G.S. § 1-254.

Plaintiff brought a declaratory judgment action to have the rights and relations between the insured and insurers clarified. This is quite proper under § 1-254. *Greensboro v. Reserve Ins. Co.*, 70 N.C. App. 651, 321 S.E. 2d 232 (1984).

Affirmed.

Judges WELLS and COZORT concur.

JAMES EUGENE WILSON, JEANNETTE WILSON BY HER GUARDIAN AD LITEM, RONALD J. SHORT, AND CHRISTOPHER WILSON BY HIS GUARDIAN AD LITEM, RONALD J. SHORT v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 8821SC291

(Filed 20 December 1988)

1. Insurance § 87.2— automobile liability insurance—lawful possession—resident of owner's household—sufficiency of evidence

Plaintiffs' evidence was sufficient for the jury on issues as to whether a driver was in lawful possession of an automobile at the time of an accident and whether he was a resident of the same household as the owner where it tended to show that the car was owned by the driver's wife; the driver had driven the car before the accident, and his wife did not report the car as stolen or tell the investigating officer that the driver did not have permission to use the car; and the driver told police officers that his place of residence was the same as that of his wife.

2. Appeal and Error § 50— instructions—failure to object at charge conference or before deliberations

Defendant insurer cannot complain on appeal about an instruction to which it did not object and essentially consented during the charge conference and to which it failed to object before jury deliberations began. Appellate Rule 10(b)(2).

3. Insurance § 100— automobile insurance—insurer's unjustified refusal to defend—consent judgment by insured—payment of amount over policy limits

Where the record, including the jury's verdict, disclosed that defendant automobile liability insurer unjustifiably refused to defend an insured driver in an action brought by plaintiffs, the trial court had the authority to order defendant to pay the amount of a reasonable consent judgment entered in good faith by plaintiffs and the driver even though such amount exceeded the limits of the policy issued by defendant.

APPEAL by defendant North Carolina Farm Bureau Mutual Insurance Company from *Freeman, Judge.* Judgment entered 16 November 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 October 1988.

This is a civil action wherein plaintiffs seek a judgment declaring the liability of defendants and awarding them compensation pursuant to insurance policies with defendants. The following facts are uncontroverted: Plaintiffs were injured in a car accident with Eddie Darrell Fields on 2 June 1985. At the time, Eddie Fields was driving a car owned by his wife. His wife's car was covered by an insurance policy issued to her by defendant North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau").

Plaintiffs brought an action against both Fields and his wife. Farm Bureau defended Fields' wife but elected not to defend Fields because it believed Fields was not insured under his wife's policy. When the claim against Fields' wife was dismissed, plaintiffs proceeded only against Fields.

Although defendant State Farm Mutual Automobile Insurance Company ("State Farm") covered plaintiffs for uninsured and underinsured motorists, it failed to become involved in any settlement negotiations or proceedings. Fields, not represented by counsel, eventually entered into a consent judgment awarding $35,000 to James Eugene Wilson, $5,000 to Jeannette Wilson, and $11,000 to Christopher Wilson. Both Farm Bureau and State Farm then denied coverage.

Plaintiffs then brought this action against defendants to determine liability and alleging bad faith on the part of State Farm. Two issues were submitted to and answered by the jury:

1) Was Eddie Darrell Fields in lawful possession of the vehicle belonging to Fannie Porch Fields on June 2 1985?

ANSWER: Yes

2) Was Eddie Darrell Fields a resident of the same household as Fannie Porch Fields on June 2, 1985?

ANSWER: Yes

The trial court entered a judgment making findings of fact and the following conclusions of law:

1. North Carolina Farm Bureau Mutual Insurance Policy afforded coverage to Eddie Darrell Fields while operating the 1980 Chrysler owned by his wife Fannie Porch Fields on June 2, 1985.

2. The allegations in the complaint brought by the Plaintiffs against Eddie Darrell Fields as the Defendant in 85 CVS 5891 brought the claim within coverage of the North Carolina Farm Bureau Mutual Insurance Policy in question.

3. Under its motor vehicle liability insurance policy, North Carolina Farm Bureau Mutual Insurance Company had a duty to defend Eddie Darrell Fields in case number 85 CVS 5891, and it breached its contract when it wrongfully failed to defend Eddie Darrell Fields as a Defendant in that action.

4. North Carolina Farm Bureau Mutual Insurance Company's refusal to defend Eddie Darrell Fields as the Defendant in case number 85 CVS 5891 was unjustified, and was in bad faith regardless of any mistaken belief that the claim was outside their policy coverage.

5. North Carolina Farm Bureau Mutual Insurance Company had a duty to try and settle a claim against its insureds in case number 85 CVS 5891; it breached that duty when they refused to accept an offer of settlement by the Plaintiffs in case number 85 CVS 5891 for policy limits.

6. North Carolina Farm Bureau Mutual Insurance Company's refusal to accept the Plaintiff's offer of settlement in case number 85 CVS 5891 for policy limits constituted a breach of the implied covenant of good faith and fair dealing.

7. The Plaintiffs shall recover of the Defendant North Carolina Farm Bureau Mutual Insurance Company the sum of $51,000 irregardless of policy limits.

All claims against State Farm were dismissed, and in a separate order, post-trial motions to set aside the verdict, for judgment notwithstanding the verdict, and for a new trial were denied. Defendant Farm Bureau appealed.

William Z. Wood for plaintiff, appellee.

Petree Stockton & Robinson, by Robert J. Lawing and Richard J. Keshian, for defendant, appellant.

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall and Laurie H. Woltz, for defendant, appellee.

HEDRICK, Chief Judge.

[1] Defendant Farm Bureau first argues the evidence was not sufficient to support submission of the issues to the jury. We disagree. Compulsory automobile insurance coverage is provided to a driver if he is in "lawful possession" of the automobile. G.S. 20-279.21. In this case, plaintiffs sought to prove Fields was in lawful possession of the car he was driving at the time of the accident. Plaintiffs also sought to prove Fields was a spouse of the policyholder and resident of the same household. This would have provided voluntary coverage under the language of the policy.

Taken in a light most favorable to plaintiffs, there was evidence both of Fields' lawful possession of the car and his residency being the same as that of his wife. There is evidence that Fields had driven the car before the accident, and his wife did not report the car as stolen or tell the investigating officer that Fields did not have permission to drive the car. This alone was some evidence of implied permission, and created an issue for the jury's resolution. *See Bailey v. Insurance Co.*, 265 N.C. 675, 144 S.E. 2d 898 (1965). Likewise, Fields told police officers that his

place of residence was the same as that of his wife. This and other evidence presented at trial made residency a proper issue for the jury's consideration. *See Great American Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 338 S.E. 2d 145 (1986). Defendant Farm Bureau's argument is without merit.

[2] Defendant Farm Bureau next argues that "the trial court's instructions were clearly erroneous and misled and prejudiced the jury." Farm Bureau contends the instructions as to the first issue were erroneous because the court did not instruct that permission, either express or implied, is an essential element of lawful possession. Farm Bureau has failed to preserve this question for review because it did not object to the instructions at the end of the jury charge and before deliberations began as provided in Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure.

Farm Bureau admits it failed to object, but argues that based on *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984), its exception to the instructions on lawful possession is preserved despite its lack of formal objection. We disagree. In *Wall v. Stout*, our Supreme Court held that where a plaintiff objected to a defendant's proposed instructions throughout the charge conference it was unnecessary for the objections to be repeated following the charge. The Court stated that Rule 10(b)(2) was "obviously designed to prevent unnecessary new trials caused by errors in instructions the court could have corrected if brought to its attention at the proper time." *Id.* at 188-89, 311 S.E. 2d at 574.

In the present case, even though the record shows there was much discussion as to what instructions would be given, no objections were made during the charge conference. Counsel for Farm Bureau at one point stated, ". . . I would say that there's no reason to put in the charge anything about permission. . . ." Farm Bureau cannot now complain about an instruction it did not object to and essentially consented to during the charge conference.

Defendant Farm Bureau further argues the trial court's instruction on residency was erroneous in that it was incomplete and overbroad. Upon review of the record, we disagree. The trial court's instructions were taken from previous cases dealing with residency and were neither misleading nor overbroad. These arguments are without merit.

[3] Defendant Farm Bureau next argues the trial court exceeded its authority in ordering it to pay the amount of the consent judgment entered into by plaintiffs and Fields even though such an amount exceeded the policy limits. Farm Bureau's policy limits were $25,000 per person and $50,000 per accident. The consent judgment awarded $35,000 to James Wilson and $51,000 total. The trial court's rationale for ordering Farm Bureau to pay the total amount was that its "refusal to defend . . . was unjustified, and was in bad faith regardless of any mistaken belief that the claim was outside their policy coverage." The trial court also concluded Farm Bureau had a duty to settle the claim and that Farm Bureau breached an implied covenant of good faith and fair dealing. Defendant contends such conclusions and the order entered were erroneous because the issue of bad faith was raised during a post-trial motion hearing, was raised by a party without standing to do so, was not decided by the jury, was not supported by competent evidence, and was contrary to the law of North Carolina.

In *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 376, 343 S.E. 2d 15, 19 (1986), this Court addressed the issue of duty to defend and bad faith on the part of insurance companies:

> The obligation of a liability insurer to defend an action brought by an injured third party against the insured is absolute when the allegations of the complaint bring the claim within the coverage of the policy. *Insurance Co. v. Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513 (1967); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E. 2d 775 (1984). *See also Waste Management v. Insurance Co.*, slip op. no. 70PA85 (N.C., filed 18 February 1986). The insurer's refusal to defend the action is unjustified if it is determined that the action is in fact within the coverage of the policy. 14 Couch, *Insurance* 2d sec. 51:156 (1982). This is so even if the refusal to defend is based on the insurer's honest but mistaken belief that the claim is outside the policy coverage. *Id.*

In this case, the complaint in the action of plaintiffs against Fields is not in the record. The jury's verdict, however, determined the action was within the coverage of the policy. Defendant Farm Bureau's refusal to defend was therefore unjustified. Farm Bureau could not, if it had the opportunity, assert that it was an

honest mistake since that is irrelevant. The judge, basing his decision on the jury's verdict, properly concluded that Farm Bureau's actions were unjustified.

This Court has further addressed the consequences of unjustified refusal to defend:

> . . . When an insurer without justification refuses to defend its insured, the insurer is estopped from denying coverage and is obligated to pay the amount of any reasonable settlement made in good faith by the insured of the action brought against him by the injured party.

Ames v. Continental Casualty Co., 79 N.C. App. 530, 538, 340 S.E. 2d 479, 485, *disc. rev. denied*, 316 N.C. 730, 345 S.E. 2d 385 (1986).

In this case, because Farm Bureau unjustifiably refused to defend Fields, it "is obligated to pay the amount of any reasonable settlement made in good faith. . . ." The record, including the jury's verdict, discloses the insurer unjustifiably refused to defend Fields, and the insurer is obligated to pay a reasonable settlement made in good faith. No question is raised that the judgments totalling $51,000 was not a reasonable settlement made in good faith. Thus, the trial court, based on this record, had the authority to order defendant Farm Bureau to pay $51,000.

We find no error in the trial, and the judgment is affirmed.

No error and affirmed.

Judges JOHNSON and PARKER concur.

Langley v. R. J. Reynolds Tobacco Co.

PETE J. LANGLEY, PLAINTIFF v. R. J. REYNOLDS TOBACCO COMPANY, DEFENDANT, AND GEORGE W. KANE, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. HERRING DECORATING, INC., THIRD-PARTY DEFENDANT

No. 8821SC358

(Filed 20 December 1988)

1. **Negligence § 50.1— fall of worker through loading dock canopy—summary judgment for building owner and contractor—improper**

The trial court erred in granting defendants' motions for summary judgment in a negligence action arising from the fall of a worker through a loading dock canopy where the evidence was sufficient to give rise to an inference that plaintiff was an invitee on the premises of both defendants; defendant Reynolds knew or had reason to know that the canopy over the loading dock had been damaged when the general contractor, defendant Kane, dropped debris onto the canopy through which plaintiff fell; and defendant Kane, in response to defendant Reynolds' request, undertook to remedy and correct the situation.

2. **Negligence § 54— fall by worker through canopy—contributory negligence—issues of fact**

There were material questions of fact as to plaintiff's contributory negligence in an action arising from plaintiff's fall through a loading dock canopy where the evidence gave rise to an inference that plaintiff did not know and did not have reason to know that the canopy above the loading dock was unsafe.

APPEAL by plaintiff from *Freeman, Judge.* Judgments entered 4 November 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 28 November 1988.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries allegedly resulting from the negligence of defendant, George W. Kane, Inc. (hereinafter Kane), and defendant, R. J. Reynolds Tobacco Company (hereinafter Reynolds). Both defendants moved for summary judgment. The affidavits and depositions offered in support of and in opposition to the motions for summary judgment tend to show the following:

In 1983, Reynolds hired Kane as a general contractor to renovate a six-story building in Winston-Salem. During the course of this renovation, Kane's employees demolished certain sections of the upper floors of the building, causing bricks and other masonry debris to fall onto a metal canopy below. This metal canopy was located over the loading dock and used as shelter to

protect the dock and the dockworkers from inclement weather. One section of the canopy had been "obliterated" by the falling debris. Reynolds officials notified Kane that it would be responsible for the damage to the canopy and directed Kane to take steps to protect their property from the falling debris. Thereafter, Reynolds officials closed the street adjacent to the building on the side where the canopy was located, and Kane's employees put tires and plywood on top of the metal canopy in an attempt to protect it from the debris. Kane continued to drop bricks onto the canopy, and the plywood became covered with the debris.

After the tires and plywood were in place, plaintiff began waterblasting the exterior walls of the building. At that time, plaintiff was employed by Herring Decorating, Inc. (hereinafter Herring). Herring had been hired by Kane to do high-pressure waterblasting and painting on the exterior portion of the building. Plaintiff was to clean the wall by making a series of "drops" while in an aerial basket. These "drops" consisted of moving vertically from the top of the building to the ground while cleaning the wall from the basket. After each "drop" the basket was moved horizontally to the right, and another vertical "drop" was made. In order to clean all the way down to the metal canopy, it was necessary for plaintiff to get out of the aerial basket and stand on the canopy. It is normal procedure for painters to utilize roof space in order to complete their work.

Plaintiff had made two successful "drops" on the day of the accident. Each time he was lowered in the basket to approximately twelve inches above the canopy. Each time plaintiff stepped out of the basket onto the canopy, removed his safety belt and cleaned the building down to the top of the canopy. On plaintiff's third drop, he stepped out of the aerial basket onto the canopy, removed his safety belt and took a short break. After finishing a soft drink, plaintiff took one step, the metal canopy collapsed and plaintiff fell to the cement loading dock below. Plaintiff sustained severe injuries to his back, right hip and right foot.

From summary judgment for both defendants, plaintiff appealed. The third-party defendant, Herring, also appealed.

B. Jeffrey Wood for plaintiff, appellant.

Avery, Crosswhite & Whittenton, by William E. Crosswhite, for third-party defendant, appellant.

Womble, Carlyle, Sandridge & Rice, by Reid C. Adams, Jr., for defendant, appellee, R. J. Reynolds Tobacco Company.

Petree Stockton & Robinson, by Robert J. Lawing, and Jane C. Jackson, for defendant, appellee George W. Kane, Inc.

HEDRICK, Chief Judge.

[1] Plaintiff argues the trial court erred in granting defendants' motions for summary judgment. We must first determine plaintiff's relationship to defendant Kane, the general contractor, and defendant Reynolds, the owner of the premises. It is well-settled in this state that a contractor and his employees who go upon the premises of the owner, at the owner's request, are invitees. *Spivey v. Wilcox Company*, 264 N.C. 387, 141 S.E. 2d 808 (1965). The owner, therefore, owes a duty of due care under all the circumstances to the contractor and the contractor's employees. *Id.* Our Supreme Court, in *Deaton v. Elon College*, 226 N.C. 433, 438, 38 S.E. 2d 561, 565 (1946), stated the general rule as follows:

> The owner is not responsible to an independent contractor for injuries from defects or dangers of which the contractor knew or should have known, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this he is liable for resultant injury.' (Citations omitted.)

It is also well-settled that the employee of a subcontractor working for a general contractor is an invitee in relation to the general contractor. *Wellmon v. Hickory Construction Co.*, 88 N.C. App. 76, 362 S.E. 2d 591 (1987); *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 291 S.E. 2d 287 (1982). Ordinarily, therefore, both the general contractor and the owner of the premises owe to the subcontractor and its employees the duty of ordinary care. This rule extends only to defects which the subcontractor or his employees could not have reasonably discovered and of which the owner or general contractor knew or should have known. *Wellmon v. Hickory Construction Co.*, 88 N.C. App. 76, 362 S.E. 2d 591 (1987).

Applying the foregoing principles to the facts in the present case, we hold the forecast of evidence is sufficient under G.S.

1A-1, Rule 56 to give rise to an inference that plaintiff, as an employee of Herring, was an invitee on the premises of both defendants wherein he was performing work in furtherance of his employer's contract with the general contractor. We further hold that the forecast of evidence is such as to require reversal of summary judgment entered in favor of both defendants. The forecast of evidence is such as to give rise to an inference that defendant Reynolds knew or had reason to know that the canopy over the loading dock had been damaged when the general contractor, defendant Kane, dropped debris onto the canopy through which plaintiff fell. The forecast of evidence is also sufficient to raise an inference that defendant Kane, in response to defendant Reynolds' request, undertook to remedy and correct the situation caused by the falling debris by placing tires and plywood over the canopy. From this forecast, the jury could find that not only the owner, defendant Reynolds, knew or had reason to know of the unsafe condition of the canopy, but that the general contractor, defendant Kane, knew or had reason to know of the weakened and unsafe condition of the canopy through which plaintiff fell. The condition of the canopy immediately before plaintiff fell and what, if anything, the owner knew or should have known, and what, if anything, the general contractor knew or should have known are all circumstances to be resolved by the trier of the facts after plaintiff has had an opportunity to develop his case before a judge and jury.

[2] Defendants' contentions that the evidence discloses contributory negligence on the part of plaintiff as a matter of law is likewise without merit. The same evidence that gives rise to genuine issues of material fact with respect to the negligence of defendants also gives rise to material questions of fact as to plaintiff's contributory negligence. Issues of contributory negligence, like those of ordinary negligence, are rarely appropriate for summary judgment. *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E. 2d 47 (1985), *aff'd per curiam*, 315 N.C. 383, 337 S.E. 2d 851 (1986). Summary judgment will only be granted where plaintiff's own evidence so clearly discloses contributory negligence that no other reasonable conclusion could be reached. *Izard v. Hickory City Schools Bd. of Education*, 68 N.C. App. 625, 315 S.E. 2d 756 (1984).

The forecast of evidence is such as to give rise to an inference that plaintiff did not know and did not have reason to know that the canopy above the loading dock was unsafe. The forecast is such as to give rise to inferences that defendant Kane's own employees walked upon the canopy, and they attempted to protect the canopy by placing tires and plywood over it as a shield. Whether the unsafe condition of the canopy was obvious and would bar plaintiff's claim by his own negligence in walking upon it is for the jury's determination, taking into consideration all of the circumstances surrounding the accident. In our opinion, none of the numerous cases cited by defendants in support of their contentions are controlling.

The purported appeal of the third-party defendant of its denial of its motion for summary judgment will be dismissed. Ordinarily, an appeal does not lie from the denial of a motion for summary judgment because no substantial right is affected. *See* G.S. 1-277; *Hill v. Smith*, 38 N.C. App. 625, 248 S.E. 2d 455 (1978); *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970).

Summary judgment for defendants with respect to plaintiff's claims are reversed and the cause remanded to the superior court for further proceedings.

Reversed and remanded in part; dismissed in part.

Judges JOHNSON and PARKER concur.

JOAN L. KIMMEL, ADMINISTRATRIX OF THE ESTATE OF EDWIN R. DILLARD, IV, DECEASED v. CHARLES B. BRETT, M.D., THE SAM RAVENEL CLINIC, DONALD D. SMITH, M.D., PETER J. JAROSAK, M.D., AND EDGAR W. LITTLE, M.D.

No. 8818SC388

(Filed 20 December 1988)

Appeal and Error § 24.1— assignments of error—failure to state grounds—abandonment of exceptions

In accordance with Appellate Rule 10(c), plaintiff's exceptions upon which assignments of error are based are deemed abandoned where the assignments of error do not state the grounds upon which the errors are assigned.

APPEAL by plaintiff from *Friday (John R.), Judge.* Judgment entered 17 November 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 October 1988.

Robert S. Cahoon for plaintiff-appellant.

Tuggle Duggins Meschan & Elrod, P.A., by Sally A. Lawing and Rachel B. Hall, for defendant-appellees.

GREENE, Judge.

Plaintiff, Joan L. Kimmel, as administratrix of her son's estate, instituted this action alleging the medical negligence of the defendants caused her son's death. A jury rendered a verdict favorable to the defendants and plaintiff appeals.

Plaintiff's evidence tended to show that on the evening of 8 February 1983 her five-year-old son Edwin R. Dillard, IV ("Jed") became seriously ill with symptoms which included severe headache, vomiting, inability to sit up, crying, and a fever of one hundred and four degrees Fahrenheit. Plaintiff took her son to the emergency room of Moses H. Cone Memorial Hospital where she described Jed's symptoms to defendant Dr. Charles B. Brett, a member of the defendant Sam Ravenel Clinic. The Sam Ravenel Clinic consists of defendant physicians Charles B. Brett, Donald D. Smith, Peter J. Jarosak, and Edgar W. Little. After examining Jed, Dr. Brett ordered an aspirin suppository to reduce Jed's fever, a throat culture, and a blood test. After the blood test results were returned from the lab, Dr. Brett prescribed an antibiotic and told plaintiff he would call her if the results from the throat culture were positive for strep throat. Dr. Brett also gave plaintiff a suppository to give to Jed if he continued vomiting. Plaintiff took Jed home and when Jed began to vomit, plaintiff gave Jed the suppository Dr. Brett had given her and put him to bed.

Plaintiff testified that at approximately 12:30 a.m. on 9 February 1983, plaintiff heard Jed moaning and went to check on him. She found he had fallen out of bed, that he could not be aroused, was limp, unresponsive, and had his arms drawn across his chest with his fists clinched. Plaintiff telephoned Dr. Brett and described the symptoms. Dr. Brett told her the sleepy and unresponsive symptoms were just side effects of the suppository.

Plaintiff testified that she then told Dr. Brett he was not listening to her and that he responded by saying, "Go back to bed, Momma, I have never lost a kid with a sore throat."

Plaintiff then telephoned another physician who advised her to call the pediatric resident physician at Moses H. Cone Memorial Hospital. Plaintiff did so and talked to Dr. June Russell. While they were talking, Jed's breathing became irregular and at one point stopped. Plaintiff and her husband rushed Jed to the hospital. On the way to the hospital, Jed stopped breathing and had no pulse. Plaintiff gave mouth-to-mouth resuscitation until they reached the hospital.

Hospital attendants got Jed's heart beating again and put him on a respirator. Dr. Russell telephoned Dr. Brett, informed him of Jed's condition, and Dr. Brett rushed to the hospital. A neurosurgeon performed a spinal tap and as a result, Jed was diagnosed as having meningitis and meningitis secondary to Hemophilus influenza. Dr. Brett continued to care for Jed throughout his hospital stay until Jed died on 24 February 1983.

Plaintiff's sole expert witness testified that in his opinion Dr. Brett's examination, diagnosis, and treatment of Jed Dillard fell below the standard of practice and medical care for a medical doctor specializing in the field of pediatrics in Greensboro, North Carolina. He based his opinion on the fact that Dr. Brett failed to suspect and diagnose meningitis in the face of Jed's symptoms, prescribed two medications that were incorrect and were not indicated by the symptoms, and erroneously attributed Jed's symptoms at the time of the 12:30 a.m. phone call to the suppository.

Defendant called as witnesses three experts in the field of pediatrics who testified that Dr. Brett's examination, diagnosis, and treatment of Jed Dillard conformed fully with the accepted standard of care for board certified pediatricians practicing in Greensboro or similar communities. These experts further testified that the medicines were appropriately prescribed, that meningitis in a child the age of Jed is highly unlikely in the absence of the symptom of a stiff neck, and that Dr. Brett checked for the symptom of a stiff neck and did not find it in Jed Dillard. Therefore, according to these experts, a spinal tap which was eventually used to diagnose meningitis was not indicated at the

time Dr. Brett examined Jed because spinal taps are usually not performed in the absence of a stiff neck.

The issue presented by this appeal is whether plaintiff's exceptions as set out in the record should be abandoned for failure to comply with North Carolina Rule of Appellate Procedure 10(c) which requires assignments of error to state the basis upon which error is assigned.

I

The North Carolina Rules of Appellate Procedure require that each assignment of error contained in the record on appeal "state plainly and concisely and without argumentation the basis upon which error is assigned." App. R. 10(c); *see Pamlico Properties IV v. SEG Anstalt Co.*, 89 N.C. App. 323, 325, 365 S.E. 2d 686, 687 (1988) (broadside assignments of error which do not state a specific basis for the alleged error violate Rule 10); *McManus v. McManus*, 76 N.C. App. 588, 590, 334 S.E. 2d 270, 272 (1985) (assignments of error which allege trial court erred in its valuation of certain items raise no issue for this court to determine where basis for such error was not stated in the assignments). Here plaintiff made and brought forward fourteen assignments of error, four of them containing numerous subdivisions, and not one states the "basis upon which error is assigned," as required by Rule 10(c). App. R. 10(c). A typical assignment of error brought forward by the plaintiff reads:

ASSIGNMENT OF ERROR NO. 6

> The trial court erred to plaintiff's prejudice in allowing, over plaintiff's objection, defendants' witness Dr. Simon to testify that, "My opinion is that what Dr. Brett did in the emergency room was very reasonable and would be done by most practicing physicians," as shown by exceptions Nos. 10 and 11 (T p 805), and 12 (T p 806).

Although plaintiff states that the court "erred to plaintiff's prejudice," this is not a sufficient basis upon which to assign error. Relevant evidence will not be excluded solely because such evidence is prejudicial. 1 Brandis on North Carolina Evidence Sec. 80 (3d ed. 1988).

One of the purposes of Rule 10(c) is "to identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position." App. R. 10(c), commentary. This rule also enables the appellate court to "fairly and expeditiously" consider the assignments of error as framed without "making a voyage of discovery" through the record in order to determine the legal questions involved. *Id.; see Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 793, 127 S.E. 2d 573, 574 (1962) (a similar requirement under prior Rules of Practice in the Supreme Court of N.C. was intended to prevent the necessity of the Court going "on a voyage of discovery" through the record to find the question involved). Included in our Appellate Rules is an appendix which gives examples of the correct way to state assignments of error in the record on appeal. N.C. Rules, Appendix C, Table 5. Two such examples relating to civil jury trial rulings are:

> Defendant assigns as error the following:
>
> 1. The Court's admission of the testimony of the witness E. F. 30, *on the ground that* the testimony was hearsay.
>
> EXCEPTION No. 7, R p. 29.
>
> EXCEPTION No. 8, R p. 30.
>
> 2. The Court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, *on the ground that* plaintiff's evidence as a matter of law established his contributory negligence.
>
> EXCEPTION No. 8, R p. 45.

N.C. App. Rules, Appendix C, Table 5 (emphasis added).

Here, plaintiff assigns as error certain admissions and exclusions of evidence, and the denial of plaintiff's motion to set aside the jury verdict without stating the grounds upon which the errors are assigned as required by the rules and demonstrated by the examples. Therefore, in accordance with Rule 10(c), plaintiff's exceptions upon which assignments of error are based are deemed abandoned. App. R. 10(c) (exceptions upon which assignments of error are based are deemed abandoned if assignments of error do not state basis upon which error is assigned). Further-

more, as appellant does not argue in her brief that the judgment is not supported by the verdict, we do not address that issue. App. R. 10(a) (even in the absence of exceptions in the record, on appeal from final judgment, a party may present for review the question "whether the judgment is supported by the verdict" by arguing it in brief).

Nevertheless, we exercise our discretion under Appellate Rule 2, suspend the rules, and decide the case on the merits. App. R. 2. After voyaging through the record and appellant's brief in search of arguments in support of appellant's assignments of error and after considering such arguments, we find no prejudicial error.

Accordingly, the judgment is

Affirmed.

Judges ORR and SMITH concur.

MARY T. FERGUSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES W. FERGUSON, JR., DECEASED, PLAINTIFF v. MARGARET WILLIAMS AND RING DRUG CO., D/B/A BOBBITT'S PROFESSIONAL PHARMACY, DEFENDANTS

No. 8821SC377

(Filed 20 December 1988)

Physicians, Surgeons and Allied Professions § 12.2— pharmacist—duty of care—12(b)(6) motion improperly granted

The trial court erred by granting defendants' motion for a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in a wrongful death action against a pharmacy and pharmacist where plaintiff alleged that the drug Indocin, prescribed for her intestate, is contraindicated for patients with an aspirin allergy such as her intestate; that her intestate told defendant Williams that he was allergic to aspirin, Percodan and penicillin; that her intestate was advised by defendant Williams that it was safe to take the drug; and that her decedent had an anaphylactic reaction and died. According to the allegations in the complaint, defendant pharmacist did more than simply fill the prescription as ordered by the doctor; while a pharmacist has no duty to advise absent knowledge of the circumstances, a pharmacist who is alerted to the specific facts and who undertakes to advise a customer then has a duty to advise correctly.

Ferguson v. Williams

APPEAL by plaintiff from *Albright, Judge.* Order entered 27 April 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 26 October 1988.

This is a civil action wherein plaintiff, as administratrix of her husband's estate, seeks damages for wrongful death under G.S. 28A-18-2. Plaintiff originally instituted this action against defendants and Dr. John T. Hayes, decedent's physician.

In her complaint, plaintiff first alleged Hayes prescribed the drug Indocin to decedent on 17 December 1984. Decedent then had the prescription filled by the "Defendant pharmacist" at Bobbitt's Pharmacy. On 18 December 1984, decedent took one of the pills which caused him to have an anaphylactic reaction and caused his death. Plaintiff alleged Hayes was negligent in prescribing the drug, and then alleged the pharmacist was also negligent as follows:

> 9) That in his treatment of Plaintiff's intestate, the Defendant pharmacist, who was at all times acting within the course and scope of his employment with Defendant Rabil and with Defendant Bobbitt Pharmacies, was negligent in that he either did not possess or he did not employ the degree of professional learning, skill and ability he represented that he had; he did not exercise reasonable care and diligence in the application of his knowledge and skill; he did not use his best judgment in the treatment or care of Plaintiff's intestate; he failed to apply his training and experience in evaluating the information given to him by the Plaintiff intestate such that he filled the prescription for Indocin for the Plaintiff's intestate when he knew or should have known that such a drug would cause a severe and probably fatal reaction in Plaintiff's intestate; he failed to contact the prescribing physician to verify that the prescription was correct even after the Plaintiff's intestate had advised the Defendant pharmacist of his medical condition; and finally, the Defendant pharmacist failed to properly warn the Plaintiff's intestate of the severe contra-indications for the use of the drug Indocin for one suffering from a medical condition such as Plaintiff's.

Plaintiff then asked for damages in excess of $10,000 from defendants jointly and severally.

Defendants filed an answer denying the material allegations, and then filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted, and because plaintiff had failed to name the pharmacist and correctly name the pharmacy.

Plaintiff, on 12 March 1987, moved to amend her complaint by correctly identifying defendant Williams and defendant Ring Drug Company. Plaintiff further sought to amend paragraph six of her complaint to add, in part, the following:

> (e) On December 17, 1984, the plaintiff's intestate took the prescription for Indocin to the defendant Bobbitt to be filled. Prior to filling said prescription, it is alleged upon information and belief that the plaintiff's intestate told defendant Williams that he was allergic to aspirin, Percodan and penicillan [sic] and that said defendant wrote on the prescription form the words "allergic to percodan." It is further alleged upon information and belief that plaintiff's intestate sought out and was relying upon the skill, judgment and expertise of defendant Williams with respect to the safety of taking the drug Indocin given the fact that plaintiff's intestate suffered the aforementioned medical condition. Upon information and belief it is alleged that plaintiff's intestate was advised by defendant Williams that it was safe to take the drug Indocin even though the medical literature specifies that the use of the drug Indocin is contraindicated in persons who suffer aspirin allergies or aspirin sensitivities.

Plaintiff also sought to add a second claim for relief based upon implied warranties under G.S. 25-2-314 and G.S. 25-2-315.

Defendants, on 15 April 1987, then amended their answer alleging contributory negligence on the part of decedent. By consent of the parties, both amendments were allowed with no effect on the motion to dismiss.

On 27 April 1987, an order was entered dismissing the action against defendants under Rule 12(b)(6) "for failure to state a claim upon which relief can be granted. . . ." The case remained pending against Hayes.

On 29 February 1988, plaintiff voluntarily dismissed her action against Hayes with prejudice. On 29 February 1988, plaintiff gave notice of appeal as to the dismissals against defendants.

Michael R. Nash for plaintiff, appellant.

Petree Stockton & Robinson, by J. Robert Elster and Stephen R. Berlin, for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiff argues on appeal that the complaint and amendments state valid claims for relief, and that the motion to dismiss by defendants should not have been granted. We agree. In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the allegations must be viewed as admitted. *Warren v. Halifax County*, 90 N.C. App. 271, 368 S.E. 2d 47 (1988). 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.*

In this case, the complaint alleges negligence on the part of defendant Williams in her duties as a pharmacist. Our Supreme Court in *Spry v. Kiser*, 179 N.C. 417, 422, 102 S.E. 708, 710 (1920) (*quoting* 9 Ruling Case Law, at p. 704, Sec. 11), stated:

> The legal measure of the duty of druggists towards their patrons, as in all other relations of life, is properly expressed by the phrase "ordinary care," yet it must not be forgotten that it is "ordinary care" with reference to that special and peculiar business, and in determining what degree of prudence, vigilance, and thoughtfulness will fill the requirements of "ordinary care" in compounding medicines and filling prescriptions, it is necessary to consider the poisonous character of many of the drugs with which the apothecary deals, and the grave and fatal consequence which may follow the want of due care. For the people trust not merely their health but their lives to the knowledge, care, and skill of druggists, and in many cases a slight want of care is liable to prove fatal to some one. It is therefore proper and reasonable that the care required shall be proportioned to the danger involved.

Another definition of the standard of care required of a pharmacist, which was stated in *Spry* is "that ordinary care, in reference to the business of a druggist, must be held to signify the highest practicable degree of care consistent with the reasonable conduct of the business." *Id.* at 422, 102 S.E. at 710-11 (*quoting Wilson v. Faxon*, 208 N.Y., 108 (Ann. Cases, 1914, D. 49; 47 L.R.A. (N.S.), 693, and note)).

The duties of a pharmacist were set out further by this Court in *Batiste v. Home Products Corp.*, 32 N.C. App. 1, 231 S.E. 2d 269, *disc. rev. denied*, 292 N.C. 466, 233 S.E. 2d 921 (1977). In that case, we held that a pharmacist has a duty to act with due, ordinary care and diligence in compounding and selling drugs.

The plaintiff in *Batiste* was given a prescription by her doctor for the oral contraceptive drug, Ovral. She took the prescription to the defendant pharmacy where she was sold a certain quantity of Ovral in the same condition and composition as originally manufactured. Plaintiff took the prescribed Ovral and consequently suffered a severe stroke. We found that the trial court properly dismissed plaintiff's claim for relief based on the pharmacist's negligence and stated the following:

> The prescription was filled as directed. There is no allegation that the product was other than it was supposed to be. There is no allegation that the druggist did any compounding or added to or took from the product as prepared and contained in the sealed container, or that the druggist did anything to change the prescription given him, or that the drug delivered to plaintiff was in any way different than the drug prescribed by plaintiff's physician, or contained any foreign material.

Id. at 9, 231 S.E. 2d at 274.

In the case *sub judice*, plaintiff alleges that "[t]he drug Indocin is contraindicated in patients who suffer from an aspirin allergy, which is the medical condition suffered by plaintiff's intestate." She alleges that plaintiff's intestate told defendant Williams that he was allergic to aspirin, Percodan and penicillin. Plaintiff also alleges that her intestate "sought out and was relying upon the skill, judgment and expertise of defendant Williams with respect to the safety of taking the drug Indocin given the fact that plaintiff's intestate suffered the aforementioned medical

condition." Plaintiff further alleges that her intestate was advised by defendant Williams that it was safe to take the drug. This presents a different case for review than does *Batiste.* According to the allegations in plaintiff's complaint, the defendant pharmacist did more than simply fill the prescription as ordered by the doctor. Even though there is no allegation that the product itself "was other than it was supposed to be," the complaint sufficiently alleged that plaintiff's intestate asked for and was given advice by defendant Williams, and subsequently plaintiff's intestate relied upon that advice in taking the drug. While a pharmacist has only a duty to act with due, ordinary care and diligence, this duty, like all others, expands and contracts with the circumstances. Here, it is alleged that defendant Williams undertook to dispense not only drugs, but advice also. While a pharmacist has no duty to advise absent knowledge of the circumstances, under *Batiste,* once a pharmacist is alerted to the specific facts and he or she undertakes to advise a customer, the pharmacist then has a duty to advise correctly. We cannot say after examining plaintiff's complaint that it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of her claim. We hold the trial court erred in dismissing plaintiff's complaint pursuant to Rule 12(b)(6) and remand this case to the Clerk of Superior Court of Forsyth County for appropriate action in accordance with this opinion.

Reversed and remanded.

Judges JOHNSON and PARKER concur.

SHAWN RAMEY, EMPLOYEE-PLAINTIFF v. SHERWIN-WILLIAMS COMPANY, EMPLOYER, AND CIGNA INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 8810IC326

(Filed 20 December 1988)

Master and Servant § 50.1— workers' compensation—carpet installer—independent contractor

Plaintiff was an independent contractor rather than an employee of defendant at the time of an accident and thus was not entitled to workers' compensation where plaintiff installed carpet for defendant at construction sites at

which defendant furnished the carpet; plaintiff was basically free to set his own hours and to determine which days of the week he worked; plaintiff was paid a set price per yard; plaintiff's occupation required special skill and training; plaintiff chose the materials to attach the carpet to the floor and furnished his own tools; and plaintiff had some discretion in how the carpet was to be laid as long as he met basic industry standards.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award filed 25 November 1987. Heard in the Court of Appeals 31 October 1988.

Mills & Rives, by Hugh C. Mills, for plaintiff-appellant.

Tate, Young, Morphis, Bach & Farthing, by Edwin G. Farthing, for defendant-appellee.

JOHNSON, Judge.

On 25 November 1985, plaintiff Shawn Ramey had finished work for the day as a carpet installer for defendant Sherwin-Williams Co. (hereinafter Sherwin-Williams) at a construction site at which defendant furnished the carpet and vinyl. As he drove home in his 1977 Chevrolet Blazer he experienced mechanical difficulty and pulled off the road. He then crawled under the vehicle to work on the universal joint. As plaintiff hammered the metal parts, a piece of metal flew into his right eye causing an injury which required immediate medical treatment and hospitalization.

Following his injury, plaintiff filed a claim for Workers' Compensation with the Industrial Commission on 27 December 1985. The matter was heard in Dobson, North Carolina before a Deputy Commissioner of the Industrial Commission. At the parties' request the Deputy Commissioner ruled only on the issues of jurisdiction, liability, and plaintiff's average weekly wage.

On 27 March 1987 the Deputy Commissioner filed the opinion and award dismissing plaintiff's claim for lack of jurisdiction. In his opinion, the Deputy made findings of fact and concluded as a matter of law, that at the time of plaintiff's accident he was not an employee of defendant Sherwin-Williams, and that therefore the Industrial Commission was without jurisdiction in the matter. Plaintiff appealed to the Full Commission. On 25 November 1987, the Full Commission affirmed in all respects the result reached by the Deputy Commissioner and adopted his opinion as its own. From dismissal by the Full Commission, plaintiff appeals.

Plaintiff's first Assignment of Error and the dispositive question raised by this appeal is whether the Industrial Commission erred in finding that, at the time of plaintiff's accident, he was an independent contractor and not an employee of defendant Sherwin-Williams.

It is well established that in order for a claimant to recover under the Workers' Compensation Act, the employer-employee relationship must exist at the time of the claimant's injury. *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). The Industrial Commission's determination that this relationship did not exist in the instant case is a jurisdictional fact and is therefore not conclusive on appeal. *Lucas v. Li'l General Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976). This Court has the duty to examine the entire record and make independent findings concerning the existence of the employer-employee relationship. *Id.* The burden of proof on this issue falls on the claimant. *Id.*

G.S. sec. 97-2(2) defines an "employee" as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, . . . but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer. . . ."

This statutory definition does not add to the common law understanding of the term "employee," and therefore we look to common law tests to determine whether the claimant was an employee of defendant. *Carter v. Frank Shelton, Inc.*, 62 N.C. App. 378, 303 S.E. 2d 184 (1983).

The distinction between an employee and an independent contractor for purposes of the Workers' Compensation Act must turn on the particular facts of the case. Our Supreme Court has stated that the "vital test" to be answered in distinguishing between the two is whether "the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E. 2d 137, 140 (1944). As a guide to determining what degree of independence a worker has retained, the Court in *Hayes* outlined a number of factors which, if found, point towards a worker's being considered to be an independent contractor:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time. (Citations omitted.)
>
> The presence of no particular one of these *indicia* is controlling. Nor is the presence of all required.

Id. at 16, 29 S.E. 2d at 140.

After carefully reviewing the record of this case in light of the factors stated in *Hayes*, we conclude that plaintiff was an independent contractor rather than an employee at the time of his injury and therefore may not avail himself of the Workers' Compensation Act.

We find the following circumstances to be controlling in this case. First, plaintiff was basically free to set his own hours and to determine which days of the week he worked, although his work schedule was occasionally influenced by the need to accommodate defendant's customers.

Second, plaintiff was paid on a per yard basis. Each Friday plaintiff would submit a bill showing the amount of carpet or vinyl he had laid. He, like all the other carpet installers, was paid a set price per yard.

In plaintiff's particular situation he was paid by a check made out to his father, Gerald Ramey, who also installed carpet for Sherwin-Williams. Some of the checks would include a notation stating that certain amounts were paid for plaintiff's work. This arrangement was merely an accommodation to plaintiff who had not acquired liability insurance, and therefore under defendant's company policy could not sign a subcontractor's contract and be paid directly by Sherwin-Williams. This method of payment does not affect the substance of plaintiff's relationship with the defendant.

We are aware that an employer's assumption that a claimant is self-employed and his failure to withhold taxes from the claimant's pay may not be determinative of the claimant's employment status. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E. 2d 3 (1982). However, we note that plaintiff was not paid out of the regular payroll account used to pay defendant's regular employees, but rather through a check voucher system which defendant used to pay independent contractors and bills of local vendors. No taxes or other deductions were taken from the voucher checks, and plaintiff filed self-employment tax with his 1985 income tax return.

Third, plaintiff's occupation as a carpet and vinyl installer required special skill and training, and plaintiff had considerable leeway in the manner in which he did his job. He chose the materials to attach the carpet to the floor, and selected and purchased his own tools. Plaintiff also had some discretion in how the carpet was to be laid as long as he met basic industry standards, such as matching carpet so as to avoid shade variations and using carpet economically. He was visited at the jobsite about once a week by an employee of defendant to make sure there were no problems.

Plaintiff was required to follow a blueprint and obviously could not decide for himself which carpet should go into particular rooms. However, the fact that a worker is supervised to the extent of seeing that his work conforms to plans and specifications does not change his status from independent contractor to employee. *Pumps, Inc. v. Woolworth Co.*, 220 N.C. 499, 17 S.E. 2d 639 (1941).

Overall, plaintiff's control over the many details of his job and his hours, plus the quantitative method by which he was paid, lead us to conclude that plaintiff was indeed an independent contractor at the time of his injury.

Plaintiff's Assignments of Error two through five all concern the issue of his employment status. Because we have determined that plaintiff was an independent contractor, we need not address them.

By his sixth Assignment of Error, plaintiff argues that the Industrial Commission erred by not giving equitable consideration

to G.S. sec. 97-19 as amended in 1987. The Full Commission was correct in stating that the question of jurisdiction would have been decided in favor of plaintiff if his injury had occurred after the effective date of the 1987 amendment. However, this is not the case. Plaintiff's injury occurred on 25 November 1985. The amended version of G.S. sec. 97-19 became effective upon ratification on 5 August 1987. Therefore, the amendment is not controlling in the instant case.

For all the foregoing reasons, we agree with the findings of the Industrial Commission. Therefore, its decision is

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

VERNELL STALLINGS, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. 8810IC390

(Filed 20 December 1988)

Highways and Cartways § 9.2— object thrown from bridge—action for negligent design—dismissed

The Industrial Commission did not err by dismissing a claim against the Department of Transportation for negligent planning and design of improvements to a bridge arising from injuries received by plaintiff after a third party threw or dropped a water hydrant cap from the bridge onto the car in which plaintiff was riding. Even if the Department of Transportation has a duty to protect plaintiff from the criminal conduct of third persons, the record on appeal does not disclose that any employee of the Department of Transportation had actual knowledge of the incidents at the bridge before plaintiff was injured. Under the facts of this case, the employees, officers and agents of the Greensboro Police Department are not employees, officers or agents of the State under the North Carolina Tort Claims Act.

APPEAL by plaintiff from the Industrial Commission. Decision and Order and Judgment entered 14 December 1987. Heard in the Court of Appeals 5 October 1988.

On 21 February 1983, plaintiff filed an affidavit with the Industrial Commission seeking damages for the alleged negligence

of the North Carolina Department of Transportation in the planning and design of improvements of the Tuscaloosa Street Bridge over U.S. Highway 29 in Greensboro, North Carolina. By several amendments, plaintiff named Thomas W. Bradshaw, Jr., Secretary of the Department of Transportation; E. W. Easter; J. E. Conn; John Watkins, Division Engineer; Billy Rose, State Highway Administrator; the members of the North Carolina Board of Transportation; and all employees and agents of the Department of Transportation as the State employees upon whose alleged negligence the claim is based. The Deputy Commissioner granted defendant's motion to dismiss insofar as the alleged negligence of Thomas W. Bradshaw, Jr. was concerned. On 3 May 1984, defendant filed a motion for summary judgment. On 21 November 1984, defendant filed another motion to dismiss. The Deputy Commissioner allowed defendant's motion to dismiss on 10 April 1987. Plaintiff gave notice of appeal, and the Industrial Commission adopted the Deputy Commissioner's decision on 14 December 1987. Plaintiff appeals.

Douglas, Ravenel, Hardy, Crihfield & Moseley, by Robert D. Douglas, III, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

SMITH, Judge.

Defendant made both a motion to dismiss and a motion for summary judgment. The Industrial Commission granted the motion to dismiss but made findings of fact based on evidence presented to the Commission.

> If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

G.S. 1A-1, Rule 12(b). Thus, we review the Industrial Commission's decision as if the motion for summary judgment had been granted. Summary judgment should be granted "if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). "Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). Questions of fact which are immaterial to the legal issues presented will not defeat the granting of summary judgment. *Id.*

The Industrial Commission found the following facts to support its order dismissing plaintiff's claim:

> 1. On April 28, 1980, the plaintiff was riding as a passenger in the front seat of an automobile being operated by Harry Stallings on U.S. Highway 29 in the City of Greensboro and passing under the Tuscaloosa Street bridge overpass when an individual named Rupert Weeks threw or dropped a water hydrant cap from the railing of the bridge which collided with the automobile, breaking through the windshield, striking the plaintiff in the face and causing injuries to the plaintiff's face and head.
>
> 2. At said time, Rupert Weeks was not an employee or agent of the State of North Carolina.
>
> 3. That prior to said date of April 28, 1980, the NC Department of Transportation through its agents and employees, had planned, engineered, constructed and maintained said Tuscaloosa Street Bridge without fencing along the sides and over the top of the walkways on said Bridge.
>
> 4. That said planning, engineering, construction and maintenance of said bridge without fencing on the side and top of said walkways was a decision-making and administrative function of said Department and did not constitute negligence on the part of an employee or agent of the State of North Carolina, which proximately caused the injuries giving rise to the plaintiff's complaint.
>
> 5. That plaintiff's injuries were proximately caused by the negligence and wanton disregard of the rights of others

of Rupert Weeks, in dropping or throwing the water hydrant cap from said Tuscaloosa Street Bridge.

Based on these facts, the Industrial Commission concluded that "plaintiff's injuries were not proximately caused by the negligence of an employee or agent of the State" and dismissed plaintiff's claim.

Plaintiff appeals contending the Department of Transportation is liable for plaintiff's injuries pursuant to the Tort Claims Act, G.S. 143-291. Plaintiff contends that the Department of Transportation has a duty to protect plaintiff from the criminal conduct of third persons. We reject this contention and affirm the Industrial Commission.

"It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued." *Zimmer v. N.C. Dept. of Transportation*, 87 N.C. App. 132, 134, 360 S.E. 2d 115, 117 (1987). Claims for tort liability are expressly allowed by the waiver of the State's immunity in the Tort Claims Act.

This act imposes liability in tort actions only to the extent "a private person would be liable to the claimant in accordance with the laws of North Carolina." G.S. 143-291. Plaintiff contends that a private person would be liable for his injuries under the "foreseeability test" of *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E. 2d 36 (1981). In *Foster*, the plaintiff sued the owners of a shopping mall for injuries received when she was assaulted in the mall parking lot. In the year before the plaintiff was assaulted, thirty-six criminal incidents at the mall had been reported. The Court enunciated a "foreseeability test": if the criminal acts of a third person are reasonably foreseeable, a landowner has a duty to exercise ordinary care to protect one on the premises to transact business. Therefore, plaintiff reasons, the Department of Transportation was negligent in planning and constructing improvements to the Tuscaloosa Street Bridge if the events surrounding plaintiff's injury were foreseeable. According to plaintiff, if any of the Department of Transportation's employees had either actual or constructive knowledge of prior similar incidents, then the acts of the third party, Rupert Weeks, were reasonably foreseeable and the Industrial Commission erred in finding plaintiff had no claim for relief. Even if we accept plain-

tiff's theory, we find no basis for recovery on the evidence presented in the record on appeal.

The record on appeal contains the affidavit of Frank W. Fields, Central Records Manager of the City of Greensboro Police Department. Attached to Fields' affidavit are reports of the Greensboro Police Department of 11 incidents between 6 June 1975 and 24 April 1980 in which objects were dropped or thrown from the Tuscaloosa Street Bridge. The transcript of evidence before the Commission reveals that a Department of Transportation division engineer was informed of the incidents at the bridge by letter on 12 May 1980, after the incident involving plaintiff on 28 April 1980. Thus, the record before this court does not disclose that any employee of the Department of Transportation had actual knowledge of the incidents at the Tuscaloosa Street Bridge before plaintiff was injured. Plaintiff has thus failed to prove negligence by the Department of Transportation under his own theory of recovery. In his brief, plaintiff refers to the Department of Transportation's answers to interrogatories which refer to incidents similar to those in which plaintiff was injured and which occurred at the Tuscaloosa Street Bridge. However, these answers to interrogatories are not included in the record on appeal and we cannot determine that the Department of Transportation had notice of criminal acts before plaintiff was injured.

Plaintiff further contends the prior reports to the Greensboro Police Department create an issue of foreseeability that should not be determined by motion to dismiss or motion for summary judgment. Plaintiff contends that the City of Greensboro is a political subdivision of the State and thus knowledge of the employees of the Greensboro Police Department is attributable to the State and its agency, the Department of Transportation. We do not agree. The Tort Claims Act establishes a claim for relief "as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority." G.S. 143-291. We hold that under the facts of this case the employees, officers and agents of the Greensboro Police Department are not employees, officers or agents of the State under the North Carolina Tort Claims Act. Plaintiff has not shown actual or constructive knowledge attributable to the Department of Transpor-

tation. Thus plaintiff is not entitled to recover as a matter of law. Summary judgment was properly granted.

Affirmed.

Judges ORR and GREENE concur.

DAVID ARLIN MILLER v. CYNTHIA JOYCE MILLER

No. 8823DC176

(Filed 20 December 1988)

Appeal and Error § 41— motion to modify child custody—failure to record hearing—absence of evidence from record on appeal—dismissal of appeal

A hearing on a motion in the cause requesting a modification of a child custody order was a "trial" which was required by N.C.G.S. § 7A-198 to be recorded, but the trial court's failure to have the hearing recorded did not relieve appellant of her burden to set forth the necessary evidence in the record on appeal in accordance with Appellate Rule 9(a)(1)(v) and to show prejudicial error. The appeal must be dismissed where a review of the evidence presented at the hearing was essential for the appellate court to make a proper determination of the issues raised by appellant but appellant failed to set forth evidence in the record on appeal by reconstructing the testimony with the assistance of those persons present at the hearing.

Judge ORR dissenting.

APPEAL by defendant from *Gregory (Edgar B.), Judge.* Order entered 6 October 1987 in District Court, ASHE County. Heard in the Court of Appeals 7 September 1988.

Plaintiff and defendant were married in 1968 and divorced in 1987. During their marriage, they had four children. In July 1984 for the second time in the marriage, defendant suddenly without notice left the marital home and moved out of state. On 24 August 1984, plaintiff filed a complaint requesting legal and primary custody of the couple's four children. Notice of service by publication was filed on 28 August but defendant failed to appear at the scheduled hearing. On 19 October 1984, the district court granted primary custody of the children to plaintiff. Defendant subsequently filed an answer to plaintiff's complaint on 30 November. On 13 December 1984 the couple entered into a consent judgment

which provided *inter alia* that principal custody of the minor child Dennis Miller would alternate between plaintiff and defendant for three-month intervals until Dennis reached school age at which time a re-evaluation would be made. On 10 April 1987, plaintiff and defendant entered into another consent judgment dealing in part with marital property. This judgment further stated that the custody arrangement for the children would remain unchanged. Subsequently, on 22 July 1987 defendant, without notice or permission, took Dennis Miller and moved to Missouri. Plaintiff then filed a motion in the cause seeking custody of Dennis Miller. Pending service of the motion on defendant and a complete hearing on the merits of the case, temporary custody was granted to defendant on 24 July 1987. Notice of Service of Process by Publication was filed on 14 August 1987 and defendant was personally served with a summons on 18 September. At the hearing on 2 October, defendant appeared in court unrepresented by an attorney. The court was informed that three days prior to the hearing the attorney who had previously represented defendant contacted plaintiff's attorney and told him that he would not represent defendant at the hearing. At the hearing, defendant made a motion for a continuance so that she could hire an attorney. The court denied the motion and subsequent to the hearing, which was not transcribed or electronically recorded, granted custody of Dennis Miller to plaintiff. Defendant appeals.

John T. Kilby for plaintiff-appellee.

Hall and Brooks, by W. Andrew Jennings, for defendant-appellant.

SMITH, Judge.

In her assignments of error, defendant contends that the trial court erred in 1) refusing to grant defendant's motion for a continuance; 2) failing to record the trial proceedings; 3) granting custody of Dennis Miller to plaintiff after finding that plaintiff had in the past abused the couple's two daughters; and 4) granting custody of Dennis Miller to plaintiff in that no substantial change in circumstances had occurred which would warrant changing custody. Defendant has not taken exception to any conclusion of law or to the entry and signing of judgment. In her case on appeal, defendant failed to set forth the evidence pre-

sented at the hearing as required by App. R. 9(a)(1)(v). This rule requires that a record on appeal contain

> so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the entire verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed.

It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form. *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 315 S.E. 2d 537 (1984). Rules of appellate procedure are mandatory and failure to follow these rules can result in dismissal. *Id.*

A review of the evidence presented at the 2 October 1987 hearing is essential for this Court to make a proper determination of the issues raised by defendant. In *McAlister v. McAlister*, 14 N.C. App. 159, 187 S.E. 2d 449, *cert. denied*, 281 N.C. 315, 188 S.E. 2d 898 (1972), a case in which defendant argued that the trial court erred in denying his motion to have the proceedings recorded by a court reporter, this Court held that the moving party must show that failure to record the judicial proceedings prejudiced him in some way. *Id. See also Howell v. Howell*, 19 N.C. App. 260, 198 S.E. 2d 462 (1973). Without the evidence, a determination as to whether defendant was prejudiced in any way is impossible. Likewise, a determination as to whether the trial court's findings are supported by the evidence requires a review of the evidence presented at the hearing.

> [T]he trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. . . . Therefore, in order to understand the errors defendant assigns, it is necessary for this Court to determine if there is *any* evidence to support the disputed findings and conclusions. Defendant's rule violations effectively preclude such review by this Court.

Fortis Corp., 68 N.C. App. at 753-54, 315 S.E. 2d at 538. (Citation omitted) (emphasis in original). Additionally, a review of the evidence is necessary for this Court to properly determine whether

the trial court erred in denying the motion for a continuance. A motion for a continuance is not *ipso facto* allowed when a party's attorney withdraws. *Williams and Michael v. Kennamer*, 71 N.C. App. 215, 321 S.E. 2d 514 (1984). "[A] motion to continue is addressed to the sound discretion of the trial judge." *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E. 2d 380, 386 (1976). In deciding whether to grant the motion a court should "hear the evidence pro and con, consider it judicially and . . . 'consider all the facts in evidence . . . . [A] denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient.' " *Id.* at 483, 223 S.E. 2d at 386 (citation omitted). Without a narration of the evidence or reasons presented in support of the motion to continue, it is not possible for this Court to determine whether the trial judge abused his discretion.

Further, we hold that a hearing on a motion in the cause requesting a modification of a child custody order is a "trial" within the meaning of G.S. 7A-198. Defendant is correct in her contention that G.S. 7A-198 was violated by not preserving or recording the hearing as required by the statute. We strongly disapprove of the failure to comply with the mandate of G.S. 7A-198. However, this violation of the statute does not relieve defendant of her burden of complying with App. R. 9(a)(1)(v) and showing prejudicial error. *See In re Peirce*, 53 N.C. App. 373, 281 S.E. 2d 198 (1981).

"Defendant's rule violation[] [has] precluded the possibility of effective appellate review of the questions presented and the appeal, must accordingly, be [d]ismissed." *Fortis*, 68 N.C. App. at 754, 315 S.E. 2d at 538. We note that means were available for defendant to compile a narration of the evidence, i.e., reconstructing the testimony with the assistance of those persons present at the hearing. If appellee was then to contend the record on appeal was inaccurate in any respect, that matter could be resolved by the trial judge in settling the record on appeal. App. R. 11.

For the foregoing reasons, defendant's appeal is

Dismissed.

Judge GREENE concurs.

Judge ORR dissents.

Judge ORR dissenting.

I agree with the majority's conclusion that defendant is correct in contending that G.S. 7A-198 was violated by the court's failure to preserve or record the trial as required by statute. However, in my opinion, this failure constitutes sufficient prejudice to warrant reversal.

It is an unworkable and unfair result to dismiss this appeal for failure to provide a transcript of the trial. The appellant was required to try the case without counsel due to the trial court's denial of her motion to continue. The trial court failed to record the trial and appellant had no knowledge of her right to have it recorded. To require a layperson and an attorney who was not involved in the trial of this case to attempt to reconstruct the testimony of the trial or face dismissal of the appeal is to push the Rules of Appellate Procedure to a new technical high. I vote to reverse and remand the case for a new trial.

JAMES ANDREW WILSON v. STATE RESIDENCE COMMITTEE OF THE UNIVERSITY OF NORTH CAROLINA

No. 8815SC196

(Filed 20 December 1988)

1. Domicile § 6— university student—in-state status denied—evidence sufficient

There was substantial evidence upon which the State Residence Committee could base its decision to deny petitioner's request for in-state tuition status where petitioner was born and primarily educated in Tennessee; attended undergraduate school at the University of North Carolina at Chapel Hill; entered the Marine Corps after graduation and was later posted at Camp LeJeune; returned to North Carolina after his military service and was briefly enrolled at Coastal Carolina Community College, where he was classified as an in-state student; listed Tennessee as his domicile on military records; voted in a Tennessee election by absentee ballot while stationed in Beirut, Lebanon in 1984; listed Tennessee as his state of residence on his Law School Admissions Test in 1986; paid income taxes in Tennessee following his return to North Carolina after his military service; registered his motor vehicles in North Carolina in 1984 and obtained a state driver's license in 1986.

2. Domicile § 6— State Residence Committee—not required to give reasons for decision

The trial court did not err by not requiring the State Residence Committee to give specific reasons for its decisions because the SRC is not governed by N.C.G.S. § 150B-36.

APPEAL by respondent from *Brannon, Judge.* Order entered 15 December 1987 in Superior Court, ORANGE County. Heard in the Court of Appeals 30 August 1988.

Petitioner, James Andrew Wilson, a law student at the University of North Carolina at Chapel Hill, applied for reclassification to in-state status for tuition purposes in March 1987. It was initially determined by the Assistant Dean that he was not a North Carolina resident and, therefore, not entitled to be reclassified.

Wilson appealed that decision to the University's Residence Status Committee (the Committee). The Committee affirmed the prior determination. Thereafter, Wilson appealed to the University's State Residence Committee (SRC) where again his request was denied.

Having exhausted all administrative remedies, Wilson filed suit in superior court pursuant to G.S. 150B-43 for review of the SRC's decision. The trial court reversed the Committee's decision and entered judgment for Wilson on the grounds that the SRC's determination was unsupported by substantial evidence in the record. The SRC appeals.

Epting & Hackney, by Robert Epting, attorney for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas J. Ziko and Associate Attorney General Valerie L. Bateman, for respondent-appellant.

ORR, Judge.

[1] The first issue before this Court is whether, under the whole record test, there was substantial evidence upon which the SRC could base its decision to deny Wilson's request for in-state tuition status. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclu-

sion." *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 205, 214 S.E. 2d 98, 106 (1975) (citation omitted).

A review of the evidence shows that Wilson, who at the time of this action was a resident of Carrboro, North Carolina was born and primarily educated in Tennessee. He attended undergraduate school at the University of North Carolina at Chapel Hill. After graduation he entered the United States Marine Corps and was later posted at Camp LeJeune. Following his military service, Wilson returned to North Carolina and was briefly enrolled at Coastal Carolina Community College where he was classified as an in-state student. In 1982, Wilson listed Tennessee as his domicile on military records. In 1984, he voted in a Tennessee election by absentee ballot while stationed in Beirut, Lebanon. In 1986, he listed Tennessee as his state of residence on his Law School Admissions Test application. Also, following his return to North Carolina after his military service, Wilson paid income taxes to Tennessee. He registered his motor vehicles in North Carolina in 1984 and he obtained a state driver's license in 1986.

In reaching its decision, appellant, State Residence Committee, evaluated Wilson's residency status in accordance with specific provisions contained in an SRC administrative manual which was written in compliance with G.S. 116-143.1, 150B-43 and 150B-51. The manual instructs the reviewing agency to determine, *inter alia*, whether the student's arrival into the state was coincidental with his enrollment in an institution of higher education.

For a person to have in-state status, they must have maintained a bona fide home in North Carolina for the twelve months immediately preceding the filing of a Residence Status Application. *See Hall v. Board of Elections*, 280 N.C. 600, 187 S.E. 2d 52 (1972). Appellant argues that there was substantial evidence to support its decision because, with the exception of registering his vehicles and being posted at Camp LeJeune, all of the facts which Wilson claims established his North Carolina residence occurred between August 1986 and March 1987. According to appellant, these acts occurred less than twelve months prior to Wilson's applying for reclassification.

Wilson contends that the evidence supports the single conclusion that he has maintained a home within the state since 1983. He points to his membership in a North Carolina professional as-

sociation, his registration of his vehicles and his acquisition of a state-issued driver's license as indicia of his intent to be a resident.

Admittedly, the whole record does not support the decision of the SRC to the exclusion of all other possible conclusions; however, the record does disclose substantial evidence which is sufficient to support the SRC's determination. The facts established that Wilson initially came to North Carolina to attend undergraduate school. Although he did return here after his military service, the SRC was required to consider all of the evidence when determining whether Wilson was a North Carolina resident for tuition purposes.

Wilson admitted that he changed his driver's license and vehicle registrations only as it became necessary to carry on his normal routines within the State. He explained that he listed his parents' address as his permanent residence because he assumed that they would always know how to contact him. He claims that he misunderstood the question and listed Tennessee as his residence by accident on his Law School Admissions Test application.

Previous decisions have supported the position that as between the agency which has expertise in its area and the reviewing court, the agency is in a better position to "determine the weight and sufficiency of the evidence and the credibility of the witnesses . . . ." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E. 2d 547, 565, *pet. reh'g denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980). Furthermore, if there is sufficient competent evidence which rationally supports the agency's decision, a court may not substitute its judgment for that of the agency "even though the court could justifiably have reached a different result. . . ." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977) (citation omitted).

The evidence contained in the record before us is sufficient to support the SRC's decision that Wilson was not a North Carolina resident at least twelve months before applying for reclassification. The court below therefore erred in reversing the decision of the SRC.

[2] Finally, we have considered Wilson's claim that the court below erred in not requiring the SRC to give specific reasons for

its decisions. The section of the North Carolina statute which is dispositive of this issue is section 150B-1(d). This statute gives to the University of North Carolina and its constituent or affiliated boards or agencies and institutions an express exemption from the entire Administrative Procedure Act. Although the provisions requiring judicial review of final administrative decisions are applicable, the SRC is not governed by G.S. 150B-36, the provision which requires agencies to state reasons for their decisions. Therefore, Wilson is not entitled to the explanation which he requested, and we will not disturb the decision of the superior court on that particular issue.

Reversed in part. Affirmed in part.

Judges EAGLES and SMITH concur.

BETTY SMITH MORRIS (PLOTT) v. MICHAEL CHRISTOPHER MORRIS

No. 8821DC383

(Filed 20 December 1988)

1. **Divorce and Alimony § 24.1— child support—shared custody—guidelines of Chief District Court Judges**

The fact that defendant had sole custody of and furnished the sole support for one of the parties' three children while contributing to the support of the two children in plaintiff's custody justified the trial court's consideration of the "shared custody" factor set forth in N.C.G.S. § 50-13.4(c1)(2) in a child support proceeding, and the trial court did not err in concluding that the guidelines of the Conference of Chief District Court Judges could not practically be applied because of the shared physical custody arrangement.

2. **Divorce and Alimony § 24.2— child support—amount in separation agreement —evidence of appropriate amount**

When the trial court is called upon for the first time to determine the appropriate level of child support, the presumption of reasonableness of the amount of child support provided for in a separation agreement is one of evidence only; that is, the agreed upon amount of support constitutes some evidence of the appropriate level of support, but this evidence must be weighed and considered by the trial court with all other relevant and competent evidence bearing upon the factors set forth in N.C.G.S. § 50-13.4(c).

3. Divorce and Alimony § 24.2— child support—improper reliance on separation agreement—remand for proper determination

A child support proceeding must be remanded for a proper determination of the amount of support where the trial court improperly weighed and relied upon the amount provided for in an amended separation agreement.

APPEAL by plaintiff from *Harrill, James A., Jr., Judge.* Order entered 16 November 1987 in FORSYTH County District Court. Heard in the Court of Appeals 1 November 1988.

Plaintiff and defendant were married on 12 July 1970. The parties subsequently had three children: Jennifer Lynn Morris, born 28 December 1971; Amanda Caroline Morris, born 9 March 1974; and Michael Christopher Morris, II, born 16 August 1976. Plaintiff and defendant separated on or about 31 March 1983 and were divorced on 24 April 1984. Prior to their divorce, the parties entered into a separation agreement on 16 May 1983 which provided *inter alia* that the plaintiff have custody of the minor children and that defendant pay $500 a month for child support and provide medical and life insurance.

In 1985, the parties entered into a modification of the separation agreement which provided that plaintiff would have custody of Jennifer and Amanda, that defendant would have custody of Michael, and that defendant would pay $330.00 per month for the support of Jennifer and Amanda. Both parties are employed, as are their respective spouses. Plaintiff's monthly gross income was $1,587.00; her present husband's annual income was in excess of $55,000.00. Defendant's monthly gross income was $2,678.00; his present wife earned approximately $36,000.00 per year. Defendant furnishes the sole support for Michael. On 1 September 1987 plaintiff made a motion to have reasonable child support established pursuant to N.C. Gen. Stat. § 50-13.4. Defendant responded to the motion in the form of a general denial. The matter came on for trial on 2 November 1987. At the hearing the trial court made findings of fact, a conclusion of law and entered an order directing defendant to pay plaintiff $174.90 a month for each child in her custody and to continue to carry medical insurance on the children. Defendant was also ordered to maintain the children as irrevocable beneficiaries of defendant's life insurance policies pursuant to the amended separation agreement.

Plaintiff appealed from this order.

David F. Tamer for plaintiff-appellant.

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

WELLS, Judge.

Defendant's brief contains a section which is denominated, "Motion to dismiss and Defendant-Appellee's Brief." The record on appeal contains no motion to dismiss filed in accordance with Rule 37 of the North Carolina Rules of Appellate Procedure. Therefore, we decline to address the motion as presented in defendant's brief.

[1] Plaintiff assigns error to finding of fact seven of the trial court's order. Finding of fact seven is as follows:

> (7) The guidelines of the conference of Chief District Court Judges are not practical to apply herein due to the shared physical custody arrangement herein.

This "finding" is more properly denominated a conclusion of law, as it decides a question of law rather than one of fact, namely, the applicability of guidelines prescribed by the Conference of Chief District Court Judges for use in child support cases to the facts and circumstances of the instant case. N.C. Gen. Stat. § 50-13.4(c1) (1987) states in part:

> The Conference of Chief District Judges shall prescribe uniform statewide advisory guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes.
>
> Such advisory guidelines may provide for variation of the amount of support recommended based on one or more of the following:
>
> (2) any shared physical custody arrangements. . . .

An examination and interpretation of the statute as written clearly indicates that the guidelines prescribed by the Conference of Chief District Court Judges are not mandatory and binding but rather *advisory* in nature.

We note that the guidelines adopted pursuant to the statute provide for support payments to be based on a percentage of the

non-custodial parent's gross income (presently 25 percent for two children). Plaintiff contends that the trial court erred in making this disputed "finding" because it did not "find" how or why the shared custody arrangements rendered the guidelines not practical to apply in this case. We reject this argument. The fact that defendant had sole custody of one of the children and furnished his sole support, while defendant contributed to the support of the two children in plaintiff's custody, clearly justified the trial court's consideration of the "shared custody" factor.

In another assignment of error, plaintiff contends that the trial court erred in making and entering the following findings of fact and conclusions of law:

> (10) The Court specifically finds that the plaintiff has failed to rebut the presumption that the amount mutually agreed upon in the June, 1985, amended separation agreement is a just and reasonable amount of child support for the defendant to pay to the plaintiff; that the Court finds that said amount is fair and reasonable, taking into consideration the estates, earnings, conditions and accustomed standard of living of the children and the parties, the child care and homemaker contributions of each party and other facts of this particular case, including, *inter alia*, the remarriages of the parties.
>
> (11) As the defendant has received two five percent cost of living pay increases since the execution of the June, 1985, amended separation agreement, and as the defendant actually nets an increase in pay, after taxes, of approximately six percent of said increases in pay, the Court finds that it would be just and reasonable for the child support as agreed upon by the parties in the June, 1985, amended separation agreement to be increased by the sum of six percent for a total of $19.80 per month, or $9.90 per month per child.
>
> . . .
>
> Based upon the foregoing findings of fact, the Court concludes that, as there is a presumption in the absence of evidence to the contrary that the amount mutually agreed upon by the parties in the June, 1985, amended separation agreement is just and reasonable, and as the plaintiff has

failed to rebut said presumption by the greater weight of the evidence, and as the Court finds the amount agreed upon to be just and reasonable, taking into consideration the estates, earnings, conditions and accustomed standard of living of the children and the parties, the child care and homemaker contributions of each party and other facts of this particular case, including, *inter alia*, the remarriages of the parties, the defendant should be ordered to increase his child support payments by the sum of $9.90 per month per child, ...

[2] This Court's opinion in *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E. 2d 581 (1986) contains an excellent analysis of the appropriate weight to be given child support payments agreed upon in separation agreements when a trial court is called upon for the first time to determine the appropriate level of such payments. *See also* this Court's opinion in *Holderness v. Holderness*, 91 N.C. App. 118, 370 S.E. 2d 602 (1988). We perceive that the teachings of *Boyd* and *Holderness* and the opinions of our Supreme Court reviewed and relied upon therein is that the "presumption" of reasonableness of the agreed upon level of support in such cases is one of evidence only; that is, the agreed upon level of support constitutes some evidence of the appropriate level of support, but that this evidence must be weighed and considered by the trial court together with all other relevant and competent evidence bearing upon the statutory factors set out in N.C. Gen. Stat. § 50-13.4 (c) (1987). In other words, in cases such as the one now before us, the trial court is writing upon a clean slate, and the previously agreed upon level of support is but one factor to be considered.

In this case, plaintiff filed a financial affidavit which tended to show that her two daughters required support in the amount of $2,023.00 per month. At trial, plaintiff testified that as her daughters grew older, it cost more to maintain them and that the cost of food, clothing, and personal upkeep had gone up considerably since her separation from defendant.

[3] We conclude that in this case the trial court may have improperly weighed or relied upon the agreed upon level of support, the clear implication being that it may have failed to properly consider and weigh all of the evidence bearing upon the statutory factors. Because it must be properly addressed on remand, we note and emphasize that the trial court's order does not contain a

specific finding as to level of support needed "to meet the reasonable needs of the [children] for health, education, and maintenance . . . ," G.S. 50-13.4(c), a necessary aspect of such an order.

For the reasons stated, we vacate the order of the trial court and remand this case for further proceedings consistent with this opinion. There being no questions urged upon us as to the record of evidence adduced at the previous hearing, we do not order a new trial.

Vacated and remanded.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. TROY W. AYERS

No. 8818SC577

(Filed 20 December 1988)

1. **Criminal Law § 51.1— social worker—qualification as child abuse expert**

The trial court did not err in qualifying a social worker to testify as an expert in child abuse where the witness testified: she held a bachelor's degree in social work and a master's degree in counseling and guidance; she has had over 100 hours of training in the area of sexual abuse; she directly supervised about 350 cases involving sexual abuse as a counseling services supervisor; and she also personally counseled approximately seventy victims of sexual abuse on a weekly basis for six months to two years per victim.

2. **Criminal Law § 169.3— admission of testimony over objection—failure to object to similar testimony**

Defendant was not prejudiced by the admission over objection of opinion testimony by a social worker that amnesia is a symptom of sexually abused children where a physician had previously testified without objection that in her opinion children who have been sexually abused often have amnesia as to details of the incidents.

3. **Criminal Law § 112.2— instructions—duty of jury to ascertain truth—no plain error**

The trial court's instructions on the duty of the jury to ascertain the truth did not lower the State's burden of proof to less than proof beyond a reasonable doubt and did not constitute plain error.

State v. Ayers

APPEAL by defendant from *Friday (John R.), Judge.* Judgment entered 4 December 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 December 1988.

Defendant was found guilty by a jury of two counts of first degree rape of his eight-year-old step-granddaughter. The convictions were consolidated for sentencing, and defendant was sentenced to life imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Allen Jernigan, for the State.

Mary K. Nicholson for defendant-appellant.

SMITH, Judge.

Defendant brings forward two assignments of error. First, he contends the trial court erred in qualifying a witness, Alice Bitticks, as an expert in child sexual abuse and in allowing the witness to testify as an expert. Defendant's second assignment of error is to a portion of the court's instructions to the jury. We have reviewed the assignments of error and find that defendant's trial was free from error.

At trial, the victim was qualified as a witness and testified that she lived with her father, her paternal grandmother and her grandmother's husband, defendant. She testified that on two occasions when she and defendant were at their home alone defendant inserted his "woo" into her "private." Eventually the victim told her mother of the events. The victim was then examined by a physician and questioned by law enforcement officers. The State also presented testimony of the victim's mother, the examining physician, the investigating officer and a social worker, Alice Bitticks, which tended to corroborate the victim's testimony. Defendant's evidence included his own testimony of a good relationship with the victim and a denial of the alleged incidents. He also presented the testimony of several witnesses as to his reputation for truthfulness in the community.

[1] Defendant first assigns error to the testimony of Ms. Alice Bitticks, Counseling Services Supervisor at Turning Point, a division of Family and Children Services. Defendant contends the court erred by qualifying and allowing Ms. Bitticks to testify as an expert in child sexual abuse. We note initially that when the

court accepted the witness as an expert, defendant's trial counsel stated that he had no objection to the testimony as long as the testimony did not reach psychological or psychiatric questions, a condition to which the court agreed. However, defendant notes an exception in the trial transcript to the court's ruling accepting the witness as an expert. Our Supreme Court has stated that "[a] party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of Rule 10(b)." *State v. Oliver*, 309 N.C. 326, 335, 307 S.E. 2d 304, 312 (1983). "[F]ailure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal." *Id.* at 334, 307 S.E. 2d at 311. Thus, defendant may not assign error to the witness's qualification as an expert but may only assign error to questions which are properly objected to at trial. App. R. 10(b)(1). Moreover, we find no error in the qualification of Ms. Bitticks as an expert. Ms. Bitticks testified that she holds a bachelor's degree in social work and a master's degree in counseling and guidance. In her three and one-half years of employment at Turning Point, she has had over 100 hours of training in the area of sexual abuse. As counseling services supervisor at Turning Point, she directly supervised about 350 cases involving sexual abuse. She also personally counseled approximately seventy victims of sexual abuse on a weekly basis for six months to two years per victim. "It is enough that through study or experience the expert is better qualified than the jury to render [an] opinion regarding the particular subject." *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E. 2d 598, 604 (1985), *disc. rev. denied and appeal dismissed*, 316 N.C. 198, 341 S.E. 2d 581 (1986). *See* G.S. 8C-1, Rule 702.

[2] Defendant's only objections to Ms. Bitticks' testimony were to questions regarding her opinion on whether amnesia is a symptom of sexually abused children. Prior to Ms. Bitticks' testimony, the examining physician had testified that in her opinion children who have been sexually abused often have amnesia as to details of the incidents. "Exception to the admission of testimony is waived when testimony of the same import is . . . admitted without objection." *McNeil v. Williams*, 16 N.C. App. 322, 324, 191 S.E. 2d 916, 918 (1972). Plaintiff's first assignment of error is without merit.

[3] Defendant's final assignment of error is to the court's instructions to the jury. The court gave the following instruction:

> Now, ladies and gentlemen of the jury, the highest aim of every legal contest is the ascertainment of the truth. In these cases, you have no friendly [sic] to reward or enemy punished [sic]. You have no anger to appease or sorrow to assuage. You as the jury have the solemn duty in these cases to let your verdict speak the truth.

Defendant contends the instruction is error in that it lowers the State's burden of proof to less than the "beyond a reasonable doubt" standard. We disagree with defendant's contention.

Defendant was given an opportunity to object to the jury instructions but did not do so. Our appellate rules provide that "[n]o party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." App. R. 10(b)(2). "Rule 10(b)(2) . . . requiring objection to the charge before the jury retires is mandatory and not merely directory." *State v. Fennell*, 307 N.C. 258, 263, 297 S.E. 2d 393, 396 (1982). Furthermore, we find no violation of a substantial right entitling defendant to review under the "plain error" doctrine of *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). In determining whether an alleged defect in a jury instruction is "plain error," we must decide if the alleged error had probable impact on the jury's finding of guilt. *Id.* We find no such impact here. "[I]t 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). The instruction given is essentially the pattern jury instruction in N.C.P.I.—Crim. 101.36. The charge does not, as defendant contends, admonish the jury to resolve every question presented by the evidence rather than decide whether the jury is convinced of defendant's guilt beyond a reasonable doubt. Moreover, the court properly instructed the jury on the State's burden of proof and the concept of reasonable doubt. Construed as a whole, the instructions given did not constitute error.

No error.

Judges EAGLES and PARKER concur.

TRACY MCLAUGHLIN AND HUSBAND, KEITH MCLAUGHLIN, PLAINTIFFS v. CRAIG ALEXANDER MARTIN, THOMAS JOSEPH SHEA, CITY OF FAYETTEVILLE, NORTH CAROLINA INTERLOCAL RISK FINANCING FUND, AND UNIGARD INSURANCE COMPANY, DEFENDANTS

No. 8812SC288

(Filed 20 December 1988)

Declaratory Judgment Act § 4.3— action to determine uninsured motorist coverage—appeal dismissed

A declaratory judgment action was dismissed where plaintiffs alleged that the individual defendants were uninsured motorists and sought a judgment declaring the status and limits of the coverages available to them from other defendants, but liability did not attach under the uninsured motorist coverage of both insurers until a valid judgment was obtained. Plaintiffs have not obtained any such judgment, there is no assurance that they ever will, and there is no present controversy between adverse parties. N.C.G.S. § 1-253.

APPEAL by defendant Interlocal Risk Financing Fund from *Herring, Judge.* Judgment entered 3 February 1988 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 28 September 1988.

Harris, Sweeny & Mitchell, by Charles E. Sweeny, Jr., Ronnie M. Mitchell, and W. Trent Fox, Jr., for plaintiff appellees.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., for defendant appellant Interlocal Risk Financing Fund of North Carolina.

Russ, Worth, Cheatwood, Guthrie & Trehy, by Walker Y. Worth, Jr., for defendant appellee City of Fayetteville.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Theodore B. Smyth, for defendant appellee Unigard Insurance Company.

PHILLIPS, Judge.

Though the record does not show it, plaintiffs purportedly have another action pending in which they seek to obtain judgment against the individual defendants for negligently injuring Tracy McLaughlin in a collision between their car and a vehicle owned by defendant City that she was operating. In this declaratory judgment action, plaintiffs allege that the individual de-

fendants were uninsured motorists and they seek a judgment declaring the status and limits of the uninsured motorist coverages that are available to them from the other defendants. The case was tried to the presiding judge, who found and concluded that: The individual defendants were uninsured motorists at the time involved; defendant Interlocal Risk Financing Fund then had a contract with defendant City under which it provided uninsured motorists coverage on defendant City's vehicles with limits of $1,000,000 per occurrence with a "retention" of $100,000 for each occurrence; this coverage is primary and Interlocal Risk Financing Fund is obligated to pay all sums plaintiffs are legally entitled to recover of the uninsured motorists up to $1,000,000; the City is not obligated to reimburse the Fund for any payment it makes to plaintiffs; secondary uninsured motorist coverage with limits of $100,000 per person will be available to plaintiffs under Unigard's policy on their personal car when the Fund's $1,000,000 limits have been exhausted.

The appeal of Interlocal Risk Financing Fund questions only the portion of the judgment concerning its responsibility for the first $100,000 of any judgment plaintiffs get in the action against the uninsured motorists. This question will not be addressed, however, because we have no jurisdiction over the case and the appeal is dismissed.

Under G.S. 1-253 a jurisdictional requisite for a declaratory judgment action is an actual present controversy between adverse parties, *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974), and the record in this case does not show that any such controversy exists. Under the uninsured motorist coverages of both insurers liability does not attach until a valid judgment is obtained against an uninsured motorist. Plaintiffs have not obtained any such judgment and there is no assurance that they ever will. Since plaintiffs are not now entitled to any uninsured motorist insurance limits from either insurer and neither is now obligated to plaintiffs under their coverages, the question that the case undertakes to raise is hypothetical, and we do not resolve hypothetical questions. In *Newton v. The Ohio Casualty Insurance Co.*, 91 N.C. App. 421, 371 S.E. 2d 782 (1988), the facts were similar and we made the same ruling. Our decision is not affected by the fact that the parties stipulated that the trial court had jurisdiction of the subject

matter and the parties; for subject matter jurisdiction is not granted by parties to a case, but by the General Assembly. *City of Raleigh v. Norfolk Southern Railway Co.*, 275 N.C. 454, 168 S.E. 2d 389 (1969).

Appeal dismissed.

Judges EAGLES and PARKER concur.

FAYE McLEOD v. MONIQUE FAUST

No. 885DC558

(Filed 20 December 1988)

Appeal and Error § 37— failure to file settled record on appeal

Plaintiff's appeal is dismissed for failure to file a properly settled record on appeal where the record was not agreed to and was filed before expiration of the 45-day period allowed by the trial judge for defendant to serve objections or file a counter-proposed record on appeal. Appellate Rules 11, 12(a) and 25.

APPEAL by plaintiff from *Rice (Charles E., III), Judge.* Judgment entered 21 October 1987 and order entered 18 December 1987 in District Court, NEW HANOVER County. Heard in the Court of Appeals 8 December 1988.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellant.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick and Reid G. Hinson, for defendant-appellee.

SMITH, Judge.

A jury found that plaintiff was injured by defendant's negligence and that plaintiff's own negligence contributed to her injury. On 21 October 1987, the trial court entered judgment for defendant and taxed costs against plaintiff. Plaintiff's motion for judgment notwithstanding the verdict was denied on 18 December 1987. On 23 December 1987, plaintiff gave notice of appeal.

On 2 June 1988, defendant filed in this Court a motion to dismiss the appeal. For plaintiff's failure to file a properly settled

record on appeal, defendant's motion to dismiss the appeal is allowed pursuant to App. R. 25.

App. R. 12(a) requires the appellant to file with the appropriate appellate court a record on appeal that has been settled by any of the procedures authorized in App. R. 11. Plaintiff, the appellant in this case, has failed to comply with the requirements of App. R. 11 in settling the record on appeal.

On 4 January 1988, Judge Rice signed the appeal entry and granted plaintiff 60 days in which to prepare and serve a proposed record on appeal upon defendant. Judge Rice allowed defendant 45 days in which to object to plaintiff's proposed record on appeal or file a counter-proposed record on appeal. Plaintiff moved for and was allowed an extension of time up to and including 30 April 1988 in which to file and serve the proposed record on appeal. The order granting this extension of time did not alter the 45-day period which defendant had been given to serve objections or file a counter-proposed record on appeal. On 28 April 1988, plaintiff's attorney hand-delivered a copy of the proposed record on appeal to defendant's attorney. Plaintiff filed the proposed record with this Court on 23 May 1988. The record was not agreed to and it was filed before the expiration of defendant's 45-day period in which to serve objections or file a counter-proposed record on appeal. Thus, the record on appeal has not been settled according to any provisions of App. R. 11.

We note that plaintiff filed the proposed record on appeal with this Court on Monday, 23 May 1988, 152 days after notice of appeal was given. As the 150-day period expired on a Saturday, the proposed record on appeal was timely filed in accordance with App. R. 12(a). However, appellant is not entitled to use all the time less than 150 days and then file a record on appeal that has not been settled as required by App. R. 11. Plaintiff, as appellant, bears the burden of seeing that the record on appeal is properly settled and filed with this Court. *State v. Gilliam*, 33 N.C. App. 490, 235 S.E. 2d 421 (1977). Plaintiff could have served the proposed record on appeal on defendant in ample time to allow defendant 45 days to file objections, requested the trial court to amend the order to allow defendant a shorter period of time to make objections, or requested this court to grant an extension of the 150-day period for filing the record on appeal.

Plaintiff's proposed record on appeal filed with this Court contains the following statement, signed by plaintiff's attorney:

STATEMENT REGARDING SETTLEMENT OF RECORD ON APPEAL

Per Appellate Rule 11, the Proposed Record on Appeal was duly served upon counsel for the Defendant/Appellee on April 28, 1988. The Defendant/Appellee having failed, within the time allowed pursuant to Rule 11, to file a notice of approval or objections, amendments, or a proposed alternative Record on Appeal, the foregoing is hereby submitted as the Record on Appeal.

This the 17th day of May, 1988.

Plaintiff apparently believed that the 15-day period for serving objections in App. R. 11 applied to bar defendant's objections to the proposed record. However, the trial court allowed defendant 45 days to serve objections or file a counter-proposed record on appeal and thus the 15-day period of App. R. 11 is inapplicable.

As plaintiff has not filed a properly settled record on appeal, defendant's motion to dismiss the appeal is allowed. Because we are unable to determine what issues might arise in a properly settled record, the appeal is dismissed without considering or determining whether a writ of certiorari should be granted.

Appeal dismissed.

Judges EAGLES and PARKER concur.

AUTOMOTIVE RESTYLING CONCEPTS, INC. v. CENTRAL SERVICE LINCOLN MERCURY, INC.

No. 888DC312

(Filed 20 December 1988)

Constitutional Law § 26— Virginia judgment—business transaction in Virginia—full faith and credit

The trial court correctly granted summary judgment for plaintiff, upholding a Virginia judgment against defendant, where defendant transacted business in Virginia by having its automobiles restyled by plaintiff in Virginia.

Automotive Restyling Concepts, Inc. v. Central Service Lincoln Mercury, Inc.

Under Sec. 8.01-328.1 of the Code of Virginia, only one business transaction in Virginia is required to confer personal jurisdiction with respect to that transaction; moreover, Virginia's exercise of jurisdiction over defendant did not offend traditional notions of fair play inherent in constitutional due process because, having voluntarily availed itself of the privilege of having its cars improved and restyled in Virginia, that state's enforcement of defendant's obligation to pay for those services was to be expected. U.S. Constitution Art. IV, sec. 1.

APPEAL by defendant from *Jones, Arnold O., Judge.* Judgment entered 25 January 1988 in District Court, WAYNE County. Heard in the Court of Appeals 3 October 1988.

Judson H. Blount, III and Kaufman & Canoles, by David J. Pierce, Norfolk, Virginia, for plaintiff appellee.

Barnes, Braswell, Haithcock & Warren, by Glenn A. Barfield, for defendant appellant.

PHILLIPS, Judge.

In appealing from an order of summary judgment which upholds a Virginia judgment obtained against it, defendant contends that the judgment is invalid because the Virginia court did not have *in personam* jurisdiction over it. The only question presented is whether the judgment sued on is valid under the law of Virginia; *Dansby v. North Carolina Mutual Life Insurance Co.*, 209 N.C. 127, 183 S.E. 521 (1936); if it is the full faith and credit clause of the United States Constitution art. IV, sec. 1 requires us to give it the same effect here that it has there. *Spence v. Durham*, 283 N.C. 671, 198 S.E. 2d 537 (1973), *cert. denied*, 415 U.S. 918, 39 L.Ed. 2d 473, 94 S.Ct. 1417 (1974).

The pertinent undisputed facts bearing upon this question are that: Plaintiff, a Virginia corporation situated in Virginia Beach, is in the business of restyling and restoring used automobiles; defendant, a North Carolina corporation situated in Goldsboro, is in the business of selling new and used automobiles. In the spring of 1985, following a meeting in Goldsboro between an employee of plaintiff and defendant's president, the parties agreed that plaintiff would restyle four of defendant's used cars. Another employee of plaintiff later went to defendant's premises in Goldsboro, got the automobiles and took them to plaintiff's facility in Virginia Beach, where they were restyled. When plain-

tiff's bill was received, defendant refused to pay it, contending that some of the work was defective and the value of one car was diminished because plaintiff wrecked it while taking it to Virginia, and plaintiff sued defendant in the District Court of Virginia Beach. Substituted service on defendant was obtained by serving the Secretary of the Commonwealth of Virginia, who duly forwarded a copy of the papers to defendant; and upon defendant failing to answer the complaint or otherwise appear in the case, judgment was entered against it for $3,343 along with interest thereon from 18 March 1986.

The validity of a foreign judgment against a nonresident defendant depends upon two requisites: (1) Whether the court was authorized by statute to exercise jurisdiction over the nonresident defendant; and (2) whether the exercise of jurisdiction was in accord with the constitutional limits of due process. *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393 (W.D. Va. 1987); *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). Both conditions were met in this case and the ruling of the trial court is affirmed.

In this case the Virginia court was authorized by statute to exert jurisdiction over defendant by Sec. 8.01-328.1 of the Code of Virginia, which states that:

> A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
>
> 1. Transacting any business in this Commonwealth.

This section is a "single act" statute requiring only one business transaction in Virginia to confer personal jurisdiction on its courts with respect to that transaction. *United Coal Co. v. Land Use Corp.*, 575 F. Supp. 1148 (W.D. Va. 1983). Defendant's argument that the statute is inapplicable since it did not go to that state in regard to the cars is without merit. By having its automobiles restyled by plaintiff in Virginia at a cost of several thousand dollars it transacted business there, as was contemplated when it contracted for plaintiff, whose place of business is in Virginia, to do the work. Nor under the circumstances did Virginia's exercise of jurisdiction over defendant offend traditional notions of fair play inherent in constitutional due process.

Hanson v. Denckla, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945); *Viers v. Mounts*, 466 F. Supp. 187 (W.D. Va. 1979). Having voluntarily availed itself of the privilege of having its cars improved and restyled in Virginia, that state's enforcement of defendant's obligation to pay for the services so obtained was to be expected.

The trial court's refusal to dismiss defendant's counterclaim was not appealed and is not before us.

Affirmed.

Judges EAGLES and PARKER concur.

MARVIN O. HILL v. THE CITY OF KINSTON AND ROSS HAIGLER, CHIEF OF POLICE OF THE CITY OF KINSTON

No. 888SC414

(Filed 20 December 1988)

Trespass § 2— dismissal of police officer—action for intentional infliction of emotional distress—summary judgment for defendants proper

The trial court properly granted defendants' motion for summary judgment on a complaint for intentional infliction of emotional distress where plaintiff was arrested and indicted for possessing and receiving stolen goods; plaintiff was suspended without pay; the charges against him were subsequently dismissed; a Board of Inquiry investigated plaintiff's conduct and recommended dismissal; and that recommendation was upheld by the city manager and the Personnel Board of the City Council. The process of plaintiff's dismissal was carried out in a responsible manner and the forecast of evidence shows no extreme or outrageous conduct.

APPEAL by plaintiff from *Small, Herbert, Judge.* Order entered 9 December 1987 in LENOIR County Superior Court. Heard in the Court of Appeals 26 October 1988.

Plaintiff, a lieutenant in the Kinston Police Department, was dismissed from his position following a Board of Inquiry hearing regarding his indictment for possessing and receiving stolen goods. Plaintiff learned of a robbery on 19 November 1988 at the

Big Blue Store, in which sixteen kerosene heaters were stolen. The following day plaintiff visited Oscar Rouse, a police informant with a criminal record, and asked for help with his private business. Rouse asked plaintiff if he were interested in purchasing a kerosene heater for forty dollars. Plaintiff eventually purchased two heaters and one gas grill, asking Rouse whether the heaters were his but not inquiring from where he had obtained them. (Tp. 38.)

Rouse was subsequently arrested, and Police Chief Haigler suspended plaintiff from his job without pay pending an investigation into the matter. Although plaintiff was indicted for receiving stolen property, these charges were later dismissed by the State. Upon the Board of Inquiry's recommendation that plaintiff be dismissed, Haigler dismissed him by letter of 22 May 1985. Plaintiff's appeal to the city manager was unsuccessful. Plaintiff then appealed to the personnel board, which upheld his dismissal. Plaintiff alleges that Haigler prepared the disposition of appeal prior to the committee entering its decision.

Plaintiff filed a complaint against the City of Kinston and Haigler alleging that he had been wrongfully terminated and had suffered intentionally inflicted mental distress. The trial court granted defendants' motion for summary judgment, and plaintiff appealed.

Whitley, Coley and Wooten, by Eugene Griffin Jenkins, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by M. Ann Anderson, C. Daniel Barrett and Richard L. Rainey, for defendant-appellees.

WELLS, Judge.

Plaintiff contends that the trial court erred in granting defendants' motion for summary judgment on the intentional infliction of mental distress claim. He argues that his forecast of evidence was sufficient to raise a triable issue of fact regarding the elements of the tort of intentional infliction of mental distress, which are: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another," *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). A defendant is entitled to summary judgment if he

shows that the plaintiff cannot prove one or more essential elements of his claim. *Id.* (*citing Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979)).

In *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986), this Court reversed the entry of summary judgment against an employee plaintiff, holding that her allegations of workplace harassment showed extreme and outrageous conduct sufficient to withstand the defendant's motion. Her forecast of evidence tended to show that another employee made numerous sexual advances toward her, and upon being refused screamed profanities at her and threatened her with bodily injury. "No person," we stated in that case, "should have to be subjected to [such conduct] without being afforded remedial recourse through our legal system." *Id.*

In the same opinion, however, we affirmed the entry of summary judgment against two other plaintiffs, holding that the defendants' conduct toward them was not extreme and outrageous. One plaintiff had been shouted at and the defendant's employee had called her names and interfered with the performance of her job, but this pugnacious conduct alone did not " 'exceed all bounds usually tolerated by a decent society.' " *Id.*, *quoting Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Similarly, the third plaintiff's allegations that she had been denied a pregnancy leave of absence, directed to carry heavy objects, cursed at, and fired after leaving work to go to the hospital were insufficient to withstand the employer's motion for summary judgment.

In the case now before us, plaintiff appears to emphasize that since the criminal charges against him were ultimately dismissed, the failure of defendants to reinstate him makes them answerable for intentional infliction of mental distress. The forecast of evidence shows, however, that the process of plaintiff's dismissal was carried out in a responsible manner. Following his suspension plaintiff's actions and conduct were investigated and heard by a duly constituted Board of Inquiry, which recommended his dismissal. Acting upon that recommendation, defendant Haigler then notified plaintiff of his dismissal. Plaintiff then appealed to the city manager, who upheld Haigler's decision. Plaintiff then appealed to the Personnel Board of the City Council, which upheld his dismissal.

While we can understand and sympathize with plaintiff's anguish and distress at having his career as a police officer terminated under these circumstances, the forecast of evidence shows no extreme or outrageous conduct on the part of defendants, an essential element of the tort of intentional infliction of mental distress, *Dickens v. Puryear, supra.* The entry of summary judgment on plaintiff's claim of intentional infliction of mental distress must be affirmed.

In his brief, plaintiff has not challenged the dismissal of his claim for wrongful discharge, and we therefore affirm that aspect of the trial court's judgment.

Affirmed.

Judges ARNOLD and COZORT concur.

JIM F. CARR v. ORA S. CARR

No. 8822DC107

(Filed 20 December 1988)

Divorce and Alimony § 30— erroneous equitable distribution order

An equitable distribution order was incomplete and erroneous where it failed to classify, value and distribute various bank accounts and household goods but left matters relating thereto open for an indefinite period in the hope that the parties will evaluate and divide them; it contained no findings of the "net" value of the total marital estate, the properties distributed to each party, or three tracts of maritally owned real estate; it made an unequal division without findings that the statutory factors required by N.C.G.S. § 50-20(c) were considered and that such division was equitable; and it failed to distribute three tracts of marital real estate but declared that the parties own each tract as tenants in common and directed that they be sold by commissioners if the parties do not divide them within an unstated time.

APPEAL by plaintiff from *Martin, Lester P., Jr., Judge.* Judgment entered 22 June 1987 and order entered 31 August 1987 in District Court, IREDELL County. Heard in the Court of Appeals 29 August 1988.

DeLaney & Sellers, by Timothy G. Sellers, for plaintiff appellant.

No brief filed for defendant appellee.

PHILLIPS, Judge.

The equitable distribution judgment appealed from is incomplete and erroneous in several respects. To enter a proper equitable distribution judgment the trial court must classify all property owned by the parties or either of them as either marital or separate; must determine the net market value of the marital property as of the separation date; must determine what division of the marital property is equitable; and must distribute the property to the parties accordingly. *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); *Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985). And in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness. *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).

The failings of this judgment include the following:

(1) Instead of identifying, classifying, valuing and distributing the various bank accounts and articles of household property that the parties were found to have acquired during the marriage, the judgment left everything relating to these properties open for an indefinite period in the hope that the parties, who have agreed about very little in recent years, will evaluate and divide them. This is the antithesis of a distribution and it rendered interlocutory what purports to be and should be a final judgment. It also prevents us from knowing what properties the parties will receive, much less their value, and made meaningless the statement that the distribution is equitable. Though agreements are to be welcomed by the courts, "agreements" that have not and may never be made have no place in a purportedly final equitable distribution.

(2) No findings were made as to the *net* value of the total marital estate, or the properties distributed to each party, or of the three tracts of maritally owned real estate. That

the court did find what the fair market values of the three tracts were is not sufficient since these values were not reduced by their encumbrances which include at least past due taxes according to the evidence. Be that as it may, fair market value, though a necessary preliminary finding in these cases, is not the same as net value and G.S. 50-20(c) requires that net value be determined.

(3) Though the distribution undertaken is unequal (according to our calculations, an unnecessarily laborious process due to the disorganized arrangement of the judgment, properties worth $48,990.88 were distributed to plaintiff and $37,225.04 to defendant), no findings were made that the statutory factors required by G.S. 50-20(c) were considered and no determination was made that an unequal division is equitable.

(4) Instead of dividing and distributing the three tracts of marital real estate in some practical and equitable manner (a simple thing to do since each tract has approximately the same fair market value and a balance can be readily achieved by reducing the major recipient's personal property or requiring an appropriate payment), the judgment merely declared that the parties own each tract as tenants in common and directed that if they do not divide the tracts within an unstated time, they be sold by commissioners under the Judicial Sales Act. This is not a distribution, but a dilatory and potentially wasteful substitute that neither reason nor the record justifies.

(5) No conclusions of law were made.

The judgment was not a total loss, however, for findings made in findings of fact 1 through 9 as to the status and fair market value of the properties referred to therein are supported by competent evidence and are therefore binding upon us. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). But the statements made in those findings as to the distribution of the properties referred to therein have no basis and are vacated along with all the other parts of the judgment. Working from the findings that have been affirmed, upon remand such further proceedings may be conducted as are necessary for the entry of a proper judgment herein.

Affirmed in part; vacated in part; and remanded.

Judge WELLS concurs.

Judge BECTON concurs in the result.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 DECEMBER 1988

CARR v. CARR No. 8822DC106	Iredell (85CVD1007)	Affirmed
CHRYSLER CREDIT CORP. v. SMITH No. 887DC854	Nash (87CVD117)	Vacated & Remanded
COLE v. COLE No. 8820SC602	Moore (86CVS235)	Dismissed
DeHART v. WINCHESTER No. 8830SC341	Swain (82CVS153)	No Error
FRIEDMAN v. CLARKE No. 8812SC606	Cumberland (84CVS1371)	Dismissed
GOSS v. HUDSON No. 8814DC285	Durham (86CVD2887)	Reversed & Remanded
GREENE v. GREENE No. 8822DC886	Davie (84CVD291)	Affirmed
IN RE BOWEN No. 8827DC779 IN RE JETTER No. 8827DC780	Gaston (86J39) (87J299)	Affirmed
IN RE FORECLOSURE OF MOORE No. 883SC321	Craven (87SP131)	Appeal Dismissed
IN RE TRUST OF JACOBS v. WEINSTEIN No. 8826SC364	Mecklenburg (86SP417) (86SP418)	Dismissed
LOWDER v. ALL STAR MILLS No. 8820SC648	Stanly (79CVS015)	Appeal Dismissed
LUNSFORD v. HAWK No. 8815DC446	Alamance (86CVD1599)	Appeal Dismissed
SIGMON v. TIMMERMAN INS. SERVICE No. 8822SC380	Iredell (86CVS1108)	No Error
STATE v. BAKER No. 888SC862	Wayne (87CRS7811)	No Error
STATE v. BIRDSONG No. 8810SC314	Wake (87CRS19602)	Judgment Arrested

STATE v. CANNON No. 888SC1073	Lenoir (86CRS9491)	No Error
STATE v. CLONINGER No. 8827SC267	Gaston (86CRS32664)	Affirmed
STATE v. DIAZ No. 8814SC751	Durham (86CRS28582) (86CRS28583) (86CRS28677)	No Error
STATE v. EDMISTEN No. 8826SC656	Mecklenburg (87CRS073389)	Affirmed
STATE v. FUNDERBURKE No. 8827SC270	Gaston (87CRS843) (87CRS1289)	No Error
STATE v. GILL No. 8827SC300	Cleveland (87CRS2718)	No Error
STATE v. GILLIAM No. 8829SC346	Henderson (87CRS3839)	No Error
STATE v. HAGIE No. 8822SC859	Davie (87CRS285) (87CRS286)	No Error
STATE v. JETER No. 8810SC573	Wake (87CRS34970) (87CRS34972)	No Error
STATE v. JOHNSON No. 8814SC555	Durham (85CRS36343) (85CRS36345) (85CRS36346)	Vacate and remand for new sentencing hearing
STATE v. KEMP No. 8824SC727	Mitchell (87CRS227) (87CRS269) (87CRS270) (87CRS271) (87CRS272) (87CRS273) (87CRS274) (87CRS275) (87CRS276) (87CRS277) (87CRS278) (87CRS279) (87CRS280) (87CRS281) (87CRS282)	Affirmed in Part; Remanded for Resentencing in Part

STATE v. LAMBERT No. 8827SC725	Lincoln (87CRS2278) (87CRS2279) (87CRS2280)	No Error
STATE v. McCRAY No. 8818SC210	Guilford (87CRS24593) (87CRS24594)	No Error
STATE v. PATTERSON No. 8830SC430	Cherokee (87CRS680) (87CRS681)	No Error
STATE v. PENLAND No. 882SC376	Beaufort (87CRS4074) (87CRS4152)	Appeal Dismissed
STATE v. ROUNDTREE No. 888SC408	Lenoir (87CRS3465)	No error in part, vacated in part
STATE v. WALKER No. 8812SC843	Cumberland (87CRS40125)	Remanded for a new sentencing hearing
STATE EX REL. WILLIAMS v. BROWN No. 887SC887	Nash (88CVS372)	Affirmed
STEPP v. CONSOLIDATED ALUMINUM No. 8810IC836	Ind. Comm. (511614)	Affirmed
WATKINS v. WATKINS No. 8815DC717	Orange (71CVD4)	Affirmed & remanded in part; dismissed in part

STATE OF NORTH CAROLINA v. RONALD ARLESTUS ATTMORE

No. 8815SC407

(Filed 30 December 1988)

1. **Criminal Law § 91.7— continuance on ground of absence of witness—denial proper**

The trial court did not err in denying defendant's motion to continue based on the absence of a psychiatric witness where defendant's trial commenced six months after his arrest and four months following his indictment; ample time existed for defendant's lawyer to learn of the psychiatrist's identity and to make efforts to locate her, but counsel did not attempt to do so because he did not view any evidence she might offer as being relevant to defendant's case; defendant made no credible showing that a continuance would have enabled him to secure the witness's attendance; the psychiatrist could not have assisted defendant had he attempted to present an intoxication defense; she would have been of minimal assistance had defendant asserted an insanity defense; and defendant therefore did not suffer prejudice as a result of the denial of his continuance.

2. **Criminal Law § 91.4— continuance to obtain new counsel—no ineffective assistance of counsel—denial of continuance proper**

The trial court did not err in denying defendant's motion for continuance to give him time to hire new counsel because his court-appointed lawyer ineffectively represented him by failing to investigate an insanity defense, since defendant was under a burden to show that his counsel's putative deficiencies prejudiced him; though defense counsel deserved no commendation for his pretrial preparation, he had no duty to explore the insanity defense to the extent defendant claimed he should have; and an insanity defense would not have changed the outcome of the trial in any event.

3. **Criminal Law § 64— defendant's evidence of intoxication—court's instructions to defendant not error**

There was no merit to defendant's contentions that (1) the trial judge's observation that defense counsel gave defendant "correct legal advice" about the defenses of insanity and intoxication discouraged defendant and his lawyer from asserting either defense, and (2) the trial judge erroneously advised "that intoxication is no defense to crime in North Carolina," since the trial judge's statements could have been taken to mean that defendant could not base an insanity defense on voluntary intoxication, which was a correct statement of the law; but even if the judge's statements about intoxication constituted error, defendant did testify about his drug use on the night in question, and that testimony failed to establish a defense of cocaine-induced intoxication, thus rendering harmless the judge's "misstatement."

4. **Criminal Law § 112.6— voluntary intoxication—instruction not required**

Evidence was insufficient to require the trial court to instruct the jury on the defense of voluntary intoxication where defendant testified as to his intent to commit robbery; he testified in great detail about the events which occurred

at the crime scene; he testified that he was "zooted" from crack cocaine on the date of the crime; and the only other suggestion of intoxication was one eyewitness's observation that defendant's eyes appeared "glassy."

5. **Criminal Law § 138.28— punishment for kidnapping—aggravating factor of prior convictions**

A thirty-year sentence for defendant's kidnapping conviction was proper under the Fair Sentencing Act where the evidence supported the trial court's finding that the aggravating factor of a prior conviction for a criminal offense punishable by more than 60 days' confinement outweighed the mitigating factors of drug abuse and defendant's combat service in Viet Nam.

6. **Jury § 7.4— racial discrimination in jury selection—insufficiency of evidence**

Defendant failed to make out a *prima facie* case of racial discrimination in the selection of the petit jury where the jury consisted of six white men, three black women, and three white women; the State had exercised two peremptory challenges; both veniremen struck were black males; and there were no suggestions of racially discriminatory intent within the prosecutor's articulated motives for challenging the two veniremen.

APPEAL by defendant from *Thomas S. Watts, Judge.* Judgment entered 3 December 1987 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 1 November 1988.

Attorney General Lacy H. Thornburg by Associate Attorney General David F. Hoke for the State.

Appellate Defender Malcolm Ray Hunter, Jr. by Assistant Appellate Defender Mark D. Montgomery for defendant-appellant.

BECTON, Judge.

On 3 December 1987, a jury convicted the defendant, Ronald Arlestus Attmore, of one count of first degree rape, one count of first degree sex offense, six counts of second degree kidnapping, and one count of robbery with a firearm. The trial judge sentenced defendant to concurrent life terms for the rape and sex offense, a consecutive 30-year term for one of the kidnapping counts, consecutive terms of nine years for each of the remaining five kidnapping counts, and a consecutive 30-year term for the armed robbery offense. Plainly put, the judge sentenced defendant to life imprisonment plus 105 years. From this judgment, defendant appeals. We find no error.

The evidence at trial tended to show that defendant, armed with a handgun, entered a supermarket in Elizabeth City at ap-

proximately 10 p.m. on 2 July 1987. He gathered together six employees and, at various times and for varying lengths of time, confined each of them inside the store's produce cooler. He also used his weapon to obtain the store's money from its manager. Soon after defendant entered the supermarket, the Elizabeth City police surrounded it.

At one point during the siege, defendant took a female employee into an area of the store apart from the produce cooler and away from the other employees. The woman testified that defendant, by threatening her life, forced her to submit to cunnilingus and to have sexual intercourse with him. Defendant testified that he had intercourse with the woman, but he denied coercing her.

After several hours inside the building, defendant used the six employees as a "shield" and walked from the store to a car belonging to another of the employees, Tammy Hoffman. Ms. Hoffman then drove defendant from the supermarket grounds. At a police roadblock in Virginia, defendant surrendered his gun to Ms. Hoffman and allowed her to leave the car. She testified that when the car first encountered the blockade, defendant put the gun to her head and yelled to the police to "back off" or he would "blow [her] . . . head off."

Statements made by defendant during pretrial motions indicated that he had served in the United States Army, receiving an honorable discharge in 1970. While in the military, he performed one-and-a-half tours of duty in Viet Nam, suffering shrapnel wounds in the head and arms during his first tour. Defendant said he began to use drugs while in Viet Nam and continued using them when he returned home. He told the judge that between 1985 and 1987 he had consulted with a psychiatrist, one Dr. Sheryl Farshart, at "a place where Viet Nam veterans go and . . . relate to different experiences." He stated he had volunteered to participate in "research" the psychiatrist conducted and that she had tried to get him "off the drugs [and] into a treatment [program or clinic]."

Defendant testified that on 2 July 1987 he became "really high" on crack cocaine (crack) while in New Bern. "The next thing [he] knew," he was in Elizabeth City. There, he purchased more crack, smoked it, and "by that time" was "really zooted." Melvin

Hopkins, the supermarket manager, testified that during the commission of the crimes defendant's "eyes were glassy."

I

Defendant's appeal addresses the trial judge's refusal to grant two pretrial motions to continue, a statement by the judge that led defendant to believe he could not use insanity nor intoxication as defenses, the judge's imposition of the maximum sentence for one of the kidnapping convictions, and the judge's statement that defendant failed to make out a *prima facie* case of racial discrimination in the selection of the petit jury. The issues involving the motions to continue and those concerning the insanity and intoxication defenses are sufficiently interrelated by the facts of this case that we may address them together. Essentially, defendant has raised two questions with these assignments of error. The first is whether the trial judge should have granted either of the motions to continue. To answer this question, we must address the second issue: whether defendant's lawyer should have developed an insanity or intoxication defense. We begin by presenting these issues in their factual contexts.

A. *First Motion to Continue*

On the day set for trial, defense counsel moved to continue the case on the basis of information, furnished him by defendant the previous day, that Dr. Farshart had gone to British Columbia and "was not able [to attend the opening of trial], but [would return to testify] . . . if a continuance could be granted." The lawyer told the court that "other than the general description of [Dr. Farshart's] being in British Columbia," he had no other information as to her whereabouts. When the judge asked if the lawyer had given notice of a potential insanity defense, the latter replied he had not because "there was nothing that . . . [he] felt . . . [he] could present as any type of evidence to show insanity." The judge denied the motion to continue. Counsel then entered pleas of not guilty on behalf of defendant to each of the State's charges.

B. *Second Motion to Continue, Judge's Statements, and Jury Instructions*

After hearing the continuance motion, the judge ordered a recess. When court reconvened, defense counsel again moved to

continue, this time to give defendant an opportunity to hire a new lawyer. When asked by the judge to explain why he was dissatisfied with his representation, defendant complained, among other objections, that the lawyer had not obtained defendant's military service record and had failed to talk to Dr. Farshart. In effect, defendant said, his lawyer was prepared to try the case without any defense.

Upon questioning, the lawyer stated he had prepared for trial by meeting twice with defendant, by obtaining the police record of the 2 July incident through discovery, and by "do[ing] research and prepar[ing] the jury *voir dire*." He did not have defendant's military records, he said, because he had asked defendant to write to obtain them, but defendant had not done so. The judge denied the motion. After the second denial, defendant asked to be heard and alleged that the court was not treating him fairly. During an ensuing colloquy, the following exchange occurred between the judge and defendant.

> The Court: What have you asked [your lawyer] to . . . do [ ]?
>
> Mr. Attmore: He hasn't even sent for my military record . . . and he said that I didn't ask him—inquire to him about grounds for insanity because I was under the influence of drugs, and he gives a plea of—you ask him was a plea of insanity, and he said no. Man, come on now. Don't—please. Just don't even do this to me.
>
> The Court: He gave you correct legal advice.

Later in the discussion, when defendant again claimed he was under the influence of crack on 2 July, the judge told defendant this:

> The Court: Let me say to you, sir[,] that the voluntary consumption of a controlled substance is not a defense—
>
> Mr. Attmore: Well, still, that's beside the point.
>
> The Court: —in any criminal action.

Defendant's lawyer continued to represent him throughout the trial. At the conclusion of the evidence, counsel did not request—and the judge did not give—an instruction to the jury on the defense of intoxication.

C. *Analysis: First Motion to Continue*

[1] A ruling on a motion to continue rests with the discretion of the trial court and is not open for appellate review absent an abuse of that discretion. *E.g., State v. Hutchins*, 303 N.C. 321, 343, 279 S.E. 2d 788, 802 (1981). If, however, the motion is based upon any of a defendant's constitutional rights, the trial court's ruling is reviewable on appeal. *Id.* State and federal constitutional guarantees to due process require that every defendant have a reasonable time and opportunity to gather evidence and to confront the State with contrary evidence at trial. *See State v. Baldwin*, 276 N.C. 690, 698, 174 S.E. 2d 526, 531 (1970). To win a new trial, defendant must show not only that the denial of the motion to continue was erroneous, but he must demonstrate that he suffered prejudice as a result of the denial. *See State v. Duncan*, 75 N.C. App. 38, 43, 330 S.E. 2d 481, 485 (1985), *disc. rev. denied*, 314 N.C. 544, 335 S.E. 2d 317 (1985). We hold that defendant has made neither showing.

Defendant's trial commenced approximately six months after his arrest and four months following his indictment. Ample time existed for defendant's lawyer to learn of Dr. Farshart's identity and to make efforts to locate her. The record indicates counsel did not attempt to find Dr. Farshart because he did not view any evidence she might offer as being relevant to defendant's case. Furthermore, as of the day of trial, the defense could say only that Dr. Farshart was in "British Columbia." In *State v. Smith*, our supreme court observed that defendant Smith "made no credible showing that he would be able to secure a psychiatrist's services even if given more time to do so." 310 N.C. 108, 113, 310 S.E. 2d 320, 323 (1984). The language of *Smith* applies here: defendant made no credible demonstration that a continuance would have enabled him to secure Dr. Farshart's attendance. Consequently, the judge did not err, nor did he abuse his discretion, by refusing to grant a continuance.

Even had the judge's denial of the motion been erroneous constitutionally, defendant has failed to demonstrate prejudice. The psychiatrist could not have assisted defendant had he attempted to present an intoxication defense; she could not have testified to defendant's level of impairment on the night of 2 July. Furthermore, for reasons we will discuss at greater length, she

would have been of minimal assistance had defendant asserted an insanity defense. We do not find, therefore, that defendant suffered prejudice as a result of the denial of his continuance motion.

This assignment of error appears to contain, as an underlying allegation, a charge of ineffective assistance of counsel. Although defendant contends that the trial judge denied counsel adequate time to prepare for trial, we infer that defendant is in fact arguing that his lawyer *inadequately prepared* by not locating and interviewing Dr. Farshart. While we have reached our holding on this assignment of error under a due-process analysis, our holding would be identical had defendant explicitly alleged ineffective representation. Since defendant *has* charged ineffective assistance of counsel in his next assignment of error and since our analysis *infra* would be equally applicable to this issue, we will not elaborate further here.

D. *Analysis: Second Motion to Continue*

[2] Defendant argues that the judge should have granted the second continuance motion so as to give defendant time to hire new counsel. Primarily, he contends that his court-appointed lawyer ineffectively represented him by failing to investigate an insanity defense. The right to counsel under both the federal and state constitutions includes the right to be effectively represented by that counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 25 L.Ed. 2d 763, 773 (1970); *State v. Lewis*, 321 N.C. 42, 48, 361 S.E. 2d 728, 732 (1987). Therefore, the trial court's denial of the second continuance motion is reviewable on appeal. *See Hutchins*, 303 N.C. at 343, 279 S.E. 2d at 788. Of necessity, our disposition of this issue will entail an examination of the merits of any insanity defense defendant's lawyer might have presented.

The standard in North Carolina for determining whether a criminal defendant was denied the effective assistance of counsel is the test devised by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984). *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E. 2d 241, 248 (1985). First, a defendant must show the lawyer's performance was deficient; second, he or she must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 562, 324 S.E. 2d at 248 (emphasis omitted) (quoting *Strickland*, 466 U.S. at 687, 80 L.Ed. 2d at 693).

Defendant argues that he is not under a burden to show that his counsel's putative deficiencies prejudiced him. Instead, he claims he need only make "a preliminary showing that his sanity [could have] likely be[en] a 'significant factor at trial.' " *State v. (Billy) Moore*, 321 N.C. 327, 335, 364 S.E. 2d 648, 652 (1988) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 74, 84 L.Ed. 2d 53, 60 (1985)). We do not read *Moore* this way, and we reject this argument. In *Moore*, our Supreme Court cited *Ake* for the proposition that when a defendant makes a preliminary showing that his sanity will be a significant issue at trial, the defendant is entitled to a court-appointed psychiatrist to assist in the preparation of the defense. *Id.* The facts and holding of *Moore* are inapposite here; here, defendant complains that his lawyer performed ineffectively by failing either to make contact with Dr. Farshart or to request a psychiatric evaluation of defendant. The *Strickland* test applies fully.

A *Strickland* inquiry need not be conducted in a step-by-step fashion. If it is evident on review that "in the absence of counsel's alleged errors the proceeding would [not] have been different," we need not question whether the lawyer's performance was, in fact, deficient. *Braswell*, 312 N.C. at 563, 324 S.E. 2d at 249. However, in this case, we do choose to consider whether the defendant's lawyer ineffectively assisted defendant.

From our review of the record, defense counsel deserves no commendation for his pretrial preparation. It is very troubling that a lawyer whose client ultimately was consigned to prison for life conducted but two interviews with him prior to trial. Equally troubling is the idea that counsel would put the onus on his imprisoned client to obtain military records; as defendant told the judge, "[Being in jail] is not like being out there in the street whe[re] you can just pick up the phone and call somebody. . . ." But while we question the manner in which this lawyer prepared for trial, "[t]he object of an ineffectiveness claim is not to grade counsel's performance." *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E. 2d 719, 721 (1985) (quoting *Strickland*, 466 U.S. at 697, 80 L.Ed. 2d at 699). Our inquiry must concern the degree to which the lawyer had an obligation to investigate an insanity defense and whether that defense would have produced a different result at trial had it been offered. Considering the record before us, we believe counsel had no duty to explore the defense to the extent

defendant claims he should have, and we conclude that an insanity defense would not have changed the outcome of the trial in any event.

Under North Carolina law, the test of insanity is whether a defendant, at the time of the alleged criminal act, labored "under such a defect of reason, from disease or deficiency of mind, as to be incapable of knowing the nature and quality of his act, or if he [did] know this, was [he] by . . . defect of reason incapable of distinguishing between right and wrong in relation to such act." *State v. Vickers*, 306 N.C. 90, 94, 291 S.E. 2d 599, 603 (1982). Defendant presented no evidence that he had ever been under psychiatric treatment; he made no showing that Dr. Farshart had had any dealings with him beyond observing the "rap sessions" defendant attended in New York; he offered no indication that Dr. Farshart learned anything of his psychological profile beyond his drug problems; finally, he failed to demonstrate whether his service records contained any information relevant to his mental health. During the hearing on the second continuance motion, defendant had an opportunity to indicate to the judge what psychiatric evidence existed and its relevance to the charges against him. He did not make these showings, and he has made no similar showing on appeal. Absolutely nothing in the record suggests that there was any pertinent psychiatric evidence that the lawyer should have gathered before trial. Ultimately, then, we must conclude that defendant offered nothing to put his lawyer on notice that the latter needed to explore whether an insanity defense existed. His lawyer's failure to pursue psychiatric evidence, therefore, was not constitutionally defective under the *Strickland* test.

Even if defendant had satisfied the first prong of *Strickland*, his claim would nonetheless fail under its second prong. Had defendant's lawyer procured the military records, put Dr. Farshart on the stand, or proffered an insanity defense by some other means, the outcome of the trial would have been, in all likelihood, identical. The State's case against defendant was strong. Five eyewitnesses identified defendant as the perpetrator. Defendant himself gave lucid details of, and admitted committing, each of the crimes with the exception of the rape and sex offense. As to the latter charges, defendant's defense was that the victim consented; he did not claim "to be incapable of knowing the

nature and quality of his act[s]," nor did he contend that he was by "defect of reason incapable of distinguishing between right and wrong. . . ." *Vickers*, 306 N.C. at 94, 291 S.E. 2d at 603.

We hold, therefore, that defendant was not denied the effective assistance of counsel, and we find no error in the trial judge's refusal to grant the second motion to continue.

E. *Analysis: Trial Judge's Statements*

[3] Defendant builds two arguments around the statements made by the judge during the pretrial motions. First, defendant claims the judge's observation that defense counsel gave defendant "correct legal advice" about the defenses of insanity and intoxication discouraged defendant and his lawyer from asserting either defense. Second, defendant contends that the judge "further advised . . . that intoxication is no defense to crime in North Carolina," advice defendant contends was erroneous.

The colloquy between the judge and defendant requires some interpretation. Defendant told the judge he desired a new lawyer because

> He hasn't even sent for my military record . . . and he said that I didn't ask him—inquire to him about grounds for insanity because I was under the influence of drugs, and he gives a plea of—you ask him was a plea of insanity, and he said no.

The judge responded by saying, "He gave you correct legal advice." If defendant was suggesting that he could have presented an insanity defense based on long-term, military-documented drug use, then the trial judge's statement was correct. Stated differently, if defendant was saying "I asked my lawyer if my being high on crack was grounds for an insanity defense, and he said 'No,' " defendant indeed received "correct legal advice" from his lawyer. Voluntary consumption of drugs cannot be the basis of an insanity defense. *See State v. Austin*, 320 N.C. 276, 296, 357 S.E. 2d 641, 654 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 224 (1987) (voluntary intoxication not legal excuse for crime). In the same light, the judge did not misstate the law by stating that "voluntary consumption of a controlled substance is not a defense . . . in any criminal action" if the judge meant that "you cannot base an insanity defense on voluntary intoxication."

If, on the other hand, defendant was suggesting that voluntary intoxication could be a defense to the criminal charges, then the trial judge was wrong since intoxication may affect one's ability to form the specific intent required to commit the crime of robbery with a firearm. *See State v. White*, 322 N.C. 506, 515-16, 369 S.E. 2d 813, 817-18 (1988). For the sake of argument, we will presume that the judge's statements about intoxication constituted error. To begin with, although defendant contends "his lawyer was put on notice [by the judge's comments] not to try to introduce evidence of defendant's mental condition on the night in question," we note that defendant *did* testify about his drug use on the night of 2 July. That testimony failed to establish a defense of cocaine-induced intoxication and thus rendered harmless the judge's "misstatement." Moreover, defendant's assignment of error addressing the jury charge further demonstrates that the judge's "error" was harmless. We will explore this question separately.

F. *Analysis: Jury Instruction on Intoxication*

[4] Defendant argues that the trial judge should have instructed the jury on the defense of voluntary intoxication. We point out that defendant did not object to the jury charge before the jury retired. Thus, he has waived his right to argue this question on appeal, unless the judge's failure to submit the instruction amounted to plain error. N.C. R. App. P. 10(b)(2) (1988); *see State v. Price*, 310 N.C. 596, 600-01, 313 S.E. 2d 556, 560 (1984). We do not find plain error in this case.

To be entitled to an instruction on voluntary intoxication, "the evidence must show that at the time of the [offenses] the defendant's mind and reason were so completely intoxicated and overthrown that he could not form a specific intent [to commit the offenses]." *State v. Gerald*, 304 N.C. 511, 521, 284 S.E. 2d 312, 318-19 (1981). In the absence of such evidence, the court need not instruct on the intoxication defense. *Id.* at 521, 284 S.E. 2d at 319. Just as the record in this case was devoid of any evidence suggesting defendant's insanity, so is there a paucity of evidence demonstrating that defendant was intoxicated to the extent required by *Gerald*.

On the witness stand, defendant said this:

> I wanted some more drugs, and I didn't have any more money to get the kind of drugs I wanted. And my intentions [were] just strictly that. Go get some—rob a store and get some money and get some drugs.

The only charge against defendant to which voluntary intoxication was relevant was the charge of robbery with a firearm. *See State v. Boone*, 307 N.C. 198, 209, 297 S.E. 2d 585, 592 (1982) (intoxication not a defense to crimes of first degree rape and first degree sex offense); *State v. Wilson*, 73 N.C. App. 398, 405, 326 S.E. 2d 360, 365 (1985), *disc. rev. denied*, 313 N.C. 514, 329 S.E. 2d 400 (1985) (kidnapping not specific intent crime), *but see State v. Moore*, 315 N.C. 738, 743, 340 S.E. 2d 401, 404 (1986) (dicta that kidnapping is specific intent crime). Defendant not only testified as to his intent to commit robbery, he testified in great detail about the events that occurred in the supermarket. Beyond defendant's own statements that he was "zooted" on 2 July, the only suggestion of intoxication was Melvin Hopkins' observation that defendant's eyes appeared "glassy."

We do not find this evidence sufficient to have entitled defendant to an instruction on intoxication, and we find no error in the failure of the judge to submit the charge to the jury. At the same time, therefore, if the judge misstated the law to defendant about intoxication as a defense to the formation of specific intent, this error was harmless in that, ultimately, no evidence came forth at trial that would have required the judge to instruct on that defense. Thus, we overrule these assignments of error.

II

[5] Defendant next argues that the trial judge applied an "unspoken aggravating factor," in contravention of the Fair Sentencing Act, N.C. Gen. Stat. Sec. 15A-1340.4 (1983), by imposing the maximum sentence of 30 years for the kidnapping of Tammy Hoffman. We disagree.

At sentencing, the judge found as an aggravating factor that defendant had a prior conviction for a criminal offense punishable by more than 60 days' confinement. He found as mitigating factors defendant's drug abuse and his combat service in Viet Nam. The judge found that the aggravating factor outweighed the mitigating factors and, on this basis, he sentenced defendant to the maximum sentence of 30 years for the Hoffman kidnapping.

The discretion of the sentencing judge to impose a sentence that is greater than the presumptive term is controlled by the requirement that the judge make written findings that the aggravating factors in the case outweigh the mitigating factors. *See State v. Ahearn*, 307 N.C. 584, 596, 300 S.E. 2d 689, 696-97 (1983). Those findings must be supported by the greater weight of the evidence. *Id.* So long as the appellate court discovers no error in the trial judge's findings, it presumes that the trial court's judgment is "valid and just." *Id.* at 597, 300 S.E. 2d at 697 (quoting *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962)). Detecting no error in the judge's finding that defendant's prior conviction outweighed the mitigating factors, we hold the 30-year sentence for the kidnapping conviction to be proper under the Fair Sentencing Act.

III

[6] Defendant's final assignment of error concerns the judge's statement that defendant had failed to make out a *prima facie* case of racial discrimination in the selection of the petit jury. During the jury-selection process, the State exercised two peremptory challenges. Both veniremen struck were Black males. We note, once more, that no objection was entered at trial to the State's peremptory challenges, nor did defendant challenge the petit jury before it was empanelled. Failure to object at trial normally precludes our consideration of the issue defendant attempts to raise here. *See State v. Robbins*, 319 N.C. 465, 488, 356 S.E. 2d 279, 293 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987). N.C. Gen. Stat. Secs. 15A-1446(a), (b) (1988). However, even if defendant had properly preserved this question, his assignment of error would fall, nonetheless, on its merits.

After the jury had been selected, the judge said, "Because there is the vague possibility that at some remote time in the future . . . some *Batson* issue could arise . . . I want to put the following things in the record." Inviting the prosecutor and defense counsel to "correct" him if he "misstate[d] anything," the judge proceeded to note the race and sex of each person who had been examined during the jury *voir dire*, which people had been struck, and which side had initiated the various challenges. Finally, he requested, but did not order, the prosecutor to explain the reasons for the State's peremptory challenges, which the prosecutor did.

The jury that heard defendant's case consisted of six White men, three Black women, and three White women. Two Black men sat as alternates.

After a jury has been empanelled, a defendant may establish a *prima facie* case of invidious racial discrimination in a prosecutor's use of peremptory challenges by making three showings: (1) that defendant is a member of a cognizable racial group; (2) that the prosecutor used the challenges to exclude members of defendant's race; and (3) "that these and other relevant facts and circumstances, as they are set out in the record, raise an inference of racially discriminatory intent on the part of the state." *Robbins*, 319 N.C. at 490, 356 S.E. 2d at 294. If such a *prima facie* showing of discrimination is made, the burden then shifts to the State to advance neutral reasons for its challenges. *Batson v. Kentucky*, 476 U.S. 79, 97, 90 L.Ed. 2d 69, 88 (1986); *Robbins*, 319 N.C. at 489, 356 S.E. 2d at 293-94.

The record indicates that defendant failed to make a *prima facie* showing of discrimination; we do not find suggestions of racial animus within the prosecutor's articulated motives for challenging the two veniremen. This assignment of error is overruled.

IV

We find no error in the trial of this case.

No error.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. RAYMOND CANNON MARSHALL

No. 8822SC231

(Filed 30 December 1988)

1. Rape and Allied Offenses § 3— victim's last name added to indictment—no improper amendment

Where defendant was indicted for four different criminal violations, three of which alleged the victim's complete name, the addition of the alleged rape victim's last name to one of the four indictments was not an amendment, as it did not substantially alter the charge set forth in the indictment, and there

was therefore no merit to defendant's contention that the trial court erred in allowing the State to amend the rape indictment.

2. Criminal Law § 162— evidence of defendant's prior rape conviction—failure to object

Defendant in a rape case waived his right to assert any error on appeal where he failed to object or move to strike a witness's unresponsive testimony that defendant had been in jail for rape before; moreover, there was no merit to defendant's contention that a motion to strike or an objection to the answer and a subsequent request of the trial judge to instruct the jury to disregard the answer of the witness "would have only harmed the defendant's chance at a fair trial . . . by inflaming [the jurors'] minds to a greater degree," since it is assumed that the jury heeds an instruction not to consider a witness's answer.

3. Criminal Law § 169.3— blood and saliva samples from victim—failure to object

Where blood and saliva samples from a rape victim were introduced into evidence without objection, defendant lost the benefit of his earlier objection.

4. Rape and Allied Offenses § 4— doctor's opinion that rape could have taken place at knife-point—inadmissible evidence not prejudicial

Though the trial court in a rape case erred in allowing a doctor to testify that an abrasion over the victim's urethra could happen during intercourse which was performed at knife-point or under duress, as the expert was not any better qualified than the jury to have an opinion on the subject of whether intercourse was performed in such a manner, defendant was not prejudiced by the error, since the State presented a considerable amount of other evidence regarding the alleged rape being performed at knife-point.

5. Criminal Law § 101.2— statement overheard by juror during voir dire—similar evidence subsequently introduced at trial—defendant not prejudiced

The trial court did not err in denying defendant's motion for mistrial made on the ground that the jury was tainted by testimony overheard by a juror during a voir dire hearing, since the judge determined that the fairness and impartiality of the jury had not been compromised when only one juror heard a question asked as to whether defendant had been arrested, and there was evidence presented without objection during the course of the trial that defendant had been placed under arrest. N.C.G.S. § 15A-1061.

6. Criminal Law § 76— defendant's statements—motion to suppress—timeliness

Defendant met his burden of establishing the timeliness of his motion to suppress his oral and written incriminating statements where defendant showed that he had not been notified of the State's intention to use the statements at trial within twenty working days of trial. N.C.G.S. § 15A-975.

7. Criminal Law § 76— admissibility of defendant's statements—no waiver by defendant of right to contest for failure to follow procedural requirements

Though the trial judge had the authority pursuant to N.C.G.S. § 15A-977(c)(1) to summarily deny defendant's motion to suppress defendant's statements because defendant did not give a legal basis for his motion to suppress, the trial judge instead exercised his discretion not to summarily deny

the motion and immediately proceeded to conduct a voir dire relating to the admissibility of defendant's statements and subsequently entered written findings and conclusions; therefore defendant did not waive his right to contest the admissibility of statements made by him for failure to comply with the procedural requirements of N.C.G.S. § 15A-977.

8. **Criminal Law § 76.5— confession—failure to make finding as to inducement to make confession—finding not required**

Though the trial court, in determining the voluntariness of defendant's confession, failed to resolve a conflict in the evidence as to whether the detective attempted to entice the defendant into giving a statement on the condition that a bond would be set if the statement was given, this conflict was not material, since the issue of whether a bond reduction was or was not promised was a collateral inducement having no relation to the offense, and the trial judge was not required to make findings of fact on the issue; likewise, the failure of the trial court to include in its written order a conclusion that the confession was voluntary was not fatal, since the trial judge orally ruled in court at the conclusion of the voir dire that the statements were admissible and that they "were freely and voluntarily made."

9. **Rape and Allied Offenses § 5; Larceny § 7— first degree rape—first degree sexual offense—financial transaction card theft—larceny—sufficiency of evidence**

In a prosecution of defendant for first degree rape, first degree sexual offense, financial transaction card theft, and felonious larceny where defendant argued that there was not substantial evidence as to each essential element of the offenses charged to warrant the cases being submitted to the jury, but defendant made no attempt to argue in what respect the evidence was insubstantial, his assignment of error was deemed abandoned; however, the evidence presented was sufficient to withstand the motion to dismiss and to warrant sending the case to the jury on all charges where the victim testified that defendant, armed with a knife, overcame her will and forced her into acts of vaginal and anal intercourse and fellatio upon his person; the victim positively identified defendant as her assailant; defendant's confession to the crimes was properly admitted against him; the victim further testified that defendant took her bank card and made her tell him the code number for it; and defendant orally admitted using the bank card to obtain funds and told a detective the amounts withdrawn and the times of the withdrawals. Appellate Rule 28(b)(5).

APPEAL by defendant from *Walker (Russell G.), Judge.* Judgments entered 5 November 1987 in Superior Court, DAVIE County. Heard in the Court of Appeals 8 September 1988.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the State.

Hall & Vogler, by E. Edward Vogler, Jr., for defendant-appellant.

GREENE, Judge.

In this criminal action defendant was indicted for the offenses of first-degree rape, N.C.G.S. Sec. 14-27.2 (1986), first-degree sexual offense, N.C.G.S. Sec. 14-27.4 (1986), financial transaction card theft, N.C.G.S. Sec. 14-113.9(a)(1) (1986) and felonious larceny, N.C.G.S. Sec. 14-72(b)(1) (1986).

The defendant pled not guilty and was found guilty by a jury on all charges. The defendant was sentenced to two life sentences plus an additional ten-year sentence, each sentence to run at the expiration of the other. The defendant appeals.

The issues to be determined are whether the trial court erred in I) allowing the State to amend the rape indictments; II) allowing a witness to testify the defendant had previously been in prison for rape; III) allowing evidence of a saliva sample and blood sample from the victim; IV) allowing an expert to give his opinion as to how the abrasions suffered by the victim could have been caused; V) failing to declare a mistrial; VI) admitting into evidence the defendant's written and oral statements; VII) denying the defendant's motion to dismiss all charges; and VIII) denying the defendant's motion for appropriate relief.

I

[1] The defendant first argues the trial court erred in allowing the State to amend the rape indictment by substituting the name of "Regina Lapish Foster" for the name of "Regina Lapish."

N.C.G.S. Sec. 15A-923(e) (1988) provides that "[a] bill of indictment may not be amended." An amendment has been defined "to be any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E. 2d 556, 558 (1984). Here the defendant was indicted for four different criminal violations. Three of these indictments allege the offense was committed against the person of "Regina Lapish Foster." The indictment for rape used the name "Regina Lapish." It is clear that the rape indictment inadvertently omitted the last name of Regina Lapish Foster. At no time was defendant misled or surprised as to the nature of the charges against him. Accordingly, the addition of the alleged victim's last name to one of the four indictments was not an amendment as it

did not "substantially alter the charge set forth in the indictment." *Id.*

II

[2] The defendant next contends that the unresponsive answer of a witness was error and highly prejudicial. The unresponsive answer was:

> . . . one day when I was at Gail's house, Stella was there. They were only there a few minutes after I got there, and there was a big, black boy with her that was her son. When they left—and this is hearsay or whatever—Gail told me that that was her son and that he had been in prison for rape before.

This testimony was given in response to a question to the witness as to whether she had ever "seen him at Gail Philbeck's house before." The reference in the answer to "he had been in prison for rape before" was clearly in reference to the defendant.

However, the defendant did not object or move to strike the answer. Assuming the answer of the witness to be inadmissible and prejudicial, the defendant's "[f]ailure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal." N.C.G.S. Sec. 15A-1446(b) (1988); N.C.G.S. Sec. 8C-1, Rule 103(a)(1) (1988) (where evidence admitted, error cannot be asserted upon appeal unless there is timely objection or motion to strike); *State v. McDougall*, 308 N.C. 1, 9, 301 S.E. 2d 308, 314, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed. 2d 173 (1983); *see* 1 Brandis on North Carolina Evidence Sec. 27, p. 133 (3d ed. 1988) (where only the answer is objectionable, an objection should be treated as a motion to strike). Here the defendant neither objected or moved to strike the answer and therefore has waived his right to assert any error on appeal.

The defendant nonetheless argues that a motion to strike or an objection to the answer and a subsequent request of the trial judge to instruct the jury to disregard the answer of the witness "would have only harmed the defendant's chance at a fair trial . . . by inflaming [the jurors'] minds to a greater degree." Our courts have long rejected this argument and recognize that if the jury is properly instructed not to consider the answer of the wit-

ness, it is to be assumed the "jury heeded the caution." *Apel v. Coach Co.*, 267 N.C. 25, 31, 147 S.E. 2d 566, 570 (1966); *State v. Franks*, 300 N.C. 1, 13, 265 S.E. 2d 177, 184 (1980) (no prejudicial error where jury actually heard inadmissible answer, provided the jurors were properly instructed to disregard the answer).

III

[3] The defendant contends the trial court erred in allowing into evidence saliva and blood samples from the victim Regina Foster. The defendant contends the State failed to establish a chain of custody showing that the blood and saliva were in fact obtained from Regina Foster. However, as these items were later introduced into evidence without objection, the defendant loses the benefit of his earlier objection. *State v. Corbett*, 307 N.C. 169, 179, 297 S.E. 2d 553, 560 (1982).

IV

[4] Defendant next argues that the testimony of Dr. Randall Storm was "highly speculative and prejudicial to the defendant." Dr. Storm was asked to tell the members of the jury about the "abrasion over the urethra" of the victim Regina Foster. The doctor answered as follows:

> It was a sore area, a reddened area, one which is conceivably from vigorour [sic] intercourse, though not necessarily traumatic intercourse. It would be conceivable that it would happen in intercourse that was performed at knifepoint or under duress.

The defendant timely objected to the answer of the doctor, which objection was overruled by the trial court.

Expert testimony is admissible if it will " 'assist the jury to draw inferences from the facts because the expert is better qualified' than the jury to form an opinion on the particular subject." *State v. Fletcher*, 92 N.C. App. 50, 56, 373 S.E. 2d 681, --- (1988) (quoting *State v. Bullard*, 312 N.C. 129, 139, 322 S.E. 2d 370, 376 (1984)); *see* N.C.G.S. Sec. 8C-1, Rule 702 (1986) (expert testimony admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue"). Furthermore, experts are permitted to give their opinion even though it embraces an ultimate issue to be decided by the trier of fact. N.C.G.S. Sec. 8C-1,

Rule 704 (1986). Experts, however, are precluded from stating that a legal standard has been met. *State v. Ledford*, 315 N.C. 599, 617, 340 S.E. 2d 309, 320-21 (1986) (expert precluded from testifying that injuries were proximate cause of death).

Here the expert was not any better qualified than the jury to have an opinion on the subject whether intercourse "was performed at knife-point or under duress." *Cf. State v. Galloway*, 304 N.C. 485, 489, 284 S.E. 2d 509, 512 (1981) (expert allowed to testify that an "examination revealed evidence of traumatic and forceable penetration *consistent with* an alleged rape"); *State v. Allen*, 50 N.C. App. 173, 175-76, 272 S.E. 2d 785, 787 (1980), *appeal dismissed*, 302 N.C. 399, 279 S.E. 2d 353 (1981) (doctor allowed to express an opinion that "woman could be raped without there being evidence of trauma about the vulva or vaginal areas" as the doctor had "a more than adequate understanding of the medical results of incidents such as rape"). Although the expert was qualified to testify about the physical characteristics of the urethra and surrounding areas, he was "not competent to testify as to a causal relation which rests upon mere speculation." 6 Strong's N.C. Index 3d, *Evidence* Sec. 50.2, p. 146 (1977); *see Lockwood v. McCaskill*, 262 N.C. 663, 669, 138 S.E. 2d 541, 546 (1964) (admission of expert testimony which supports a particular causal relationship will be held erroneous where it is merely speculative). " 'The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative.' " *In re Peirce*, 53 N.C. App. 373, 387, 281 S.E. 2d 198, 207 (1981) (quoting *Board of Education v. Lamm*, 276 N.C. 487, 493, 173 S.E. 2d 281, 285 (1970)). Here, as the State presented a considerable amount of other evidence regarding the alleged rape being performed at knife-point, we conclude the admission of this testimony was not prejudicial.

V

[5] The defendant argues the trial court erred in failing to declare a mistrial on the grounds the jury was tainted by testimony overheard by a juror during a voir dire hearing. The trial court, after determining that the door to the jury room had been open during a portion of the voir dire, questioned each juror individually. The record reflects that only one juror heard anything

said at the voir dire hearing and that juror only heard "someone asked, I guess the witness, if the Defendant would have been arrested at that time." As there was evidence presented to the jury during the course of the trial, and without objection, that defendant had been placed under arrest, there was no "substantial and irreparable prejudice to the defendant's case." N.C.G.S. Sec. 15A-1061 (1988) (judge may declare a mistrial if there is error, legal defect or conduct "resulting in substantial and irreparable prejudice to the defendant's case"). We agree therefore with the trial judge who in denying the defendant's motion for a mistrial determined that the fairness and impartiality of the jury had not been compromised when only one juror heard a question asked as to whether the defendant had been arrested. The decision of whether to grant a motion for mistrial rests within the sound discretion of the trial judge and here we find no abuse of that discretion. *State v. Boyd*, 321 N.C. 574, 579, 364 S.E. 2d 118, 120 (1988).

VI

Defendant next contends the trial court erred in admitting into evidence the defendant's written and oral statements given on 17 May 1987 and 18 May 1987 in which he made various admissions relating to the charges against him. The State argues the defendant has waived any right to contest the admissibility of defendant's statements, as the defendant has failed in his burden of showing that he complied with the timeliness requirements of N.C.G.S. Sec. 15A-975 (1988) (setting forth the situations in which a motion to suppress evidence may be made for first time during trial) and the procedural requirements of N.C.G.S. Sec. 15A-977 (1988) (setting forth procedure for filing of motion to suppress).

A

[6] We first address whether defendant has met his burden of showing he complied with the timeliness requirements. The motion to suppress must be timely filed in accordance with N.C.G.S. Sec. 15A-975. Generally, a motion to suppress must be made before trial. N.C.G.S. Sec. 15A-975(a). A defendant may move to suppress evidence at trial only "if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (twenty working days) of its intention to use certain types of evidence; or

that additional facts have been discovered after a pretrial determination and denial of the motion which could not have been discovered with reasonable diligence before determination of the motion." *State v. Satterfield*, 300 N.C. 621, 625, 268 S.E. 2d 510, 514 (1980); N.C.G.S. Sec. 15A-975(b). The burden of establishing that the motion to suppress is timely filed is on the defendant. *Id.* at 624-25, 268 S.E. 2d at 513-14. Here the defendant's motion to suppress was first made at the trial and was in the form of a general objection to a question asked of a witness as to what if anything the defendant told the witness. Defendant met his burden of establishing the timeliness of his motion to suppress by showing that he had not been notified of the State's intention to use the statements of defendant at trial within twenty working days of trial. Accordingly, we conclude defendant complied with the timeliness requirements of N.C.G.S. Sec. 15A-975.

B

[7] A "motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made and should be accompanied by an affidavit containing facts supporting the motion." *Satterfield*, 300 N.C. at 625, 268 S.E. 2d at 514; *see also State v. Hunter*, 305 N.C. 106, 112, 286 S.E. 2d 535, 539 (1982) (defendant must "specifically state to the court before voir dire . . . the basis for his motion to suppress or for his objection to the admission of the evidence"). The trial judge here had the authority pursuant to N.C.G.S. Sec. 15A-977(c)(1) to summarily deny the motion to suppress because defendant did not give a legal basis for his motion to suppress. N.C.G.S. Sec. 15A-977(c)(1) (1988) (judge *may* summarily deny the motion to suppress evidence if motion does not contain legal basis for motion); *State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E. 2d 857, 859 (1985) (where defendant fails to set forth adequate legal grounds, trial court is vested with discretion of whether to summarily deny the motion). However, the trial judge exercised his discretion not to summarily deny the motion and immediately proceeded to conduct a voir dire relating to the admissibility of the defendant's statements and subsequently entered written findings and conclusions. N.C.G.S. Sec. 15A-977(d)-(f). Thus, we conclude defendant has not waived his right to contest the admissibility of statements by him for failure to comply with the procedural requirements of N.C.G.S. Sec. 15A-977.

C

Once it is determined the defendant's motion is not barred by N.C.G.S. Sec. 15A-975 or it is not summarily denied pursuant to N.C.G.S. Sec. 15A-977(c)(1), a voir dire hearing must be held pursuant to N.C.G.S. Sec. 15A-977(d). As stated above, the trial judge here conducted a voir dire hearing. The State has the burden at the voir dire hearing of showing by a preponderance of the evidence "the admissibility of the challenged evidence; and, in the case of a confession, the State must affirmatively show (1) the confession was voluntarily made, (2) the defendant was fully informed of his rights and (3) the defendant voluntarily waived his rights. *State v. Cheek*, 307 N.C. 552, 557, 299 S.E. 2d 633, 636 (1983); *State v. James*, 321 N.C. 676, 685, 365 S.E. 2d 579, 585 (1988) (the State must meet its burden by a preponderance of the evidence).

At the voir dire hearing conducted in this case, the State's evidence tended to show the defendant gave three statements to the detective, two oral and one written. On 17 May 1987, the defendant first gave an oral statement and ten minutes later executed a written statement. The 17 May statements related to the alleged rape and sexual assaults. On 18 May 1987, the defendant gave an oral statement. The 18 May statement related to the alleged credit card theft and larceny. The defendant was advised on all three occasions either orally or in writing of his constitutional rights as mandated by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). The defendant executed a written waiver of his constitutional rights preceding the oral statement of 17 May. The detective at no time made any promises or threats to entice the defendant to give any statements.

The defendant's evidence at the voir dire hearing tended to show: He executed only one statement and that was written on 17 May 1987, and he made this statement only after he was told by the detective that bond would not be set until "we write down what we talked about." After the conversation about the bond, the defendant wrote down what the officer "told me we had talked about." Defendant admitted to signing a paper writing which he did not read. Defendant testified he did not realize the statements could be used against him in court but admitted he was advised of his right to remain silent and knew he had a right to have a lawyer present during the questioning.

After hearing the evidence on voir dire, the trial court determined that all three statements had been made by the defendant and allowed the statements into evidence. In support of the court's order, the trial court entered the following written findings of fact and conclusions of law:

1. That defendant gave statements to Detective Williams on May 17 and 18, 1987;

2. That defendant gave two oral statements and one written statement in which he made various admissions regarding his participation in the activities which led to the charges against him;

3. That at the time defendant gave the first oral statement and the written statement, he had not been formally arrested, had voluntarily accompanied Detective Williams to the Davie County Sheriff's Department and was free to leave at anytime;

4. That prior to talking with defendant in the Sheriff's Department offices, Detective Williams fully advised defendant of his rights to silence and to legal counsel;

5. That defendant admits to being able to read and write the English language;

6. That defendant admits that he understood the rights about which Detective Williams advised him;

7. That defendant, both orally and in writing, waived his constitutional right to silence and agreed to talk with and to give a written statement to Detective Williams on May 17, 1987, without a lawyer being present;

8. That defendant never asked for a lawyer to be appointed and never sought to end the questioning; and

9. That on May 18, 1987, defendant was again advised of these rights prior to further questioning and refused to sign the waiver form or to give a written statement, but did agree to orally answer Detective Williams' questions about the bank card involved in the incident which Detective Williams was investigating.

BASED UPON THE FOREGOING FINDINGS THE UNDERSIGNED CONCLUDES AS A MATTER OF LAW that the two oral statements and one written statement given to Detective Williams were given after defendant had been fully and properly advised of his constitutional rights to silence and to legal counsel and after the defendant had knowingly, willingly, freely and voluntarily waived those rights.

[8] The defendant now assigns as error the trial court's admission of the defendant's written and oral statements on the grounds that the defendant did not voluntarily give these statements. We limit our review of the admissibility of the confession to the issue of whether it was voluntarily given as defendant does not raise any other issue concerning the confession in his assignments of error. App. R. 10(a) (no exception which is not made the basis of an assignment of error may be considered on appeal).

On appeal from a denial of a motion to suppress, the question presented is whether the conclusion of the trial court is supported by findings and whether the findings are supported by competent evidence in the record. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E. 2d 53, 59 (1985). The findings and conclusions entered by the trial court in this case are devoid of any reference to the issue of voluntariness.

The failure of a trial court to find facts is not always fatal. The trial court is not required in every instance to make findings of fact to support its conclusions and must do so only if "there is a *material* conflict in the evidence on voir dire." *State v. Riddick*, 291 N.C. 399, 408, 230 S.E. 2d 506, 512 (1976) (emphasis in original). "If there is conflict in the evidence which is *immaterial* and has no effect on the admissibility of the confession, it is not error to admit the confession without findings." *Id.* at 409, 230 S.E. 2d at 512 (emphasis in original). In reviewing the evidence presented at the voir dire hearing, there was a conflict in the evidence as to whether the detective attempted to entice the defendant into giving a statement on the condition that a bond would be set if the statement was given. This was the only evidence presented at voir dire relating to the issue of the voluntariness of the statements. The trial court did not resolve this conflict in the evidence, as it made no findings of fact on the

issue. We therefore must determine whether the conflict is material as that term is defined in *Riddick.*

A "confession cannot be received into evidence where the defendant has been influenced by any threat or promise; . . . a confession obtained by the slightest emotions of hope or fear ought to be rejected." *State v. Booker*, 306 N.C. 302, 307, 293 S.E. 2d 78, 81 (1982) (quoting *State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1826)). However, the "inducement to confess whether it be a promise, a threat, or mere advice must relate to the prisoner's *escape* from the criminal charge against him." *Id.* at 308, 293 S.E. 2d at 82 (emphasis in original). Here the issue of whether a bond reduction was or was not promised is a "collateral inducement, having no relation to the offense," *id.* at 309, 293 S.E. 2d at 82 (quoting *State v. Hardee*, 83 N.C. 619, 623-24 (1880)), and therefore the alleged promise to set a bond if defendant confessed did not "relate to the prisoner's *escape* from the criminal charge against him." *Id.* at 308, 293 S.E. 2d at 82 (emphasis in original). Instead, the alleged promise was "entirely disconnected from the possible punishment or treatment defendant might receive," and did not affect the admissibility of the defendant's statements. *Id.* at 309, 293 S.E. 2d at 82; *see also State v. Church*, 68 N.C. App. 430, 434, 315 S.E. 2d 331, 333 (1984) (defendant's statement not rendered involuntary because it may have been made with the hope that lower bond would be set). Accordingly, we determine the issue of the bond about which there was a conflict in the evidence at the voir dire hearing, is immaterial and the trial judge was not required to make findings of fact on the issue.

Likewise, the failure of the trial court to include in its written order a conclusion that the confession was voluntary is not fatal. Although the trial judge concluded in his written order that defendant was advised of his rights and voluntarily waived them, that conclusion alone is insufficient to determine the admissibility of a confession. The confession must also be found to have been voluntarily made. *Cheek*, 307 N.C. at 557, 299 S.E. 2d at 636 (confession must be voluntarily made, after defendant has been informed of his rights, and has voluntarily waived his rights). However, this court has held that the absence of a formal ruling is not prejudicial where the court's decision is clear from the record. *State v. Hicks*, 79 N.C. App. 599, 601, 339 S.E. 2d 806, 808 (1986) (admission of victim's in-court identification of defendant is

not reversible error because court failed to make formal ruling denying motion to suppress where decision was clear from record); *see also State v. Frank*, 284 N.C. 137, 144-45, 200 S.E. 2d 169, 174-75 (1973) (admission of defendant's confession at trial indicates the judge concluded it was voluntarily made and failure to formally rule was not fatal). Here the trial judge orally ruled in court at the conclusion of the voir dire that the statements were admissible at trial and that they "were freely and voluntarily made." Therefore, it is not prejudicial error that such a conclusion was inadvertently omitted from the subsequent formal written order.

Accordingly, defendant's assignment of error based upon the denial of his motion to suppress is overruled.

VII

[9] The defendant next contends the trial court erred in denying his motion to dismiss the charges at the end of the State's evidence and at the end of all the evidence. The only argument in defendant's brief in support of this assignment of error is that "there was not 'substantial evidence' as to each essential element of the offenses charged to warrant the cases being . . . submitted to the jury." As the defendant makes no attempt to argue in what respect the evidence is insubstantial, we consider this assignment of error abandoned. App. R. 28(b)(5) (brief must contain arguments in support of assignment of error). Here, appellant's non-specific and general argument amounts to no more than a request for this court to wade through the record to determine if the assignment of error has merit. *In re Appeal from Environmental Management Comm'n*, 80 N.C. App. 1, 18, 341 S.E. 2d 588, 598, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 139 (1986). We have nonetheless, pursuant to Rule 2 of the Rules of Appellate Procedure, in order to prevent manifest injustice, reviewed the transcript of evidence and find substantial evidence of each essential element of the offenses charged. *State v. Hutchins*, 303 N.C. 321, 344, 279 S.E. 2d 788, 803 (1981) (in considering motion to dismiss, the question is whether there is substantial evidence of each essential element of the offense).

The State called the victim to the stand who testified that the defendant, armed with a knife, overcame her will and forced her into acts of vaginal and anal intercourse, and fellatio upon his person. The victim positively identified the defendant as her as-

sailant. Her testimony alone presents substantial evidence of the essential elements of first-degree rape and first-degree sexual offense. In addition, as discussed above, defendant's confession to the crimes charged were properly admitted against him. The victim further testified that the defendant took her bank card and made her tell him the code number for it. A detective also testified for the State that the defendant orally admitted using the bank card to obtain funds and told the detective the amounts withdrawn and the times of the withdrawals. This testimony constitutes substantial evidence of the essential elements of financial card theft and felonious larceny. When considered in the light most favorable to the State, the evidence presented was sufficient to withstand the motion to dismiss and to warrant sending the case to the jury on all the charges.

VIII

The defendant finally argues the trial court erred in denying his motion for appropriate relief, made pursuant to N.C.G.S. Sec. 15A-1414 (1988), which was made after the entry of the verdict.

The defendant asserts in his brief as grounds for the motion the following: "(a) the court's rulings were contrary to law with regard to the motions made during the trial with regard to the admission and exclusion of the evidence, (b) that the evidence at the close of all the evidence, the evidence was insufficient to justify submission of the case to the jury, and (c) that the verdict was contrary to the weight of the evidence." In support of this assignment of error, defendant argues in his brief that for "the reasons previously stated in the appellant's brief, . . . the court's denial of the defendnat's [sic] motion for appropriate relief was improper."

As we have in this opinion rejected the arguments of the defendant in support of his previous assignments of error, we now further determine the trial judge did not abuse his discretion in denying defendant's motion for appropriate relief. *State v. Arnette*, 85 N.C. App. 492, 498, 355 S.E. 2d 498, 502 (1987) (a motion for appropriate relief is within the discretion of the trial court and will not be disturbed absent a showing of abuse of discretion).

No error.

Judges ORR and SMITH concur.

HELEN S. TAYLOR v. JAMES H. TAYLOR

No. 885DC472

(Filed 30 December 1988)

1. **Divorce and Alimony § 30— equitable distribution—classification of property as marital—wife's testimony as basis**

In an equitable distribution proceeding where the wife offered an affidavit and testified concerning the classification of certain personal property as marital rather than separate, and the husband submitted a counter affidavit and cross-examined the wife at the hearing, the wife's evidence constituted the competent evidence necessary to sustain the trial judge's findings as to the character of the personal property.

2. **Divorce and Alimony § 30— equitable distribution—property conveyed by husband to husband and wife—marital property—improper standard of proof—harmless error**

Though the trial court erred in finding "by the greater weight of the evidence" that real property conveyed by the husband to himself and the wife as tenants by the entirety was marital property, such error was harmless where the husband failed to rebut the marital presumption by clear, cogent and convincing evidence, and no intention was expressed in the deed that the property was to remain the husband's separate property.

3. **Divorce and Alimony § 30— equitable distribution—status of real property—further findings of fact required**

Because it could not effectively be determined whether certain real property in fact belonged to the marriage, and if it did, whether defendant should have been assigned the sole obligation of paying off its debt, the case is remanded for further findings of fact.

4. **Divorce and Alimony § 30— evidence of parties' income and health—no findings made—equal division of marital property improper**

Because the judgment in an equitable distribution proceeding did not contain any findings about the parties' health and income, even though evidence on these matters was brought forth at trial, the order of equal division of marital property is vacated.

5. **Divorce and Alimony § 30— equitable distribution—husband's lawsuit against former employer—wife awarded improper share of future judgment**

The trial court in an equitable distribution proceeding erred in finding that plaintiff wife would be entitled to one-half of any amounts recovered by

defendant for lost wages and medical expenses as a result of his lawsuit against his former employer, since such award should have been limited to one-half of any monies representing reimbursement for defendant's lost wages and medical expenses incurred prior to the parties' separation.

APPEAL by defendant from *Charles E. Rice, III, Judge.* Judgment entered 18 December 1987 in District Court, NEW HANOVER County. Heard in the Court of Appeals 3 November 1988.

Sperry and Cobb by George H. Sperry for plaintiff-appellee.

Shipman and Lea by Gary K. Shipman for defendant-appellant.

BECTON, Judge.

This is an appeal challenging the trial court's classification and distribution of the parties' marital property under the Equitable Distribution Act, N.C. Gen. Stat. Sec. 50-20 (1987). From a judgment ordering equal distribution of certain real and personal property classified as marital property, defendant appeals. We affirm in part, vacate and remand in part.

I

The plaintiff-appellee, Helen S. Taylor, and the defendant-appellant, James H. Taylor, married on 23 June 1974. The couple separated on 12 October 1985 and divorced on 14 November 1986.

On 23 and 24 March 1987, the trial court heard and received evidence on the Taylors' respective claims for equitable distribution of their marital property. The evidence, presented in the form of testimony from the parties and other witnesses, and in the form of books, records, reports, affidavits, and stipulations, produced "complexities of . . . issues" that caused the judge to take the matter under advisement at the conclusion of the hearing. He entered judgment approximately nine months later, on 18 December 1987. We will summarize those parts of the judgment, and the evidence relevant to them, that most directly involve the issues now on appeal.

A. *Classification of the Personal Property*

Helen Taylor filed with the court, and testified from, an Equitable Distribution Affidavit. The affidavit listed under "Item #5"

two pieces of personalty Ms. Taylor claimed as belonging to her. These items, along with a wall clock that was a birthday gift from Ms. Taylor's mother, were found by the judge to constitute Helen Taylor's separate property. The judge found as fact that Helen Taylor's separate property had a net market value of $80. He found that James Taylor "may have some separate property[,] but the evidence is so elusive the court cannot find as a fact what his separate property would be."

"Item #7" on the affidavit consisted of a four-page list of household furnishings and tools that Ms. Taylor averred "[were] marital property on the date of separation." This list detailed the articles, several of which Ms. Taylor claimed to have been interspousal gifts and wedding gifts, their dates of acquisition, and their value as of the date the Taylors separated.

At the hearing, James Taylor's attorney questioned Ms. Taylor about the household furniture. She acknowledged that Mr. Taylor "had . . . furnished" their residence prior to the marriage, but she claimed that the items listed on her affidavit were purchased after the Taylors had married. Mr. Taylor testified at the hearing that Ms. Taylor might have acquired "a few pots and pans" during the marriage but that the residence was otherwise "fully stocked . . . when she moved in."

Ms. Taylor also claimed that sundry tools were marital property. She acknowledged that Mr. Taylor had owned tools prior to the marriage and that she had purchased "about four or five" tools for him as gifts. Seeking to contradict her, Mr. Taylor testified he had purchased some of the tools prior to the marriage, claimed the Taylors did not possess various tools Helen Taylor had included on her affidavit, and claimed others had been gifts from Ms. Taylor.

B. *Classification of the Real Property*

The judge found as a fact that all of the real property the Taylors owned—two houses, a 20-acre tract of land, and three vacant lots—were marital property.

The evidence of both parties tended to show that the Taylors' marital residence, at 210 Bermuda Drive in Wilmington, had been Mr. Taylor's residence during a previous marriage. To acquire his former wife's interest in the house and its adjacent

lot, Mr. Taylor paid her $2,115.73. On 15 January 1976, Mr. Taylor deeded the house and lot to himself and Helen Taylor to hold as tenants by the entirety.

The evidence also showed that on 7 October 1985, Mr. Taylor used $5,000 of marital funds as a down payment on a house and land at 541 Castle Hayne Road. The purchase price of this property was $38,000; the financing arrangement apparently called for payment of the $33,000 balance by October 1986. Title to the Castle Hayne property was taken in Mr. Taylor's name only; Ms. Taylor signed a document on 4 October 1985 releasing her marital interest in the property.

In September 1986, Mr. Taylor borrowed approximately $32,000 from a third-party tenant of the Castle Hayne Road property in order to pay off the original note. At the hearing, the tenant testified she had borrowed $25,000 from the Wachovia Bank to enable her to make the loan to Mr. Taylor and that, in lieu of rent, she made monthly payments to the bank. Mr. Taylor testified that the original lienholders had not yet cancelled the deed of trust and that there were a "few thousand dollars" still owing on the note. He testified further that he had given a second deed of trust to the tenant as security for her loan to him.

C. *Pending Litigation*

The judge found as fact that both parties had been gainfully employed since the marriage, but that James Taylor had lost his job and had a lawsuit pending against his former employer for wrongful termination. The judge further found that "if [Mr. Taylor] receives any monies from that lawsuit that are reimbursed him for medical expenses or los[t] wages . . . [Helen Taylor] is entitled to one-half of said funds."

D. *The Judgment*

The judge valued the personal marital property at $23,252. He appended to the judgment two lists, one entitled "Wife Property," the other "Husband Property." These lists described the personalty, dates of acquisition, and value as of the date of separation. The property awarded to Helen Taylor totaled $11,626, as did the property awarded to James Taylor.

Deeming all of the realty to be marital property, the judge ordered the property sold, with the proceeds to be divided equal-

ly between the parties. He directed James Taylor to pay, from separate funds, the balance owing on the original $33,000 encumbrance on the Castle Hayne Road property prior to that property's sale.

James Taylor appeals from the judgment.

II

Equitable distribution follows a statutorily-prescribed formula. The trial court first classifies the property as marital or separate; next, it determines the marital property's net value; last, it distributes that property between the parties. *E.g., Cable v. Cable,* 76 N.C. App. 134, 137, 331 S.E. 2d 765, 767 (1985), *disc. rev. denied,* 315 N.C. 182, 337 S.E. 2d 856 (1985). Mr. Taylor acknowledges in his brief that trial courts have broad discretion in making an equitable distribution. *See White v. White,* 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985). He further recognizes that if the judge's adequate findings of fact are supported by competent evidence, we will not disturb the judgment on review unless the appellant shows a clear abuse of discretion. *See Johnson v. Johnson,* 78 N.C. App. 787, 790, 338 S.E. 2d 567, 569 (1986). Notwithstanding, Mr. Taylor argues on appeal that the trial judge incorrectly classified the marital and separate property and inequitably distributed the property found to be marital. We shall address each contention in turn.

III

In his brief, Mr. Taylor has abandoned voluntarily two assignments of error. Of the twelve assignments remaining, ten address the classification issue. The gist of Mr. Taylor's argument is that he brought forth enough evidence at the equitable distribution hearing to have allowed the trial judge to identify the tools and household furnishings as being Mr. Taylor's separate property and to identify the Bermuda Drive and Castle Hayne Road houses as being marital property in part and Mr. Taylor's separate property in part. Because Mr. Taylor has challenged the judge's findings of fact in this way, our review will be limited to the question whether *any* competent evidence in the record sustains the court's findings. *See Nix v. Nix,* 80 N.C. App. 110, 112, 341 S.E. 2d 116, 118 (1986).

A. *The Personal Property*

[1] N.C. Gen. Stat. Sec. 50-20(b) (1987) defines marital and separate property. The former is, in part, "all real and personal property acquired by either spouse or both spouses during the course of the marriage." N.C. Gen. Stat. Sec. 50-20(b)(1). Separate property is, partly, "all real and personal property acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. Sec. 50-20(b)(2).

The findings of the trial judge as to the character of the Taylors' personal property are culled from Helen Taylor's affidavit. The lists of "Wife Property" and "Husband Property" show that the judge accepted the averments of the affidavit and believed Ms. Taylor's testimony. Mr. Taylor had every equal opportunity to present his case for the judge's consideration. Mr. Taylor submitted a counter affidavit and cross-examined Ms. Taylor at the hearing. The core of Mr. Taylor's argument is that insufficient weight was accorded his evidence by the trial judge. However, "[t]he mere existence of conflicting evidence . . . [does] not justify reversal." *Lawing v. Lawing*, 81 N.C. App. 159, 163, 344 S.E. 2d 100, 104 (1986) (citation omitted).

In *Lawing*, the defendant husband assigned error to the trial judge's valuation of a ring. Both the husband and wife submitted affidavits delineating what they claimed to be the marital personalty, and each assigned value to that property. The plaintiff wife valued the ring at $5,000 while the husband estimated it to be worth $750. No other evidence was proffered concerning the ring's value. The judge valued the ring at $5,000. We said that "under the any competent evidence standard, [the wife's] affidavit clearly sufficed to support the trial court's finding as to the ring's value." *Id.* (citation omitted). This case differs from *Lawing* in that Mr. Taylor has assigned error to the trial court's classification, not its valuation, of the personalty. Notwithstanding, the same standard we utilized in *Lawing* applies here. The record indicates that the evidence in this case was at times confusing, at times contradictory, and at all times complicated. Still, we find in the record the competent evidence necessary to sustain the trial judge's findings as to the character of the personal property. That competent evidence was proffered by Ms. Taylor in her affidavit and testimony. We find no error.

B. *The Real Property*

[2] The Bermuda Drive house and lot, although acquired separately by Mr. Taylor, were conveyed by him to himself and Helen Taylor as tenants by the entirety. This conveyance raised a presumption that Mr. Taylor had given the property as a gift to the marriage. *See McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E. 2d 910, 916-17 (1985), *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985); *McLean v. McLean*, 323 N.C. 543, 374 S.E. 2d 376 (1988). Mr. Taylor bore the burden of rebutting that presumption by clear, cogent, and convincing evidence; otherwise, the property could be considered separate " 'only if such an intention [was] stated in the conveyance.' " *McLean*, slip op. at 13 (quoting N.C. Gen. Stat. Sec. 50-20(b)(2)). Mr. Taylor testified at the hearing that Ms. Taylor had been "on [his] back continuously" about making the conveyance, and he finally had acquiesced to "make a go of the marriage."

The trial judge found "by the greater weight of the evidence" that the Bermuda Drive property was marital property. This implies the trial court required Ms. Taylor to prove by a preponderance of the evidence that the Bermuda Drive property was maritally owned property. This was obviously error, but on the facts in this case, we find the error was harmless. There is no evidence in the record to support a finding that the property was to remain the separate property of the husband, and thus the failure of the trial court to enter a finding that Mr. Taylor did not rebut the marital presumption by clear, cogent and convincing evidence is harmless. Furthermore, there is no "intention" in the deed to the parties as tenants by the entirety that the property was to remain Mr. Taylor's separate property, and, therefore, the trial judge correctly included the Bermuda Drive property among the marital assets. Accordingly, we do not disturb the trial court's classification of this property as marital property.

[3] Mr. Taylor argues that the judge could not logically have found the Castle Hayne Road property to be wholly marital property while, at the same time, ordering Mr. Taylor to satisfy the original lienholder out of separate funds. As to this property alone, we vacate and remand for further findings. As our Supreme Court stated in *Coble v. Coble*, "Effective appellate review of an order entered by a trial court sitting without a jury is large-

ly dependent upon the specificity by which the order's rationale is articulated." 300 N.C. 708, 714, 268 S.E. 2d 185, 190 (1980). The judgment in the present case contains only the most general findings of fact about the Castle Hayne Road property. The judgment merely recites that "[Mr. Taylor] put an encumbrance on . . . [the] property after separation to pay off the first encumbrance" and "that there should only be one encumbrance at the time of the separation in the amount of $33,000." We have examined the record, and we cannot infer the trial court's rationale in classifying this property as marital. Because it cannot effectively be determined whether Castle Hayne Road property in fact belongs to the marriage, and, if it does, whether Mr. Taylor should have been assigned the sole obligation of paying off its debt, we remand for further findings of fact.

IV

[4] Mr. Taylor next challenges the trial court's equal division of the marital property. He argues that the evidence in this case established that an unequal division of the property was more equitable than the distribution the trial court made. Mr. Taylor bases his contention on an alleged disparity of income between himself and Helen Taylor, and on his claim that he is permanently and partially disabled.

Our Equitable Distribution Act makes mandatory equal division of marital property unless the court determines that such division is inequitable. *White*, 312 N.C. at 776, 324 S.E. 2d at 832. In making this determination, the court must consider the twelve statutory factors listed at Section 50-20(c). *See Alexander v. Alexander*, 68 N.C. App. 548, 551, 315 S.E. 2d 772, 775 (1984). Two of these factors are the income of the parties and their physical health. N.C. Gen. Stat. Sec. 50-20(c)(1), (3).

If, at an equitable distribution hearing, evidence concerning the income and health of the parties tends to show that an equal division of the marital property is inequitable, the trial court must make findings of fact as to these factors. *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E. 2d 595, 600 (1988). The judgment in this case is barren of any findings about the Taylors' health and income, even though evidence on these points was brought forth at the trial. Consequently, we must vacate the order of equal division of the marital property. On remand, we

direct the trial judge to support whatever judgment he renders with findings of fact addressing the Taylors' incomes and health.

V

[5] James Taylor assigns error to the trial court's finding that Helen Taylor will be entitled to "one-half" of any amounts recovered by Mr. Taylor for lost wages and medical expenses as a result of his lawsuit against his former employer. Mr. Taylor contends, and Ms. Taylor stipulates, that the wording of the finding allows Ms. Taylor to a share of the portion that might be awarded for post-separation medical expenses and lost wages. Accordingly, we vacate and remand with instructions that Ms. Taylor is entitled to a claim against one-half of any monies which represent reimbursement for Mr. Taylor's lost wages prior to the parties' separation and those reimbursing him for medical expenses incurred prior to separation. *See Johnson v. Johnson*, 317 N.C. 437, 454, 346 S.E. 2d 430, 439-40 (1986).

VI

The judgment of the trial court classifying the personal property is affirmed. That portion of the judgment classifying the house at 210 Bermuda Drive, three vacant lots, and a 20-acre tract of land as marital property is affirmed. That portion of the judgment classifying the property at 541 Castle Hayne Road as marital and ordering Mr. Taylor to satisfy the initial encumbrance from his separate funds is vacated and remanded for further findings. That portion of the judgment ordering equal division of the Taylors' marital assets is vacated and remanded for further findings pursuant to Section 50-20(c). Finally, should Mr. Taylor recover any monies from his former employer as reimbursement for lost wages and/or medical expenses, Ms. Taylor may claim only one-half of the amount that represents compensation up to the date of the Taylors' separation.

Affirmed in part, vacated and remanded in part.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. LEWIS M. SCARBOROUGH, JR.

No. 881SC140

(Filed 30 December 1988)

1. **Criminal Law § 15.1— pretrial newspaper publicity—change of venue properly denied**

The trial court did not err in denying defendant's motion for a change of venue due to substantial pretrial publicity which prevented defendant from receiving a fair and impartial trial where defendant did not allege or prove that the information in the newspaper concerning defendant's various sex-related charges and convictions was inaccurate or untrue; defendant did not demonstrate that it was likely that the jurors would improperly base their decisions on any pretrial evidence of which they were aware; defendant produced no evidence on the circulation of newspapers containing articles about him; there was no evidence as to how the articles had affected the community's opinion of defendant; and defendant presented no evidence showing how the comments of a prospective jury member tainted the opinions of the other members as alleged.

2. **Criminal Law § 89.3— prior corroborative statement—statement sufficiently similar to witness's testimony**

In a prosecution for second degree rape and taking indecent liberties with a minor, the statement of the prosecutrix to defendant, "I don't really want to do this," was not so inconsistent with the prosecutrix's testimony that she told defendant that they shouldn't have sex as to establish an abuse of discretion by the trial court in allowing the former statement into evidence as corroborative testimony.

3. **Criminal Law § 89.3— witness's prior statement not treated as substantive evidence**

The trial court's instructions did not allow the jury to consider the prosecutrix's prior statement as substantive evidence.

4. **Rape and Allied Offenses § 5— second degree rape—use of force—sufficiency of evidence**

In a prosecution for second degree rape, there was no merit to defendant's contention that there was no evidence that he used or threatened to use force so as to overcome the prosecutrix's will as contemplated by N.C.G.S. § 14-27.3(a)(1), since the State's evidence tended to show that the prosecutrix was only 15 years old and the defendant, her cousin, was 35 years old; the alleged attack took place in a dark, remote wooded area; and the prosecutrix did not scream or fight defendant because she was scared and thought it would be useless.

5. **Criminal Law § 34.1; Rape and Allied Offenses § 4.1— victim's statement about defendant's prior acts—admission prejudicial error**

The trial court in a second degree rape case erred in allowing the prosecutrix to testify that she was scared of defendant and that she did not scream or

fight him because she knew "what he had done to other girls," even if the State's purpose in introducing the evidence was a permissible one, since the probative value of that testimony was substantially outweighed by its prejudicial effect. N.C.G.S. § 8C-1, Rules 403 and 404.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 17 September 1987 in Superior Court, DARE County. Heard in the Court of Appeals 27 September 1988.

Upon indictment, proper in form, defendant was convicted of second-degree rape and taking indecent liberties with a minor. From that judgment, defendant now appeals.

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

John W. Halstead, Jr., for defendant-appellant.

ORR, Judge.

The alleged facts are that on 18 January 1987, the prosecutrix was visiting with her aunt, the mother of defendant. After having been at her aunt's home all afternoon, the prosecutrix decided to go home and asked defendant for a ride. On the ride home, defendant turned down a road which was described as deserted and dark in a cut-out area of the woods. Defendant told the prosecutrix that he had something to "show" her.

The prosecutrix noticed that defendant was "playing with his private parts" and that he had taken his penis out. Defendant got out of the jeep and silently walked around to the passenger side where the prosecutrix was. He opened her door and touched her about her vaginal area through her pants and underpants. After unzipping his pants and pulling down the prosecutrix's pants and underpants, defendant had vaginal intercourse with her.

The prosecutrix testified that although she did not scream or fight defendant because she was scared and thought it would be useless, she did tell him that "we shouldn't . . . ." Defendant's response indicated that they would "do it sometime anyway."

Defendant took the prosecutrix home, dropped her off and told her "good night." Her father and stepmother were at home and awake but she did not mention the incident. It was not until

several days later that she told a girlfriend and defendant's estranged wife. Months later she told her boyfriend, who is now her husband. At his insistence, the prosecutrix told her family and spoke with a police officer about the occurrence. The prosecutrix was interviewed by Deputy Cheesman about the incident in March of 1987. Defendant was arrested and charged as previously indicated.

Several articles appeared in a local newspaper about defendant's various sex related charges and convictions between the period of 10 June 1986 and 15 September 1987. Defendant denied all allegations of wrongdoing. At trial, defendant's witnesses testified that the prosecutrix was taken home by her father and that defendant stayed at his parents' home all evening until he went to his home for the night.

I.

[1] The first issue before this Court is whether the trial court erred in denying defendant's motion for a change of venue due to substantial pretrial publicity that prevented defendant from receiving a fair and impartial trial.

In the absence of a showing by the defendant that the lower court "gross[ly]" abused its discretion on this matter, there can be no reversal of its decision. *State v. Matthews*, 295 N.C. 265, 279, 245 S.E. 2d 727, 735 (1978), *cert. denied*, 439 U.S. 1128 (1979).

The test for whether a change of venue should be granted is whether the defendant has established "that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E. 2d 339, 347 (1983).

In the instant case, defendant has neither alleged nor proven that the information in the media was inaccurate or untrue. Moreover, defendant did not demonstrate that it was likely that the jurors would improperly base their decisions on any pretrial evidence of which they were aware.

In addition, defendant produced no evidence on the circulation of newspapers containing articles about him, and there was

no evidence of how the articles had impacted on the community's opinion of him. Defendant offered testimony from one witness stating that in her opinion defendant would not receive a fair trial in the county. This witness also stated, however, that she personally did not know of any talk in the community about the defendant's circumstances.

Furthermore, defendant presented no evidence showing how the comments of a prospective jury member tainted the opinions of the other members as alleged. Veniremen were liberally removed by the defense. None of the remaining members indicated that they would have difficulty giving defendant the fair trial to which he was entitled. In the absence of some credible proof of prejudice to defendant we find no ground for reversing the lower court's decision with respect to this issue.

II.

[2] Next, we will address whether the trial court properly permitted a prior statement of the prosecutrix which defendant alleges also included additional, inconsistent and noncorroborating matters.

Initially, it must be noted that "[t]rial judges are granted broad discretion in admitting evidence which goes to the credibility of witnesses." *State v. Covington*, 290 N.C. 313, 337, 226 S.E. 2d 629, 645 (1976). (Citation omitted.) Reversal of a decision, therefore, may be had only upon a sufficient showing of an abuse of discretion. Our Supreme Court considered a similar issue in *State v. Ramey*, 318 N.C. 457, 469, 349 S.E. 2d 566, 573 (1986). In *Ramey*, the Court stated that:

> [i]n order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony.

Furthermore, "[t]o be admissible as corroborative evidence, testimony of a prior statement by the witness sought to be corroborated does not have to be precisely identical to such prior testimony of that witness." *State v. Madden*, 292 N.C. 114, 128, 232 S.E. 2d 656, 665 (1977).

Deputy Cheesman's testimony did corroborate the prosecutrix's statements. He testified that the prosecutrix told defendant "I don't really want to do this." Defendant claims that statement is inconsistent with the prosecutrix's testimony that they shouldn't have sex. The two statements are not so dissimilar as to establish an abuse of discretion by the trial court in allowing the former statement into evidence as corroborative testimony. Based upon the foregoing facts, we conclude that there was no error as to this issue.

III.

[3] Likewise, we find that there is little merit in defendant's challenge to the jury instructions. In those instructions the trial court stated that:

> [A]nything that the witness, Linda Beasley, might have said to this officer at another time is not to be considered as evidence as what was said . . . . If you find that it was, in fact, said, then you may consider it. If you find it corroborates her testimony at this trial or if it conflicts her testimony at this trial, then you may consider this . . . .

Defendant argues that the instruction allows the jury to consider the statement as substantive. However, we find that in considering the entire instruction contextually, the trial court made it clear that the evidence was not to be considered for substantive purposes. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

IV.

[4] Next, we are asked to consider whether defendant's motion to dismiss should have been granted as to the second-degree rape charge due to an insufficiency of the evidence.

In considering defendant's motion to dismiss, the trial court was required to "consider all the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference of fact arising from the evidence." *State v. Easterling*, 300 N.C. 594, 604, 268 S.E. 2d 800, 807 (1980).

Defendant contends that there was no evidence that he used or threatened to use force so as to overcome the prosecutrix's will as contemplated by G.S. 14-27.3(a)(1). Defendant bases his

argument on the case of *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984). The *Alston* court found that the victim's general fear of her attacker was insufficient where she had previously engaged in consensual intercourse with him. However, *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987) limited *Alston* to "those situations which are factually similar to *Alston*." 319 N.C. at 47, 352 S.E. 2d at 681. Here, defendant made no allegations that he and the prosecutrix had ever engaged in consensual intercourse. Consequently, the facts in *Alston* are distinguishable.

Defendant introduced evidence which tended to imply that the prosecutrix's love for him exceeded the realm of healthy family concern and bordered on a romantic type attraction.

On the other hand, the State produced evidence which tended to show that the prosecutrix was only 15 years old and the defendant, her cousin, was 35 years old. The State's evidence indicated that the alleged attack took place in a dark remote wooded area and that the prosecutrix was scared.

Based upon the evidence which was presented, the court was correct in submitting the charge of second-degree rape to the jury. When there is conflicting evidence, it is the jury's duty to determine what the facts are and reconcile any differences between the State's evidence and the defense's evidence. *See State v. Spangler*, 314 N.C. 374, 333 S.E. 2d 722 (1985). This assignment of error is overruled.

V.

Finally, defendant contends it was error for the trial court to allow the prosecutrix to testify as to defendant's reputation in the community and as to what she believed defendant would do to her to establish her fearful state of mind and her lack of consent to the alleged rape.

Defendant argues that G.S. 8C-1, Rule 403 and Rule 404 precluded the admission of the prosecutrix's statements. He claims that he was unduly prejudiced before the jury and that he is therefore entitled to a new trial. G.S. 8C-1, Rule 403 excludes evidence which is otherwise admissible if the probative value of such testimony is substantially outweighed by its prejudicial effect. Rule 404, with limited exceptions, will preclude character evidence which is offered to show that defendant acted in conformity

with such character traits on the particular occasion involved. Such exceptions include admitting character evidence to prove "*motive*, opportunity, *intent*, preparation, *plan*, *knowledge*, identity or absence of mistake, entrapment or accident." *State v. McKoy*, 317 N.C. 519, 530, 347 S.E. 2d 374, 381 (1986) (emphasis in original). (Mitchell, J., concurring.)

[5] At the trial, prosecutrix testified that she was scared of defendant and that she did not scream or fight him because she knew "what he had done to other girls." This testimony introduced evidence of defendant's prior bad conduct. In essence, the State sought to introduce through the back door what it clearly could not introduce through the front door—an attack on defendant's character by showing a disposition to commit offenses similar to those for which the defendant was on trial.

This Court is aware of the inherent dangers of allowing the jury to consider such evidence. We have stated on numerous occasions that "[e]ven if evidence is admissible under Rule 404(b), the trial court still must determine whether its probative value outweighs the danger of undue prejudice to the defendant." *State v. Frazier*, 319 N.C. 388, 390, 354 S.E. 2d 475, 477 (1987).

The evidence which was admitted could have conceivably misled the jury, confused the issues and caused the jury to decide this case on improper grounds. In light of other evidence which implied that the prosecutrix had more than a mere healthy familial love for defendant, as evidenced by her letter to defendant stating "you [defendant] need all the love and tenderness you can hold and if it comes right down to it, I will give it all to you myself," reasonable minds may have differed on whether or not the intercourse was consensual. The giving of consent would have vitiated any allegation of forced intercourse. Therefore, we cannot say that there is no reasonable possibility that another result would not have been reached if this testimony had not been admitted in error.

We conclude that even if the purpose for which the State introduced the testimony was a permissible one, the probative value of that testimony was substantially outweighed by its prejudicial effect. Therefore, we reverse the judgment entered below and order a new trial.

Reversed and remanded.

Judge SMITH concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I join with the majority except to the extent that the majority holds the prosecutrix's testimony that she did not scream or fight the defendant because she knew "what he had done to other girls" is inadmissible under N.C.G.S. Sec. 8C-1, Rule 404(b) (1986) and N.C.G.S. Sec. 8C-1, Rule 403 (1986). I find no error in the defendant's trial and would not grant him a new one.

I cannot agree that the *only* relevance of the prosecutrix's statement is to show the character of the accused and that he acted in conformity therewith. *State v. Young*, 317 N.C. 396, 412, 346 S.E. 2d 626, 635 (1986) (evidence of other offenses is admissible if it tends to prove any other relevant fact); *State v. Emery*, 91 N.C. App. 24, 33, 370 S.E. 2d 456, 461 (1988) ("evidence of other offenses is admissible so long as it is relevant to any issue other than the character of the accused"). Here the defendant was charged and convicted of second-degree rape, which offense requires proof that the offense was committed "against the will" of the victim. N.C.G.S. Sec. 14-27.3 (1986). Accordingly, the prosecutrix's evidence of her awareness of the prior conduct of the defendant is admissible to show that her "will had been overcome by her fears for her safety." *Young*, 317 N.C. at 413, 346 S.E. 2d at 636. Therefore, the prosecutrix's testimony was competent to explain her unusual defensive behavior and was probative on the issue of whether her will had been overcome in part by her fears for her safety.

Even if this evidence is admissible under Rule 404(b), its probative value must still outweigh the danger of undue prejudice to the defendant in order to be admissible under Rule 403. *State v. Frazier*, 319 N.C. 388, 390, 354 S.E. 2d 475, 477 (1987). Here the majority concludes that the probative value of the testimony was "substantially outweighed by its prejudicial effect" because the evidence "could have conceivably misled the jury, confused the issues and caused the jury to decide this case on improper

grounds." I disagree. The issue of whether to exclude the evidence under Rule 403 is a matter "within the sound discretion of the trial court, 'and his ruling may be reversed for an abuse of discretion only upon a showing that it "was so arbitrary that it could not have been the result of a reasoned decision." ' " *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E. 2d 139, 145 (1988) (citations omitted). Here the record discloses no abuse of discretion by the trial court in admitting this evidence.

STATE OF NORTH CAROLINA v. GEORGE G. CHARLES

No. 8810SC79

(Filed 30 December 1988)

1. **Rape and Allied Offenses § 5— first degree rape—penetration—rope as deadly weapon—sufficiency of evidence**

The State introduced sufficient evidence of vaginal penetration through the victim's testimony to permit a rational jury to find beyond a reasonable doubt that defendant engaged in forced intercourse with the victim, and evidence that defendant used a rope to choke the victim until she lost consciousness supported a reasonable inference that the cord as used by defendant was a dangerous weapon as a matter of law; therefore, the trial court did not err in failing to instruct on lesser included offenses of first degree rape.

2. **Burglary and Unlawful Breakings § 5— unpermitted use of key—sufficiency of evidence of first degree burglary**

Defendant's unpermitted use of a key did not transform his unpermitted entrance into the victim's apartment into anything less than first degree burglary.

3. **Criminal Law § 34.6— testimony indicating defendant's previous incarceration—defendant not prejudiced**

The trial judge did not abuse his discretion to the prejudice of defendant when he allowed the victim to testify that defendant stated "they are never going to take me in again alive," even if the statement did refer to previous incarceration, since the statement is probative of defendant's knowledge of his guilt, and there was no showing that its probative value was substantially outweighed by its prejudicial effect.

4. **Assault and Battery § 15.2— choking victim with cord—instructions supported by evidence—verdict arrested—defendant not prejudiced**

Evidence was sufficient to support the trial court's instruction that, if the jury found that defendant intentionally choked the victim with a rope or cord, then it would be their duty to return a verdict of guilty of assault with a dead-

ly weapon with intent to kill, but even if such instruction was erroneous, defendant was not prejudiced because the judge arrested the jury's verdict as to this conviction.

5. **Jury § 7.7— denial of challenge for cause—failure to exhaust peremptory challenges—waiver of right to challenge**

Defendant in a rape case could not properly raise an issue as to whether the lower court erred in denying defendant's challenge for cause of a prospective juror where defendant did not exhaust his peremptory challenges at trial. N.C.G.S. § 15A-1214(h) and (i).

6. **Criminal Law § 138.14— sentence—aggravating factors outweighing mitigating factors**

The trial court properly found that aggravating factors of defendant's previous guilty plea to second degree rape and his conviction of carrying a concealed weapon outweighed factors in mitigation, and the rape victim's statement regarding defendant's good rapport with her children amounted to a lack of showing of his bad character and not statements reflecting his good character.

APPEAL by defendant from *Battle, Judge.* Judgment entered 27 August 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 7 September 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Allen Jernigan, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant-appellant.

ORR, Judge.

Defendant, George G. Charles, was convicted of first-degree rape, first-degree sexual offense, first-degree burglary, and assault with a deadly weapon. Defendant was given concurrent life sentences for the rape and sexual offense, a consecutive 20-year sentence for the burglary, and judgment was arrested on the assault with a deadly weapon conviction.

On appeal, defendant has brought forth numerous assignments of error relating to: (1) certain jury instructions, (2) the admission of specific exculpatory statements, (3) the removal of a prospective juror, and (4) the trial court's refusal to find certain mitigating factors.

The State's evidence tended to show that the victim and defendant were acquaintances from church. Some time after a sepa-

ration from her husband, the victim and defendant dated one another, but following certain disagreements, discontinued their relationship. On 13 May 1987, defendant saw the victim at church with her estranged husband. Later that night, defendant went to the victim's residence but she did not allow him to enter. The victim asked defendant to leave which he did, but he later returned in the early hours of the morning.

The victim awoke shortly after 2:00 a.m. and found defendant standing nude at her bedside. Defendant began to pull at the victim's underwear but he stopped when he was asked to do so. The victim then agreed to talk with defendant if he would put on his clothes. The victim then went downstairs with defendant, talked with him briefly, and followed him to the door to see that he left. Defendant suddenly grabbed the victim and carried her to the couch. Defendant then pulled down the victim's underwear and unzipped his pants.

During their struggle, defendant choked the victim with his hands and tried to have intercourse with her. When they fell off of the couch, defendant began to choke the victim with a cord until she lost consciousness. Upon regaining consciousness the victim found defendant "trying to have sexual intercourse with [her]." Defendant then engaged in oral sex with her.

Following this, the victim complained about throat pains and asked defendant for some water. Defendant gave the victim a cup of water and called the rescue squad. Defendant was leaving when he encountered the police. He told them that all that the victim said was true. Defendant was arrested and taken into custody where he made an incriminating statement. The victim was then taken to the hospital for treatment.

I.

[1] We will first address the issue of whether the court erred in failing to instruct the jury on second-degree rape, attempted second-degree rape, second-degree sexual offense, and felonious breaking or entering, all of which are lesser included offenses to those for which defendant was convicted.

Defendant did not object to the instructions at trial. Therefore, this issue was not properly preserved for appeal. In order for the instruction to be the basis of a reversal, it must rise to the

level of "plain error." *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983); *United States v. McCaskill*, 676 F. 2d 995 (4th Cir. 1982). We have examined the record and determined for the reasons set forth below that no instructional error occurred which would have affected the jury's decision.

A.

Defendant contends that there is conflicting evidence of whether penetration of the victim actually occurred. He argues that due to this ambiguity in the evidence, the jury should have been instructed on the relevant lesser included offenses. Defendant is incorrect in his assertions. The victim testified that when she regained consciousness, defendant was forcing his penis inside her. She further responded affirmatively when asked whether defendant had put his penis inside her.

Our Supreme Court has on several occasions relied on the rule that "[e]vidence of the slightest penetration of the female sex organ by the male sex organ is sufficient for vaginal intercourse . . . ." *State v. Williams*, 314 N.C. 337, 351, 333 S.E. 2d 708, 718 (1985). We find that the State introduced sufficient evidence of vaginal penetration through the victim's testimony to permit a rational jury to find beyond a reasonable doubt that defendant engaged in forced intercourse with the victim.

Additionally, defendant claims that the court erred in not charging the jury on second-degree rape because the evidence was controverted as to whether the cord that he used was a deadly weapon as a matter of law. According to *State v. Young*, 317 N.C. 396, 346 S.E. 2d 626 (1986), "[i]n order to be characterized as a 'dangerous or deadly weapon,' an instrumentality need not have actually inflicted serious injury. A dangerous or deadly weapon is 'any article, instrument or substance which is *likely* to produce death *or* great bodily injury.' " *Id.* at 417, 346 S.E. 2d at 638 (citation omitted) (emphasis original). The *Strickland* court in upholding a trial court's instruction that the jury could consider a rope to be a deadly weapon said: " '[a] deadly weapon is not one which must kill but one which under the circumstances of its use is likely to cause death or great bodily harm.' " *State v. Strickland*, 307 N.C. 274, 295, 298 S.E. 2d 645, 659 (1983) (citation omitted).

Furthermore, the court should charge the jury that an instrumentality is deadly " '[w]here the allegedly deadly weapon and

the manner of its use are of such character as to admit of but one conclusion. . . .' " *State v. Torain*, 316 N.C. 111, 119, 340 S.E. 2d 465, 470 (1986) (citation omitted). Based upon *Torain*, the deadly nature of an instrument is a jury question " 'where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, ...' " *Id.* at 120, 340 S.E. 2d at 470.

In the instant case, as in *Torain* and *Young*, the defendant used his weapon to subdue his victim so that his assault could be completed. Here the victim was choked until she lost consciousness. Under these circumstances, the manner in which defendant used the rope could have resulted in the victim's death by strangulation. There is little question that choking a person with a cord until they lose consciousness could likely result in death or serious bodily injury. Therefore, we believe that the only reasonable inference is that the cord as used by defendant was a dangerous weapon as a matter of law.

Accordingly, we conclude that there was no contradictory evidence which would have compelled the judge to charge the jury on the lesser included offenses. Instructions on the lesser included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning crucial elements of the offense. *See State v. Wright*, 304 N.C. 349, 283 S.E. 2d 502 (1981).

B.

[2] Defendant also argues that because he entered the victim's house with a key and did not break the close of her dwelling as proscribed by the burglary statute, he was therefore entitled to have the jury instructed on the lesser offense of felonious breaking or entering. The elements of felonious breaking or entering are "(1) the breaking *or* entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E. 2d 575, 577 (1986) (emphasis added). *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101 (1964) states that "[t]here is a sufficient breaking where a person enters a building with a felonious intent by unlocking a door with a key." *Id.* at 25, 134 S.E. 2d at 107.

Based upon the evidence, defendant was not entitled to a charge on this lesser included offense. There was sufficient evi-

dence to establish a burglary free from ambiguities or contradictions. " 'The jury should be instructed on a lesser included offense when, and only when, there is evidence from which the jury could find that such included crime of lesser degree was committed.' " *State v. Jolly*, 297 N.C. 121, 127, 254 S.E. 2d 1, 5 (1979) (citation omitted). The defendant's unpermitted use of a key is hardly a fact which transformed his unpermitted entrance into something less than a burglary in the first degree. This assignment of error is overruled.

II.

[3] Our attention is now turned toward determining whether the trial judge abused his discretion to the prejudice of defendant when he allowed the admission of statements which referred to the defendant's prior incarceration. The defense contends that the evidence was unduly prejudicial to defendant and, therefore, should have been excluded under N.C.R. Evid. 804, 608 and 609. The State argues that this evidence is admissible to show defendant's acknowledgement of responsibility for his criminal conduct. The States cites *State v. Redfern*, 246 N.C. 293, 98 S.E. 2d 322 (1957) as support for this contention.

The case of *State v. Mack*, 87 N.C. App. 24, 359 S.E. 2d 485 (1987), which involved an inference to criminal activity which defendant claimed was prejudicial and injurious to his defense is pertinent to our consideration of this issue. In *Mack* we stated that the "[e]xclusion of *allegedly* prejudicial evidence under N.C.G.S. sec. 8C-1, Rule 403 is a matter within the sound discretion of the trial judge." *Mack*, 87 N.C. App. at 29, 359 S.E. 2d at 489 (emphasis added).

The statement which defendant is challenging also involves an inference to criminal activity. The victim testified that defendant stated "they are never going to take me in again alive." Defendant argues that "again" makes reference to previous incarceration. At trial a general objection was made. Consequently, our finding that the evidence was competent for any purpose would prevent us from disturbing the decision below. *See State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971). Defendant conceded in his brief that the statement had "minimal" probative value. We are persuaded by the State's argument that the statement is probative of defendant's knowledge of his guilt. Further, there has

been no showing that the probative value of the statement was substantially outweighed by its prejudicial effect. Therefore, having found that the statement was properly admitted and defendant was not prejudiced, we overrule this assignment of error.

III.

[4] We next address the question of whether the court below committed reversible error in its instructions on the assault with a deadly weapon charge. Defendant argues that, by instructing the jury that if they found that "defendant intentionally choked [the victim] with a rope or a cord . . . then it would be your duty to return a verdict of guilty of assault with a deadly weapon with intent to kill," invaded a matter within the province of the jury. Defendant contends that this charge violated his constitutional rights because it created an impermissible mandatory inference that a rope or cord is a deadly weapon. Again, we note that because defendant failed to object to this instruction at trial, in order for this assignment to be the basis of a reversal, the judge's instruction must have constituted "plain error."

Upon reviewing the entire record as we are required to do, we find that defendant is incorrect in his assertion that this charge was an instructional error. Moreover, assuming that an error occurred, such error was adequately cured and no reversal is required.

As we previously stated, the circumstances and the manner in which defendant attacked the victim with the cord justified the court's finding that the cord which was used is a deadly weapon as a matter of law. Based upon our previous analysis, we conclude that the jury instructions did not create an impermissible presumption that a cord is a dangerous or deadly weapon as a matter of law. Moreover, defendant could not have been prejudiced by this instruction because the judge arrested the jury's verdict as to this conviction. We see no reason to disturb the court's decision on this matter. *See State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973) (where a jury verdict of not guilty rendered nonprejudicial the failure of the trial judge to submit a lesser included offense); *State v. Berkley*, 56 N.C. App. 163, 287 S.E. 2d 445 (1982) (where an acquittal of the more serious crime made harmless the submission of that charge to the jury).

IV.

[5] This Court will in turn address itself to the issue of whether the lower court erred in denying defendant's challenge for cause of a prospective juror. The prospective juror which defendant sought to challenge was a man who testified on *voir dire* that his mother had been raped when he was a child. He further stated that he had received help for some related emotional problems, and that there was nothing which would affect his ability to be fair and impartial at the trial.

Pursuant to G.S. 15A-1214(h) and (i), the defendant may raise this sort of issue on appeal only when he has: "(1) [e]xhausted the peremptory challenges available to him; (2) [r]enewed his challenge as provided in subsection (i) of this section; and (3) [h]ad his renewal motion denied as to the juror in question." Subsection (i) states that "[a] party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied . . . ."

In the instant action, defendant concedes that he did not comply with the requirements of this statute; nevertheless, he urges this Court not to "rigidly" apply these provisions. Because defendant did not follow the mandatory requirements under this rule, this issue is not properly before us. *State v. Sanders*, 317 N.C. 602, 346 S.E. 2d 451 (1986). Therefore, we decline to address it.

V.

[6] The final issue to be addressed is whether the lower court abused its discretion in finding that the aggravating factors outweighed the mitigating factors. Defendant argues that the testimony of the victim, as well as other testimony, established certain mitigating factors. He claims that the court erred in not finding these factors to be mitigating because they were uncontradicted and supported by the evidence.

The State argues that there was insufficient evidence to support defendant's position. Likewise, the State contends that the evidence did not compel the result sought by defendant. "The balancing of the properly found factors in aggravation and mitigation is left to the sound discretion of the trial judge." *State v. Teague*, 60 N.C. App. 755, 758, 300 S.E. 2d 7, 8-9 (1983).

In reviewing the record, we find ample support for the lower court's decision. Defendant previously pled guilty to second-degree rape and was convicted of carrying a concealed weapon. The court found that these factors outweighed factors offered in mitigation. We note that the victim's statement regarding defendant's good rapport with her children amounted to a lack of a showing of his bad character and not statements reflecting his good character. *State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983).

Based on the foregoing, defendant received a fair trial, free from any prejudicial error.

No error.

Judges GREENE and SMITH concur.

ALICE BONITA BRANDT v. ROBERT O. BRANDT

No. 8810DC173

(Filed 30 December 1988)

1. **Divorce and Alimony § 21.3— alimony set out in separation agreement—no reduction provided upon change of child custody—plaintiff entitled to arrearages**

The trial court properly entered summary judgment for plaintiff on her claim for alimony arrearages where the parties executed a separation agreement free from duress or other illegalities; defendant agreed to pay plaintiff support and specifically listed the different events which would cause those payments to be reduced or terminated; and there was no proviso relating to a reduction in payments if defendant was to be awarded legal custody of the parties' minor child.

2. **Divorce and Alimony § 21.3— alimony arrearages—defendant's deliberate depression of income—sufficiency of evidence**

There was sufficient evidence to establish that defendant was capable of complying with the support provisions of a separation agreement where the evidence supported findings by the court that a company owned by defendant's present wife is actually a joint venture for defendant and his wife; defendant has assets titled in the names of his wife and her company in order to avoid attachment by defendant's creditors; defendant is not receiving a salary from the joint venture because he is deliberately trying to depress his income; the annual gross income for defendant and his wife is $60,000; and defendant has the potential to earn an additional $14,000 per year as his share of the profits from the joint venture.

3. **Divorce and Alimony § 24.6— plaintiff's poor health—inability to contribute to child's support—sufficiency of evidence**

Evidence was sufficient to support the trial court's finding that plaintiff, due to her poor health, was unable to work in order to help support the parties' minor child, even though there was evidence to the contrary.

4. **Divorce and Alimony § 24.6— change of child custody to defendant—defendant not entitled to any child support from plaintiff—sufficiency of evidence**

The trial court did not err in concluding that some of defendant's living expenses, including private school tuition for the parties' daughter, were not reasonable and necessary; furthermore, because the court determined that certain expenditures for which defendant was seeking reimbursement were improperly allocated to the child or were not necessary and reasonable and that plaintiff's health prevented her from earning an income, there was no error when the court concluded that defendant was not entitled to any retroactive or prospective child support.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendant from *Morelock, Judge*. Order entered 11 September 1987 in Civil District Court, WAKE County. Heard in the Court of Appeals 7 September 1988.

Summary judgment was granted for plaintiff; defendant was ordered to specifically perform under a separation agreement. Defendant appeals this judgment.

Womble, Carlyle, Sandridge & Rice, by Carole Gailor, attorney for plaintiff-appellee.

Nicholas J. Dombalis, II, attorney for defendant-appellant.

ORR, Judge.

Plaintiff-wife and defendant-husband were married on 3 February 1968. They separated on 25 February 1979. In September of 1979, they entered into a separation agreement, the relevant terms of which will be set forth in the text of this opinion. Thereafter, on 26 March 1980, the parties were granted an absolute divorce.

One child, Kimberly Denise Brandt, was born to the couple on 6 June 1977. Custody of the minor daughter was awarded to plaintiff with reasonable visitation privileges being granted to defendant in accordance with paragraph four of the separation agreement.

Despite the initial custody agreement between the Brandts, Kimberly now lives with defendant, and has lived with him since 1981. Kimberly is enrolled in a private school near her father's home, but she travels to Louisiana to spend her Christmas and summer vacations with her mother each year.

Plaintiff's action, which was instituted on 31 August 1984, claimed that her needs and her daughter's needs had become much greater and that she was in need of support because defendant had discontinued his payments without her consent. Additionally, plaintiff requested arrearages and sought to enforce defendant's compliance with the terms of the separation agreement.

Defendant's answer counterclaimed for legal custody of Kimberly, and it contained a motion to strike all support provisions under the agreement. Defendant further asked the court for reimbursement of all child support payments made to plaintiff by which she was unjustly enriched.

Judge Cashwell heard each party's summary judgment motion in February of 1986. At that time, he concluded that "there [was] no dispute of material fact with regard to the Defendant's liability to the Plaintiff for the payment of alimony . . . under the Agreement. . . ." Plaintiff's motion was granted; the court indicated that the actual amount of arrearages would be determined at a later hearing.

Defendant filed several motions seeking relief from judgment and amendments to the trial court's finding of facts. After these motions were denied, they were again reviewed by Judge Morelock. Ultimately, all of defendant's motions were denied. However, the court agreed to determine whether defendant was entitled to any retroactive or future support from plaintiff, if and when the court awarded defendant legal custody of Kimberly. The court thereafter granted plaintiff's two motions *in limine* precluding defendant from introducing certain evidence at the later hearing on custody and arrearages.

The hearing resulted in judgment being entered in favor of plaintiff. Defendant was ordered to pay $57,625.00 in alimony arrearages. The court further ordered joint custody of Kimberly, with defendant having primary and physical custody and plaintiff

having secondary custody. Defendant's requests for retroactive and future child support from plaintiff were denied.

I.

[1] The first issue is whether the lower court erred in granting plaintiff's summary judgment motion.

Summary judgment is appropriate only when all of the materials filed in connection with the action make clear that there are no factual questions to be resolved by the fact finder, and the movant is entitled to a favorable judgment as a matter of law. G.S. 1A-1, Rule 56 (1988).

A paragraph in the Brandts' separation agreement, subheaded as "Alimony," states:

> 5. ALIMONY: for the support of the Wife and child, Husband agrees to pay Wife TWO THOUSAND ONE HUNDRED FIFTY AND NO/100 ($2,150.00) DOLLARS per month for the period of October, 1979, through September, 1984; and ONE THOUSAND FIFTY AND NO/100 ($1,050.00) DOLLARS per month for the period of October, 1984, through September 1999. In the event of the death of the Wife, the above payments will stop. In the event of the remarriage of the Wife, the above monthly payments will be reduced to THREE HUNDRED SEVENTY-FIVE AND NO/100 ($375.00) DOLLARS per month but only after September, 1984. . . .

Defendant has cited two cases which support the proposition that the literal wording of separation agreements does not control the interpretation of the contract. *Rustad v. Rustad*, 68 N.C. App. 58, 314 S.E. 2d 275, *disc. rev. denied*, 311 N.C. 763, 321 S.E. 2d 145 (1984). Defendant also cited *Pruneau v. Sanders*, 25 N.C. App. 510, 214 S.E. 2d 288, *cert. denied*, 287 N.C. 664, 216 S.E. 2d 911 (1975), to support the proposition that when interpreting separation agreements, courts must ascertain the intent of the parties.

While the defendant has accurately stated these rules, we find that they have no application in the dispute before us. The facts of this case do not require us to determine what the parties' intentions were in order to evaluate the appropriateness of the court's granting plaintiff's summary judgment motion. The facts indicate that the parties executed this agreement free from any

duress or other illegalities which would invalidate their contract. Defendant agreed to pay plaintiff support and he specifically listed the different events which would cause those payments to be reduced or terminated. There was no proviso relating to a reduction in payments if defendant was to be awarded legal custody of Kimberly. The parties negotiated the terms of their agreement at arm's length. We see nothing which would have kept defendant from bargaining for the terms which he desired. We will not rewrite this agreement to allow defendant to add a new condition under which support payments will be reduced. Therefore, we find that there was no genuine issue of material fact to be decided; defendant's obligation to pay support to plaintiff was clear. We overrule this assignment of error.

II.

[2] The next issue before us is whether the court erred in ordering defendant to specifically perform the spousal support agreement.

Defendant contends that there was not enough credible evidence presented to establish that he was capable of complying with the support provisions of the agreement. He claims that currently his only income is derived from his position as a technical consultant. He admits to doing consulting work for a company owned by his new wife, but he denies receiving any compensation for his services. Defendant claims that since his annual income is only $30,000.00 he cannot make the required payments.

The evidence at trial showed that defendant donates at least 15% of his time to his wife's instrument services company, Eastern Instruments, and he's given office space and other benefits instead of monetary remuneration. Defendant's wife owns 100% of Eastern Instruments' stock; she earns an annual salary of $30,000.00. In addition, defendant owns at least two vehicles, and he receives health insurance and benefits from Eastern Instruments.

The court concluded, based upon this evidence, that defendant has assets which are titled in the names of Eastern Instruments and his wife's name in order to avoid attachment by defendant's creditors. Additionally, the court found that defendant was not receiving a salary from Eastern Instruments because

he was deliberately trying to depress his income. The testimony which supports the court's decision shows that defendant's wife has very little technical knowledge about instrument services. Rather, her background is in the administrative sphere of her company. The consulting work performed by defendant is indispensable to the company. Therefore, the court was correct in concluding that Eastern Instruments is a joint venture for defendant and his wife and that defendant chose not to receive a salary in order to depress his income.

The collective annual gross income for defendant and his wife is approximately $60,000.00. Defendant has the potential to earn up to an additional $14,000.00 per year as his share of the profit from Eastern Instruments. Therefore, the evidence in the record does support the conclusion that defendant is financially able to specifically perform the separation agreement. This assignment of error is overruled.

III.

[3] We turn next to the issue of whether there is sufficient evidence in the record to support a finding that plaintiff, due to her poor health, is unable to work in order to help support the minor child.

Generally, the court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed even though there is contrary evidence. *See Wachovia Bank v. Bounous*, 53 N.C. App. 700, 281 S.E. 2d 712 (1981).

At trial, plaintiff testified that her heart illness was very prohibiting because she experiences a great deal of pain and physical discomfort when she engages in any activity for extended periods of time. In addition, plaintiff testified that she has suffered two strokes, that she takes medication daily, and that her prognosis shows no signs for improvement.

Defendant's cross-examination of plaintiff elicited some testimony which tended to contradict plaintiff's assertion that her illness is incapacitating. Plaintiff testified that her illness prevents her from taking extensive trips, yet she admitted to having taken lengthy trips during periods in which she described her health as poor.

The trial court considered this evidence and concluded that the plaintiff's medical condition prevented her from undertaking any meaningful employment and that she is unable to work and earn income to defray her own expenses. This conclusion is supported by the testimony of the plaintiff. Despite the contradictions, we will not disturb the trial court's conclusion.

IV.

[4] The next issue is whether the court erred in concluding that some of defendant's living expenses were not reasonable and necessary.

Defendant argues that Kimberly needs stability in her life and that the private school which she attends provides that stability. Therefore, he claims, tuition expenditures are necessary and proper. Plaintiff's evidence indicated that she was not consulted prior to Kimberly's enrollment in private school by defendant and that she cannot afford to contribute to the tuition payments.

After considering the evidence, the court noted that it was commendable for defendant to have placed the child in private school. However, it was likewise noted that defendant simply did not demonstrate that private school is a necessary or reasonable expense. Our examination of the record reveals no evidence as to why Kimberly could not excel in public school. Therefore, the lower court's conclusion was proper.

Furthermore, because the court determined that certain expenditures for which the defendant was seeking reimbursement were improperly allocated to Kimberly, or were not necessary and reasonable, and that plaintiff's health prevented her from earning an income, there was no error when the court concluded that defendant was not entitled to any retroactive or prospective child support.

Plaintiff contributed as much as she was able to based upon her income. She no longer contributes anything because defendant has stopped making payments; therefore, plaintiff has no income. She has done all that is required of her and defendant is not entitled to any reimbursement or future support payments from plaintiff. "When a trial court is faced with calculating a retroactive child support award, it must consider, among other

things whether what was actually expended was 'reasonably necessary' for the child's upport, . . . and the defendant's ability to pay during the time for which reimbursement is sought. . . ." *Buff v. Carter*, 76 N.C. App. 145, 146, 331 S.E. 2d 705, 706 (1985) (citations omitted). *See also Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976).

V.

Finally, defendant raised two other assignments of error; one involved the grant of plaintiff's motion *in limine*, the other related to the court's findings of fact regarding the expenses of the parties and their minor daughter.

In his brief, defendant cited no case law or other authority to support his arguments. Therefore, defendant has abandoned these two assignments, and we shall not consider them. App. R. 28(b)(5).

The judgment entered below is

Affirmed.

Judge SMITH concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

While I agree with the rest of the majority's decision, I dissent from its holding the trial court did not err in granting plaintiff's motion for summary judgment. I would vacate the entry of summary judgment and remand for trial on the issue raised in the complaint.

The court's summary judgment order characterizes the payments due under the Agreement as "alimony." Alimony is defined in Section 50-16.1(1) as "payment for the support and maintenance of a *spouse*." N.C.G.S. Sec. 50-16.1(1) (1987) (emphasis added). However, while the relevant provision of the Agreement is titled "Alimony," the provision specifically provides that the payments are "for the support of the wife *and* child" (emphasis added). This ambiguous admixture of alimony and child support requires the parties' intention be further ascertained in order to require specific performance of defendant's support obligations under the Agreement. This presents a question for the jury and parol evi-

dence is admissible. *Hartman v. Hartman*, 80 N.C. App. 452, 455, 343 S.E. 2d 11, 13 (1986).

Consequently, summary judgment was inappropriate since a genuine issue of material fact exists. I therefore respectfully dissent from the majority's disposition of that issue.

PAUL JEFFREY NEWTON, D/B/A NEWTON BROTHERS v. CITY OF WINSTON-SALEM

No. 8821SC188

(Filed 30 December 1988)

Municipal Corporations § 37— city's demolition of building—failure to give owner statutory notice

Defendant city acted without authority in ordering the demolition of a dwelling unfit for human habitation without affording the owner notice and an opportunity to be heard in the manner required by N.C.G.S. § 160A-445, and the city was liable in damages for the value of the building at the time of demolition irrespective of whether the owner had actual notice in time to have protected his rights.

APPEAL by plaintiff from *Judge Preston Cornelius*. Judgment entered 26 October 1987 in FORSYTH County Superior Court. Heard in the Court of Appeals 30 August 1988.

Horton & Kummer by Hamilton C. Horton, Jr., for plaintiff appellant.

Hutchins, Tyndall, Doughton & Moore by Richard Tyndall and Laurie H. Woltz for defendant appellee.

COZORT, Judge.

The question presented in this appeal is whether defendant city is liable in damages to plaintiff for demolishing plaintiff's building without complying with the procedural requirements of N.C. Gen. Stat. §§ 160A-441 through -450. The trial court held as a matter of law that defendant had not served plaintiff with complaints and orders in accordance with § 160A-445. Nevertheless, the trial court instructed the jury that, if it found that defendant "use[d] reasonable diligence to provide actual notice to Plaintiff

. . . so that Plaintiff had timely notice to protect his rights," then plaintiff was not entitled to recover the lost value of his building. We find the trial court erred in submitting that issue to the jury.

In February of 1982 the Housing Inspection Division of defendant City of Winston-Salem (the City) received a complaint about a building located at 219 E. 10th Street in Winston-Salem. The building was owned by plaintiff, who at that time rented the building to a tenant as a residential dwelling. As a result of the complaint, the city housing inspector inspected the residence. He found eighteen violations of the City's housing code. Thereafter, the City mailed to plaintiff's business address a certified letter containing a Complaint and Notice of Hearing to show cause why the City should not declare the building an unfit building and order plaintiff to take corrective action. A return receipt signed by plaintiff's secretary showed that the letter was received. At a hearing held on 24 February 1982, the City determined that the building was unfit for human habitation. Plaintiff did not appear at the hearing. Following the hearing, a certified letter containing an order to take corrective action was mailed to plaintiff at his business address. A return receipt showed that this letter was received on 1 March 1982.

During the next months, the City inspected the building and determined that plaintiff had not taken corrective action. Sometime prior to October of 1983, the City relocated the tenant to other housing.

On 30 May 1984, more than two years after its initial order for repair had been served, the City mailed a certified letter to plaintiff at his business address informing plaintiff that the building had been found standing open and asking plaintiff to secure the property. The letter was returned "unclaimed." The housing inspector supervisor unsuccessfully attempted to contact plaintiff by telephone and in person and asked plaintiff's secretary to tell plaintiff to call him. Plaintiff did not respond to these messages.

On 11 December 1984, the city inspector found that the building had been vandalized and left standing open and "that the condition of the property had changed." Thereafter, on 13 December 1984, the inspector sent by certified mail an order to repair or demolish the dwelling. The letter was returned "unclaimed." In January of 1985, the inspector again inspected the building and

determined that it had not been repaired or demolished as ordered, and that more vandalism had taken place.

On 31 January 1985, the City mailed to plaintiff at his business address a certified letter notifying plaintiff that the Board of Aldermen would consider the property and take action against it. The letter was returned "unclaimed." At its meeting, the Board of Aldermen adopted an ordinance ordering plaintiff to demolish the building or the City would demolish it. A copy of the ordinance was mailed to plaintiff, at his business address, but this letter too was returned "unclaimed." A sign concerning the impending demolition was posted on the building. The demolition took place on 26 and 27 March 1985, and a lien for the cost of the demolition was placed on the property.

On 1 August 1986, plaintiff brought an action in trespass against the City for the demolition of his building. He sought damages in excess of $100,000 for the loss of the building and its contents and an "appropriate sum" for the loss of use of the building as a storage and carpentry facility. At trial, plaintiff maintained that he knew nothing about the City's demolition plans until after the building was destroyed. He contended that the City did not comply with the service of process provision of N.C. Gen. Stat. § 160A-445 and, therefore, that defendant's act in demolishing his building was unlawful, entitling him to damages. Defendant contended that it had substantially complied with the provision on service of process, and that plaintiff had notice of the impending demolition but failed to take steps to protect his rights, thus precluding recovery.

After presentation of the evidence, the trial court directed a verdict for plaintiff on the issue of service. However, the court then instructed the jury that if it found that the City had exercised reasonable diligence to provide plaintiff with actual notice and that plaintiff had timely notice to protect his rights, then the jury was not to consider the question of damages for the value of the building. The court further instructed the jury that the City was liable to plaintiff for its failure to salvage materials that plaintiff proved were salvageable.

The jury answered the following questions as indicated:

1. Did Defendant, City of Winston-Salem, use reasonable diligence to provide actual notice to Plaintiff of the impend-

ing demolition of his building at 219 E. Tenth Street, so that Plaintiff had timely notice to protect his rights? (If the answer to No. 1 is yes, go to issue No. 3.)

ANSWER: Yes.

2. If not, what was the value of the building at 219 E. Tenth Street? (If you answer No. 2, return to the Courtroom.)

ANSWER: _____

3. Were there salvagable [*sic*] materials in the building at 219 E. Tenth Street? (If the answer to No. 3 is no, return to the Courtroom.)

ANSWER: Yes.

4. If so, what was the salvage value of those materials?

ANSWER: $1,845.

On appeal, plaintiff contends that the trial court erred in submitting the first issue to the jury and thus precluding recovery of the value of his building based on a finding of reasonable diligence to provide actual notice. We agree.

N.C. Gen. Stat. § 160A-441 confers upon cities and counties the power to exercise their police powers by adopting and enforcing ordinances ordering a property owner to repair, close, or demolish dwellings that are determined to be unfit for human habitation and therefore dangerous and injurious to the health and safety of the public. N.C. Gen. Stat. § 160A-441 (1988). The statute specifically states that cities and counties may exercise such powers only "in the manner herein provided." *Id.* Furthermore, "[i]t is well established that a municipal corporation has no inherent police power, but may exercise such power only to the extent that it has been conferred upon the city by statute." *Horton v. Gulledge*, 277 N.C. 353, 359, 177 S.E. 2d 885, 889 (1970), *overruled on other grounds*, 305 N.C. 520, 290 S.E. 2d 675 (1982). Finally, the power of the State itself is subject to the limitations imposed by the Constitution, which forbids arbitrary interference with the rights of property owners. *See Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E. 2d 325, 330 (1968). Therefore, the authority of the City of Winston-Salem to order the demolition of a building is limited both by the Constitution and by the enabling legislation. *Id.*

The enabling legislation provides that an ordinance adopted by a city to regulate buildings unfit for human habitation "shall contain" certain provisions, including the following:

> (3) That if, *after notice and hearing*, the public officer determines that the dwelling under consideration is unfit for human habitation, he shall state in writing his findings of fact in support of that determination and shall issue and cause to be served upon the owner thereof an order,
>
> a. If the repair, alteration or improvement of the dwelling can be made at a reasonable cost in relation to the value of the dwelling (the ordinance of the city may fix a certain percentage of his value as being reasonable), requiring the owner, within the time specified, to repair, alter or improve the dwelling in order to render it fit for human habitation or to vacate and close the dwelling as a human habitation; *or*
>
> b. If the repair, alteration or improvement of the dwelling cannot be made at a reasonable cost in relation to the value of the dwelling (the ordinance of the city may fix a certain percentage of this value as being reasonable), requiring the owner, within the time specified in the order, to remove or demolish such dwelling.

N.C. Gen. Stat. § 160A-443 (1988) (emphasis added).

Subsections (4) and (5) enable the City to make repairs or demolish property if the owner fails to do so, but no repair or demolition may take place until an ordinance authorizing such action is enacted by the governing body. N.C. Gen. Stat. § 160A-443(5) (1988). However, "[n]o such ordinance shall be adopted to require demolition of a dwelling until the owner has first been given a reasonable opportunity to bring it into conformity with the housing code." *Id.*

The statute further provides the method of service of complaints and orders issued by the City:

> Complaints or orders issued by a public officer pursuant to an ordinance adopted under this Part *shall be served* upon persons either personally or by registered or certified mail. If the identities of any owners or the whereabouts of persons

> are unknown and cannot be ascertained by the public officer in the exercise of reasonable diligence, and the public officer makes an affidavit to that effect, then the serving of the complaint or order upon the unknown owners or other persons may be made by publication in a newspaper having general circulation in the city . . . . When service is made by publication, a notice of the pending proceedings shall be posted in a conspicuous place on the premises thereby affected.

N.C. Gen. Stat. § 160A-445 (1988) (emphasis added).

Finally, if a dwelling is demolished by the City, the City shall sell the materials, any personal property, fixtures or appurtenances and credit the proceeds of the sale against the cost of demolition. N.C. Gen. Stat. § 160A-443(6) (1988).

In ordering and carrying out the demolition of plaintiff's property, none of these statutory requirements were followed.

The *order to repair* received by plaintiff on 1 March 1982 was issued following a properly noticed hearing which plaintiff did not attend. However, when the *order to demolish* was issued almost three years later, plaintiff had not been served with a notice of hearing at which the City would determine the appropriateness of such an order. As set out above, section (3) of § 160A-443 authorizes the City, *after notice and hearing*, to "issue and cause to be served upon the owner," an order to repair *or* an order to demolish. An order to repair is issued after a determination that repairs can be made at a reasonable cost in relation to the value of the dwelling. An order to demolish involves a different determination, namely, that the repairs *cannot* be made at a reasonable cost in relation to the value of the dwelling. These are clearly two distinct factual determinations supporting two distinct kinds of orders. In this case, the City's demolition order was issued almost three years after the City held a hearing and issued its order to repair. The demolition order was based on the building inspector's determination that "the condition of the property had changed" due to vandalism. Plaintiff was given no opportunity to be heard on this determination as required by § 160A-433(3).

As the trial court found, the City failed to comply with the service of process provision of § 160A-445. The City made no attempt to serve plaintiff personally with the demolition order, nor

did the City seek to avail itself of service by publication after exercising reasonable diligence in attempting to ascertain plaintiff's whereabouts. Statutes authorizing service by mail or publication are strictly construed and must be followed with particularity. *Hassell v. Wilson*, 301 N.C. 307, 314, 272 S.E. 2d 77, 82 (1980). Furthermore, no inference of notice may be drawn from the fact that the City's letters were returned "unclaimed." *Cf. Casey v. Barker*, 219 N.C. 465, 14 S.E. 2d 429 (1941), holding that *failure* to accept or claim mail did not import notice where the statute authorized service predicated on the *refusal* to accept or claim such mail. "Actual notice, given in any manner other than that prescribed by statute cannot supply constitutional validity to the statute or to service under it." *Distributors, Inc. v. McAndrews*, 270 N.C. 91, 94, 153 S.E. 2d 770, 772 (1967).

Finally, the City failed to sell any salvageable materials as required by § 160A-443(6). The jury awarded plaintiff $1,845.00 for salvage value. Plaintiff is not, however, limited to recovery for the lost value of these materials. The City acted without authority in ordering the demolition of plaintiff's building without affording plaintiff notice and an opportunity to be heard as required by statute. "A municipal corporation is liable for the destruction or demolition of a building as a public nuisance . . . where the City did not observe due process requirements." McQuillin, *Municipal Corporations*, § 24-561 (footnotes omitted). The City acted at its peril in failing to exercise its powers in the manner prescribed by the statute, and thus it is liable to plaintiff for any provable damages.

A jury finding of "reasonable diligence to provide actual notice . . . so that plaintiff had timely notice to protect his rights" does not insulate the City's liability or limit plaintiff's recovery. Other jurisdictions considering similar circumstances have ruled that a property owner has no duty to take affirmative steps to halt a city's threatened wrongful conduct. *See Geftos v. City of Lincoln Park*, 39 Mich. App. 644, 198 N.W. 2d 169, 175 (1972); *Leppo v. City of Petaluma*, 20 Cal. App. 3d 711, 97 Cal. Rptr. 840, 842-43 (1971); *Solly v. City of Toledo*, 7 Ohio St. 2d 16, 218 N.E. 2d 463, 467 (1966); *Moll Co. v. Holstner*, 252 Ky. 249, 67 S.W. 2d 1 (1934). Thus, proof of actual notice is irrelevant to plaintiff's right to recover damages. The trial court erred in instructing the jury that it could find that the defendant used reasonable

diligence to provide actual notice and thus absolve the defendant of its liability for damages to plaintiff, even though the defendant failed to serve the plaintiff as required by law before demolishing the building.

At the conclusion of the evidence, the trial court granted plaintiff's motion for directed verdict on the issue of service. Defendant did not appeal from this ruling. Thus, defendant's failure to comply with the statutory requirement of service of the complaint and order has been conclusively established. The only issue left to be resolved is whether the plaintiff is entitled to damages for the loss of the value of the building as a result of the demolition. The cause must be remanded for the jury to determine the value of the building at the time of demolition. Any value so found by the jury which exceeds the $1,845.00 value of salvageable materials already found by the jury and awarded to the plaintiff as damages is to be reduced by $1,845.00.

The judgment of the trial court is vacated and the cause remanded for a new trial solely on the issue of damages.

Judgment vacated; new trial on damages.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. CALVIN SUMMERS

No. 8826SC177

(Filed 30 December 1988)

1. Rape and Allied Offenses § 5— first degree rape—11-year-old victim's testimony not scientifically accurate—sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss the charge of first degree rape, though the victim's testimony was not scientifically accurate, where the evidence tended to show that the 11-year-old victim was asleep in her own bed when defendant came into her room and took off her panties; the victim told defendant to go into his own room, but defendant instead put his "private" in her "private" between her legs; a doctor testified that his examination revealed that her hymen was not intact, and a hymen does not remain intact during sexual intercourse; the doctor further testified that from his conversations with the victim, he determined to his "own satisfaction" that a penis had penetrated her vagina; and an officer testified the vic-

tim stated to him that defendant "got on top of me and put his 'thing' inside of me."

2. **Criminal Law § 162— motion in limine to suppress testimony—requiring objections at trial—no abuse of discretion**

The trial court in a rape case did not abuse its discretion in requiring defendant to object to the examining physician's testimony as it occurred at trial rather than ruling on defendant's motion in limine to exclude certain statements allegedly made by the victim during her examination where defendant failed to object to the court's ruling, and defendant failed to show how he was prejudiced by the questioning procedure utilized by the trial court.

3. **Criminal Law § 73.2— first degree rape—victim's statement to doctor for purpose of diagnosis and treatment—doctor's testimony admissible**

The trial court in a first degree rape case did not err in allowing a doctor to testify concerning the victim's statements to him since the statements were made for the purpose of diagnosis and treatment and were therefore permitted as an exception to the general hearsay rule. N.C.G.S. § 8C-1, Rule 803(4).

4. **Rape and Allied Offenses § 4.1— first degree rape—evidence of similar incidents—admissibility**

The trial court in a first degree rape case did not err in allowing evidence of similar incidents committed against the victim by defendant where the challenged testimony tended to establish a plan or scheme by defendant to sexually abuse the victim when her mother went to work, and proof of the incidents, which allegedly occurred within twelve months prior to the incident for which defendant was charged, was not so remote in time as to outweigh its probative force. N.C.G.S. § 8C-1, Rule 404(b).

APPEAL by defendant from *Burroughs (Robert M.), Judge.* Judgment entered 23 September 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1988.

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

Grant Smithson for defendant-appellant.

GREENE, Judge.

Defendant was convicted of first-degree rape under Section 14-27.2(a)(1) and of taking indecent liberties with children under Section 14-202.1. N.C.G.S. Sec. 14-27.2(a)(1) (1986); N.C.G.S. Sec. 14-202.1 (1986). The trial court arrested the indecent liberties verdict and sentenced defendant to life imprisonment. Defendant appeals.

The State's evidence tended to show that the eleven-year old victim lived with her mother and defendant. On or about 1 December 1986, defendant entered the victim's bedroom after her mother left for work, removed the victim's panties, got on top of her and put his "private" inside her "private." The next day, the victim told her mother what had happened and the mother took her to a hospital where a physical examination by Dr. Nadel revealed the victim's hymen was not intact. The examining physician further testified that the victim stated that defendant had put his penis inside her and touched her between her legs and on her breasts. An investigating officer testified the victim stated to him that the defendant had gotten into her bed, fondled her breasts and legs and put his "thing" inside her.

Defendant's own testimony and other evidence tended to show that he had lived with the victim's mother for approximately eight years and on the evening in question the victim had asked him to put some salve on her leg rash. He stated he had never fondled her or had sexual intercourse with her.

The dispositive issues presented are: I) whether the trial court erroneously denied defendant's motion to dismiss the charge of first-degree rape; II) whether the trial court erroneously required defendant to object to the examining physician's testimony as it occurred rather than grant defendant's motion *in limine* to exclude certain statements allegedly made by the victim during her physical examination; and III) whether evidence of defendant's prior sexual contact with the victim was properly admitted.

I

[1] Defendant first argues the trial court erroneously denied his motion to dismiss the first-degree rape charge for lack of substantial evidence. Upon a motion to dismiss, the court determines as a matter of law whether there is substantial evidence of each essential element of the charged offense and whether the defendant is the perpetrator of the offense. *State v. Bruce*, 315 N.C. 273, 281, 337 S.E. 2d 510, 515 (1985). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Scott*, 323 N.C. 350, 372 S.E. 2d 572,

575 (1988). In determining whether there is substantial evidence of each element, the court is required to consider *all* of the evidence—whether competent or incompetent—in the light most favorable to the State and allow the State all reasonable inferences that may be drawn from all the evidence so considered. *Id.; State v. McMilliam*, 243 N.C. 771, 774, 92 S.E. 2d 202, 205 (1956) (appellate court considers even evidence determined on appeal to have been erroneously admitted).

An essential element of rape under Section 14.272(a)(1) is vaginal intercourse which is defined as "the *slightest* penetration of the female sex organ by the male sex organ." *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E. 2d 856, 861 (1984) (emphasis in original); Section 14-27.2(a)(1) (requiring vaginal intercourse). Defendant disputes whether the State presented substantial evidence at trial to permit the conclusion that defendant had vaginal intercourse with the victim. Defendant specifically notes that at no time during the victim's testimony did she use the words "penis" or "vagina," nor was the victim asked to point to her anatomy nor asked to use anatomical dolls to describe what happened. However, the law "does not disqualify a little girl, alleged to have been the victim of a sexual assault, to testify as a witness concerning the acts of the defendant, or belittle the significance of her testimony, merely because she does not identify with scientific accuracy the portions of her anatomy and that of the defendant involved in the assault. . . ." *State v. Shaw*, 293 N.C. 616, 622, 239 S.E. 2d 439, 443 (1977).

Viewed most favorably to the State, the evidence tends to show that the eleven-year-old victim was asleep in her own bed on 1 December 1986 when defendant came into her room and took off her panties. The victim told the defendant to go into his own room but the defendant instead put his "private" in her "private" between her legs. Doctor Nadel testified his examination revealed a hymen that was not intact and that a hymen does not remain intact during sexual intercourse. Doctor Nadel further testified that from his conversations with the victim he determined to his "own satisfaction" that a penis had penetrated her vagina. Officer Bohn testified the victim stated to him that defendant "got on top of me and put his 'thing' inside of me."

Although the victim's own testimony was perhaps scientifically inaccurate and somewhat ambiguous, it was corroborated

by the testimony of numerous other witnesses. Therefore, the victim's arguably imprecise testimony at worst raises a question for the jury as to her meaning and credibility. *See Shaw*, 293 N.C. at 623, 239 S.E. 2d at 413. However, the testimony of the victim, Dr. Nadel and Officer Bohn was clearly such that reasonable minds could accept the conclusion beyond a reasonable doubt that defendant's penis penetrated the victim's vagina. *Cf. State v. Hicks*, 319 N.C. 84, 86, 352 S.E. 2d 424, 425 (1987) (substantial evidence for rape charge where victim testified defendant put his "privacy" into her "privacy"). Therefore, the trial court did not err in denying the defendant's motion to dismiss the charge of first-degree rape.

II

[2] Defendant next challenges Dr. Nadel's testimony in two ways. First, defendant claims the trial court erroneously failed to rule on his motion *in limine* to bar any testimony by Dr. Nadel that the victim had stated she had been raped by defendant several times during the preceding month and that, during the 1 December 1986 episode, defendant "began touching her genitalia [and] about the breasts, pulled down her panties and entered her vaginally while he lay on top of her." In his motion *in limine*, defendant contended these statements were inadmissible hearsay which were not the victim's statements but were merely Dr. Nadel's interpretation of what the victim told him during the physical examination. However, after Dr. Nadel's voir dire, the trial court stated it would allow Dr. Nadel to testify and would simply rule on defendant's specific objections as Dr. Nadel testified. When informed of this decision, defendant's counsel replied, "Fine," and never objected to the trial court's procedure for questioning Dr. Nadel. Absent any objection, defendant may not challenge the court's action on appeal. N.C.R. App. 10(b)(1). We in any event note defendant has failed to show how he was prejudiced by the questioning procedure utilized by the trial court. Under these circumstances, defendant has failed to show the trial judge abused his discretion in requiring defendant to object to Dr. Nadel's testimony at trial. *See State v. Ruof*, 296 N.C. 623, 628, 252 S.E. 2d 720, 724 (1979). Furthermore, the trial court's action under these circumstances was not "plain error" as alleged by defendant. *State v. Black*, 308 N.C. 736, 741, 303 S.E. 2d 804,

806-07 (1983) (applying "plain error" review to failure to object under Rule 10(b)(1)).

[3] Second, defendant challenges the trial court's admission over defendant's objection of certain other hearsay testimony by Dr. Nadel. Specifically, Dr. Nadel testified he asked the victim if "anything" was put inside her and the victim responded, "Yes." This conversation between Dr. Nadel and the victim arose during Dr. Nadel's physical examination of the victim in the emergency room of Charlotte Memorial Hospital the day after the alleged rape. The victim had been taken to the emergency room for diagnosis and treatment by her mother who suspected rape. We conclude from these facts that the victim's statements to Dr. Nadel were made for the purposes of diagnosis and treatment and were reasonably pertinent to Dr. Nadel's diagnosis and treatment. The question and answer were therefore permitted as an exception to the general hearsay rule. N.C.G.S. Sec. 8C-1, Rule 803(4) (1986); *State v. Aguallo*, 318 N.C. 590, 596-97, 350 S.E. 2d 76, 81 (1986).

We note in passing that defendant also challenges Dr. Nadel's testimony that he determined to his "own satisfaction" that a penis had penetrated the victim's vagina despite the fact he could not recall the exact words used by the victim. Irrespective of any hearsay exceptions, defendant argues that Dr. Nadel should have been confined to restating the precise words used by the victim and was precluded from making his own inferences from the victim's words. However, we need not address this argument since defendant did not object at trial to Dr. Nadel's testimony in this respect and therefore waived any right to challenge that testimony on appeal. N.C.R. App. P. 10(b)(1). Nor has defendant demonstrated the trial court's error, if any, was so fundamental as to justify our "plain error" review. *Black*, 308 N.C. at 741, 303 S.E. 2d at 807. We again note there was ample other evidence before the trial court to support the jury's verdict.

III

[4] Defendant finally raises numerous assignments of error arising from the testimony of the victim, Dr. Nadel and Officer Bohn indicating defendant had sexual contact with the victim prior to the incident for which he was charged. Defendant thus claims not only that the court erroneously admitted such evidence, but also

that the court should have severed the trial of the rape and indecent liberties charges and claims defense counsel's failure or inability to accomplish these ends constituted ineffective assistance of counsel. However, as we reject the premise that evidence of these prior sexual contacts was inadmissible, we reject these assignments of error.

The victim testified in part as follows:

> Q. Okay. What did you finally tell your moma about what had happened?
>
> A. I told her that [the defendant] come in my room nights and say he was going to put me asleep and then he'll climb in my bed and start feeling all over me and then took off my—take off my panties and then stick his private in me.
>
> Q. Okay. Had this happened before?
>
> . . . .
>
> A. It happened about, I guess ten times in the total of a year.

The victim's testimony was corroborated by the testimony of Dr. Nadel and Officer Bohn that the victim made similar statements to them.

While Rule 404(a) of our rules of evidence states that evidence of a person's character is not admissible to prove he acted in conformity therewith on a particular occasion, Rule 404(b) states:

> *Other crimes, wrongs or acts.*—Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. Sec. 8C-1, Rule 404(a), (b) (1986). "Our courts have been very liberal in admitting evidence of similar sex crimes in construing the exception to the general rule" excluding character evidence as set forth in 404(a). *State v. Williams*, 303 N.C. 507, 513, 279 S.E. 2d 592, 596 (1981). However, to be admitted under

Rule 404(b), the evidence must not only be of a similar sexual contact, but must also not be so remote in time as to be more prejudicial than probative under the balancing test of Rule 403. *State v. Boyd*, 321 N.C. 574, 577, 364 S.E. 2d 118, 119 (1988).

The challenged testimony by the victim, Dr. Nadel and Officer Bohn tends to establish a plan or scheme by defendant to sexually abuse the victim when the victim's mother went to work; furthermore, as the alleged prior incidents occurred within twelve months prior to the incident for which defendant was charged, proof of the incidents was not so remote in time as to outweigh its probative force. *See Boyd*, 321 N.C. at 577-78, 364 S.E. 2d at 120; *cf. State v. Jones*, 322 N.C. 585, 369 S.E. 2d 822 (1988) (excluding proof of seven-to-twelve-year-old incidents). We thus hold the trial court did not err in allowing evidence of these prior incidents.

Defendant sets forth other assignments of error, several of which fail to state their basis or ground as required under Rule 10(c) of our appellate rules. Nevertheless, we have reviewed those assignments of error pursuant to Appellate Rule 2 and find them either moot or meritless in light of our earlier discussion.

No error.

Judges ORR and SMITH concur.

SIDNEY C. MITCHELL AND TUGGLE, DUGGINS, MESCHAN & ELROD, P.A., PLAINTIFFS v. WILLIAM F. ROTHWELL, DEFENDANT

No. 8818SC536

(Filed 30 December 1988)

1. Bills and Notes § 20— conditional delivery of demand promissory note—insufficiency of evidence

Evidence was insufficient to require the trial judge to submit to the jury an issue of conditional delivery of a demand promissory note where the only supporting evidence was defendant maker's testimony that the note was executed only for the period of time necessary for him to get his wife to join him in executing a deed of trust on their home, and that the note was to be discarded after the deed of trust was executed or his wife refused to sign it.

2. Bills and Notes § 19— defenses of impossibility and duress—directed verdict for plaintiff proper

In an action to recover on a demand promissory note, the trial court properly granted plaintiff's motion for directed verdict on the issues of impossibility and duress, since defendant seemed to argue that his inability to get his wife to sign a deed of trust in order to secure another $300,000 promissory note should relieve him of responsibility on the $300,000 demand promissory note, but plaintiffs here were not seeking to enforce the unexecuted secured promissory note; the promissory note was signed after considerable negotiations had taken place between plaintiff's attorney and defendant; and there was no threat by plaintiffs of any legal action or any other kind of threat which forced defendant to execute the note.

3. Bills and Notes § 20— requested instruction given in substance

In an action to recover on a demand promissory note, the trial court properly instructed the jury on the issue of consideration, even though the instructions did not follow defendant's request word for word.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 6 January 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 December 1988.

This is a civil action wherein plaintiffs seek to recover $300,000.00 pursuant to a promissory note executed by defendant. The evidence offered at trial tends to show the following:

In 1984, plaintiff Mitchell instituted a civil action against Manufacturing Technology, Inc. (hereinafter MTI) to recover for commissions allegedly owed to him under his contract of employment with MTI. On 8 July 1985, a settlement was reached and a consent judgment entered awarding plaintiff Mitchell $498,773.45. On 19 July 1985, plaintiff Mitchell procured an execution based upon the Consent Judgment. This execution was delivered to the Sheriff of Guilford County who, on 19 July 1985, levied on the premises of MTI by padlocking its offices. When defendant Rothwell, a substantial creditor and acting manager of MTI, learned that the MTI offices had been padlocked, he called plaintiff Mitchell's attorney to set up a meeting. Plaintiff Mitchell's attorney, Kenneth R. Keller, then of the law firm Tuggle, Duggins, Meschan & Elrod, P.A., agreed to meet with defendant on 22 July 1985 to discuss the situation.

At the meeting on 22 July 1985, defendant told Keller that he wanted the doors of MTI opened so that outside accountants could complete their audit of MTI's records and books. These ac-

countants had been hired by defendant to audit MTI's accounts so that MTI could obtain an infusion of capital from potential financial investors. Keller agreed to remove the levy of execution in exchange for some form of collateral or security. The only collateral that defendant possessed that plaintiffs were willing to accept was a house located in Charlotte owned jointly by defendant and his wife. Keller and defendant agreed that if defendant would execute a promissory note for $300,000.00 to be secured by a deed of trust on defendant's house, then plaintiffs would permit MTI to be opened and remain open until the audit was completed. Defendant assured Keller that he would go to Charlotte and make every effort to persuade his wife to sign the deed of trust. The deed of trust would take at least one day to be prepared, signed by both defendant and his wife, and recorded. Defendant did not want to wait to get MTI opened, so in order to get MTI opened immediately, defendant signed a note promising to pay plaintiffs $300,000.00 on demand. Keller and defendant then went to the Sheriff's office together and had the levy of execution removed. Thereafter, defendant went to Charlotte to talk to his wife but was unsuccessful in his attempt to get her to sign the deed of trust. On 24 July 1985, defendant called Keller to inform him that the deed of trust would not be executed. Keller informed defendant that plaintiffs would proceed to relevy execution and close MTI. On 26 July 1985, Keller sent written notice to defendant demanding payment of the $300,000.00 demand promissory note. Keller also had execution reissued, and the MTI premises were closed. Within a few weeks after the levy of execution was reissued, MTI filed for bankruptcy.

On 3 December 1986, plaintiffs filed a complaint against defendant seeking to recover on the $300,000.00 demand promissory note. At trial, the following issues were submitted to and answered by the jury as indicated:

> 1. Was the promissory note, Plaintiffs' Exhibit No. 4, given for consideration?
>
> ANSWER: Yes
>
> 2. Was there a failure of consideration on the part of the Plaintiffs, which failure released the Defendant from any further obligation on the promissory note, Plaintiffs' Exhibit No. 4?

ANSWER: No

3. Did the parties at the time of the signing of the promissory note enter into an agreement by the terms of which the Plaintiffs would withdraw execution of the MTI judgment and withhold it until an audit of the business records of MTI was performed and delivered to venture capitalists, as alleged by the Defendant?

ANSWER: No

4. If so, did the Plaintiffs materially breach such agreement?

ANSWER: ____

5. What amount are the Plaintiffs entitled to recover of the Defendant?

ANSWER: $370,931.27

From a judgment entered on the verdict, defendant appealed.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Michael D. Meeker, and Jan Y. Bostic, for plaintiff, appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks, and Douglas E. Wright, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to the trial judge's refusal to submit to the jury an issue of conditional delivery of the demand promissory note and to instruct the jury thereon. Defendant argues the evidence, when considered in the light most favorable to him, was sufficient to raise an inference that the $300,000.00 note in question was delivered to plaintiffs on condition that it would be destroyed or rendered invalid if defendant was unsuccessful in getting his wife to execute the deed of trust to secure the other promissory note. Resolution of the question presented requires a careful analysis of the evidence to determine whether any construction of the evidence presented does in fact raise a reasonable inference that the demand note was delivered conditionally. The burden is on defendant to offer evidence tending to show nonliability on the note "and if the testimony on that point,

considered in the light most favorable for him, afforded any competent evidence in support of his contention, he was entitled to have it submitted to the jury with appropriate instructions from the court as to all material phases of the case presented by such evidence." *Perry v. Trust Co.*, 226 N.C. 667, 670, 40 S.E. 2d 116, 118 (1946).

Defendant argues the following testimony elicited at trial is sufficient to raise an issue of conditional delivery:

> As to whether when I signed the promissory note here, I intended to be personally obligated to the amount of $300,000.00 on the note, that promissory note was signed to cover the time that it would take me to go to Charlotte and get my wife to sign the deed of trust and to execute the deed of trust so that it would go to Keller, and that was conditioned on the other. As to what was going to happen if I did not get the secured note, if I were successful in getting my wife to sign the deed of trust, then that promissory note would have been discarded. As to what was going to happen to the promissory note if I didn't get my wife to sign it, then there was no validity to either document. It was going to be discarded again.

This evidence does not prove any condition precedent to defendant's liability on the demand note. This evidence leads to the conclusion that the promissory note was not to be considered valid under any set of circumstances. Regardless of whether defendant procured his wife's signature, the note was to be "discarded," and defendant would not be liable. We hold no construction of the evidence raises an inference of conditional delivery of the demand promissory note.

[2] Defendant next contends the trial court erred in granting plaintiffs' motions for directed verdicts on the issues of impossibility and duress. Defendant argues there was sufficient evidence presented to submit the issues to the jury. Defendant further argues in his brief that "[i]t is submitted that the evidence supported the defendant's position that his inability to provide the deed of trust as collateral for the term of note was due to an impossibility not of his own making or responsibility." He seems to argue that since he could not get his wife to sign the

deed of trust in order to secure the other $300,000.00 promissory note, he should not be held liable for the demand note in question.

Plaintiffs here are not seeking to enforce the unexecuted secured promissory note, Instead, they are seeking to recover on a fully executed demand promissory note. Defendant signed the note at the 22 July 1985 meeting, and there is no evidence in the record which would be sufficient to justify a verdict for defendant on the defense of impossibility. *See Adler v. Lumber Mutual Fire Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971).

In support of his contention that the trial court erred in granting a directed verdict for plaintiffs on the issue of duress, defendant cites *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). In *Link*, the husband used the threat of instituting legal proceedings to obtain sole custody of the children to force his wife to transfer, without other consideration, her rights to certain stocks and debentures. The court held for the wife, finding that there was evidence to support a finding of duress. Defendant claims that the evidence in the present case, when viewed in the light most favorable to him, is similar to that in *Link*. Defendant argues that plaintiffs knew that defendant and his companies were substantial creditors of MTI and that MTI's financial difficulties adversely affected defendant and his companies. Defendant further contends that plaintiffs wrongfully used the levy of execution on MTI's premises in order to coerce a grossly unfair payment from him "which was not related to any legal obligation" defendant had to plaintiffs.

Defendant's contentions are not supported by inferences that could be drawn from the evidence presented. According to defendant's own testimony at trial, plaintiff Mitchell obtained a levy of execution on 19 July 1985, before defendant was aware that such action would be taken. Defendant testified that prior to this levy of execution, he was not threatened with the action in any way by any of plaintiffs. After MTI's premises were padlocked, it was defendant who contacted plaintiffs about setting up a meeting to deal with the situation and to get MTI opened up again. Defendant further testified that he was adamant about getting MTI opened that same day and told Keller that "inasmuch as I had to have the place opened right now, I would not have any problem in signing a promissory note for [$300,000.00]. . . ."

The evidence in the present case is clearly distinguishable from that of *Link*. The promissory note here was signed after considerable negotiations had taken place between Keller and defendant. There was no threat by plaintiffs of any legal action, indeed there was no threat of any kind. In our opinion, the trial court did not err in directing a verdict in favor of plaintiffs as to the defense of duress. No construction of the evidence raises any inference from which a jury could find defendant signed the note while under duress or that it was impossible for defendant to perform.

Defendant next argues the trial court erred in the manner in which it conducted the charge conference. Citing no cases as authority, defendant contends the verdict of the jury must be "reversed" because the judge did not inform defendant of the precise wording of the instructions at the conference.

Here, the judge discussed with the attorneys what issues were going to be submitted and told them that the jury instructions would follow the applicable law on the issues submitted. We find no conceivable prejudicial error in the manner in which the judge conducted the "charge conference."

By Assignment of Error No. 4, defendant argues the "trial court erred in its instructions to the jury on how the issues should be answered and considered." While some of the judge's instructions with respect to how the issues were to be answered could have been confusing, when considered contextually and as a whole, it is obvious that the trial judge made it clear as to how the issues were to be addressed and answered by the jury. This assignment of error is meritless.

[3] In his last argument, defendant contends the trial court erred in its instructions to the jury on the issue of consideration. Defendant submitted a request for instruction concerning consideration which stated, "A promise by the plaintiffs to withdraw and withhold execution on MTI would be a thing of legal value and, when given in exchange for a promise to pay, would constitute good and valid consideration." Defendant argues that he is entitled to a new trial because the judge omitted the words "and withhold" when the judge instructed the jury on the issue of consideration.

Although the judge did omit the words "and withhold" from the jury instructions, the record reveals that Issue No. 3 was submitted to the jury as follows:

> 3. Did the parties at the time of the signing of the promissory note enter into an agreement by the terms of which the Plaintiffs would withdraw execution of the MTI judgment and withhold it until an audit of the business records of MTI was performed and delivered to venture capitalists, as alleged by the Defendant?
>
> ANSWER: No

This issue, as submitted, embraced defendant's theory that the consideration bargained for was not only the withdrawal of the execution of MTI, but the withholding as well. The jury was not deprived of a chance to rule in defendant's favor on the issue of consideration. In fact, the jury was given that opportunity and chose to answer "No" to that issue. This assignment of error, like the others, has no merit.

No error.

Judges ARNOLD and ORR concur.

BONNIE GARRIS v. DAVID GARRIS

No. 885DC299

(Filed 30 December 1988)

1. Appeal and Error § 6.2— ruling on plea in bar not appealable

Where defendant asserted that a separation/property settlement agreement barred plaintiff's action for alimony and equitable distribution, the trial court's ruling on that plea in bar was not appealable, since the court's ruling only disposed of defendant's plea in bar but did not finally adjudicate any of plaintiff's claims, nor did the court's ruling affect a substantial right such that it was appealable under N.C.G.S. §§ 1-277(a) and 7A-27(d).

2. Husband and Wife § 10.1— separation agreement—court's determination that agreement was unconscionable improper

The trial court erred in determining as a matter of law that the parties' separation/property settlement agreement was unconscionable before defend-

ant had the opportunity to offer all of his evidence concerning the validity of the agreement.

APPEAL by defendant from *Tucker (Elton G.), Judge.* Judgment entered 26 October 1987 in District Court, NEW HANOVER County. Heard in the Court of Appeals 28 September 1988.

Burney, Burney, Barefoot & Bain, by Roy C. Bain, for plaintiff-appellee.

James W. Lea III for defendant-appellant.

GREENE, Judge.

The sole issues presented by this appeal are: (A) where defendant asserts a separation/property settlement agreement barred plaintiff's action for alimony and equitable distribution, whether the court's ruling on that plea in bar is appealable; and (B) whether the trial judge erred in determining as a matter of law that the separation/property settlement agreement was unconscionable before defendant had the opportunity to offer all of his evidence concerning the validity of the agreement.

A

In response to plaintiff's complaint for divorce, equitable distribution and alimony, defendant alleged a valid separation /property settlement agreement (the "Agreement") waived all of plaintiff's marital rights to equitable distribution and alimony and requested the Agreement be incorporated in the court's final judgment. As valid contractual waivers of these rights are enforceable in this State, defendant's allegation of the Agreement is properly characterized as a plea in bar to plaintiff's complaint. *See* N.C.G.S. Sec. 52-10.1 (1984); N.C.G.S. Sec. 52-10(a) (1984) (may assert valid marital contract as plea in bar); *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E. 2d 228, 232 (1987) (may contractually waive equitable distribution rights); *Crutchley v. Crutchley*, 306 N.C. 518, 524, 293 S.E. 2d 793, 797 (1982) (may contractually release alimony rights); *see also* N.C.G.S. Sec. 50-16.6(b) (1987) (alimony may be barred by valid separation agreement so long as agreement performed).

Defendant demanded a jury trial. However, upon defendant's testimony that he failed to disclose certain highly valuable real

estate acquired during the marriage but before the parties entered the Agreement, the court dismissed the jury, refused to hear further evidence and directed a verdict on its own initiative that the Agreement was unconscionable and void. The court made the following findings:

> [T]hat defendant testified that he had his attorney draw the . . . Agreement; that the Agreement was drawn; that he picked it up at the attorney's office; took it home to the plaintiff;
>
> He further testified that the plaintiff read the . . . Agreement and that the two of them discussed it;
>
> That there is no evidence in the trial that the plaintiff consulted with an attorney about the . . . Agreement or the contents thereof;
>
> That the defendant further testified that he did not know about the legal things in the written agreement, and that he did not tell the plaintiff that part of the Market Street property was marital property; that he did not tell the plaintiff that the corporation set up during the marriage and which owned, at the time of the entry of the . . . Agreement, approximately twenty automobiles were marital property; that the written . . . Agreement stating that the parties at the time of the execution of the instrument fully and completely disclosed to the other the existence and nature of all marital property was inaccurate;
>
> The court finds as a fact and as a conclusion of law that the payment to the wife the sum of $2,500 and the transferring sole ownership in the wife of a 1978 Grand Prix automobile is unconscionable as a matter of law, especially in the light of the defendant's testimony that the Market Street property, part of which is clearly marital property under our law, is worth approximately a million dollars, and the corporation selling automobiles on Market Street at the time the agreement was entered into, as well as the mobile home and numerous items of jewelry and farms and other household furnishings which are also marital property.

[1] The court's ruling on the Agreement did not dispose of plaintiff's claims for equitable distribution and alimony but only

disposed of defendant's plea in bar to those claims: the court's ruling was thus interlocutory. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 377, 381 (1950). Although the court's order stated that its ruling "affects a substantial right and is a proper subject of immediate appeal," the court's order could not be certified as a final appealable order under Rule 54(b). N.C.G.S. Sec. 1A-1, Rule 54(b) (1983). It is true that the court's statement was an adequate certification that there was "no just reason for delay" under Rule 54(b). *See Smock v. Brantley*, 76 N.C. App. 73, 74-75, 331 S.E. 2d 714, 716, *disc. rev. denied*, 315 N.C. 590, 341 S.E. 2d 30 (1985) (identical statement was "tantamount" to certification). However, there must be a final adjudication of at least *one* claim in order to permit appeal under Rule 54(b) since that rule requires as a condition precedent that the court "enter a final judgment as to *one or more* but fewer than all the claims or parties . . . ." Sec. 1A-1, Rule 54(b) (emphasis added); *Tridyn Ind. Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E. 2d 443, 447 (1979); *see generally* 6 Moore's Fed. Pract. par. 54.33[1] (2d ed. 1988). Since the court's ruling only disposed of defendant's plea in bar, the ruling did not finally adjudicate any of plaintiff's claims. The ruling was thus not certifiable as a final appealable order under Rule 54(b).

Nor does the court's ruling affect a substantial right such that it is appealable under Sections 1-277(a) and 7A-27(d). N.C.G.S. Sec. 1-277(a) (1983); N.C.G.S. Sec. 7A-27(d) (1986). The court's adverse ruling on defendant's plea in bar would be analogous to the court's refusal to dismiss plaintiff's claims for equitable distribution and alimony despite defendant's assertion of some affirmative defense. Such a denial would not affect a substantial right entitling defendant to appeal the interlocutory ruling. *E.g. Johnson v. Pilot Life Ins. Co.*, 215 N.C. 120, 1 S.E. 2d 381 (1939) (denial of motion to dismiss based on release and statute of limitations does not affect substantial right). No substantial right of defendant will be lost or prejudiced by delaying his appeal until the final judgment on plaintiff's equitable distribution and alimony claims. Thus, our statutes do not permit as a matter of right the appeal of the trial court's interlocutory ruling on defendant's assertion of the Agreement as a plea in bar.

However, the trial court in this case entered its verdict on its own initiative before defendant had concluded his evidence on the

validity of the Agreement. Given that peculiar circumstance, delaying our review of the court's directed verdict would paradoxically not result in a fuller factual and legal record on any subsequent appeal. *Cf. Lamb v. Wedgwood South Corp.*, 308 N.C. 419, 424, 302 S.E. 2d 868, 871 (1983) (disallowing interlocutory appeal where delay of appeal would allow fuller factual and legal record). Therefore, we will exercise our power to grant certiorari to address this appeal for the limited purpose of determining whether the trial court erred in entering a directed verdict before defendant concluded his evidence on the validity of the Agreement. N.C.G.S. Sec. 7A-32(c) (1986); N.C.R. App. 21(a)(1).

B

[2] There is no inherent procedural bar to the trial court's entering a directed verdict on its own motion during a trial. *L. Harvey and Son Co. v. Jarman*, 76 N.C. App. 191, 198-99, 333 S.E. 2d 47, 52 (1985); *see also Peterson v. Peterson*, 400 F. 2d 336, 343 (8th Cir. 1968) (if court determines no issue of fact for jury, no need for "useless formality" of motion under Rule 50(a)); *Aetna Cas. & Sur. Co. v. L. K. Comstock & Co.*, 488 F. Supp. 732, 734 (D. Nev. 1980), *rev'd on other grounds*, 684 F. 2d 1267, 1268 n.2 (9th Cir. 1982) (court has power to enter verdict on own motion pursuant to Rule 41, Rule 50(a) and inherent discretionary powers). However, we do not encourage frequent use of this power. *Jarman*, 76 N.C. App. at 199, 333 S.E. 2d at 52. In deciding to enter a directed verdict, the trial court should consider all the evidence in the light most favorable to the non-movant and direct the verdict only if the evidence so considered is insufficient as a matter of law to justify a verdict. *See Kelly v. Int. Harvester Co.*, 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971). Thus, while the trial court's directing this verdict may have been procedurally permissible, the question remains whether it was proper in light of the evidence at the time it was entered.

The reason for the court's verdict is evident from the transcript and the court's order: the court decided as a matter of law that defendant's admitted failure to disclose a valuable tract of land that was arguably marital property was so manifestly unfair or "unconscionable" as to void the subsequent Agreement—irrespective of whatever defendant's subsequent evidence might show. However, particularly in determining whether the

Agreement was "unconscionable," the court must consider *all* the facts and circumstances surrounding the Agreement. *See Brenner v. Little Red School House, Limited*, 302 N.C. 207, 213, 274 S.E. 2d 206, 210 (1981). While the court found plaintiff had not consulted with an attorney, we note the court made no findings concerning the conflicting evidence whether the parties executed the Agreement before or after their separation. *Compare Eubanks v. Eubanks*, 273 N.C. 189, 196, 159 S.E. 2d 562, 567 (1968) (agreements between spouses must be entered into with full knowledge of circumstances and rights) *and Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E. 2d 117, 119, *cert. denied*, 317 S.E. 2d 703, 347 S.E. 2d 41 (1986) (spouses are fiduciaries until they separate) *with Averitt v. Averitt*, 88 N.C. App. 506, 508-09, 363 S.E. 2d 875, 877-78, *aff'd per curiam*, 322 N.C. 468, 368 S.E. 2d 377 (1988) (failure to disclose legal effect did not void agreement where parties had separated, defendant retained counsel and plaintiff accepted benefits after disclosure).

We therefore hold that on remand the trial court must permit defendant to conclude his evidence on the facts and circumstances surrounding the Agreement before it decides either to submit any issues to the jury or again rules the Agreement was unconscionable as a matter of law. In either case, the trial court and the parties will be given an opportunity to develop more fully the facts in dispute and shed light on the merits of defendant's assertion of the Agreement as a plea in bar. Any errors defendant again desires to assert may be preserved by exception and raised on appeal after the court finally determines at least one of plaintiff's claims.

Reversed and remanded.

Judges ORR and SMITH concur.

DELOIS WATSON v. WINSTON-SALEM TRANSIT AUTHORITY AND UTICA MUTUAL INSURANCE COMPANY

No. 8810IC426

(Filed 30 December 1988)

Master and Servant § 69.1— workers' compensation—employee who has reached maximum medical improvement—employer's refusal to allow employee's return—employee still temporarily totally disabled

The Industrial Commission erred in finding that because plaintiff reached maximum medical improvement she was not entitled to additional temporary total disability payments for the time her employer refused, out of concern for her safety, to allow her to return to work, since a finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury; though plaintiff may have been "ready, willing and able to return to work," she was not able to work and earn any wage from this employer; and the record contained no evidence from which it could be determined whether any other employer would have hired plaintiff at the time she reached maximum medical improvement. N.C.G.S. § 97-2(9).

APPEAL by plaintiff from an opinion and award of the Industrial Commission entered 14 December 1987. Heard in the Court of Appeals 6 December 1988.

This is a workers' compensation case. Plaintiff, Delois Watson, has worked cleaning buses for her employer, American Transit Corporation, for about seventeen years. American Transit is a private corporation under contract with the City of Winston-Salem. On 16 May 1984 plaintiff injured her right knee on the job. Defendants admitted liability under the Workers' Compensation Act (Act) and paid weekly temporary total disability benefits to plaintiff under approved settlements through 21 November 1984. Plaintiff did not work during this time period. On 21 November 1984 plaintiff's treating physician, Dr. Stephen Homer, examined her and noted on a prescription slip that she could return to work "as her comfort permits." At this point Dr. Homer also determined that plaintiff had a twenty percent permanent partial disability of her right knee.

The following day plaintiff asked Mr. James M. Ritchey, Jr., American Transit's General Manager, if she could return to work. Mr. Ritchey, concerned for plaintiff's safety, refused to allow her to return to work. A number of factors appear to have influenced

this decision. First, a different employee had previously returned to work following a knee injury and, subsequently, became more seriously injured. Plaintiff here is also a member of Transport Workers' Union #248 and a collective bargaining agreement governs her relationship with her employer. The agreement is not part of the record on appeal. Additionally, there was no "light" work available for her at the workplace.

Plaintiff executed a supplemental agreement in which it was recited that on or about 22 November 1984 she had reached "maximum medical improvement." Plaintiff received no further total disability benefits but received a lump sum payment representing an award of permanent partial disability for a period of forty weeks.

Because plaintiff wanted to return to work, Ritchey wrote Dr. Homer on 26 December 1984 asking him to review her case to determine whether she could "complet[e] all of her regular duties." In a 31 December 1984 letter responding to Ritchey's letter, Dr. Homer restated his earlier expressed opinion that plaintiff was "currently unable to resume her full activities." Plaintiff was then sent to Dr. A. D. Kornegay for additional consultation. On 31 January 1985 Dr. Kornegay concluded that plaintiff could return to work. Due to this conflict of medical opinions and pursuant to the collective bargaining agreement, Ritchey sent plaintiff to a third physician, Dr. Isabel Bittinger. On 28 May 1985, Dr. Bittinger agreed that plaintiff could return to work. Four days later, on 1 June 1985, Ritchey allowed plaintiff to resume her normal duties.

In order to receive additional temporary total disability benefits for the period of time she was not allowed to work (22 November 1984 through 31 May 1985), plaintiff brought this action. Deputy Commissioner Lawrence B. Shuping, Jr. denied plaintiff's request for additional benefits. Plaintiff appealed to the full Commission. The Industrial Commission adopted the Deputy Commissioner's opinion as its own and affirmed with two modifications. Plaintiff appeals.

Legal Aid Society of Northwest North Carolina, Inc., by Luellen Curry and Ellen W. Gerber, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III and John C. W. Gardner, Jr., for defendant-appellee.

EAGLES, Judge.

In this workers' compensation case plaintiff, Delois Watson, claims that she should receive continuing temporary total disability benefits for the period of time that her employer refused to allow her to return to work. We hold that the Industrial Commission erred in finding that because plaintiff reached maximum medical improvement she was not entitled to additional temporary total disability payments. Accordingly, we vacate and remand.

The standard of review in workers' compensation cases is whether there is any competent evidence before the Industrial Commission to support its findings and whether the Commission's findings support its conclusion. *Armstrong v. Cone Mills Corp.*, 71 N.C. App. 782, 323 S.E. 2d 48 (1984). The Act compensates a worker for work related injuries which prevent him from earning the equivalent amount of wages he was making before his injury. *See Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). Our courts have ruled that in order to receive compensation for disability, the mere fact of an injury is not sufficient but rather the injury must have caused some impairment in the worker's earning capacity. *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E. 2d 755 (1967).

G.S. 97-2(9) defines disability as an "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." Accordingly, in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E. 2d 682, 683 (1982), our Supreme Court ruled that in order to find a worker disabled under the Act the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
>
> (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
>
> (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Initially, the claimant must prove the extent and degree of his disability. *Armstrong* at 784, 323 S.E. 2d at 49. On the other hand,

once the disability is proven, there is a presumption that it continues until "the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E. 2d 588, 592 (1971).

Here plaintiff has carried her initial burden of showing that she was disabled. The record indicates that she began to receive temporary total disability payments in May 1984. The payments continued until November 1984. On 21 November 1984 her treating physician reported that she could return to work "as her comfort permits." There was no "light" work available for plaintiff nor would her employer allow her to return to work to perform her old duties. Additionally, though not in this record, the briefs indicate and the opinion and award make reference to the fact that plaintiff had signed a statement in which it was recited that she had reached maximum medical improvement on 22 November 1984.

Defendant-employer argues that the medical testimony and plaintiff's stipulation all point to the conclusion that on 22 November 1984 plaintiff was capable of earning the same wages that she had earned prior to her injury, that plaintiff's stipulation of maximum medical improvement supports the Commission's finding of maximum medical improvement and that we are bound by this finding. A finding of maximum medical improvement is not, however, the equivalent of a finding that the employee is able to earn the same wage earned prior to injury, and accordingly does not, by itself, dispose of plaintiff's claim. The maximum medical improvement finding is solely the prerequisite to determination of the amount of any permanent disability for purposes of G.S. 97-31. *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 326 S.E. 2d 328 (1985).

The Commission still must determine whether plaintiff was legally disabled under the Act. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981). As Professor Larson explains in his treatise:

> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, as

evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is *de facto* inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.

The two ingredients usually occur together; but each may be found without the other: A claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living for himself; conversely, a claimant may be able to work, in both his and the doctor's opinion, but awareness of his injury may lead employers to refuse him employment. These two illustrations will expose at once the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability. An absolute insistence on medical disability in the abstract would produce a denial of compensation in the latter case, although the wage loss is as real and as directly traceable to the injury as in any other instance.

2 Larson, The Law of Workmen's Compensation, section 57.11 (1987).

The Commission concluded that by 21 November 1984 plaintiff was "ready, willing and able to return to work for defendant-employer in her former capacity earning the same wage and was thus no longer incapacitated." Though plaintiff may have been "ready, willing and able to return to work," she was not able to work and earn any wage from this employer. For injury-related reasons her employer would not honor her request to return to work until June 1985. Furthermore, the record before us contains no evidence from which it can be determined whether any other employer would have hired plaintiff on 22 November 1984. *Hilliard* at 595, 290 S.E. 2d at 683. The record is clear that plaintiff's inability to work at American Transit during this time period is directly traceable to her knee injury. The injury and employer's refusal to allow claimant to return to work here is an excellent illustration of Professor Larson's example of situations where knowledge of an injury might lead employers to refuse claimants employment. Given the *Watkins* presumption that plaintiff's temporary total disability continues until she returns to work and our

holding that maximum medical improvement is not the equivalent of the end of claimant's disability, we vacate the award of the Industrial Commission and remand for further proceedings to determine the extent of plaintiff's disability, if any, on 22 November 1984. Additionally, we note that when the Commission reevaluates plaintiff's physical condition on 22 November 1984, it should consider whether or not defendants here are entitled to a credit for the lump sum payment made for permanent partial disability. *See* G.S. 97-42; *Moretz v. Richards & Associates*, 316 N.C. 539, 342 S.E. 2d 844 (1986).

The Commission further concluded that no substantial change had occurred since the award of permanent partial disability benefits and, therefore, plaintiff was barred from receiving additional compensation benefits. We note that this record fails to show an Industrial Commission Form 28(B) or any other document purporting to be a final award. Accordingly, a change of condition standard is not applicable here. *See Watkins* at 137, 181 S.E. 2d at 592.

Our holding here makes it unnecessary to address plaintiff's remaining assignment of error. For the foregoing reasons, we vacate and remand.

Vacate and remand.

Judges PARKER and SMITH concur.

IRA EARL JOYNER, EMPLOYEE, PLAINTIFF v. ROCKY MOUNT MILLS, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8810IC531

(Filed 30 December 1988)

1. Master and Servant § 75— workers' compensation—future medical expenses

If the Industrial Commission awards compensation for damage to an employee's lungs and future medical treatment will provide needed relief, the employee is entitled under N.C.G.S. § 97-59 to have the employer pay for such treatment.

2. Master and Servant § 85.3— workers' compensation—future medical expenses—issue before full Commission

It is the duty and responsibility of the full Industrial Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it, and the Commission may not use its own rules to deprive a plaintiff of the right to have his case fully determined; therefore, where plaintiff's original claim for compensation for chronic obstructive lung disease included a request for future medical expenses, and an award was made for loss of lung function, the full Commission erred in denying plaintiff's motion for the payment of future medical expenses on the ground that the issue of future medical expenses was not properly preserved under the Commission's rules.

APPEAL by plaintiff from the North Carolina Industrial Commission. Order entered 17 December 1987. Heard in the Court of Appeals 7 December 1988.

This is a proceeding in which plaintiff seeks the payment of future medical expenses and attorney's fees under the Workers' Compensation Act. On 30 July 1981, plaintiff first filed a claim with the North Carolina Industrial Commission seeking compensation for an occupational disease and for future medical expenses. On 3 March 1982, Commissioner Charles A. Clay held a hearing with respect to plaintiff's claims. Thereafter, on 5 December 1985, Commissioner Clay, as a hearing officer, filed an "Opinion and Award," wherein he made detailed findings of fact which, except where quoted, are summarized as follows:

Plaintiff began working for defendant-employer in August 1946. He worked as a sweeper and "bobbin dumper" at the employer's mill. He discontinued working for defendant-employer in September 1969. During his 23 years at the mill, plaintiff worked in a dusty environment due to cotton dust, and he also helped extinguish numerous fires which exposed him to heavy smoke.

Plaintiff began experiencing breathing problems in the late 1950s and early 1960s. He left his job at the mill because of surgery for a hernia, and he began working at another job. Plaintiff was later diagnosed as having "severe chronic obstructive pulmonary disease" with probable byssinosis and a 25 to 35 percent permanent lung impairment. Commissioner Clay found this was caused by plaintiff's exposure to cotton dust in his employment and that "plaintiff would benefit from a continuing program of medical treatment for his lung disease." Commissioner Clay also found that plaintiff was not partially or totally disabled.

Commissioner Clay then concluded that plaintiff suffered from an occupational disease resulting in partial loss of function of his lungs. He then awarded plaintiff $8,000.00 in compensation for each lung and attorney's fees of $4,000.00.

On 31 December 1985, defendants gave notice of appeal to the full Commission. Thereafter, on 22 April 1986, the full Commission, with Chief Deputy Commissioner Dianne C. Sellers sitting, "adopted" the decision of Commissioner Clay except that it reduced the award from $8,000.00 per lung to $4,000.00 per lung. Plaintiff appealed to the Court of Appeals raising only the issue of future medical expenses. On 5 May 1987, the Court of Appeals filed an opinion dismissing the appeal because the record did not show that the matter of future medical expenses was before the full Commission. *Joyner v. Rocky Mount Mills*, 85 N.C. App. 606, 355 S.E. 2d 161 (1987).

On 14 August 1987, plaintiff filed a request for the Commission to schedule a hearing to obtain payment of medical expenses. On 17 December 1987, following a hearing, the full Commission entered an order "that plaintiff's motion for the payment of future medical expenses, motion for imposition of attorney fees and motion for a ten percent penalty on all unpaid future medical expenses are DENIED" because the issue of future medical expenses was not "properly preserved" under the Commission's rules. Plaintiff appealed.

Lore & McClearen, by R. James Lore, for plaintiff, appellant.

Maupin Taylor Ellis & Adams, P.A., by Steven M. Rudisill and Jack S. Holmes, for defendants, appellees.

HEDRICK, Chief Judge.

The sole question presented by this appeal is whether the North Carolina Industrial Commission erred in dismissing or denying plaintiff's claim for "future medical expenses." We note at the outset that the Commission in its order filed 17 December 1987 stated that "plaintiff's motion for the payment of future medical expenses should be dismissed," but that it further ordered that the motions should be "denied." We treat the order as one dismissing plaintiff's motion rather than one denying the motion because in reality the Commission did not rule on the motion.

It merely indicated that plaintiff's claim for future medical expenses was not before it because it had not been preserved according to the Commission's rules.

The question which plaintiff wished to raise in a hearing before the Commission is addressed by G.S. 97-59, which in pertinent part states:

> Medical, surgical, hospital, nursing services, medicine, sick travel, rehabilitation services and other treatment as may reasonably be required to tend to lessen the period of disability or provide needed relief shall be paid by the employer in cases in which awards are made for disability or damage to organs as a result of an occupational disease after bills for same have been approved by the Industrial Commission.

[1] This Court has held that G.S. 97-59 requires that medical treatment "to provide needed relief" *shall* be paid by the employer where awards are made for damage to organs as a result of occupational disease and after the bills have been approved by the Commission. *Strickland v. Burlington Industries, Inc.*, 86 N.C. App. 598, 359 S.E. 2d 19 (1987). If the Commission awards compensation for damage to lungs and future medical treatment provides needed relief, it is clear therefore that the plaintiff is entitled to such treatment under G.S. 97-59. *Id.*

The Industrial Commission has the power to make rules governing administration of the Workers' Compensation Act. *Shore v. Chatham Manufacturing Co.*, 54 N.C. App. 678, 284 S.E. 2d 179 (1981), *disc. rev. denied*, 304 N.C. 729, 287 S.E. 2d 902 (1982). Its application and construction of the rules, duly made and promulgated, are ordinarily final and not subject to review. *Id.* Our Supreme Court, however, has addressed the rules of the Commission and their relation to the duties and responsibilities of the Commission:

> . . . Rules promulgated by the Commission are for the benefit of the Commission and must be complied with by the parties to a proceeding brought pursuant to the provisions of our [Workers'] Compensation Act. However, these rules do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a Deputy Com-

missioner or by an individual member of the Commission when acting as a hearing Commissioner. In fact, the Commission is the fact finding body under our [Workers'] Compensation Act. The finding of facts is one of the primary duties of the Commission. [Citations omitted.]

Brewer v. Trucking Co., 256 N.C. 175, 182, 123 S.E. 2d 608, 613 (1962). It is clear that regardless of the Commission's rules, the full Commission has the authority to modify or reject findings of fact made by the hearing officer. *Thompson v. Transport Co.*, 32 N.C. App. 693, 236 S.E. 2d 312 (1977).

[2] Plaintiff's claim, initially decided by Commissioner Clay, embodied a claim for future medical expenses. When the matter was "appealed" to the full Commission by defendants it was the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties. Indeed, if necessary, the full Commission should have conducted a full evidentiary hearing to resolve all matters embodied in plaintiff's claim. Inasmuch as the Industrial Commission decides claims without formal pleadings, it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission.

The Commission may not use its own rules to deprive a plaintiff of the right to have his case fully determined. Thus, the Commission's statement in the order dismissing plaintiff's motions that "the issue of payment of future medical expenses is not properly preserved" will not support the order.

We point out, although it hardly need be repeated, that the "full Commission" is not an appellate court in the sense that it reviews decisions of a trial court. It is the duty and responsibility of the full Commission to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it.

We recognize that the full Commission has the authority to determine the case from the written transcript of the hearing before the deputy commissioner or hearing officer, but when that transcript is insufficient to resolve all the issues, the full Commission must conduct its own hearing or remand the matter for further hearing. After the hearing or after review of the transcript of the hearing before the deputy commissioner or hearing officer,

the full Commission must make findings of fact, draw conclusions of law therefrom and enter the appropriate order. As we have pointed out before, the better practice would be for the full Commission to make its own findings of fact and not adopt the findings of fact of the deputy commissioner or hearing officer. For example, if the full Commission had made its own findings of fact in this case rather than adopting Commissioner Clay's findings, it might have avoided the necessity of multiple hearings and multiple appeals, for Commissioner Clay did find as a fact that "plaintiff would benefit from a continuing program of medical treatment for his lung disease."

The order of the full Commission filed 17 December 1987 dismissing plaintiff's motion for payment of future medical expenses is reversed, and the cause is remanded to the Commission for further proceedings to determine whether the "continuing program of medical treatment" as found by Commissioner Clay and adopted by the Commission will "tend to lessen the period of disability or provide needed relief" under G.S. 97-59 thereby requiring payment of expenses for such treatment by defendants, and for entry of an appropriate order. Upon remand, plaintiff may make such motions as he deems appropriate with respect to attorney's fees, penalties or other matters connected with the claim.

Reversed and remanded.

Judges ARNOLD and ORR concur.

JAMES GADDY, EMPLOYEE-PLAINTIFF v. ANSON WOOD PRODUCTS, EMPLOYER, SELF-INSURED, (HEWITT, COLEMAN & ASSOCIATES), DEFENDANT

No. 8810IC250

(Filed 30 December 1988)

1. Master and Servant § 58— workers' compensation—intoxication of employee—accident not caused by intoxication—no forfeiture of benefits

Intoxication alone will not work a forfeiture of an employee's workers' compensation benefits; rather, he forfeits his benefits only if the injury was proximately caused by the intoxication, and the burden of proving this causal connection is placed on the employer as an affirmative defense. There was substantial evidence to support the Industrial Commission's findings that

plaintiff's intoxication was not the proximate cause of his injury where the evidence tended to show that plaintiff, who had been instructed by the employer to help fellow employees who needed it, was assisting a co-worker to unjam a conveyor; plaintiff placed his hand on the conveyor when it "caught up" and injured his fingers; and there was no evidence to support a finding that plaintiff fell or lost his footing, or that, had plaintiff not been intoxicated, he would not have placed his hand on the belt. N.C.G.S. § 97-12(1).

2. Master and Servant § 73— workers' compensation—loss of finger—amount of compensation

Plaintiff's injury resulted in the loss of more than one phalange, and plaintiff was thus entitled to an award of permanent partial disability for loss of a finger under N.C.G.S. § 97-31(5), (7), where a physician excised a portion of the bone of the middle phalange in order to cover the remaining bone with tissue.

APPEAL by defendant from Opinion and Award of the North Carolina Industrial Commission entered 25 November 1987. Heard in the Court of Appeals 31 August 1988.

Taylor and Bower by H. P. Taylor, Jr., for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe by Edward L. Eatman, Jr., and Mika Z. Savir for defendant appellant.

COZORT, Judge.

In this workers' compensation case, defendant appeals from an order of the Industrial Commission finding that plaintiff's injury was not proximately caused by his intoxication and awarding plaintiff 20 weeks of permanent partial disability benefits for the loss of a finger. We affirm.

On 17 June 1985, the date of his injury, plaintiff had been employed by defendant Anson Wood Products for approximately one year. Plaintiff's job was to pull and stack lumber by grade and width. Other employees were responsible for putting lumber onto a vibrating conveyor (the vibrator) that shook the lumber into a chipper, a machine that grinds lumber into chips. The chips were then transported by rail to a paper company.

On the date in question, the vibrator had stopped running due to a buildup of sawdust and debris. One of plaintiff's coworkers, whose job it was to keep the vibrator unjammed, was trying to unjam the vibrator when plaintiff left his position and attempted to assist him. As plaintiff placed his hand on or near the vibrator's belt, or drive mechanism, the vibrator suddenly

"caught up" and began running, amputating the distal phalange of plaintiff's fourth, or little, finger and lacerating other fingers on his right hand.

Plaintiff was treated at the emergency room of Anson County Hospital, where his lacerations were sutured. The treating physician also excised part of the bone of the middle phalange of plaintiff's fourth finger in order to pull tissue over the amputated area for suturing. An entry on plaintiff's medical records indicates that plaintiff's blood alcohol level was 387 milligrams per liter, or .387.

At the hearing before Chief Deputy Commissioner Dianne C. Sellers, the parties stipulated to the employer-employee relationship, applicability of the Workers' Compensation Act, plaintiff's average weekly wage, defendant's self-insured status, and the date of plaintiff's injury. In an Opinion and Award filed 13 March 1987, the Deputy Commissioner made the following additional findings of fact:

> 1. Plaintiff had worked for the defendant employer approximately one year as a lumber puller and separator of the lumber by grade and width.
>
> 2. On or about 17 June 1985 plaintiff was working in such capacity when a co-worker began having trouble on a vibrating conveyor which shakes slabs of wood into the chipper. This conveyor was approximately 15 feet from where the plaintiff worked. Since the workers had been instructed to assist co-workers, plaintiff offered his assistance to the operator of the conveyor. As he placed his hand in the mechanical parts of the conveyor, it suddenly and abruptly started working, causing a traumatic amputation of a portion of his fifth finger on his right hand.
>
> 3. Plaintiff was taken to the emergency room where he was treated by Gultekin Ertugrul, M.D., who excised a portion of the bony middle phalange and brought soft tissue over the bone to cover the amputated area. In addition, plaintiff received sutures for lacerations to his second, third and fourth fingers on the dorsal side of his right hand.
>
> 4. On or about 17 June 1985 plaintiff sustained an interruption of his work routine when he experienced a traumatic

partial amputation of his right fifth finger which was not a proximate result of his intoxication.

5. As a result of said injury plaintiff was unable to earn the wages which he was earning at the time of his injury in the same or any other employment from 18 June 1985 to 16 August 1985 when he was able to return to work and at which time he sustained by virtue of the traumatic amputation and the surgical excision, the loss of the fifth finger of his right hand.

Based on these findings, the Deputy Commissioner made the following conclusions of law:

1. On 17 June 1985 plaintiff sustained an injury by accident arising out of and in the course of his employment which was not proximately caused by his intoxication. G.S. § 97-2(6); G.S. § 97-12(1).

2. As a result of said injury by accident plaintiff is entitled to temporary total disability compensation for 8.4286 weeks at a weekly rate of $108.67. G.S. § 97-29.

3. As a further result of said injury by accident plaintiff is entitled to 20 weeks of permanent partial disability at a weekly rate of $108.67. G.S. § 97-31(5).

An award corresponding to these findings and conclusions was entered.

On 25 November 1987, the Full Commission adopted the Deputy Commissioner's Opinion and Award, and affirmed. The Commission added:

The Full Commission is of the opinion that undoubtedly at the time complained of the employee was under the influence of alcohol. However, we are of the opinion that plaintiff's intoxication did not occasion his injury. At the time complained of he was at work, and although technically performing a task not usually performed by him, this was being done under instructions from his superior that the employees were to help each other in the work of the employer. It was pursuant to this instruction that plaintiff was at the point where he was located on the occasion of his injury. Further, there is no evidence that his intoxication made him carelessly place

his hand in the machine. We certainly do not approve of one working with this much alcohol in his system. However, unless the intoxication is one of the proximate causes of the injury—and the evidence would not support such a finding—the claim is a compensable one.

Defendant appeals.

[1] By its first assignment of error, defendant contends that there was no competent evidence to support the Commission's finding that plaintiff's intoxication was not the proximate cause of his injury. Moreover, defendant argues that the Commission made no finding of fact as to the cause of the accident and that plaintiff's act in placing his hand on the vibrator was an "obvious hazard" that can be explained only by plaintiff's intoxication. We disagree.

The law governing this case is found in Chapter 97 of our General Statutes, which provides in pertinent part:

> No compensation shall be payable if the injury or death to the employee was proximately caused by:
>
> (1) His intoxication . . . .

N.C. Gen. Stat. § 97-12(1) (1988).

Intoxication alone will not work a forfeiture of the employee's benefits; the statute provides for a forfeiture only if the injury was proximately caused by the intoxication. *Lassiter v. Town of Chapel Hill*, 15 N.C. App. 98, 101, 189 S.E. 2d 769, 771 (1972). The burden of proving this causal connection is placed on the employer as an affirmative defense. *See Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 340 S.E. 2d 111 (1986). The employer must prove that the employee's intoxication was "more probably than not a proximate cause of the accident and resulting injury." *Id.* at 574, 340 S.E. 2d at 113.

Our review of the Commission's decision is limited to whether there is any competent evidence to support the Commission's findings of fact, and whether the findings of fact justify its conclusions of law. *Inscoe v. DeRose Indus. Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). The determination of disputed questions of fact involves weighing the evidence, which is a function of the fact-

finder and not of the reviewing court. *Osbourne v. Colonial Ice Co.*, 249 N.C. 387, 106 S.E. 2d 573 (1959).

At the hearing, plaintiff and his co-worker testified that the vibrator was jammed and that they were attempting to unjam it when it "caught up" and injured plaintiff's fingers. Both testified that they had been instructed by the employer to assist fellow employees who needed help. Each further testified that plaintiff did not fall into the vibrator. There was no evidence to support a finding that defendant fell or lost his footing, or that, had plaintiff not been intoxicated, he would not have placed his hand on the vibrator belt. Therefore, there was substantial evidence to support the Commission's findings.

Defendant's reliance on *Anderson v. Century Data Sys., Inc.*, 71 N.C. App. 540, 322 S.E. 2d 638 (1984), *disc. review denied*, 313 N.C. 327, 327 S.E. 2d 887 (1985), is misplaced. In *Anderson*, the employee was injured when the vehicle he was driving crossed the center line and ran into a truck in the oncoming lane of traffic. The employee's blood alcohol level was .199. This Court reversed the Industrial Commission's award of benefits, because there was no evidence of any cause of the accident other than the intoxication. The Commission had, in effect, erroneously placed on the employer the burden of disproving all *possible* causes of the injury. In the case *sub judice*, however, the Commission found that plaintiff was injured because he was attempting to help a fellow employee. This finding is substantially supported by the evidence and is sufficient to explain the cause of plaintiff's injury. That plaintiff may have erred in judgment does not mandate the conclusion that the error was the result of his intoxication. *See Inscoe*, 292 N.C. at 218, 232 S.E. 2d at 453. Defendant's first assignment of error is overruled.

[2] Defendant also assigns as error the award of 20 weeks of permanent partial disability benefits. Defendant contends that plaintiff's schedule recovery was limited to 10 weeks of compensation because only the distal phalange of plaintiff's finger was amputated. We do not agree.

N.C. Gen. Stat. § 97-31 provides for the following compensation in addition to compensation payable during the healing period:

(5) For the loss of a fourth finger, commonly called the little finger, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 20 weeks.

* * *

(7) The loss of more than one phalange shall be considered the loss of the entire finger . . . .

N.C. Gen. Stat. § 97-31(5)-(7) (1988). The statute "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation." *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 2d 591, 593 (1930).

Included among the Deputy Commissioner's findings of fact, which were adopted by the Full Commission, was a finding that plaintiff's treating physician excised a portion of the bone of the middle phalange in order to cover the remaining bone with tissue. This finding is directly supported by the physician's deposition testimony. Therefore, plaintiff's injury resulted in the loss of more than one phalange. *See Flagg v. GAF Corp.*, 54 A.D. 2d 790, 387 N.Y.S. 2d 724 (1976), construing identical language contained in the New York Workmen's Compensation Law. The fact that amputation of part of the middle phalange was necessitated by the surgical procedure used to suture the amputation does not affect plaintiff's recovery under § 97-31.

For the foregoing reasons, the decision of the Industrial Commission is

Affirmed.

Judges JOHNSON and PARKER concur.

RICHARD A. BYRD, PLAINTIFF v. GEORGE W. KANE, INCORPORATED, EMPLOYEE AND HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 8810IC256

(Filed 30 December 1988)

Master and Servant § 55.6— workers' compensation—fired worker returning for paycheck—employment relationship in effect—accident arising out of but not in course of employment

Where plaintiff was fired several hours prior to the accident and was on the jobsite for the sole purpose of obtaining his paycheck as he had been requested to do by the foreman, the employment relationship was still in effect, and the accident arose out of the employment. However, the accident did not arise in the course of the employment and plaintiff was therefore not entitled to workers' compensation benefits where plaintiff's only remaining duty was to return to his supervisor's trailer to pick up his paycheck; the supervisor was not there, so plaintiff went up on the roof in search of him; plaintiff then fell through the roof to the floor 17 feet below; and plaintiff's injuries did not occur at a place where his duties were calculated to take him and under circumstances in which plaintiff was performing duties he was authorized to undertake. N.C.G.S. § 97-2(6).

APPEAL by plaintiff from the Opinion and Award of the Industrial Commission filed 21 October 1987. Heard in the Court of Appeals 1 September 1988.

On 17 March 1986 plaintiff filed a workers' compensation claim with the North Carolina Industrial Commission for injuries received at his jobsite on 7 March 1986. On 6 October 1986, a Deputy Commissioner heard plaintiff's claim and denied the claim in an Opinion and Award filed 6 March 1987. The Deputy Commissioner held that plaintiff's accident did not arise out of or in the course of his employment. Plaintiff then appealed to the Full Commission which affirmed and adopted the Deputy Commissioner's Opinion and Award on 21 October 1987. From this Opinion and Award, plaintiff appeals.

Charles R. Hassell, Jr., by Roger M. Cook, attorney for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by C. D. Taylor Pace, attorney for defendant-appellees.

ORR, Judge.

The evidence presented tends to establish that plaintiff was employed by defendant as a carpenter for several months until 7 March 1986, the date of his accident. Plaintiff worked at a jobsite known as CP&L Corporate Data Center in Raleigh, North Carolina, where for several weeks prior to his accident he worked on the roof of the building. On the roof were unfinished air-conditioning vents ("risers"), approximately three-feet-square metal boxes, 18-24 inches high. The risers opened to a concrete floor approximately 17 feet below. Prior to 7 March 1986, plaintiff nailed a sheet of plywood inside one of the risers to assist him in sawing boards.

On Wednesday afternoon, 5 March 1986 and Thursday, 6 March 1986, plaintiff did not work for defendant at the jobsite because he was applying for work with another employer. On both days, plaintiff notified his employer he would not be there. Plaintiff obtained another job to begin the following Monday. He returned to work on Friday and was fired by his supervisor, Jack Moore, who told plaintiff he was fired because of his recent lack of dependability. Moore asked plaintiff to return after 1:00 p.m. that same day to pick up his paycheck.

Plaintiff returned to the jobsite at approximately 1:30 p.m. He first went to Moore's trailer. Plaintiff testified on cross-examination that he normally received his paycheck at the trailer. Neither Moore nor his secretary was there. Plaintiff then checked another trailer and asked several brickmasons where Moore was and was told that they had seen him climbing the ladder to the roof. Plaintiff could not see who was on the roof so he, too, went up on the roof.

In an effort to find Moore, plaintiff decided to go over the riser where he had previously worked. He saw a piece of sheetrock and plywood which he believed was the same plywood he had previously nailed into the riser. In fact, the plywood plaintiff nailed to the riser had been removed. When plaintiff stepped onto the sheetrock on the riser, the sheetrock collapsed and plaintiff fell 17 feet to the concrete floor below. Plaintiff suffered substantial injuries from the impact.

Although the accident occurred on the employer's premises, the Deputy Commissioner found as fact that an employment rela-

tionship did not exist between plaintiff and defendant at the time of the accident. The Deputy Commissioner's findings were based on the determination that plaintiff was fired several hours prior to the accident; he was on the jobsite for the sole purpose of obtaining his paycheck; and plaintiff was not at a place where he had any duty to be and was not performing any benefit to his employer. The Deputy Commissioner then concluded as a matter of law that plaintiff's injuries did not arise out of or occur in the course of his employment by defendant. Therefore, plaintiff was not entitled to benefits under the Workers' Compensation Act, and the Industrial Commission had no jurisdiction over his claim under G.S. 97-2(6) and *Poteete v. North State Pyrophyllite Co.*, 240 N.C. 561, 82 S.E. 2d 693 (1954).

I.

The test as set out in G.S. 97-2(6) states that benefits under the Workers' Compensation Act are payable due to "injury by accident arising out of and in the course of the employment . . . ." The principal issue in this case is whether plaintiff met this standard.

There are no North Carolina cases addressing the situation where an employee has been terminated and is injured when he returns to the job to collect his pay. There are North Carolina cases, however, where employees were injured on their way out of the employer's office after their employment was terminated.

In *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E. 2d 582 (1982), a woman was assaulted by her employer as she left his office after tendering her resignation. This Court held that she was eligible for workers' compensation benefits. In *McCune v. Manufacturing Co.*, 217 N.C. 351, 8 S.E. 2d 219 (1940), the plaintiff was fired by his foreman who immediately thereafter assaulted him. Our Supreme Court concluded that the trial court correctly found that the Industrial Commission had jurisdiction of the matter under the Workers' Compensation Act.

In his treatise on workmen's compensation, Professor Larson directly addresses the issue of whether or not an employment relationship continues to exist when an employee returns to the employer's premises to collect pay after termination. Professor Larson states:

> The contract of employment is not fully terminated until the employee is paid, and accordingly an employee is in the course of employment while collecting his pay. This rule was laid down in an early English case in support of an award to an employee who, discharged on Wednesday, had returned on Friday, the regular pay-day, and was then injured. [Footnote omitted.]

1 A. Larson, *Workmen's Compensation*, sec. 2630 at 5-301 (1985).

In the case at bar, the plaintiff's foreman, after discharging the plaintiff, told him to return to the construction site after 1:00 p.m. that same day to get his paycheck. Plaintiff complied with the foreman's request.

Based upon *Daniels* and *McCune* and the particular facts of this case, we conclude that for purposes of coverage by the Workers' Compensation Act in the case *sub judice*, the employment relationship was still in effect when plaintiff returned to the jobsite around 1:30 to pick up his paycheck.

II.

We next address whether the accident which occurred when the plaintiff went to pick up his check arose out of and occurred in the course of his employment.

> In order for an employee to be entitled to workers' compensation benefits for accidental injury, the employee must prove that the accident arose out of and in the course of the employment. N.C.G.S. [section] 97-2(6) (1985). The term 'arising out of' refers to the origin or cause of the accident, and the term 'in the course of' refers to the time, place, and circumstances of the accident. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E. 2d 196 (1982); *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963). An accident arises 'in the course of' the employment when 'the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further directly or indirectly, the employer's business.'

Fortner v. J. K. Holding Co., 319 N.C. 640, 643-44, 357 S.E. 2d 167, 169 (1987), *quoting Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E. 2d 473, 475 (1982).

Applying this law to the facts of the case, we conclude that the plaintiff's return to the workplace, as directed by his supervisor, for the purpose of obtaining his paycheck, arose out of the employment relationship.

However, we further conclude that based upon the test set forth in *Fortner* and *Powers*, this accident did not arise *in the course of* the employment. Plaintiff's injuries did not occur at a place where his duties were calculated to take him and under circumstances in which plaintiff was performing duties he was authorized to undertake. Plaintiff's only remaining duty was to return to his supervisor's trailer to pick up his paycheck. Plaintiff's injuries, as a result of his decision to go off in search of his supervisor with the resulting fall through the roof, did not occur in the course of his employment.

We therefore affirm the determination by the Industrial Commission denying plaintiff's claim for lack of jurisdiction.

Affirmed.

Judges EAGLES and SMITH concur.

STATE OF NORTH CAROLINA v. ALVIN BRYAN WILLIS, III

No. 8813SC243

(Filed 30 December 1988)

1. Criminal Law § 138— Fair Sentencing Act—inapplicability when statute provides own presumptive sentence

The Fair Sentencing Act's presumptive sentences set out in N.C.G.S. § 15A-1340.4(f) do not apply if a separate statute provides its own presumptive sentence, as N.C.G.S. § 90-95 does; therefore, defendant who was sentenced to 35 years for trafficking 400 grams or more of cocaine received the presumptive sentence and had no appeal of right after a plea of guilty.

2. Narcotics § 5— defendant's rendering substantial assistance in apprehending others—reduction of sentence discretionary

Even if defendant did render substantial assistance in the identification and apprehension of others involved in the drug trade, which the State contended he did not, the reduction of his sentence was in the trial judge's discretion, and there was no abuse of discretion in this case. N.C.G.S. § 90-95(h)(5).

3. Narcotics § 5— sentencing hearing—Rules of Evidence inapplicable

The Rules of Evidence do not apply to a sentencing hearing under N.C.G.S. § 90-95.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 8 December 1987 in COLUMBUS County Superior Court, venue having been waived from BRUNSWICK County Superior Court for the purpose of sentencing. Heard in the Court of Appeals 28 September 1988.

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

William R. Shell, attorney for defendant-appellant.

ORR, Judge.

The defendant was indicted on 12 counts of conspiracy to traffic in cocaine and 12 counts of trafficking in cocaine. Prior to the charges, the defendant entered into a plea agreement with the State. As part of this agreement, the defendant pled guilty to one count of conspiracy to traffic in more than 400 grams of cocaine. In addition, the following was agreed to as part of the plea:

> The State of North Carolina agrees that if the defendant, to the best of his knowledge, provides substantial assistance in the identification, arrest and apprehension of any accomplices, accessories, co-conspirators, or principals, then the State will recommend at sentencing that the Court find the defendant has been of substantial assistance pursuant to 90-95(h)(5).

The trial court sentenced defendant to 35 years, the mandatory minimum sentence for drug trafficking of 400 grams or more of cocaine under G.S. 90-95(h)(3)c. Defendant appeals.

The State filed a Motion to Dismiss Appeal on 16 May 1988, claiming the defendant had no appeal of right because the sen-

tence he received under G.S. 90-95(h)(3)c was the presumptive sentence. *See* G.S. 15A-1444(a1) (1988).

The defendant, on the other hand, claims the presumptive sentence for the Class D felony he has been charged with is 12 years under G.S. 15A-1340.4(f)(2). The defendant believes he is entitled to an appeal of right under G.S. 15A-1444(a1) because his sentence exceeded the presumptive sentence.

In the alternative, the defendant filed a Petition for Writ of Certiorari on 3 June 1988 in the event he did not have an appeal of right.

I.

[1] Before reaching the merits of this appeal, we must address the procedural matters before us. The State filed a Motion to Dismiss Appeal on 16 May 1988 claiming the defendant had received the presumptive sentence and therefore had no appeal of right. The Motion to Dismiss Appeal is granted.

The Fair Sentencing Act's presumptive sentences set out in G.S. 15A-1340.4(f) do not apply if a separate statute provides its own presumptive sentence as G.S. 90-95 does. *State v. Ruiz*, 77 N.C. App. 425, 429, 335 S.E. 2d 32, --- (1985), *disc. rev. denied*, 315 N.C. 395, 338 S.E. 2d 885 (1986).

While the appeal is dismissed, we grant certiorari to hear the case on its merits.

II.

[2] Defendant contends he did render substantial assistance to the State and should have received a sentence less than the mandatory minimum sentence and fine pursuant to G.S. 90-95. He points to several instances where he contends information provided by him led to convictions or aided in a subsequent indictment against a drug trafficker.

According to the defendant, examples of substantial assistance which entitle him to a lesser sentence under the plea agreement with the State and G.S. 90-95(h)(5) include:

1. In early 1987 defendant went with SBI agent Corey Duber to Florida. The defendant identified Jack Truesdale, a major supplier, and took Agent Duber to Truesdale's home. The

SBI had no knowledge of Truesdale prior to the defendant's identification.

2. The defendant also showed Agent Duber the motel in Florida where drug transactions had taken place. The guest register from this motel was used as evidence to convict Truesdale.

3. The defendant advised Dale Varnum, a drug trafficker, to surrender and cooperate with the authorities.

4. The defendant provided the State with information on 29 different people involved in drug transactions. The defendant further identified those persons within the group who were major suppliers. Two of these major suppliers were later indicted by the Grand Jury.

5. The defendant was the only witness called at a Grand Jury investigation. At the close of the investigation the District Attorney made a statement the defendant had "been apparently cooperative." The defendant was the only witness called at this hearing.

6. The defendant was willing to cooperate in a set-up in Greenville, North Carolina, but the suspect had been warned the defendant was working for the police.

7. The defendant was instrumental in the conviction of Tucker Culley, a major drug trafficker. The defendant provided information directly, but information also came from people the defendant persuaded to cooperate.

8. The defendant provided information about the shipping company which was regularly used for the drug shipments. Agent Duber never checked into the records of this company.

The State reported to the trial court that defendant did not render substantial assistance. Rather, according to the State, defendant inhibited the investigation by providing the State with false leads and misleading information. The trial court sentenced the defendant to the mandatory minimum sentence of 35 years imprisonment and at least $250,000.00 under G.S. 90-95(h)(3)c and 90-95(i).

The determinative issue is whether the trial court properly sentenced defendant in light of the defendant's claim to have

rendered substantial assistance. The plea agreement contained the following statement:

> Sentencing is ultimately in the discretion of the Court and nothing contained herein is intended to usurp the Court's authority. It is further understood that any substantial assistance is based upon the defendant's full and complete disclosure of *any* and *all* facts relevant to investigations regarding illicit drug activity and truthful testimony should the defendant be called upon to testify. [Emphasis supplied.]

G.S. 90-95(h)(5) provides:

> [T]he sentencing judge *may* reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance. [Emphasis added.]

The reduction of the sentence is in the judge's discretion even if the judge finds substantial assistance was given.

In *State v. Myers and State v. Garris*, 61 N.C. App. 554, 301 S.E. 2d 401 (1983), *cert. denied*, 311 N.C. 767, 321 S.E. 2d 153 (1984), the Court of Appeals held the trial court did not abuse its discretion when it refused to reduce the sentence for the defendant who claimed he provided substantial assistance. The defendant had provided names and information regarding a homicide and drug trafficking to the SBI. The SBI agent in charge of the case stated that the information given was not new, nor did this information result in any convictions. *Myers and Garris*, 61 N.C. App. at 557, 301 S.E. 2d at 403.

The Court set out the standard of review for a court's ruling on substantial assistance. In order to overturn a sentencing decision, the reviewing court must find an "abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Id., quoting State v. Davis*, 58

N.C. App. 330, 335, 293 S.E. 2d 658, 662, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982), *quoting State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962).

The case of *State v. Baldwin*, 66 N.C. App. 156, 310 S.E. 2d 780, *aff'd*, 310 N.C. 623, 313 S.E. 2d 159 (1984) also points out that G.S. 90-95(h)(5) is a "provision exchanging *potential* leniency for assistance . . . . It is the only provision in the trafficking statutory scheme which gives a sentencing judge the *discretion* not to impose the statutorily mandated minimum sentence and fine." 66 N.C. App. at 159-60, 310 S.E. 2d at 782 (emphasis added). Clearly, the trial court was within its discretionary authority, based upon the State's representation that defendant had not provided substantial assistance, to impose the mandatory minimum sentence.

[3] Defendant also contends the court committed reversible error in the sentencing hearing by allowing hearsay testimony from SBI Agent Corey Duber. The defendant argues that a sentencing hearing where the judge must determine whether or not the defendant provided substantial assistance is a special type of sentencing hearing. Defendant claims this type of hearing is more akin to a mini-trial than a typical sentencing hearing. Defendant argues, therefore, that the Rules of Evidence do not apply to a typical sentencing hearing, but the Rules of Evidence do apply to this particular sentencing hearing.

We do not find this argument persuasive. There is nothing in G.S. 90-95 to indicate the Rules of Evidence apply any differently to this type of sentencing hearing. In keeping with the general rule of such proceedings, the Rules of Evidence do not apply to this sentencing hearing. Agent Duber's statement was properly admitted.

The decision of the trial court is affirmed.

Affirmed.

Judges GREENE and SMITH concur.

STATE OF NORTH CAROLINA v. FORREST ALLEN SMITH

No. 8813SC505

(Filed 30 December 1988)

Criminal Law § 138.29— felonious assault—aggravating circumstance of premeditation and deliberation—separate evidence required to prove intent to kill

In a prosecution of defendant for felonious assault with a deadly weapon with intent to kill inflicting serious injury, evidence that defendant acquired personal information about his victim, adopted an alias, contacted him to schedule a meeting about his girlfriend in order to observe what the victim looked like, waited for him to return home from work several weeks later, spoke the victim's name when he passed by, and then fired four shots at him as he tried to escape was sufficient for the trial court to find premeditation and deliberation as a nonstatutory aggravating factor; furthermore, there was no merit to defendant's contention that the evidence necessary to prove that he acted with intent to kill was also necessary to prove premeditation and deliberation, and this was not permitted pursuant to N.C.G.S. § 15A-1340.4(a), since proof of premeditation and deliberation required presenting additional evidence beyond mere intent to kill.

APPEAL by defendant from *Barefoot, Napoleon B., Judge.* Judgment entered 9 December 1987 in COLUMBUS County Superior Court. Heard in the Court of Appeals 29 November 1988.

Defendant was found guilty of felonious assault with a deadly weapon with intent to kill inflicting serious injury. Following the sentencing hearing the trial court found as a statutory aggravating factor that the offense involved damage causing great monetary loss. It further found, as nonstatutory aggravating factors, that defendant fired three more shots than necessary to sustain the conviction, and that the serious physical injury suffered by the victim was greater than that normally present for the crime. It found as statutory mitigating factors that defendant had no prior record of criminal convictions, had been honorably discharged from the United States armed services, and that he had been a person of good character or had a good reputation in the community in which he lived. It found as nonstatutory mitigating factors that defendant expressed genuine remorse to the victim, his voluntary meeting with the victim and explanation of the circumstances surrounding the crime, and that he acted under the influence of great mental and emotional distress at the time of the crime. The trial court concluded that the factors in aggrava-

tion outweighed those in mitigation and sentenced the defendant to a term of eighteen years.

In an unpublished opinion this Court remanded the case for a new sentencing hearing, holding that the statutory aggravating factor of great monetary loss applied only to property damage and not to personal injury, and that the nonstatutory aggravating factor of serious injury was an element of the offense for which defendant was convicted.

Following the second sentencing hearing the trial court found as a nonstatutory aggravating factor that the "acts or the act of the defendant was done with premeditation and deliberation . . . ." Finding that the factor in aggravation outweighed those in mitigation, it sentenced defendant to a term of eighteen years.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sueanna P. Peeler, for the State.

Appellate Defender Malcolm Ray Hunter, by Assistant Appellate Defender M. Patricia DeVine, for defendant-appellant.

WELLS, Judge.

The evidence presented at trial tended to show that defendant and a female co-worker, Mrs. Deborah Keel, were involved in a close personal friendship for about one year. Mrs. Keel testified that she ended the relationship during the summer of 1985, for although it had never developed into an extramarital affair, she felt uncomfortable maintaining it. Defendant became very upset and followed Mrs. Keel at least twice.

In mid-September a good friend of Mr. and Mrs. Keel, Kevin Maurer, received a telephone call from a man who identified himself as Tony Hill and asked Maurer to meet him at a local restaurant to discuss a woman whom Maurer was dating. Maurer agreed to the meeting but upon arriving at the restaurant found no one there. He returned home and soon received another telephone call from Hill, who asked whether he had gone to the restaurant and explained his own absence as stemming from fear of something happening to him.

Mrs. Keel testified that she had spoken frequently of Mr. Maurer at work, as he was a close family friend, and that she

kept an address book which contained his name and address on her desk. She remembered mentioning to the defendant that Maurer had a girlfriend and telling him her name.

Mr. Maurer, a twenty-seven-year-old financial analyst, returned home from work on 8 October 1987 at around 10:30 p.m. He walked past a beige Datsun parked in the parking lot of his apartment complex, and then turned around when he heard someone call his name. Standing next to the opened car door, pointing a gun at him, was a man whom he had never seen before but whom he positively identified in court as the defendant, Forrest Smith. Defendant identified himself as Tony Hill and ordered Maurer into the car. Maurer ran approximately 100 to 125 yards toward a friend's apartment, expecting the door to be unlocked as it usually was, but upon reaching it discovered that it was locked. He called for help but then remembered feeling a flashing blue light inside his head, and awakened three days later. Maurer received gunshot wounds in his shoulder and upper spine, the latter which severed his spinal cord and rendered him permanently paralyzed below the shoulders. A State Highway Patrolman stopped a car matching the description of the beige Datsun given by another apartment resident, and an Elizabethtown police officer arrested the driver, whom they identified as defendant Smith.

Defendant contends that the trial court erred in finding as a nonstatutory aggravating factor that the offense was committed with premeditation and deliberation. The maximum imprisonment for felonious assault with a deadly weapon with intent to kill inflicting serious injury is twenty years, N.C. Gen. Stat. § 14-1.1(a)(6) (1986), and the presumptive sentence is six years, N.C. Gen. Stat. § 15A-1340.4(f)(4) (1988).

The sentencing judge "may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing," whether or not such factors are specifically listed in the fair sentencing statute. N.C. Gen. Stat. § 15A-1340.4(a) (1988). One of the primary purposes of sentencing is "to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability. . . ." N.C. Gen. Stat. § 15A-1340.3 (1988).

In evaluating the proper use of nonstatutory factors to aggravate a sentence the North Carolina Supreme Court has inquired whether the factor "makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person." *State v. Hines*, 314 N.C. 522, 335 S.E. 2d 6 (1985). If the factor does not have this effect, it is not properly used to aggravate the sentence. *Id.; State v. Underwood*, 84 N.C. App. 408, 352 S.E. 2d 898 (1987).

The presence of premeditation and deliberation is important in elevating culpability for violent crimes. Although prior to 1893 no distinction was made between types of murder in North Carolina, for example, modern statutes recognize the higher degree of culpability society assigns to crimes committed with premeditation and deliberation and divide homicide into degrees. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). These factors are recognized as elevating a defendant's level of culpability because our society views as more culpable a violent offense perpetrated with careful planning and in a cool state of blood than one committed with malice but without premeditation and deliberation. *State v. Smith*, 221 N.C. 278, 20 S.E. 2d 313 (1942).

The evidence presented in the case at bar tended to show that defendant acquired personal information about his victim, adopted an alias, and contacted him to schedule a meeting about his girlfriend in order to observe what the victim looked like. Several weeks later on the night of the offense, defendant awaited the victim's return home, spoke his name when the latter passed by, and then fired four shots at him as he tried to escape. The circumstances of this felonious assault, from which the trial court could properly find premeditation and deliberation by a preponderance of the evidence, tended to show a higher degree of culpability than other assault cases in which only the assaultive conduct itself is pertinent to the degree of culpability of the defendant.

Prior decisions have accepted the nonstatutory factors that a violent offense was premeditated and deliberated, *see State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983) (second degree murder), and that it was planned, *see State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983) (first degree burglary), as reasonably related to the purposes of sentencing. Because these factors increase the

defendant's culpability and make him or her more blameworthy, they are properly considered aggravating if supported by adequate evidence.

Defendant contends that the evidence necessary to prove that he acted with intent to kill was also necessary to prove premeditation and deliberation. "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . . ." N.C. Gen. Stat. § 15A-1340.4(a) (1988). Premeditation means that the defendant formed the intent to kill during some period of time before actually committing the crime; deliberation means that the defendant was in a cool state of blood when he formed the intent to kill. *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981). Thus, proof of each factor requires presenting additional evidence beyond mere intent to kill; premeditation requires proof of the *time* when the intent to kill was formed, and deliberation requires proof of the defendant's *emotional state* when he formed this intent. In the case at bar there was ample evidence, apart from that presented to prove intent to kill, to support the trial court's finding that defendant acted with premeditation and deliberation.

Affirmed.

Judges ARNOLD and COZORT concur.

Cardwell v. Smith

JAMES D. CARDWELL AND WIFE, ELVA A. CARDWELL, J. V. BODENHEIMER AND WIFE, PEGGY BODENHEIMER, A. LEOLIN SELLS AND WIFE, NAOMI W. SELLS AND ROBERT F. LINVILLE AND WIFE, BARBARA C. LINVILLE, RONALD R. SMITH AND WIFE, M. D. SMITH, ADA S. FRYE, AND PEARL S. SELLS, PLAINTIFFS v. AUBREY SMITH, ZONING OFFICER AND SUPERINTENDENT OF INSPECTIONS OF FORSYTH COUNTY, SALEM STONE COMPANY, WILLIAM E. AYERS, JR., MARTIN-MARIETTA CORPORATION D/B/A MARTIN-MARIETTA AGGREGATES, AN OPERATING UNIT OF MARTIN-MARIETTA CORPORATION, DEFENDANTS

No. 8821SC280

(Filed 30 December 1988)

1. **Municipal Corporations § 30.6— special use permit granted—earlier appeal to Court of Appeals—purpose of remand clarified**

A 3-2 vote of the Forsyth County Zoning Board, which was affirmed by the Court of Appeals in *Cardwell v. Forsyth County Zoning Bd. of Adjustment*, 88 N.C. App. 244, resulted in the formal issuance of a special use permit for the operation of a quarry, and remand by this Court in that action was for the purpose of requiring the Zoning Board to follow its procedure and prepare a summary of the evidence heard at the initial hearing and set out findings of fact to support its grant of the special use permit.

2. **Municipal Corporations §§ 30.6, 30.8— amended zoning ordinance—applicability to defendants—validity of special use permit determinative**

Whether an amended zoning ordinance applied to defendants to preclude them from receiving building permits or whether defendants were entitled to building permits by virtue of the special use permit granted by the Zoning Board prior to amendment of the ordinance can be decided only after a final determination of the validity of the special use permit originally granted; therefore, the trial court erred in granting summary judgment for defendants based on its conclusion that the ordinance did not apply.

APPEAL by plaintiffs from *Walker (Ralph A.), Judge.* Judgment entered 11 December 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 September 1988.

Hutchins, Tyndall, Doughton & Moore, by Thomas Moore, Jr., and Thomas Taylor, attorneys for plaintiff-appellants.

Johnathan V. Maxwell, attorney for defendant-appellee Aubrey Smith.

Petree Stockton & Robinson, by Ralph Stockton, Jr., Jeffrey C. Howard and Stephen R. Berlin, attorneys for defendant-appellees Salem Stone Company, William E. Ayers, Jr. and Martin-Marietta Corporation.

ORR, Judge.

This matter arises out of an attempt by the defendant to use the property in question for a rock quarry. Plaintiff brings this action for a declaratory judgment pursuant to G.S. 1-254 (1983). The complaint states in pertinent part:

> declaring that the issuance of a building permit or other permits to Salem Stone Company, Martin-Marietta Corporation, their agents or assigns for [a] quarry or other extractive industry on the site in issue is impermissible, inasmuch as the Forsyth County Zoning Ordinance does not permit quarry use in areas zoned R-5 and R-6 . . . .

On 21 August 1986, Salem Stone applied for a special use permit to operate a quarry in a rural area in Forsyth County. On 11 September 1986, the City-County Planning Board voted and approved the plan with certain conditions. On 7 October 1986, the Forsyth County Zoning Board of Adjustment (Zoning Board) granted Salem Stone's special use permit by a 3-2 vote.

On 5 November 1986 plaintiffs, local landowners who claim that their rights are affected by the Zoning Board's decision, filed a petition for writ of certiorari seeking review in Forsyth County Superior Court of the Zoning Board's action. On 26 November 1986, suit was also filed by plaintiffs in superior court seeking a declaratory judgment that the majority rule action taken by the Zoning Board was improper. Additionally, plaintiffs sought a permanent injunction precluding any Forsyth County agency from granting permits for quarry operations.

On 26 January 1987, plaintiffs' suits were consolidated and heard in superior court. *Cardwell v. Forsyth County Zoning Board of Adjustment*, 88 N.C. App. 244, 362 S.E. 2d 843 (1987), *disc. rev. denied*, 321 N.C. 742, 366 S.E. 2d 858 (1988). Judge Albright dismissed with prejudice both the suit and the writ of certiorari from the Zoning Board's decision. Plaintiffs appealed the trial court's decision.

On 22 May 1987, plaintiffs filed this suit contending that a new zoning amendment enacted on 11 May 1987 applied to Salem Stone. The new zoning amendment, which revises Chapter 23 of the Forsyth County Code, prohibits quarry operations on lands

zoned, like this particular quarry site, as R-6. Plaintiffs' complaint requested declaratory and permanent injunctive relief.

Plaintiffs moved for summary judgment in the case *sub judice* and defendants Salem Stone Company, Martin-Marietta Aggregates and William Ayers, Jr., a partner with Martin-Marietta, filed a cross-motion for summary judgment.

Judge Walker entered an order for summary judgment as to all defendants setting out certain conclusions upon which his decision was based. Plaintiffs' motion was denied and they gave notice of appeal to this Court.

Plaintiffs' first appeal to this Court in *Cardwell I* resulted in an opinion being filed on 22 December 1987. In this opinion, our Court addressed the two issues raised by plaintiffs. We held that the original 3 - 2 vote of the Zoning Board granting the special use permit was not in violation of the general statutes. *See* G.S. 153A-3 (1987). Secondly, this Court found that the Board had failed to follow its procedure after the vote that required a summary of the evidence and proper findings of fact prepared to support its decision. The trial court's validation of the Zoning Board's decision was reversed and the matter remanded back to the Zoning Board for the preparation of a summary of the evidence and the setting out of findings of fact.

Since the time that the case *sub judice* was docketed with our Court, plaintiffs have commenced yet another action in Forsyth County Superior Court by filing a petition for certiorari. Plaintiffs are attempting to appeal the findings of fact entered by the Zoning Board made at a meeting of the Board, held pursuant to the mandate of this Court in *Cardwell I.* That petition for certiorari was granted.

[1] The first issue to be resolved is the clarification of the mandate of this Court in *Cardwell I.* Appellant contends that the reversal of the trial court's decision invalidated the special use permit. Appellees, on the other hand, contend that it merely required a procedural correction on the part of the Board.

We conclude that the 3 - 2 vote of the Zoning Board on 8 October 1986 which was affirmed by this Court results in the formal issuance of a special use permit. Whether that permit is valid is a question to be determined from a review of the record based

upon the summary of the evidence and findings of fact prepared by the Zoning Board. The remand by this Court in *Cardwell I* was for the purpose of requiring the Zoning Board to follow its procedure and prepare a summary of the evidence heard at the initial hearing and setting out findings of fact to support the Zoning Board's grant of the special use permit.

> When a trial court fails to make findings or conclusions when they are required, the appellate court 'may order a new trial or allow additional evidence to be heard by the trial court or leave it to the trial court to decide whether further findings should be on the basis of the existing record or on the record as supplemented.'

Harris v. N.C. Farm Bureau Mutual Ins. Co., 91 N.C. App. 147, 150, 370 S.E. 2d 700, 702 (1988) (citation omitted). Such summary should include findings as to: (1) whether allowing the proposed special use permit would materially endanger the health of the citizens in the area; (2) whether the applicant has met all the required conditions and specifications; (3) whether the use will substantially injure the value of adjoining or abutting properties; and (4) whether the use will be in harmony with the area in which it will be located.

As of the date of the case *sub judice* being filed on appeal, the Zoning Board had not complied with this Court's mandate in *Cardwell I.* Subsequently, as noted, the Zoning Board did comply and plaintiff instituted a new suit contesting those findings.

[2] This declaratory action raises the question of whether the amended zoning ordinance applies to defendants; thus, precluding them from receiving building permits, or whether defendants are entitled to building permits by virtue of the special use permit. To answer that, it is necessary to have a final determination of the validity of the special use permit originally granted. That determination has only now begun to proceed through our Court system.

Therefore, the trial court erred in its entry of an order granting summary judgment for defendants. *See Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980) (setting out the applicable standard for the grant or denial of a motion for summary judgment). This case should have been dismissed as not being ripe for determination.

The trial court's order is therefore

Reversed and remanded for entry of an order of dismissal.

Judges GREENE and SMITH concur.

EVANGELINE G. BEAM v. PAUL H. BEAM AND BEAM ELECTRIC COMPANY

No. 8826SC238

(Filed 30 December 1988)

Divorce and Alimony § 30— property distributed through equitable distribution— right to accounting of rental income prior to distribution

Plaintiff had an absolute right to an accounting of the rental income from two pieces of commercial property prior to the time these properties were distributed through equitable distribution where she and defendant held the property as tenants by the entirety until the time of their divorce and as tenants in common subsequent to the divorce and prior to the distribution.

Judge GREENE dissenting.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 7 December 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 September 1988.

Plaintiff Evangeline G. Beam instituted this action for an accounting of rents and benefits received by the defendant Paul H. Beam on property owned by the plaintiff and defendant as tenants by the entirety (and subsequently tenants in common) prior to the distribution of property in accordance with their equitable distribution order entered on 21 January 1986.

Defendant filed a motion for summary judgment under G.S. 1A-1, Rule 56 on 7 October 1987. The trial court granted the defendant's motion for summary judgment and plaintiff appeals.

Justice & Eve, P.A., by R. Michael Eve, Jr. and Stuart F. Clayton, attorneys for plaintiff-appellant.

Tucker, Hicks, Hodge and Cranford, P.A., by Warren C. Stack, Fred A. Hicks and Edward P. Hausle, attorneys for defendant-appellees.

ORR, Judge.

This case arises out of an issue left open in the equitable distribution order pertaining to the plaintiff and defendant on 21 January 1986. In that order, Judge Robert P. Johnson ruled the NCNB checking account number 001549526 known as the Sherri-Scott, Inc. Account was Mr. Beam's separate property and not subject to equitable distribution. Judge Johnson further stated he did "not wish and does not prejudice any right either party may have to an accounting should an accounting be sought."

The equitable distribution order was appealed to this Court in *Beam v. Beam*, No. 8626DC683 (filed 7 April 1987). One assignment of error questioned the trial court's finding that the Sherri-Scott checking account was separate property. This Court affirmed the trial court's ruling that the account in question was Mr. Beam's separate property because of Mrs. Beam's failure to offer evidence to determine when the account was established.

In the case *sub judice*, defendant contends that plaintiff's current claims are identical to her claim at the time of equitable distribution that the Sherri-Scott, Inc. Account was marital property. Defendant argues, therefore, that the trial court's summary judgment order was properly granted.

We do not agree with defendant's contention. In the present action, plaintiff requests an accounting of the rental income from two pieces of commercial property prior to the time these properties were distributed through equitable distribution. The Winona Street property was awarded to plaintiff, Mrs. Beam, and the Winnifred Street property was awarded to defendant, Mr. Beam. Plaintiff seeks an accounting of the Winnifred Street property rents and benefits as well as the Winona Street property rents and benefits so she may receive her fair share of these monies.

Plaintiff claims she is entitled to income from the rental properties during three separate time periods. The first period is the date of acquisition of the property until the date of separation. The record indicates the date of acquisition of the Winnifred Street property was 27 September 1965. There is no indication in the record of the date of acquisition of the Winona Street property. The plaintiff and defendant held the Winnifred Street property as tenants by the entirety at this stage.

Plaintiff and defendant continued to hold their property as tenants by the entirety during the second time period: the date of separation, 31 March 1978, until the date of divorce, 25 January 1984. The passage of G.S. 39-13.6 entitled a wife to an equal share of income produced by entireties property from 1 July 1983 onward. *See Perry v. Perry*, 80 N.C. App. 169, 341 S.E. 2d 53 (1986), *appeal dismissed*, 320 N.C. 170, 357 S.E. 2d 925 (1987). Plaintiff, therefore, claims she is entitled to her share of rental income from the Winnifred Street property from 1 July 1983 until the date of the divorce.

Finally, the third time period spans from the date of the divorce until the distribution of property pursuant to the equitable distribution judgment. Once the parties were divorced, they no longer held the property as tenants by the entirety but as tenants in common. *Smith v. Smith*, 249 N.C. 669, 674-75, 107 S.E. 2d 530, 534 (1959). Plaintiff also seeks an accounting for this period.

A tenant in common has a right to demand an accounting from a cotenant. *Jolly v. Bryan*, 86 N.C. 457, 460-61 (1882). Plaintiff's action for an accounting is still ripe because the statute of limitations does not begin running until her demand for an accounting is refused. *Id.*

In the case *sub judice*, plaintiff has an absolute right to an accounting and the earlier decision of this Court does not preclude it. *Id.* The trial court, therefore, erred in granting summary judgment to the defendant and denying the plaintiff her absolute right.

Reversed and remanded.

Judge SMITH concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I dissent from the majority's holding that plaintiff was entitled to bring an action for accounting after the trial court entered its judgment equitably distributing the parties' property under Section 50-20. The majority contends plaintiff retained her right

to demand an accounting from defendant pursuant to her common law status as a tenant by the entirety or tenant in common. While our Equitable Distribution Act did not itself disturb these common law forms of ownership, our Supreme Court has clearly held that the court's equitable distribution of the parties' property under the Act terminates the parties' previous *common law* right to *divide* their property based on those common law forms of ownership:

> The [A]ct was not intended to disturb these traditional forms of property ownership, the rights flowing from that ownership, or the rights a spouse may otherwise have in the property of the other. Equitable distribution is merely an alternative means of property division; alternative to already existing rights granted by statute or recognized at common law or acquired under a separation agreement. Thus, *in the absence of an equitable distribution of . . . property under N.C.G.S. Sec. 50-20,* an ex-spouse (now tenant in common) retains the right to possession and the right to alienate and may bring an action for waste, ejectment, *accounting,* or partition.

Hagler v. Hagler, 319 N.C. 287, 292, 354 S.E. 2d 228, 233 (1987) (emphasis added).

Under *Hagler,* the court's final division of the parties' property under Section 50-20 (rather than under alternative common law principles) extinguished plaintiff's former common law right to the alternative accounting and division of property requested in her complaint.

Accordingly, I would affirm the court's entry of summary judgment against plaintiff's independent action for accounting.

WILLIAM WESLEY, INDIVIDUALLY, AND MICHAEL WESLEY, A MINOR CHILD, BY AND THROUGH HIS GUARDIAN AD LITEM, WILLIAM WESLEY v. SAMUEL BLAND AND JOYCE ATKINSON BLAND

No. 8814SC294

(Filed 30 December 1988)

Rules of Civil Procedure § 41.1— voluntary dismissal—time and manner of motion proper

Plaintiffs had not rested their case, and the timing and manner of their motion for a voluntary dismissal was proper under N.C.G.S. § 1A-1, Rule 41(a)(1) where plaintiffs submitted affidavits in opposition to defendants' summary judgment motion prior to the hearing on the motion; the trial court heard argument of counsel for the defendants; when it was plaintiffs' attorney's turn to speak, he orally took a voluntary dismissal; and prior to this time, plaintiffs' attorney had not been given an opportunity to present additional evidence or argue his clients' position.

APPEAL by plaintiffs from *Barnette, Judge*. Judgment entered 10 November 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 September 1988.

On 16 December 1985, defendant, Joyce Atkinson Bland, was involved in a collision with plaintiff, Michael Wesley. Plaintiff, who was six years old at the time of the accident, was crossing Holloway Street in Durham on his way home from school when he was struck by an automobile driven by defendant.

Plaintiff's father, William Wesley, in his individual capacity and in his capacity as guardian ad litem for Michael Wesley, brought a negligence suit against defendants. The suit was filed 10 December 1986.

Defendants filed a motion for summary judgment on 22 October 1987. Affidavits were filed in advance in preparation for the summary judgment hearing. The hearing took place on 2 November 1987.

At the hearing, defendants' attorney was allowed to argue in favor of the motion. Plaintiffs' attorney then stood up in open court and took a voluntary dismissal pursuant to G.S. 1A-1, Rule 41. The trial court took the matters under advisement and on 10 November 1987, Judge Barnette signed an order granting summary judgment in favor of the defendants. On 16 November 1987, plaintiffs formally filed their notice of voluntary dismissal without

prejudice. From the trial court's entry of summary judgment for the defendants, plaintiffs appeal.

Robert T. Perry, attorney for plaintiff-appellants.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr. and Sherry R. Dawson, attorneys for defendant-appellees.

ORR, Judge.

The determinative issue on appeal is whether plaintiffs' motion for a voluntary dismissal was made in a timely manner. If the motion was timely, the trial court's order for summary judgment was improperly granted and plaintiffs are not barred from refiling the lawsuit within the one-year time limitation.

G.S. 1A-1, Rule 41(a)(1) states "an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case . . . ."

The intent of G.S. 1A-1, Rule 41(a)(1) is to allow a plaintiff who goes to court with insufficient evidence a chance to voluntarily dismiss his case and gather sufficient evidence to return to court. The plaintiff must take the voluntary dismissal before he rests his case so that the court's time is not wasted. *See* W. Shuford, *N.C. Civil Practice and Procedure* Sec. 4104 (1988).

In this case, dismissal was not taken in a timely fashion if the plaintiffs had "rested their case" prior to the dismissal. The requirements of Rule 41 in regard to voluntary dismissals and the practicalities involved in taking a dismissal pursuant to the rule are clear when it comes to the actual trial of an action. The case may only be dismissed at trial "*before* plaintiff rests his case."

The practical applicability of the rule pertaining to summary judgment is less clear. In *Maurice v. Motel Corp.*, 38 N.C. App. 588, 248 S.E. 2d 430 (1978), the Court explained when a party has "rested his case" in regard to a summary judgment hearing.

> Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has 'rested his case' within the meaning

> of Rule 41(a)(1)(i). . . . He cannot thereafter take a voluntary dismissal under Rule 41(a)(1)(i). To rule otherwise would make a mockery of summary judgment proceedings.

Id. at 591-92, 248 S.E. 2d 432-33. This Court notes that on many occasions, however, the conduct of a summary judgment hearing in our trial courts is a fairly informal proceeding.

In the case *sub judice*, the record reflects that the plaintiffs submitted affidavits prior to the hearing as evidence in opposition to the summary judgment motion pursuant to G.S. 1A-1, Rule 56. The judgment states that the trial court "heard argument of counsel for the defendants." When it was plaintiffs' attorney's turn to speak, he orally took a voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(1)(i). It appears that prior to this plaintiffs' attorney had not been given an opportunity to present additional evidence or argue his clients' position. Therefore, under the test described in *Maurice*, we conclude that plaintiffs had not rested their case and the timing of plaintiffs' motion for a voluntary dismissal was proper under Rule 41.

For purposes of summary judgment motions, this Court holds that the record must show that plaintiff has been given the opportunity at the hearing to introduce any evidence relating to the motion and to argue his position. Having done so and submitted the matter to the Court for determination, plaintiff will then be deemed to have "rested his case" for the purpose of summary judgment and will be precluded thereafter in dismissing his case pursuant to Rule 41 during the pendency of the summary judgment motion.

The manner of plaintiffs' motion was also proper under G.S. 1A-1, Rule 41(a)(1). A party may simply state in open court his intention for a voluntary dismissal and may subsequently file the dismissal. *Danielson v. Cummings*, 300 N.C. 175, 179-80, 265 S.E. 2d 161, 164 (1980).

We do not reach the issue concerning the trial court's ruling on the summary judgment motion. Once a motion for voluntary dismissal is given, there can be no further rulings on the case. *Caroon v. Eubank*, 30 N.C. App. 244, 226 S.E. 2d 691 (1976).

The summary judgment order is vacated and this case remanded for entry of plaintiffs' dismissal pursuant to Rule 41.

Vacated and remanded.

Judges GREENE and SMITH concur.

RICHARD ERIC JANSEN v. SIDNEY ROYAL COLLINS, III

No. 885SC433

(Filed 30 December 1988)

1. **Rules of Civil Procedure § 50— no record of motion for directed verdict at close of evidence—right to assign error waived**

Having failed to preserve the record of any motion for directed verdict at the close of all evidence, defendant waived his right to assign error to either the trial judge's purported ruling on that motion or the ruling on the motion for judgment n.o.v. N.C.G.S. § 1A-1, Rule 50(b)(1); Appellate Rule 10(b)(1).

2. **Automobiles and Other Vehicles § 94.7— knowledge that driver was intoxicated—passenger's contributory negligence—jury question**

Whether plaintiff was contributorily negligent in voluntarily riding in a car driven by defendant when plaintiff knew or should have known that defendant was under the influence of intoxicating beverages was a question for the jury.

APPEAL by defendant from *Barefoot (Napoleon B.), Judge.* Judgment entered 3 December 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 6 December 1988.

Plaintiff instituted this action to recover damages for personal injuries he sustained when the automobile in which he was riding as a passenger collided with a tree. The evidence at trial tended to show that plaintiff and defendant met at about 9:30 P.M. on 27 August 1985 to go out and "shoot pool." They went to several clubs before ending up at the Peppermint Lounge. Plaintiff and defendant were at this lounge from approximately 11:00 P.M. to approximately 1:30 A.M. While there, they shot pool and drank beer. When they left the Peppermint, plaintiff and defendant went to the Pantry, a convenience store across the street from the Peppermint, and purchased two wine coolers which they were sipping as defendant drove plaintiff home.

Defendant drove past plaintiff's home and about 1,000 yards beyond the house, defendant failed to negotiate a curve. Defendant lost control of the car, which went over a ditch and hit a tree. Plaintiff's face struck the windshield and he suffered injury to his back. Defendant was not injured.

Defendant having stipulated negligence and the trial court having refused to submit an issue of contributory negligence, the only issue submitted to the jury was damages. From the judgment entered on the award, defendant appeals.

Smith and Smith, by W. G. Smith, attorney for plaintiff-appellee.

Anderson, Cox, Collier & Ennis, by Donald W. Ennis, attorney for defendant-appellant.

PARKER, Judge.

Defendant brings forward five assignments of error. In his first, second and fourth assignments defendant contends that plaintiff's evidence established that plaintiff was contributorily negligent as a matter of law and that the trial judge erred in denying defendant's motion for a directed verdict at the conclusion of plaintiff's evidence and at the close of all evidence and in denying defendant's motion for judgment notwithstanding the verdict. Defendant's third assignment of error is to the trial judge's refusal to submit the issue of contributory negligence to the jury. Finally, defendant assigns error to the signing and entry of judgment on the ground that it was not supported by the evidence.

[1] Regarding defendant's assignments relating to the denial of his motions for directed verdict and judgment notwithstanding the verdict, we observe that the record fails to disclose defendant's motion at the close of all evidence. When a defendant offers evidence, as defendant did in this case, he waives his Rule 50(a) motion for directed verdict made at the close of plaintiff's evidence. *Overman v. Products Co.*, 30 N.C. App. 516, 518, 227 S.E. 2d 159, 162 (1976). A motion for directed verdict at the close of all evidence is an absolute prerequisite to the post verdict motion for judgment notwithstanding the verdict. G.S. 1A-1, Rule 50(b)(1); *Graves v. Walston*, 302 N.C. 332, 338, 275 S.E. 2d 485, 489 (1981). Therefore, defendant may not have the denial of his motion for

judgment notwithstanding the verdict reviewed on appeal if the motion for directed verdict was not renewed. See, *Id.; Overman*, 30 N.C. App. at 518, 227 S.E. 2d at 162. Under Rule 10(b)(1), N.C. Rules App. Proc., the exception is to be noted following the "record of judicial action to which it is addressed." The mere insertion of an exception in the transcript without a proper record of the motion and the judge's ruling thereon is not sufficient for purposes of review in the appellate court. See, *State v. Freeze*, 170 N.C. 710, 711, 86 S.E. 1000, 1001 (1915). Having failed to preserve the record of any motion for directed verdict at the close of all evidence, defendant has waived his right to assign error to either the trial judge's purported ruling on that motion or the ruling on the motion for judgment notwithstanding the verdict. G.S. 1A-1, Rule 50(b).

[2] Defendant's third assignment of error is that the trial judge erred in failing to submit the issue of contributory negligence to the jury. Defendant properly pled contributory negligence in his answer. Therefore, if there was more than a "scintilla" of evidence of contributory negligence and if diverse inferences could reasonably have been drawn from that evidence, the issue of contributory negligence should have been submitted to the jury. *Boyd v. Wilson*, 269 N.C. 728, 153 S.E. 2d 484 (1967); *Moore v. Bezalla*, 241 N.C. 190, 84 S.E. 2d 817 (1954).

To establish that plaintiff was contributorily negligent, defendant must prove that (i) the driver was under the influence of an intoxicating beverage; (ii) the passenger knew or should have known that the driver was under the influence of an intoxicating beverage; and (iii) the passenger voluntarily rode with the driver even though the passenger knew or should have known that the driver was under the influence of an intoxicating beverage. *Watkins v. Hellings*, 321 N.C. 78, 80, 361 S.E. 2d 568, 569 (1987). "Under the influence" has been defined as when a person "has drunk a sufficient quantity of intoxicating beverage 'to cause him to lose the normal control of his bodily or mental faculties to such an extent that there is an appreciable impairment of either or both of these faculties'." *State v. Painter*, 261 N.C. 332, 334, 134 S.E. 2d 638, 640 (1964), *cited in Davis v. Rigsby*, 261 N.C. 684, 136 S.E. 2d 33 (1964); *State v. Carroll*, 226 N.C. 237, 239-40, 37 S.E. 2d 688, 690 (1946).

Both plaintiff and defendant testified that they had been playing pool and drinking beer together and that they each had a wine cooler in the car at the time of the accident. Their evidence was conflicting, however, as to how much beer defendant had consumed and as to whether defendant was, or appeared to be, impaired by the alcohol. Plaintiff testified that he did not keep track of the number of beers either he or defendant consumed, but that the alcohol had given him a "buzz." Defendant testified that he had drunk nine beers between the time he picked up plaintiff at 9:30 P.M. and the time they left the "Peppermint Lounge" between 1:00 and 1:30 A.M. According to plaintiff's testimony, defendant walked and talked normally and did not operate his vehicle in any reckless or improper manner, but he was going "a little bit too fast" when they approached the entrance to the subdivision where plaintiff lived. Although he knew defendant had been drinking, plaintiff felt it was safe to ride with defendant driving the car. Defendant testified that while he was not staggering or falling down, he was definitely feeling the effects of the alcohol.

On this record, whether plaintiff was contributorily negligent in voluntarily riding in a car driven by defendant when plaintiff knew or should have known that defendant was under the influence of intoxicating beverages was a question for the jury. *See Weatherman v. Weatherman*, 270 N.C. 130, 132, 153 S.E. 2d 860, 863 (1967); *Boyd v. Wilson*, 269 N.C. at 729, 153 S.E. 2d at 486; *Beam v. Parham*, 263 N.C. 417, 421, 139 S.E. 2d 712 (1965). Accordingly, we hold that the judge's refusal to submit contributory negligence to the jury entitles defendant to a new trial.

New trial.

Judges EAGLES and SMITH concur.

HAZEL MARIE CRIST v. ROBERT C. MOFFATT, M.D.

No. 8828SC466

(Filed 30 December 1988)

Appeal and Error § 6.2— malpractice action—contact with plaintiff's non-party treating physicians forbidden—order not appealable

The defendant in a medical malpractice case was not entitled to appeal from the trial court's interlocutory order prohibiting defendant's attorney from contacting plaintiff's non-party treating physicians and requiring the attorney to disclose the substance of all private conversations which had already transpired between defendant's attorneys and the non-party treating physicians. N.C.G.S. § 1-277(a).

APPEAL by defendant from *Hyatt, J. Marlene, Judge.* Order entered 10 February 1988 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 2 November 1988.

On 4 December 1986 plaintiff filed this action, alleging in her complaint that she had been injured by defendant's negligence in treating her. Defendant answered in apt time, and on 5 February 1987 served plaintiff with interrogatories and requests for medical bills incurred in the care and treatment of plaintiff which plaintiff contended were incurred as a result of the alleged negligence of defendant. On 2 April 1987, plaintiff responded by producing medical bills and records of treating physicians. Included in those documents were medical records of Dr. James Tyson and Dr. Alan Thompson. On 6 July 1987, defendant took plaintiff's deposition during which plaintiff was asked about her treatment by, and conversations with, each of her treating physicians. In November 1987, defendant's counsel met privately with Dr. Tyson and Dr. Thompson to discuss plaintiff's case. After learning of these meetings, plaintiff filed a motion in the cause requesting the court (1) to compel full disclosure of conversations between defendant's counsel and plaintiff's non-party treating physicians; (2) to prohibit the use at trial of any information and/or opinions obtained in such conversations; and (3) to prohibit any further contact by defendant's counsel with plaintiff's non-party treating physicians.

In response to plaintiff's motion, the trial court entered an order summarizing the facts and events we have described, and

included the following pertinent findings, conclusion, and ordering paragraphs:

> 11. The Plaintiff has not expressly waived and did not expressly waive prior to November 19, 1987, and November 23, 1987, the Physician/Patient Privilege conferred by N.C.G.S. 8-53.
>
> 12. No resident or presiding judge, either at trial, this matter not having been called for trial, nor prior to trial during the course of discovery, has entered an order compelling disclosure pursuant to N.C.G.S. 8-53.
>
> 13. No resident or presiding judge has entered an order finding that plaintiff has waived any physician/patient privilege by providing, in response to formal requests for discovery, copies of her medical records, by testifying concerning her medical treatment at her deposition, by identifying Dr. F. Alan Thompson and Dr. James Tyson as witnesses who would testify concerning their medical treatment of plaintiff, and by not objecting to the deposition of any non-party treating physician.
>
> Based upon the foregoing findings of fact the court concludes as a matter of law that the conduct of Isaac N. Northrup, Jr. in privately contacting and discussing plaintiff's medical care and treatment with Dr. James Tyson and Dr. F. Alan Thompson, non-party treating physicians, without the plaintiff's knowledge and consent, although in good faith, was not proper.
>
> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:
>
> 1. The defendant's attorneys shall fully disclose within fifteen (15) days of the date of this order, in written form, the substance of all private conversations between the defendant's attorneys and non-party treating physicians;
>
> 2. Defendant's attorneys shall not contact non-party treating physicians without the knowledge and consent of plaintiff's attorney or, alternatively, without an order of the court;

3. The presiding trial judge shall rule upon the use at trial of any information and/or opinions obtained as a result of private conversations between the defendant's attorneys and non-party treating physicians;

. . .

Defendant appeals from the entry of this order.

Elmore & Powell, P.A., by Shirley H. Brown, for plaintiff-appellee.

Roberts Stevens & Cogburn, P.A., by Isaac N. Northrup, Jr., for defendant-appellant.

WELLS, Judge.

Defendant seeks to have this admittedly interlocutory order reversed in this appeal. We decline to do so and dismiss the appeal.

N.C. Gen. Stat. § 1-277(a) provides:

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, . . . which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

See also N.C. Gen. Stat. § 7A-27(d).

The right defendant asserts Judge Hyatt's order denied him is to privately interview plaintiff's treating physicians, defendant contending that these physicians are "fact" witnesses with knowledge of the events and circumstances underlying plaintiff's claims for relief. By this disingenuous argument, defendant asserts that he could unilaterally assume that plaintiff had waived the physician/patient privilege afforded her under N.C. Gen. Stat. § 8-53, by disclosing the fact that she was treated, by furnishing, pursuant to a discovery request, her medical records resulting from treatment by her physicians, and by participating in the taking of her deposition. We reject this argument.

We do not perceive that Judge Hyatt's order deprived defendant of any right, substantial or otherwise.

Appeal dismissed.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. ROBERT HENRY FINK

No. 8819SC323

(Filed 17 January 1989)

1. **Criminal Law § 92.1— trafficking and conspiracy—joinder of defendants**

The trial judge did not abuse his discretion by joining defendant and his two brothers for trial for conspiring to traffic in cocaine and trafficking in cocaine where statements made by defendant's brothers, allegedly during and in furtherance of the conspiracy, would have been admissible against each of the defendants whether they were tried separately or jointly. There was no error in permitting the State to file a written motion for joinder of defendants the day after the State orally argued the motion at the pretrial motions hearing because a written motion for joinder of defendants may be made at any time prior to trial and need not be written if made at a hearing; furthermore, there is no question that defendant had notice of the State's intention to join the defendants for trial and defendant can therefore show no prejudice from the timing of the State's motion.

2. **Conspiracy § 5.1— conspiracy to traffic in cocaine—unsanitized statements of co-conspirators—admissible**

The trial court did not err in a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine by admitting codefendants' statements without removing all references to defendant where the statements were made during the course of and in furtherance of the conspiracy and were therefore admissible under N.C.G.S. § 8C-1, Rule 801(d)(E). A defendant is not entitled to have his co-conspirators' incriminating statements sanitized pursuant to N.C.G.S. § 15A-927(c)(1) when the statements are admissible against him whether he is tried separately or jointly.

3. **Conspiracy § 5.2— statements of co-conspirators—admissibility—independent evidence of conspiracy**

The trial court did not err in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine by admitting statements of co-conspirators without a *prima facie* showing of conspiracy before the statements were admitted. Statements of co-conspirators are admissible against other members of the conspiracy so long as a *prima facie* case of conspiracy is established independently of the statements sought to be admitted.

4. **Criminal Law § 73.2— conspiracy to traffic in narcotics—statements of co-conspirator after sale—not inadmissible hearsay**

In a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine, the Court of Appeals summarily rejected defendant's argument that the statement of a conspirator to a buyer to "be careful with that much cocaine" occurred after the objective of the conspiracy was achieved and was therefore inadmissible hearsay.

5. **Criminal Law § 97.2— refusal to allow defendant to reopen case—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine by refusing defendant's motion to reopen his case where a mistrial had been declared as to the other two defendants on a Friday, defendant rested his case shortly afterwards, and defendant moved on Monday to reopen the case so that he could examine the codefendants. If defendant was taken by surprise by the mistrial, he should have moved for a continuance or a recess; the court would not presume that the codefendants planned not to testify and were therefore unavailable as witnesses; and the mistrial did not alter the admissibility of the co-conspirators' statements.

6. **Conspiracy § 7— instructions on separate conspiracies—overlapping conspiracies—one offense**

The trial judge erred by charging the jury as to two separate conspiracies to traffic in cocaine where the two conspiracies were so overlapped as to comprise one continuing conspiracy. The first conspiracy charge was the operative one, with the second merely a continuation of the first, and the second conspiracy conviction was therefore vacated.

7. **Narcotics § 6— trafficking in cocaine—money in defendant's shirt pocket when arrested—improperly seized**

The trial court erred in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine by ordering the forfeiture of $1,485 in unmarked currency seized from defendant's shirt pocket when he was arrested. No evidence was presented at trial to indicate that the unmarked currency was linked to a drug transaction rather than to defendant's occasional employment as a welder. N.C.G.S. § 90-112(2).

8. **Criminal Law § 138.9— consecutive sentences—credit for time served**

Defendant was not denied his statutory right to credit for time served where he was sentenced to 20 years on a cocaine trafficking charge, with 220 days credit for time served while awaiting judgment, and to 14 years on consolidated conspiracy charges, to begin at the expiration of the trafficking sentence. Consecutive sentences are treated as one sentence for purposes of providing credit for time served. N.C.G.S. § 15-196.2.

APPEAL by defendant from *James A. Beatty, Jr., Judge.* Judgment entered 28 September 1987 in Superior Court, ROWAN County. Heard in the Court of Appeals 25 October 1988.

Attorney General Lacy Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

Goodman, Carr, Nixon & Laughrun, by Theofanis X. Nixon, for defendant-appellant.

BECTON, Judge.

Defendant Robert Henry Fink ("Fink") was convicted of (1) trafficking in cocaine, and (2) conspiracy to traffic in cocaine. The central question on appeal is the effect of certain statements made by Fink's brothers—his codefendants—which were admitted at trial as statements made during and in furtherance of a conspiracy. Fink also contends that the trial judge erred in refusing to reopen the evidence, charging the jury as to two separate conspiracies, ordering forfeiture of $1,485 in cash seized at the time of arrest, and denying Fink credit for time served. We vacate the order to forfeit the $1,485 and vacate one conspiracy conviction. The remaining conspiracy conviction is remanded for resentencing. In all other respects, the trial was without error.

I

The relevant facts are as follows. Defendant, Robert Henry Fink ("Fink"), a paraplegic, sold cocaine out of the house where he lived with his two brothers, Jerome Herman Fink ("Jerry") and James Luther Fink ("Luke"). The house was secured by a four foot high chain link fence with an electronic gate controlled from inside the house. Three attack-trained doberman pinschers protected the house, and wrought iron bars covered the doors and windows. Cocaine was sold only to select customers, one of whom was Jimmy Darrell Bonds ("Bonds"), the unsuspecting middleman in an undercover SBI investigation.

Over a period of months, SBI Agent Terry Johnson ("the agent") purchased varying quantities of cocaine from Fink through Bonds. On 19 February 1987, the agent gave Bonds $5,800, in marked bills, to purchase 2.5 ounces of cocaine from Fink. Bonds normally dropped the agent off several hundred yards from the house before getting the cocaine; however, on this occasion, the agent insisted on accompanying Bonds to Fink's house "because of the amount of money" involved. Bonds and the agent went to Fink's home three times that evening. Each time,

Bonds parked his car outside the gate. The agent slumped down in the front seat and waited.

On the first trip, Luke walked out of the house toward Bonds. The agent heard Luke tell Bonds that Fink was at the hospital receiving treatment for a burn, and *to come back later since that much cocaine could be sold only when Fink was there.* Luke told Bonds to call first before coming back. When Bonds and the agent returned an hour later, Jerry came to the door and told Bonds that Fink was not home yet and to check back again.

On the third visit, Fink was at the house. Jerry came to the back door, and made the gate slide open for Bonds. From his position in the car, the agent watched Bonds enter the house; the agent saw Jerry and Fink at the doorway; and he saw Luke walk behind them. Bonds left the house after several minutes. As Bonds was leaving, the agent heard Jerry tell Bonds to "*be careful with that much cocaine.*" Bonds and the agent then drove to Bonds' house, where Bonds delivered the cocaine to the agent.

Shortly thereafter, the agent obtained a search warrant, and, in the early morning hours of 20 February 1987, law enforcement officers conducted a raid of Fink's home. Fink was found in his room, where 44 grams of cocaine and $54,000 in cash—including the $5,800 in marked bills—was discovered in a drawer. An additional $1,485 in cash (unmarked) was found in the pocket of a shirt hanging on the door. Jerry was found in the bathroom, where agents discovered more than 300 grams of cocaine concealed in the toilet tank, and cocaine residue in the toilet bowl and bathtub. Cocaine paraphernalia consisting of a grinder, mirror, and straw were found in Jerry's room. A cache of weapons was found in Fink's room and in Jerry's room.

Charges were brought against Fink, his brothers, and Bonds. Fink was charged with trafficking in cocaine by possession. He was also charged with conspiring, on 19 February 1987, with Jerry, Luke, and Bonds to traffic in cocaine by possessing more than 28 but less than 200 grams of cocaine. A separate charge was brought against him for conspiring, on 20 February 1987, with Jerry and Luke to traffic in cocaine by possessing more than 200 but less than 400 grams of cocaine.

Over objection, Fink and his brothers were tried jointly. Fink took the stand and admitted being a drug dealer. Jerry and Luke

did not testify. The agent testified, however, over objection, regarding the statements he heard Jerry and Luke make to Bonds.

Certain incompetent testimony, prejudicial to Jerry and Luke, was elicited at trial. As a result, a mistrial was declared as to them; the case against Fink continued. Shortly after the mistrial, Fink rested his case. Following a weekend recess, Fink moved to reopen the evidence. That motion was denied.

The judge charged the jury on Fink's alleged offenses of (1) conspiring with Bonds to traffic in cocaine on 19 February 1987 (Jerry and Luke were eliminated from this offense); (2) conspiring with Jerry and Luke to traffic in cocaine on 20 February 1987; and (3) trafficking in cocaine.

Fink was found guilty of all counts, and was sentenced to 14 years on the two conspiracy charges (consolidated for judgment), and to 20 years on the trafficking charge. He was fined a total of $200,000, and the cash seized at his home was ordered forfeited to the State.

II

A. *Joinder of Co-Conspirators*

[1] Fink first contends that the trial judge erred in joining him and his brothers for trial. We disagree.

Charges against two or more defendants may properly be joined for trial when—as here—the offenses charged are "part of the same act or transaction" or are "so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others." N.C. Gen. Stat. Sec. 15A-926(b)(2) (1988). Charges may also be joined when the offenses "[w]ere part of a common scheme or plan." *Id.* The general rule as to joint trial of co-conspirators was stated in *State v. Battle*, 267 N.C. 513, 519, 148 S.E. 2d 599, 603 (1966): "Ordinarily, where defendants are charged with a conspiracy—an agreement whereby they became partners in crime—they should be tried together unless some sound reason is made to appear which would require a severance."

Multiple defendants may not be jointly tried if joinder will impair the "fair determination of . . . guilt or innocence" of any of the defendants. N.C. Gen. Stat. Sec. 15A-927(c)(2) (1988). *See State*

v. Green, 321 N.C. 594, 600, 365 S.E. 2d 587, 591 (1988), *cert. denied*, --- U.S. ---, 109 S.Ct. 247 (1988). Ultimately, the decision whether to join defendants for a consolidated trial is within the sound discretion of the trial judge, and will not be overturned on appeal absent an abuse of discretion. *State v. Carson*, 320 N.C. 328, 335, 357 S.E. 2d 662, 666-67 (1987). The test for determining whether a trial judge abused his discretion in joining defendants for trial is "whether the conflicts in the defendants' respective positions at trial [are] of such a nature that, considering all of the evidence in the case, defendant was denied a fair trial." *Green*, 321 N.C. at 601, 365 S.E. 2d at 591.

Fink maintains that joinder with two of his alleged co-conspirators was an abuse of discretion. However, Fink fails to show any conflict in the respective positions of the defendants, or any other sound reason for us to conclude that joinder denied him a fair trial.

We reject Fink's assertion that the judge abused his discretion by failing to consider the prejudicial effect of the statements made by Fink's codefendant brothers before denying the motion objecting to joinder. *See* N.C. Gen. Stat. Sec. 15A-927(c)(3) (1988) (judge *may* consider such statements in deciding whether to join defendants for trial). As will be discussed below, those statements, allegedly made during and in furtherance of the conspiracy, would have been admissible against—and as damaging to—each of the defendants whether they were tried separately or jointly. *See* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 801(d)(E) (1988); *accord United States v. Curry*, 512 F. 2d 1299, 1302 (4th Cir. 1975), *cert. denied*, 423 U.S. 832, 46 L.Ed. 2d 50 (1975) (admission of co-conspirator's incriminating statements did not warrant severance since statements would be equally admissible at separate trial). Unless "joinder of [codefendants] . . . result[s] in the admission of evidence harmful to the defendant *which would not have been admissible in a severed trial* . . . [the defendant is] not prejudiced by the joinder." *State v. Lowery*, 318 N.C. 54, 61, 347 S.E. 2d 729, 735 (1986) (emphasis added).

We reject Fink's further argument that the State's motion for joinder was improperly made. Fink asserts that the State should not have been permitted to file a written motion for joinder of defendants the day after the State orally argued the

motion at the pretrial motions hearing. A written motion for joinder of defendants may be made at *any* time prior to trial. Moreover, the motion need not be *written* if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial. *See* N.C. Gen. Stat. Secs. 15A-926(b)(2), 15A-951(a), 15A-952(b), (f) (1988); *State v. Slade*, 291 N.C. 275, 281-82, 229 S.E. 2d 921, 926 (1976). Furthermore, a motion objecting to joinder argued by Luke and joined by Fink, was made at the same pretrial hearing, which occurred four months before trial. There is thus no question that Fink had notice of the State's intention to join the defendants for trial, and, therefore, he can show no prejudice by the timing of the State's motion.

In light of the foregoing, we find no error in joining Fink with his brothers for trial.

B. *Co-Conspirators' Incriminating Statements Admissible Under Rule 801(d)(E) Need Not Be "Sanitized"*

[2] Fink next contends that the trial judge erred by failing to order the codefendant brothers' statements "sanitized," removing all references to Fink. Fink asserts that this is the result mandated by *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968), and by N.C. Gen. Stat. Sec. 15A-927(c)(1). In *Bruton*, the Supreme Court held that, in a joint trial, introduction of a non-testifying codefendant's out-of-court statement, which implicated the defendant *but was inadmissible against him*, violated the defendant's Sixth Amendment right to confrontation. 391 U.S. at 126, 20 L.Ed. 2d at 479. The *Bruton* rule was adopted in North Carolina through enactment of Section 15A-927(c)(1).

Neither the *Bruton* rule nor Section 15A-927(c)(1) apply when statements are otherwise *admissible* against a defendant under the rules of evidence. *See State v. Collins*, 81 N.C. App. 346, 349, 344 S.E. 2d 310, 313 (1986), *appeal dismissed*, 318 N.C. 418, 349 S.E. 2d 601 (1986); *State v. Brewington*, 80 N.C. App. 42, 48, 341 S.E. 2d 82, 86 (1986), *disc. rev. denied*, 317 N.C. 708, 347 S.E. 2d 449 (1986). *See also Bruton*, 391 U.S. at 128, 20 L.Ed. 2d at 480-81, n.3; N.C. Gen. Stat. Sec. 15A-927(c)(1). In our view, the statements made by Jerry and Luke to Bonds were statements made "during the course and in furtherance of the conspiracy" to traffic in cocaine, and therefore were admissible against Fink under Rule 801(d)(E) of the rules of evidence. *See* N.C. Gen. Stat. Sec. 8C-1, R.

Evid. 801(d)(E) (1988); *Collins*, 81 N.C. App. at 349, 344 S.E. 2d at 313; *Brewington*, 80 N.C. App. at 48, 341 S.E. 2d at 86. A defendant is not entitled to have his co-conspirators' incriminating statements sanitized pursuant to Section 15A-927(c)(1) when, as here, the statements are admissible against him whether he is tried separately or jointly. *See State v. Sidden*, 315 N.C. 539, 551, 340 S.E. 2d 340, 348 (1986). Therefore, Fink's contention is without merit.

C. *Prima Facie Case of Conspiracy*

[3] Fink next asserts that the judge erred in admitting his brothers' statements to Bonds under Rule 801(d)(E) because, he argues, there was no *prima facie* showing of conspiracy before the statements were admitted. We reject this contention.

Statements of conspirators are admissible against other members of the conspiracy so long as a *prima facie* case of conspiracy is established *independently* of the statements sought to be admitted. *State v. Tilley*, 292 N.C. 132, 138, 232 S.E. 2d 433, 438 (1977); *Brewington*, 80 N.C. App. at 48-49, 341 S.E. 2d at 86. The judge, in his discretionary authority over the presentation of evidence, may admit the statements subject to a later showing of conspiracy. *State v. Albert*, 312 N.C. 567, 576, 324 S.E. 2d 233, 238 (1985); *Brewington*, 80 N.C. App. at 48-49, 341 S.E. 2d at 86-87.

Evidence of a conspiracy may be circumstantial. *Collins*, 81 N.C. App. at 350, 344 S.E. 2d at 313. A conspiracy " 'may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, . . . point unerringly' " to its existence. *State v. Rozier*, 69 N.C. App. 38, 49, 316 S.E. 2d 893, 901 (1984), *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984) (citations omitted). An express agreement need not be shown; evidence of a mutual, implied understanding is sufficient. *Collins*, 81 N.C. App. at 350, 344 S.E. 2d at 313-14.

In light of these principles, we conclude, without reiterating the evidence, that a mutual, implied understanding existed among the brothers to commit the unlawful act of trafficking in cocaine. Viewing the evidence in a light most favorable to the State, *see id.*, we hold that the evidence was sufficient, independent of the statements, to establish a *prima facie* case of conspiracy. Therefore, the statements were properly admitted in evidence.

[4] We summarily reject Fink's argument that Jerry's statement to "be careful with that much cocaine" occurred after the objective of the conspiracy was achieved, and therefore was inadmissible hearsay. *See State v. Gary*, 78 N.C. App. 29, 37, 337 S.E. 2d 70, 76 (1985) ("statement occurred close enough in time to the criminal acts themselves to be admissible").

We now turn to Fink's remaining assignments of error.

III

[5] On a Friday, shortly after the mistrial was declared as to Jerry and Luke, Fink rested his case. The trial resumed the following Monday. Fink then moved to reopen the evidence to allow him to examine Jerry and Luke, witnesses he contends were previously unavailable to him, to refute the agent's testimony regarding the statements made to Bonds. Fink contends that denial of that motion was reversible error. We disagree.

The decision whether to reopen a case after both parties have rested to permit additional evidence is left to the sound discretion of the trial judge. *See State v. Mutakbbic*, 317 N.C. 264, 273-74, 345 S.E. 2d 154, 158 (1986); *State v. Gibson*, 18 N.C. App. 305, 307, 196 S.E. 2d 564, 566 (1973). That determination will not be disturbed on appeal "unless it is 'manifestly unsupported by reason,' . . . or 'so arbitrary that it could not have been the result of a reasoned decision.' " *Mutakbbic*, 317 N.C. at 273-74, 345 S.E. 2d at 158-59 (citations omitted).

In the case before us, there was no "manifest abuse of discretion" warranting reversal. *See Gibson*, 18 N.C. App. at 307, 196 S.E. 2d at 566. If Fink was taken by surprise by the mistrial, as he now contends, he should have moved for a continuance or a recess instead of resting his case. He voluntarily rested at a time when his former codefendants were available as witnesses. Furthermore, we do not presume that Jerry and Luke planned not to testify, and therefore were unavailable as witnesses. Finally, at the time the trial judge ruled on the admissibility of the hearsay statements, he ruled appropriately; mistrial did not alter the statements' admissibility. Thus, there was no urgent necessity to reopen the evidence after a weekend recess to permit Fink's brothers to refute the statements, especially since Fink had that

opportunity before resting his case. We find no error in denying the motion to reopen the evidence.

IV

[6] Fink contends that the trial judge erred in charging the jury as to two separate conspiracies. We agree, and modify the judgment accordingly.

Although the offense of conspiracy is complete upon formation of an unlawful agreement, the offense continues until the conspiracy is accomplished or is abandoned. *State v. Medlin*, 86 N.C. App. 114, 122, 357 S.E. 2d 174, 179 (1987). One conspiracy "may, and often does, consist of a series of different [substantive] offenses" occurring over a period of time. *Id.* When a series of acts or agreements constitutes a single conspiracy, a defendant cannot be prosecuted on *multiple conspiracy* charges. *Id.* at 121, 357 S.E. 2d at 178 (citing *United States v. Kissel*, 218 U.S. 601, 54 L.Ed. 1168 (1910)). Of course, a defendant may still be charged with each separate substantive offense committed in furtherance of the single conspiracy. *See id.*

When the State elects to charge separate conspiracies, it is required to "prove not only the existence of [more than one] agreement[,] but also that [the agreements] were separate." *Rozier*, 69 N.C. App. at 53, 316 S.E. 2d at 902. No simple test exists to determine whether single or multiple conspiracies have been shown in a particular case. *Medlin*, 86 N.C. App. at 122, 357 S.E. 2d at 179. Some factors relevant in making that determination include the time intervals, participants, objectives, and number of meetings. *Id.* However, a single conspiracy is not transformed into multiple conspiracies simply because its members vary occasionally, and the same acts in furtherance of it occur over a period of time. *See id.* (single conspiracy should have been charged when the objectives of the conspiracy did not change during four-month life of conspiracy, and the participants were the same in three of ten substantive offenses committed in furtherance of it); *accord State v. Overton*, 60 N.C. App. 1, 13, 298 S.E. 2d 695, 702-03 (1982), *disc. rev. denied*, 307 N.C. 580, 299 S.E. 2d 652 (1983) ("that [four to sixteen] participants entered and exited the conspiracy at various times [over four years] did not convert one conspiracy into several").

In our view, the two conspiracies in the case before us were so overlapped as to comprise one continuing conspiracy. The conspiracies charged occurred within hours of each other, one on the evening of 19 February, and the other on the morning of 20 February 1987. The alleged participants in the first conspiracy were Fink, his brothers, and Bonds; the participants in the second were Fink and his brothers. Although the amount of cocaine varied in the first and second alleged conspiracies, the objective was the same: to traffic in cocaine. Moreover, inconsistent with its position on appeal, the State argued throughout the trial that there was a "*continuing conspiracy*" among the defendants.

Because there was evidence of only one ongoing conspiracy, both of Fink's conspiracy convictions cannot stand. *See State v. Hicks*, 86 N.C. App. 36, 42, 356 S.E. 2d 595, 598 (1987). We conclude that the first conspiracy charge against Fink is the operative one for purposes of establishing that he conspired to traffic in cocaine. *See Medlin*, 86 N.C. App. at 123, 357 S.E. 2d at 179; *Rozier*, 69 N.C. App. at 54, 316 S.E. 2d at 903 (earlier of conspiracy convictions should stand when multiple conspiracies were charged but only single conspiracy was proved). The alleged conspiracy of 20 February was merely a *continuation* of the original conspiracy and does not support the additional conspiracy charge. Therefore, we vacate the second of Fink's conspiracy convictions, the 20 February 1987 charge (No. 87CRS1454). Case No. 87CRS2127 is remanded for resentencing. *Cf. State v. Agudelo*, 89 N.C. App. 640, 644, 366 S.E. 2d 921, 924 (1988), *disc. rev. denied and appeal dismissed*, 323 N.C. 176, 373 S.E. 2d 115 (1988) (no need to remand for resentencing in remaining conspiracy case when minimum sentence was imposed for each conviction and sentences were to run concurrently).

V

[7] We agree with Fink's next contention that the trial judge erred in ordering forfeiture of the unmarked currency, in the amount of $1,485, seized from Fink's shirt pocket.

"All money . . . which [is] acquired, used, or intended for use, in selling [or] purchasing . . . a controlled substance" is subject to forfeiture. N.C. Gen. Stat. Sec. 90-112(2) (1985). However, mere possession of currency in close proximity to narcotics does not warrant forfeiture. *State v. Teasley*, 82 N.C. App. 150, 167, 346

S.E. 2d 227, 237 (1986), *disc. rev. denied and appeal dismissed*, 318 N.C. 701, 351 S.E. 2d 759 (1987). No evidence was presented at trial to indicate that the unmarked money was linked to a drug transaction rather than to Fink's occasional employment as a welder. Therefore, we vacate the portion of the order forfeiting the $1,485.

VI

[8] Fink last contends that he was denied his statutory right to credit for time served. Fink was sentenced to 20 years on the trafficking charge, and was given 220 days credit for time served while awaiting judgment. He was sentenced to 14 years on the consolidated conspiracy charges, to begin at the expiration of the trafficking sentence.

Section 15-196.2 provides that consecutive sentences are treated as one sentence for purposes of providing credit for time served; "the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned." N.C. Gen. Stat. Sec. 15-196.2 (1983). Thus, Fink's contention is without merit.

VII

In summary, we vacate that portion of the order forfeiting the $1,485 seized from Fink's shirt pocket. We also vacate Fink's conviction of conspiracy to traffic in cocaine on 20 February 1987 (No. 87CRS1454) and remand case No. 87CRS2127 for resentencing. We find no other prejudicial error.

Judges EAGLES and GREENE concur.

HEDGECOCK BUILDERS SUPPLY COMPANY OF GREENSBORO v. WILLIAM H. WHITE, JR., AND WIFE, JOANNE WHITE, MICHAEL G. ADAMS, AND WILLIAM H. WHITE, JR., D/B/A ADAMS-WHITE DEVELOPMENT COMPANY

No. 8818SC481

(Filed 17 January 1989)

1. Evidence § 31— construction dispute—third party internal memorandum—not received by witness

In an action arising from the installation of a roof in which plaintiff sought to recover for labor and building materials and defendant counterclaimed for improper installation of the roofing panels, the trial court properly ruled that an internal memorandum from the manufacturer of the roof panels could be used "right now" only to refresh the recollection of plaintiff's manager. Because the witness denied receiving the memorandum, the exhibit was not authenticated, was therefore not admissible, and the witness could not testify about its contents. Defendants were free to try to establish the witness's awareness of potential problems and receipt of the memorandum through oral testimony, since these existed independently of the document itself; even assuming error, defendants failed to make an offer of proof to demonstrate the significance of the excluded testimony and can therefore show no prejudice.

2. Trial § 15— objection to memorandum—judge's comment—no ruling—no prejudice

There was no prejudice in an action arising from a roof installation where defendants attempted to introduce an internal memorandum from the roof manufacturer during *voir dire* examination of their adverse witness and the trial judge responded by observing that the witness testified that "he didn't even remember getting [the memorandum] and if he did, he just threw it away." The trial judge never made a final ruling and was simply commenting on the witness's statement; although failure to rule is an abdication of the judicial function, that failure here did not rise to the level of reversible error because defendants did not try to introduce the exhibit again and never sought a final ruling on its admissibility.

3. Appeal and Error § 49— construction dispute—third party memorandum excluded—no prejudice

In an action arising from the installation of a roofing system in which plaintiff building supply company sought to recover for labor and building materials furnished on open account, defendants counterclaimed for improper installation of the roofing panels, and an internal memorandum from the manufacturer was excluded, defendants could show little if any prejudice from the exclusion of the memorandum because the memorandum would arguably have been of greater benefit to plaintiff than to defendants and because the jury decided in defendants' favor on their counterclaim.

4. Attorneys at Law § 7.4; Consumer Credit § 1— open account credit agreement—attorney fees and finance charges properly allowed

The trial court properly awarded plaintiff attorneys' fees and finance charges on the outstanding balance of the Adams-White account where, in response to a request by an agent of Adams-White, defendants sent Dr. White a new account credit application; Dr. White and his wife, who was not a partner in Adams-White, completed the application; the application provided for finance charges and attorneys' fees in the event the account was not paid; Dr. White requested that the account be opened in the name of Adams-White and sent a letter personally guaranteeing payment of the partnership account; supplies purchased by Adams-White were charged to this account; periodic statements were mailed to Adams-White at Dr. White's address; payments were made with checks drawn by Adams-White; defendant mailed a letter to Dr. White notifying him of its intention to enforce the attorneys' fee provision if the entire balance, with finance charges, was not paid within five days; and no payments were made on the account. Although defendants argue that Dr. White entered into two separate agreements, neither of which provided written evidence of indebtedness, the evidence at trial amply demonstrated that Dr. White opened the account for the partnership and not as an individual account with his wife. Moreover, defendants admitted in their answer and stipulated in a pretrial order that Dr. White acted on behalf of the partnership in opening the account. N.C.G.S. § 6-21.2.

APPEAL by defendants from *John R. Friday, Judge.* Judgment entered 2 December 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 November 1988.

Nichols, Caffrey, Hill, Evans & Murrelle, by Thomas C. Duncan and Joseph R. Beatty, for plaintiff-appellee.

Donaldson, Horsley & Greene, P.A., by Richard M. Greene, for defendant-appellants.

BECTON, Judge.

Plaintiff, Hedgecock Builders Supply Company of Greensboro ("Hedgecock Supply"), brought this action to recover for labor and building materials provided to defendants on an open account. From judgment in favor of Hedgecock Supply, the defendants, Dr. William H. White, Jr., and Michael G. Adams, individually and as partners of Adams-White Development Company, appeal. Defendants contend that the trial judge erred in (1) limiting the use of an exhibit and refusing to allow the exhibit to be introduced in evidence; (2) awarding Hedgecock Supply attorneys' fees; and (3) awarding Hedgecock Supply finance charges. We affirm.

I

The evidence at trial showed the following.

In June 1986, Dr. White, acting on behalf of Adams-White, opened an account with Hedgecock Supply to purchase building supplies to be used in the construction of two retail buildings. Over the next several months, Adams-White ordered a variety of building materials from Hedgecock Supply, including a roofing system manufactured by Alumax Aluminum Corporation ("Alumax").

The quality of the installation of the Alumax roofing system is central to the parties' dispute. When Adams-White learned that the person installing the roofing panels had been convicted of drunk driving and would be unable to finish the job in time for the scheduled "grand opening" of the buildings, Adams-White requested that Hedgecock Supply complete the installation. Hedgecock Supply agreed.

Hedgecock Supply employees, some of whom worked more than 90 hours a week to meet the Adams-White deadline, were unable to install the panels according to the manufacturer's specifications. The panels were designed to interlock and to be attached with metal clips to a flat substrate of plywood and felt; any deflection in the substrate greater than ¼ inch would impair the panels' function and appearance. The substrates on the Adams-White buildings—not installed by Hedgecock Supply—had a deflection of two to three inches. The unevenness of the substrate forced Hedgecock Supply to place the clips at a distance greater than that recommended by Alumax. Had the clips been placed at the recommended distance, the metal would have bowed, making it impossible for the panels to interlock. Unsightly rippling of the metal occurred as a result of the clip placement, and Adams-White thereafter refused to pay the Hedgecock Supply account.

Hedgecock Supply brought this action seeking payment for labor and materials supplied to Adams-White. Defendants asserted a counterclaim for improper installation of the roofing panels. At trial, a directed verdict was granted in favor of Joanne White, who was not a partner in Adams-White. The jury awarded Hedgecock Supply $111,251.50 for the balance due on the open ac-

count, and awarded the remaining defendants (Mr. Adams, Dr. White, and Adams-White) $1,500 on their counterclaim. Pursuant to the parties' stipulation, the trial judge decided the matter of finance charges and attorneys' fees, awarding Hedgecock Supply $23,223.74 in finance charges and $16,462.73 in attorneys' fees. Mr. Adams, Dr. White, and Adams-White appeal.

II

[1] By their first assignment of error, defendants contend that the trial judge erred in limiting the use of an exhibit and in refusing to admit that exhibit in evidence.

A. *The Exhibit*

The exhibit in dispute was an interoffice memorandum written by Lyle Otto to Dave Smith, both Alumax employees. Before this suit was initiated, Hedgecock Supply had Mr. Otto inspect the Adams-White buildings because the defendants, asserting that the roofing panels were defective, sought a reduction in price. The memorandum contained the following statements relevant to this appeal:

> . . . George Tippett informs me that Hedgecock Supply was supplied with the Sweet's brochures, as well as the current price book [which contained information on installation], but Jim Hedgecock claims he was not, and a verbal discussion with the installer indicates that the clip spacing might be as much as 3 [feet] o.c. [on center]. *I informed Jim Hedgecock that if the clips are 3 [feet] o.c. he can expect problems with the first serious windstorm.* . . .

(Emphasis added.)

The memorandum indicated that copies were to go to Jim Hedgecock, the manager of Hedgecock Supply, and to George Tippett, Hedgecock Supply's local Alumax representative. Defendants attempted to use the memorandum during cross-examination of Mr. Hedgecock, and tried to introduce it during their voir dire examination of Mr. Tippett, without success.

B. *Limiting Use of Exhibit to Refresh Recollection on Cross-Examination of Jim Hedgecock*

On cross-examination, defendants asked Jim Hedgecock whether he was aware that the roofs were "subject to being

blown off" as a result of the clip placement. When Mr. Hedgecock said he was not, defendants asked him whether he received a document from Alumax to that effect. Mr. Hedgecock said he did not. The memorandum was marked as an exhibit and handed to Mr. Hedgecock to read. Defendants then attempted to ask Mr. Hedgecock about its *content*, but the trial judge sustained a *general objection*, ruling that the memorandum could be used "right now" only to refresh Mr. Hedgecock's recollection.

As a matter of trial tactics, refreshing recollection is generally considered a direct-examination technique, and impeachment is generally considered a cross-examination technique. This may explain defendants' contention on appeal that the judge's ruling was in error since they sought to use the memorandum (1) to show that Mr. Hedgecock was aware of potential problems arising from the clip placement, and (2) to impeach him regarding that awareness since he denied receiving the memorandum. Ordinarily, these are permissible purposes under the rules of evidence. However, we hold, under the circumstances of this case, that the judge's ruling was proper, since defendants attempted to question Mr. Hedgecock about the *contents* of a document which he said he had never received.

As an initial matter, in light of our conclusion, discussed below, that the judge's ruling was a correct response to a "best evidence" problem, we decline to address the parties' arguments related to the exhibit's hearsay characteristics. The sustaining of a general objection by which evidence is excluded will not be found as error on appeal so long as " 'there is *any purpose for which the evidence would be inadmissible.*' " *State v. Gardner*, 311 N.C. 489, 512-13, 319 S.E. 2d 591, 606 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985) (citation omitted) (emphasis added).

The best evidence rule is implicated only when the *content* of a writing is in question. *See generally* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 1002-1004 (1988); *United States Leasing Corp. v. Everett, Creech, Hancock & Herzig*, 88 N.C. App. 418, 423, 363 S.E. 2d 665, 668 (1988), *disc. rev. denied*, 322 N.C. 329, 369 S.E. 2d 364 (1988). Under the rule, a document is considered the "best evidence" of its contents; secondary evidence of the contents will generally be excluded if the document itself can be produced. *See id.*

The best evidence rule does not prevent a fact which exists independently of a writing, but which is related to it in some way, to be proved through evidence other than the writing itself. *See, e.g., Johnson v. Hooks,* 21 N.C. App. 585, 589, 205 S.E. 2d 796, 799 (1974), *cert. denied,* 285 N.C. 660, 207 S.E. 2d 754 (1974); Brandis, 2 *Brandis on North Carolina Evidence,* Sec. 191 (1988). Thus, for example, defendants were free to ask Mr. Hedgecock questions about his knowledge of problems with the clip placement. However, if a party *elects* to prove an independent fact through the content of a writing, the best evidence rule applies. Thus, if the writing cannot be introduced in evidence, the rule prohibits inquiry into its contents to establish the fact. *See* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 1002, *Comment* (1988); *Brandis,* Sec. 191; *Whitley v. Daniels,* 28 N.C. 480, 482 (1846). *See also State v. Davis,* 284 N.C. 701, 716, 202 S.E. 2d 770, 780 (1974), *cert. denied,* 419 U.S. 857, 42 L.Ed. 2d 91 (1974) (tape recording). Of course, if the related writing is inadmissible, a party may still attempt to establish the independent fact through evidence other than the writing.

In the case before us, the best evidence rule was implicated when defendants handed Mr. Hedgecock the memorandum and asked him what it said. Because Mr. Hedgecock denied receiving the memorandum from Alumax, the exhibit was not authenticated; as a result, it was not admissible, and Mr. Hedgecock could not testify about its contents. *See generally* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 901(a) (1988); *Concrete Serv. Corp. v. Investors Group, Inc.,* 70 N.C. App. 678, 683, 340 S.E. 2d 755, 759 (1986), *cert. denied,* 317 N.C. 333, 346 S.E. 2d 137 (1986). We emphasize again that defendants were free to try to establish Mr. Hedgecock's awareness of potential problems and receipt of the memorandum through oral testimony, since these facts existed independently of the document itself. *See Stickel v. Stickel,* 58 N.C. App. 645, 647, 294 S.E. 2d 321, 323 (1982). We conclude that because defendants asked the witness what the exhibit *said,* the trial judge properly limited its use to refreshing recollection. *See State v. Cobbins,* 66 N.C. App. 616, 622, 311 S.E. 2d 653, 658 (1984) (best evidence rule is not at issue when document is used merely to trigger witness' memory and document is not offered in evidence).

Even assuming, *arguendo,* that the trial judge erred in limiting use of the exhibit, defendants failed after the court's ruling to

make an offer of proof to demonstrate the significance of the excluded testimony; therefore they can show no prejudice by the exclusion. *See* N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 43(c) (1983); N.C. Gen. Stat. Sec. 8C-1, R. Evid. 103(a)(2) (1988); *Currence v. Hardin*, 296 N.C. 95, 99, 249 S.E. 2d 387, 390 (1978); *Wright v. Blue Bird Cab Co.*, 31 N.C. App. 525, 530, 230 S.E. 2d 206, 209 (1976).

C. *Attempted Introduction of Exhibit During Voir Dire Examination of George Tippett*

[2] Defendants tried to introduce the memorandum in evidence during voir dire examination of their adverse witness, George Tippett. The trial judge responded by observing that Mr. Tippett testified that "he didn't even remember getting [the memorandum] and if he did, he just threw it away." Defendants characterize the judge's statements as a denial of their motion; however, in our view, the trial judge never made a final ruling and was simply commenting on the witness' statement. *See Munchak Corp. v. McDaniels*, 15 N.C. App. 145, 147, 189 S.E. 2d 655, 657 (1972) (appeal cannot lie from oral expression of opinion by trial judge).

Although failure to rule is "an abdication of the judicial function," *State v. Chapman*, 294 N.C. 407, 414, 241 S.E. 2d 667, 672 (1978), in most cases that failure does not rise to the level of reversible error. *State v. Hicks*, 79 N.C. App. 599, 601, 339 S.E. 2d 806, 807 (1986). Nor does it here. Defendants did not try to introduce the exhibit again, and never sought a final ruling on its admissibility. "In cases where a more definite ruling is desired, counsel should request the court to make the ruling more clear." *Id.* at 601, 339 S.E. 2d at 808. Accordingly, we hold that in the circumstances of this case, the trial judge did not commit reversible error by failing to rule on defendants' motion.

D. *No Prejudice Shown*

[3] In any event, defendants can show little, if any, prejudice in the limitation or exclusion of the memorandum. First, admission of the memorandum arguably would have been of greater benefit to Hedgecock Supply than to defendants because the memorandum concluded that the panels were correctly installed given the conditions and that problems with the roofs were caused by an uneven substrate. Therefore, defendants fail to demonstrate a "reasonable probability" that the outcome would have been more

favorable to them had the memorandum been admitted in evidence. *See Mayberry v. Charlotte Coach Lines, Inc.*, 260 N.C. 126, 130, 131 S.E. 2d 671, 675 (1963).

Second, and more important, defendants show no prejudice since the jury decided in their favor on their counterclaim for improper installation of the roofs. *See Wooten v. Cagle*, 268 N.C. 366, 370, 150 S.E. 2d 738, 740 (1966) (no prejudice by exclusion of evidence as to issue on which party prevailed); *accord Thomasson v. Brown*, 66 N.C. App. 683, 686, 311 S.E. 2d 628, 630 (1984). The jury awarded defendants $1,500, the amount an expert testified it would cost to remedy the problems with the roof on one of the buildings. Because the award was in accord with the evidence presented, we are unpersuaded that the jury might have awarded defendants a greater amount hand the memorandum been admitted.

This assignment of error is overruled.

III

[4] Defendants next contend that the trial judge erred in awarding attorneys' fees and finance charges to Hedgecock Supply. Defendants' primary argument is that the agreement between Dr. White and Hedgecock Supply was ineffective to authorize the awards. Defendants do not challenge the judge's computation.

A. *The Agreement*

In June 1986, in response to a request by an agent of Adams-White to charge building materials to the partnership, Hedgecock Supply sent Dr. White a new account credit application. Dr. White and his wife, Joanne (who was not a partner in Adams-White), completed and signed the application. That application provided for finance charges and attorneys' fees in the event the account was not paid. When Dr. White was informed that the account would be in his and his wife's name, he asked that it be opened instead in the name of Adams-White, and sent a letter personally guaranteeing payment of the partnership account.

Thereafter, supplies purchased by Adams-White were charged to this account, and periodic statements were mailed to Adams-White at Dr. White's address. Payments on the account were made with checks drawn by Adams-White. When payments ceased, Hedgecock Supply mailed a letter to Dr. White notifying him of its intention to enforce the attorneys' fees provision if the

outstanding balance on the account, including finance charges, was not paid within five days. No payments were made on the account.

B. *Attorneys' Fees*

Limited authority to impose attorneys' fees upon a debtor, otherwise generally prohibited in North Carolina, is provided by N.C. Gen. Stat. Sec. 6-21.2 (1986). Two requirements must be met before a party may recover attorneys' fees under that section. First, there must be some written "evidence of indebtedness" setting out the obligation to pay attorneys' fees in the event the debt is collected through an attorney. *Id.* Second, the debtor must be notified in writing that the attorneys' fees provision will be enforced if the outstanding balance is not paid within five days. N.C. Gen. Stat. Sec. 6-21.2(5).

Defendants urge us to hold that Section 6-21.2 does not permit an award of attorneys' fees here since, they argue, Dr. White entered into two separate agreements with Hedgecock Supply, neither of which provided "written evidence of indebtedness." The "first" agreement was the written application signed by Dr. and Mrs. White. Defendants assert that that agreement was not evidence of *indebtedness* because the Whites never used the account established by the agreement. The purported "second" agreement, through which the labor and supplies were acquired, was an *oral* agreement with Dr. White and Adams-White, they contend, and therefore cannot serve as *written* evidence of indebtedness. Defendants further argue that the partnership was not properly notified under Section 6-21.2 since Hedgecock Supply mailed the notice to Dr. and Mrs. White at their home address, not to Adams-White. We find these arguments unpersuasive.

It is fundamental that "[e]very partner is an agent of the partnership for the purpose of its business," and that a partnership is generally bound by acts of a partner done to further the business of the partnership. N.C. Gen. Stat. Sec. 59-39(a) (1982). However, "[t]he mere fact that a partnership ultimately benefits from a contract made by a partner *in his own name* does not create a partnership obligation." *Brewer v. Elks*, 260 N.C. 470, 473, 133 S.E. 2d 159, 162 (1963) (emphasis added).

A partnership will be liable for a contract entered in a partner's own name if: (1) "the partner was *acting on behalf of the*

partnership in [entering the contract] and was authorized to so act"; or (2) "the partners, with knowledge of the transaction, thereafter *ratified the acts* of their partner." *Id.* at 472-73, 133 S.E. 2d at 162 (emphasis added). Although only one of these criteria is necessary to establish partnership liability, both were satisfied in the case before us.

The evidence at trial amply demonstrated that Dr. White opened the account for Adams-White, not as an individual account with his wife. Moreover, defendants admitted in their answer, and stipulated in a pre-trial order, that Dr. White *acted on behalf of* Adams-White in opening the account. Both the admission and stipulation conclusively establish the matter; defendants are thereby bound on this issue and may not now take an inconsistent position. *See Champion v. Waller*, 268 N.C. 426, 428, 150 S.E. 2d 783, 785 (1966) (admission); *Rural Plumbing & Heating, Inc. v. H.C. Jones Construction Co., Inc.*, 268 N.C. 23, 31, 149 S.E. 2d 625, 631 (1966) (stipulation). Furthermore, Dr. White's actions were *ratified* by Adams-White when the partnership continued to order and pay for supplies on the account. *See generally Stallings v. Purvis*, 42 N.C. App. 690, 695, 257 S.E. 2d 664, 667 (1979).

We conclude that the credit application signed by Dr. White was sufficient "evidence of indebtedness" under Section 6-21.2 to obligate Adams-White to pay attorneys' fees. *Accord W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 422, 360 S.E. 2d 814, 816 (1987). We further conclude that Hedgecock Supply complied with the notice requirement of Section 6-21.2 by notifying a partner of Adams-White (Dr. White) that the attorneys' fees provision of the agreement would be enforced. *See* N.C. Gen. Stat. Sec. 59-42 (1982) (notice to any partner regarding partnership affairs operates as notice to the partnership). Accordingly, we hold that the trial judge properly awarded Hedgecock Supply attorneys' fees on the outstanding balance of the Adams-White account.

C. *Finance Charges*

Finance charges up to 18% per year may be imposed upon an overdue open-credit account so long as there is a prior agreement to that effect, or, if there is no prior agreement, the debtor is given notice before the charges are imposed. *See* N.C. Gen. Stat. Sec. 24-11(a) (1986); *Hyde Ins. Agency, Inc. v. Noland*, 30 N.C. App. 503, 506, 227 S.E. 2d 169, 171 (1976). Defendants, relying on their

"two agreements" theory, contend that there was no evidence that the Adams-White partnership agreed to pay interest on amounts overdue.

In the case before us, the credit application completed and signed by Dr. White contained an express provision for finance charges in the amount of 1.5% per month (or 18% per year) on balances more than 30 days past due. In light of our conclusion that Dr. White acted on behalf of Adams-White in entering the agreement with Hedgecock Supply, we hold that the finance charges were properly imposed on the Adams-White account.

IV

In summary, we hold that the error, if any, in limiting or excluding the exhibit was not prejudicial, and that the trial judge properly awarded attorneys' fees and finance charges to plaintiff Hedgecock Supply. Accordingly, the judgment is

Affirmed.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, APPELLEE v. NANTAHALA POWER AND LIGHT COMPANY, APPELLANT

No. 8810UC356

(Filed 17 January 1989)

Utilities Commission § 6— rates adjusted in rulemaking proceeding—error

The Utilities Commission erred by adjusting Nantahala's rates to reflect tax savings from the Tax Reform Act of 1986 in a rulemaking process. There is no statutory authority for the proposition that rates may be adjusted by some other method beyond those set out in N.C.G.S. § 62-133, general rate cases, or N.C.G.S. § 62-136 and N.C.G.S. § 62-137, a complaint proceeding; furthermore, *Utilities Commission v. Edmisten, Atty. General*, 294 N.C. 598 (*Edmisten III*), does not approve the rulemaking process for adjudicating rates.

Judge SMITH concurred in this opinion prior to 31 December 1988.

APPEAL by defendant from the North Carolina Utilities Commission order dated 6 November 1987. Heard in the Court of Appeals 5 October 1988.

On 22 October 1986, the Tax Reform Act of 1986 (TRA-86) was signed into law by President Reagan. One effect of the TRA-86 was to lower corporate tax rates. Other effects of the TRA-86 were to retroactively eliminate the investment tax credits as of 1 January 1987, and to require construction related costs to be capitalized and recovered through depreciation for tax purposes.

On 23 October 1986, the Commission issued an Order Initiating Investigation. In this Order, the Commission noted which types of utilities were subject to the Order (Nantahala was subject) and then ordered in part:

> 2. That effective January 1, 1987, each and every utility subject to the provisions of this Order shall place in a deferred account the difference between revenues billed under rates then in effect, including provisional components thereof, and revenues that would have been billed had the Commission in determining the attendant cost of service based the federal income tax component thereof on the Internal Revenue Code as now amended by the Tax Reform Act of 1986, assuming all other parameters entering into the cost of service equation are held constant.
>
> 3. That each and every utility subject to the provisions of this Order shall determine the dollar amount of the impact of the Tax Reform Act of 1986 on its annual level of income tax expense included in its North Carolina jurisdictional cost of service consistent with ordering paragraph No. 2 above and file same with the Chief Clerk of the Commission no later than November 30, 1986. Said filing shall include all workpapers and a statement of all assumptions made in complying with the foregoing requirements. Further, each affected utility in conjunction with the foregoing shall file proposed rate adjustments giving effect to the reduction in its cost of service arising from the Tax Reform Act of 1986. The Commission will consider any additional information or comments any party may wish to offer.

After the Order Initiating Investigation was handed down, the Public Staff of the North Carolina Utilities Commission filed a motion requesting the utilities subject to the order to determine the dollar impact of the TRA-86 on their rates according to the

company's last general rate case. Southern Bell Telephone and Telegraph Company filed a response in opposition to the motion of the Public Staff. The Commission adopted the motion of the Public Staff.

On 15 January 1987, Nantahala filed a compliance in accordance with the Commission's orders. In its compliance statement, Nantahala strenuously objected to a flow through of all tax rate reduction to its customers because Nantahala's most recent rate adjustment was 23 December 1983. Nantahala argued that its rate of return was only 7.75% (before an adjustment was made to reflect the change in income tax expense) while the authorized return was 12.52%. Nantahala contended its rate of return was low because of increases in costs and expenses since its last rate adjustment. Therefore, Nantahala claimed that it should not have to pass all of the reduction from the TRA-86 on to its customers.

The Public Staff filed a report on 1 May 1987 to evaluate the impact of the TRA-86. In response to the argument by several utilities that their test year was too old to represent current revenues and expenses, the Public Staff stated, "[t]his is a specious argument. While it is true that subsequent events are not considered in determining the impact of the TRA86, neither were these events considered in establishing the current rates." The Public Staff further argued that to take into account changes which occurred after the last general rate case would be "to introduce unaudited, unannualized, piecemeal increases in expenses into the scenario." The Public Staff felt the only "fair" way to look at changes subsequent to the last rate case would be to have a general rate case and therefore it was not necessary to look at recent changes in expenses in conjunction with the TRA-86.

On 12 May 1987, the Commission handed down an Order Requiring Data And Comments. In this Order, the Commission requested calculations and supporting workpapers of the flowback of excess deferred federal income taxes. The Commission also requested the utilities to file comments on their opinion "concerning the proper rate making treatment to be afforded the excess deferred income taxes."

The final order from the Commission dated 20 October 1987 and modified on 6 November 1987 required Nantahala to "calculate rate reductions related to tax savings resulting from the Tax

Reform Act of 1986 . . ." and that new tariffs be filed reflecting the calculated rate reductions.

On 30 December 1987, this Court issued a Writ of Supersedeas staying the Commission's 20 October 1987 and 6 November 1987 orders. From this order, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jo Anne Sanford, for the State.

North Carolina Utilities Commission Executive Director Robert P. Gruber, by Chief Counsel Antoinette R. Wike and Staff Attorneys Paul L. Lassiter and A. W. Turner, Jr., for appellee Public Staff—North Carolina Utilities Commission.

Hunton & Williams, by Edward S. Finley, Jr., for appellant Nantahala Power and Light Company.

ORR, Judge.

The dispositive issue in this case centers on the type of proceeding used by the Utilities Commission in issuing the Orders from which Nantahala appeals. The original document filed by the Commission on 23 October 1986 was captioned "Order Initiating Investigation." Nowhere in the Order does the Commission refer to any statute upon which the Order is based or upon which the action to be taken by the Commission is authorized. However, the designation, "Docket No. M-100, Sub 113" indicates that the Commission viewed this case as a rulemaking proceeding from the outset because that docket number is assigned to rulemaking actions.

The body of the Order notes the passage of the Tax Reform Act of 1986 and the generally favorable effect that the reduction will have on utilities. It goes on to say, "It is incumbent upon this Commission to take the appropriate action as required so as to preserve and flow through to ratepayers, *as a reduction to public utility rates*, any and all cost savings realized in this regard . . . ." (Emphasis added.) It is therefore abundantly clear that the ultimate purpose of the Commission's action was to reduce utility rates. The decretal portion of this Order concluded in part by requiring "each and every utility subject to the provisions of this Order shall determine the dollar amount of the impact of the Tax Reform Act of 1986 . . . ." Further, it was ordered that "pro-

posed rate adjustments giving effect to the reduction in its cost of service . . ." arising from the TRA-86 should be filed.

The final orders, as previously noted, required Nantahala to "calculate rate reductions related to tax savings resulting from the Tax Reform Act of 1986 . . . ." Nantahala was also ordered to file new tariffs reflecting the calculated rate reductions.

Appellant Nantahala contends that the procedure from which these Orders arise was without proper statutory authority in that a general rate case procedure as set forth in G.S. 62-133 should have been used. The Appellees, on the other hand, initially contend that the rulemaking procedure used by the Commission pursuant to G.S. 62-31 was proper and if not, then the procedure effectively complied with G.S. 62-136 and G.S. 62-137 which is described as a "complaint proceeding."

We begin by examining the statutorily authorized ways by which rates may be imposed, reduced, or raised. Article 7, "Rates of Public Utilities," sets out the various sections dealing with the issue of rates. G.S. 62-130 states, "[t]he Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction." G.S. 62-131 requires that *every* rate made, demanded or received by a public utility be "just and reasonable."

G.S. 62-133 entitled, "How rates fixed," sets out the procedure by which all general rate cases are handled. This section lists the various duties the Commission must perform when it fixes general rates for large utilities.

> The statute then provides that in fixing rates for certain public utilities (including power companies), the Commission, among other things, shall ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, estimate the utility's revenue under present and proposed rates, ascertain the utility's reasonable operating expenses, and fix a rate of return on the fair value of the property as will enable the utility by sound management to produce a fair profit for its stockholders.

Utilities Commission v. Edmisten, Atty. General, 30 N.C. App. 459, 469, 227 S.E. 2d 593, 599 (1976), *rev'd on other grounds*, 291 N.C. 451, 232 S.E. 2d 184 (1977).

G.S. 62-136 is captioned in part "Investigation of existing rates; changing unreasonable rates . . . ." This section anticipates a hearing initiated either by the Commission or upon complaint, wherein the existing rates are examined to determine if they are "unjust, unreasonable, insufficient or discriminatory" and, if so, the fixing of new rates. As noted in *Utilities Commission v. Light Co. and Utilities Comm. v. Carolinas Committee*, 250 N.C. 421, 431, 109 S.E. 2d 253, 261 (1959) by Justice Moore:

> G.S. 62-72 [now G.S. 62-136] provides as follows: 'Whenever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint, finds that the existing rates in effect and collected by any public utility for any service, product, or commodity, are unjust, unreasonable, insufficient or discriminatory, or in anywise in violation of any provision of law, the Commission shall determine the just, reasonable and sufficient rates to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.' And it is further provided in G.S. 62-26.5 [now G.S. 62-80] that, 'The Commission may at any time upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it.'
>
> A hearing pursuant to the foregoing provisions of G.S. 62-72 [62-136] and G.S. 62-26.5 [62-80] which involves a single rate or a small part of the rate structure of a public utility is called a 'complaint proceeding.' It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure of the utility and may be resolved without involving the procedure outlined in G.S. 62-124 [now 62-133], and does not justify the expense and loss of time involved in such procedure. In many instances the complainants are unable to bear such expense, in others the Utility might suffer irreparable loss by the delay involved.

The scope of a G.S. 62-136 hearing, however, need not be a full general rate case action as set forth in G.S. 62-133. G.S. 62-

137, "Scope of rate case," specifically authorizes the Commission "[i]n setting a hearing on rates upon its own motion, upon complaint, or upon application of a public utility . . ." to *either* declare it to be a general rate case *or* to confine the inquiry to "the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate of return." "It is within the province of the Commission to determine whether a hearing is a general rate case or a complaint proceeding. Indeed it is necessary as a matter of procedure that such determination be made in every hearing involving the establishment, *modification*, or revocation of rates." *Utilities Comm. v. Light Co. and Utilities Comm. v. Carolinas Comm.*, 250 N.C. at 431-32, 109 S.E. 2d at 261. (Emphasis added.)

The "complaint proceeding" as set forth in G.S. 62-136 and the provisions of G.S. 62-137 still focuses on the issue of reasonableness of the rates, and as such the ultimate result must address that issue. G.S. 62-136 says in part that after a finding that "existing rates . . . are unjust, unreasonable, insufficient, or discriminatory or in violation of any provision of the law, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates . . ." and shall fix the same. G.S. 62-137 also includes "reasonableness" as a standard of determination.

In reviewing the entire scope of Article 7, there are no other provisions dealing with the procedure by which the Commission can set or adjust rates other than G.S. 62-133, G.S. 62-136, and G.S. 62-137 (general rate cases or complaint proceedings). Appellees contend that the adjustment of rates as in the case *sub judice* is permitted via rulemaking under G.S. 62-31. The statute reads, "The Commission shall have and exercise full power and authority to administer and enforce the provisions of this Chapter, and to make and enforce reasonable and necessary rules and regulations to that end." In support of this contention, appellees cite *Utilities Commission v. Edmisten, Attorney General*, 294 N.C. 598, 242 S.E. 2d 862 (1978) (*Edmisten III*) for that proposition. We do not agree.

In *Edmisten III*, the utility applied for authority to increase rates via a surcharge based upon the perceived need to expand

exploration efforts for natural gas. The Commission in response to the application set up a rulemaking investigation limited to "the feasibility of increasing the supplies of natural gas to North Carolina." *Id.* at 600, 242 S.E. 2d at 864. The Commission then conducted hearings and took evidence on that question.

Out of this investigation, the Commission issued an Order adopting Commission Rule R1-17(h). This rule *did not* grant any specific increase in rates. Rather, "it established by rule certain procedures for participation by the utilities in exploration and drilling programs *and* for making applications for rate adjustments to recover costs and account for revenues associated with such programs." *Id.* at 601, 242 S.E. 2d at 865. (Emphasis added.) Later, upon application by a utility for such a rate adjustment pursuant to the Rule, the *Edmisten III* case was commenced.

It should be noted that in *Edmisten III* a rule was first adopted. Also, upon approval by the Commission of an exploration project:

> A utility may recover the costs of its Commission-approved projects for the previous six months reporting period by filing for an increase in its rates through a tracking charge. Such increases are limited, however, to the amount by which reasonable costs of the programs exceed revenues received from them. In the event revenues received should exceed reasonable costs, the utility must file to adjust its rates downward by an amount sufficient to amortize these excess revenues over the following six months period.

Edmisten III, 294 N.C. at 604, 242 S.E. 2d at 866.

We thus note that in *Edmisten III*, there could be an increase in rates or a reduction based upon the evidence. In addition, "the requested rate increases will not result in increasing the applicant company's rate of return over the rate of return most recently approved for that company in a general rate case." *Edmisten III*, 294 N.C. at 607, 242 S.E. 2d at 868. Finally, the opinion points out that the issue in *Edmisten III* came up on appeal based upon G.S. 62-90(c), "Right of appeal; filing of exceptions," and that G.S. 62-137 "is inapplicable to proceedings conducted under G.S. 62-90(c) . . . ." *Edmisten III*, 294 N.C. at 608, 242 S.E. 2d at 869.

All of the factors noted above distinguish *Edmisten III* and its applicability to the case *sub judice*. First of all, in this case, there was the expressed intent in the Commission's original order to reduce rates; secondly, there was no rule actually promulgated, simply an order mandating the reduction in rates. Thirdly, there was no across-the-board application as in the rule in *Edmisten III*. In other words, there was no provision that if tax rates went up the utilities could raise rates just as they were lowered by the reduced tax rates. We conclude therefore that *Edmisten III* does not approve the rulemaking process for the purpose of adjusting rates, nor do we find any statutory authority for the proposition that rates may be adjusted by some other method beyond those set out in G.S. 62-133 or G.S. 62-136 and G.S. 62-137.

In this case, the Commission made no findings as to the reasonableness of Nantahala's then existing rates, either before or after the passage of the TRA-86. Nor does the Commission make any findings as to the reasonableness of the rates after the impact of its order requiring tax savings to be passed along to the customers. Under either a general rate case or a complaint proceeding, it is incumbent on the Commission to determine whether existing rates and proposed rates are "just, reasonable, and sufficient." *See* G.S. 62-136. Failure to do so constitutes reversible error.

We have reviewed the citations by appellees as to authority for allowing the Commission to adjust rates without following the requirements of G.S. 62-133 or G.S. 62-136. Those citations have no application to the issue before us.

Appellees attempt to circumvent the requirements of G.S. 62-133 and G.S. 62-136 by contending that a complaint case can be handled as a rulemaking proceeding thereby denying the appellant a trial-type hearing as would be required under a general rate case or a complaint proceeding. As pointed out previously, there is no authority either in our statutes or in the case law that allows rates to be adjusted by a rulemaking process. That determination must be made in either a general rate case or in a complaint proceeding where the issue of reasonableness of the rates is adequately determined and set out by the Commission in findings of fact and conclusions of law.

As noted in the dissent filed in this case by Commissioner Tate:

> The overall regulatory scheme in this state provides that rates shall be set in general rate cases or in complaint cases (G.S. 62-133, G.S. 62-134 and G.S. 62-137). This refund procedure is *neither*, and yet the Majority has decreased the rates for every utility in North Carolina in one quick stroke. The North Carolina Supreme Court has given us specific directions:
>
> 'The basic theory of utility rate making, pursuant to G.S. 62-133, is that rates should be fixed at a level which will recover the cost of the service to which the rate is applied, plus a fair return to the utility. A utility company may not properly be denied the right to charge such a rate, for the present use of its service, for the reason that, in a preceding month, the utility earned an excessive rate of return due to the fact that an expense which it was expected to incur in such previous month did not materialize. For example, rates for use of a utility's service are set at a level which will enable the company to pay, among other items, its anticipated tax expense. *If by virtue of some change in the tax law, it develops that the company did not incur the anticipated expense for the payment of which it collected revenues in prior months, its rates for present and future service may not be cut, on that account, below what it otherwise would be entitled to charge for the present or future service.*" (Emphasis added.) *North Carolina Utilities Commission v. Edmisten*, 291 N.C. 451, 468-69, 232 S.E. 2d 184 (1977).'
>
> The court's instructions could not be more specific. The Commission simply cannot decrease one item of expense except after a full evidentiary hearing in a complaint case or a rate case. Of course, no one's rights are prejudiced when a utility volunteers to reduce its rates.
>
> I acknowledge that the Tax Reform Act of 1986 (TRA-86) resulted in unanticipated revenues due to the lowering of corporate tax rates. I also acknowledge that it would be *equitable* for the utilities to return this unexpected windfall to its customers, and a number have voluntarily agreed to do so. But the Legislature has not seen fit to provide the Utilities

Commission with equitable jurisdiction, nor have any court decisions allowed us that discretion. It is not enough to find that our Orders are fair—they must also be lawful.

The Orders of the Utilities Commission as applied to Appellant are hereby reversed.

Reversed.

Judges GREENE and SMITH concur.

Judge SMITH concurred in this opinion prior to 31 December 1988.

STATE OF NORTH CAROLINA v. GARY ALTON CLINDING

No. 8810SC355

(Filed 17 January 1989)

1. **Criminal Law § 76.6— testimony in another trial amounting to confession—sufficiency of findings as to admissibility**

The trial court made adequate findings of fact to support his ruling admitting defendant's testimony in the earlier trial of his brother which amounted to a confession of the crime charged in this case.

2. **Criminal Law § 75.13— confession in another trial—confession made on attorney's advice—confession not coerced**

Defendant's testimony in his brother's earlier trial which amounted to a confession of the crimes charged in this case was not a coerced confession, even though the testimony was given as a result of defendant's own attorney's advice to cooperate with the authorities, since the attorney was not a person in authority in the sense of having defendant in his control or custody.

3. **Kidnapping § 1.3— kidnapping and robbery arising from same incident—instructions on kidnapping proper**

Where there was evidence that defendant forced five employees to the back of a store and into a freezer, retrieved one employee and forced him from the freezer and into the office where he was forced to open the safe, guided the employee back to the freezer, informed all five employees that they would be shot if they left the freezer, and committed all the acts with the use of a deadly weapon, the trial court's instruction that the State must prove beyond a reasonable doubt that defendant confined, restrained or removed the victims from one place to another for the purpose of facilitating an armed robbery was sufficient for the jury to understand that it must find that the confinement or

removal was separate and apart from the robbery in order to find defendant guilty of kidnapping.

4. **Kidnapping § 1.3— instruction on lesser offense erroneous—defendant not prejudiced**

Though the trial court erred in instructing, over objection, that defendant might be convicted of kidnapping for the purpose of facilitating armed robbery, as charged, if the jury found that the kidnapping was for the purpose of facilitating common law robbery, defendant was not prejudiced, since the erroneous instruction was on a lesser included offense; essentially the same evidence was required to prove the State's theory and the theory in the erroneous instruction; and defendant's confession along with the positive eyewitness testimony of five people allowed for no reasonable possibility that a different result would have been reached at trial had the error not been committed.

5. **Kidnapping § 1.3— removal and confinement alleged in indictment—instruction on restraint not prejudicial**

There was no merit to defendant's contention that the trial court committed plain error in instructing the jury on restraint when the indictment alleged only removal and confinement as theories of kidnapping, since evidence of defendant's guilt was overwhelming, and there was no reasonable possibility that a different result would have been reached had the instruction not been given.

APPEAL by defendant from *Fountain, George M., Judge.* Judgment entered 20 November 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 31 October 1988.

Attorney General Lacy H. Thornburg, by Associate Attorneys General Teresa L. White and Grayson L. Reeves, Jr., for the State.

J. Randolph Riley for defendant-appellant.

JOHNSON, Judge.

Defendant appeals from his convictions of robbery with a dangerous weapon and four counts of second degree kidnapping. He was sentenced to forty-two years' imprisonment.

The State's evidence tended to show the following: On the evening of 28 September 1986 at around 11:00 p.m., John Johnson, assistant manager of the Wendy's establishment on Western Boulevard in Raleigh, North Carolina was approached by a man who forced him to get onto the floor. Johnson and four other employees, Susan Worthington, Cynthia Oates, Ronald Wyatt and Linda Thompson were then taken to the back of the store and

placed into the freezer by defendant and an accomplice who was providing instructions. After about two minutes had elapsed, defendant and the accomplice forced Johnson from the freezer and took him into the office where the safe was located. While held at gunpoint, Johnson opened the safe. Defendant then removed all the money and placed it into an employee's book bag. He then took Johnson back to the freezer and told him, along with the others, that they would be shot if they came out of the freezer.

Detective D. C. Williams of the Raleigh Police Department testified that he had his first meeting with defendant on 1 April 1987, after defendant had been arrested and was later taken to his office. He then attempted to advise defendant of his rights and to interview him. Defendant refused to sign a waiver but talked to Detective Williams about his activities of the previous week. This conversation was not taped, but Detective Williams took notes as the information was relayed to him, which he later read in open court. All of this information concerned a robbery of Roger's Food Mart, in connection with which defendant had been identified.

Detective Williams testified further that he had his second meeting with defendant on 13 April 1987 while defendant's attorney was present. Prior to this interview, which was tape recorded and later transcribed, defendant signed a waiver of his rights. Detective Williams, along with defendant's attorney, who explained the waiver to him, witnessed his signature.

At the trial of his brother, Lycoe Clinding, defendant testified on 30 June 1987 that he committed the 28 September 1986 robbery of Wendy's on Western Boulevard. He stated that he used a gun in the commission of this robbery which he pointed at a fellow while forcing him to open the safe. He also stated that he had been made no promises by the State in exchange for his testimony. A transcript of this testimony was admitted as evidence in defendant's own trial.

On appeal, defendant's first two Assignments of Error concern the admissibility of two statements which he contends were inculpatory. Although defendant refers to the statement he made to Detective Williams on 13 April 1987, the bulk of his argument relates to the testimony he gave on 30 June 1987 in his brother's trial, which was later admitted as evidence in his own trial.

[1] He first argues that the trial court failed to make adequate findings of fact showing the basis for admitting this testimony which amounted to a confession. We do not agree.

The general rule as stated in *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983) is that after conducting a *voir dire* hearing to test the admissibility of a defendant's confession, the trial judge should make findings of fact showing the basis for the ruling. Although it is the better practice to always find facts supporting the admissibility of the evidence, the procedure is not required where there is no conflict at all in the evidence or only immaterial conflicts. *Id.*

At the trial of this matter on *voir dire* examination, the trial court specifically found the following facts:

> [t]hat the Defendant was represented by Mr. George Hughes, an attorney of Wake County at the—at the times these alleged statements were made. That Mr. Hughes was diligent in his representation of the Defendant and learned that he had several other charges pending in addition to those for which he is now being tried. In his best judgment, it was to the best interest of the Defendant to cooperate with the State, and he communicated that fact to the Defendant.
>
> . . .
>
> The Defendant informed Mr. D. C. Williams, a police officer of the City of Raleigh, who attempted to read him his Miranda rights that he did not wish to hear those rights, that he was—that he knew what his rights were, and he had in fact been informed of his Miranda rights on one or more prior occasions when he has been arrested.
>
> . . .
>
> During the trial of his brother on April 30, 1987, the Defendant freely, voluntarily, and knowingly testified for the State, and his testimony has been transcribed.

Adhering to the rule set forth in *Lang*, we find that the trial judge made adequate findings of fact to support his ruling to admit the challenged statements. The court did not merely state a conclusion of law that this testimony was freely and voluntarily given, *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982), as de-

fendant alleges, but also found facts which demonstrated, at least in part, how this decision was reached.

[2] Defendant next contends that the trial court erred in admitting the transcript of his testimony given in his brother's trial as evidence in his own trial. He essentially contends that his confession was induced by promise or hope for reward, prohibited by *State v. Chamberlain*, 307 N.C. 130, 297 S.E. 2d 540 (1982). We disagree.

Defendant has failed to demonstrate how a "person in authority" induced him to confess by making promises. *State v. Fuqua*, 269 N.C. 223, 228, 152 S.E. 2d 68, 72 (1967). He argues that by following his own attorney's advice to cooperate with the authorities, his action in doing so became a coerced confession. We find such an argument untenable, and are guided by the reasoning set forth in *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975).

In *Thompson* the Court found that defendant's father, who was a police officer by profession, was not a " 'person in authority' in the sense of having defendant in his control or custody." *Id.* at 323, 214 S.E. 2d at 755. The Court was also influenced by the defendant's previous criminal activities, which indicated that the son was not that susceptible to being dominated by his father.

In the case *sub judice*, the "person in authority" is, according to defendant, his own attorney. It is obvious to us that the attorney had neither custody nor control over defendant but merely performed the role for which he was retained, to provide counsel. Defendant also stated in his own brief that he "had been released on bond previously in exchange for assistance to the police department in providing names and information about armed robberies." He was well acquainted with the legal system and was thus much less capable of being coerced than he suggests.

We therefore hold that the trial court was correct in overruling defendant's motion to suppress his confession.

[3] By his next three Assignments of Error defendant challenges the instructions given to the jury on the kidnapping charges. He first contends that the trial court erred in refusing to instruct that in order for defendant's acts of confinement to constitute kidnapping, they must have been separate, complete and independent of the robbery. We disagree. The leading case which de-

fendant cites in support of his position, *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978), is not helpful to him on this issue.

In *Fulcher*, a case involving kidnapping and crimes against nature, the Court stated that because certain felonies such as rape or armed robbery inherently include some degree of restraint of the victim, it was of the opinion that the Legislature did not intend to make such an inevitable restraint punishable as kidnapping pursuant to G.S. sec. 14-39. The Court recognized, on the other hand, that two or more offenses may emerge from the same course of conduct and stated that

> there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, *provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony.*

Fulcher at 524, 243 S.E. 2d at 352 (emphasis added).

In applying these principles to the facts, the Court found that the State's evidence clearly supported the jury's finding that the defendant bound the victims' hands and forced them to submit by threatening the use of a deadly weapon, thus restraining them for the purpose of committing a crime against nature. "The restraint of each of the women was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time." *Id.*

In the case *sub judice*, the trial court instructed the jury that

> the State has the burden of satisfying you from the evidence and beyond a reasonable doubt that Susan Worthington as to that particular case was over the age of 18—of 16 years and that the Defendant unlawfully confined her, restrained her or removed her from one place to another; and that if he did so, for the purpose of facilitating the commission of any felony—strike that. *If he did so for the purpose of facilitating the felony of robbery, then that would constitute second degree kidnapping.* The same rule applies as to Ronald Wyatt, Cynthia Oats (sic) and Linda Thompson.
>
> . . .

> Furthermore, the bill alleges that these four people were restrained and confined and removed from one place to another for the purpose of facilitating an armed robbery—the felony of armed robbery.

(Emphasis added.) This instruction is similar to the one given in *State v. Battle*, 61 N.C. App. 87, 300 S.E. 2d 276, *disc. rev. denied*, 309 N.C. 462, 307 S.E. 2d 367 (1983), an armed robbery case in which the trial court instructed that the State had the burden of proving beyond a reasonable doubt that the defendant removed the victim from one place to another for the purpose of facilitating flight after the commission of a felony.

On appeal, this Court overruled defendant's assignment of error based upon the trial court's failure to instruct the jury that the removal must have been separate and apart from that which is an inevitable feature of the commission of another felony. The court opined that since the trial court charged the jury in the language from the statute, the instruction "complied with the requirement of *Irwin* [*State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981)], that the jury find that the removal be separate and apart from the other felony in order to find him guilty of kidnapping." *Battle* at 93, 300 S.E. 2d at 279.

There is evidence in the case *sub judice* that defendant forced five employees to the back of the store and into a freezer; retrieved one employee and forced him from the freezer and into the office where he was forced to open the safe; guided that employee back to the freezer; and informed all five employees that they would be shot if they left the freezer. All of these acts were committed with the use of a deadly weapon.

We find that this evidence was sufficient to support the trial court's instruction as given. The court, as in *Battle*, instructed the jury with statutory language. *Fulcher*, at 524, 243 S.E. 2d at 352. This procedure complied with the *Irwin* directive that the jury must find that the removal is separate and apart from the other felony in order to find defendant guilty of kidnapping.

[4] Defendant next contends that the trial court erred in instructing, over objection, that defendant might be convicted of kidnapping for the purpose of facilitating armed robbery, as charged, if the jury found that the kidnapping was for the purpose of facilitating common law robbery, a theory not charged.

We note at the outset that the trial court erred in submitting this theory to the jury because it was not supported by the indictment. *State v. Odom*, 316 N.C. 306, 341 S.E. 2d 332 (1986); *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984). However, we find the error nonprejudicial.

We find *Brown* and *Odom* distinguishable from the instant case. In *Brown*, the indictment charged defendant with kidnapping by reason of moving the victim from one place to another for the purpose of facilitating rape. The trial court instructed the jury that the kidnapping was committed for the purpose of terrorizing the victim. In *Odom*, the indictment charged defendant with kidnapping for the purpose of facilitating rape and the trial court instructed the jury that the kidnapping was for the purpose of facilitating flight after committing rape.

In the case *sub judice* the trial court instructed the jury as follows: "But if you find the Defendant guilty of either armed robbery *or common law robbery* and find that the defendant kidnapped the person referred to in each charge for the purpose of facilitating that robbery, then you would return a verdict of guilty of second degree kidnapping." (Emphasis added.) The erroneous instruction was on a lesser included offense of that charged in the indictment. We find that this fact clearly distinguishes our case from *Brown* and *Odom*. Essentially the same evidence was required to prove the State's theory and the theory in the erroneous instruction, save the use of the dangerous weapon.

Moreover, in view of defendant's confession, along with the positive eyewitness testimony of five persons, we conclude that the error committed in this regard was harmless beyond a reasonable doubt. In our view there is no reasonable possibility that a different result would have been reached at trial had this error not been committed. *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966). Defendant's assignment of error is therefore overruled.

[5] Lastly, defendant contends that the trial court committed plain error in instructing the jury on restraint when the indictment alleged only removal and confinement as theories of kidnapping. Because the evidence of defendant's guilt in this case is overwhelming, to wit: the testimonies of five eyewitnesses, and a confession by the defendant explaining his involvement in the

crimes, suffice it to say that we do not believe that a different result would likely have been reached had this instruction not been given. *Odom, supra.*

It is for these reasons that in the trial of defendant's case we find

No error.

Chief Judge HEDRICK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. PETER GREENSPAN

No. 8815SC282

(Filed 17 January 1989)

1. **Extortion § 1— offer to refrain from pressing criminal charges in exchange for money—"threat" within meaning of extortion statute**

Defendant's action in making a telephone call in which he offered to refrain from pressing criminal charges in exchange for money amounted to threatening criminal prosecution and clearly came within the definition of "threat" proscribed by N.C.G.S. § 14-118.4, the extortion statute.

2. **Blackmail § 1; Extortion § 1— blackmail statute superseded by extortion statute**

The extortion statute, N.C.G.S. § 14-118.4, superseded the blackmail statute, N.C.G.S. § 14-118, since the extortion statute, enacted later, covered the same acts as the blackmail statute but provided a different penalty; therefore, defendant, who was charged with extortion under N.C.G.S. § 14-118.4, was indicted and tried under the proper statute.

3. **Extortion § 1— offer to refrain from pressing criminal charges in exchange for money—guilt of extortion victim no defense**

Where defendant called a person who had previously made harassing phone calls to him and indicated that he would not press charges if that person would pay him money, there was no merit to defendant's contention that there was no wrongful intent because he reasonably believed that the threatened party was guilty, since the victim's guilt of the crime of which he is accused is no defense to a charge of extortion; furthermore, it was no defense that defendant believed he was entitled to the property.

4. **Extortion § 1— instructions as to threat—no error**

There was no merit to defendant's contention in an extortion prosecution that the trial court expressed an opinion or stated an irrebuttable presumption in favor of the State when the court instructed that "[s]tating that one will ob-

tain arrest warrants for some alleged crime unless one is paid some money is a threat," since that was a correct statement of the law; moreover, defendant made no specific objection to that portion of the charge and failed to include an exception in the record.

5. **Criminal Law §§ 138.41, 138.42— sentence—good character—belief that conduct was legal—failure to find mitigating factors—no error**

The trial court in an extortion case did not err in failing to find in mitigation that defendant was a person of good character or had a good reputation in the community, and that he reasonably believed his conduct was legal, since defendant did not offer any evidence as to his reputation in the community; his character witness testified that she and defendant were "very good friends" and had known each other for only five months; and, though defendant testified to the contrary, the evidence indicated that he knew that a criminal prosecution could not be settled.

APPEAL by defendant from *Brannon (Anthony M.), Judge.* Judgment entered 4 September 1987 in Superior Court, ORANGE County. Heard in the Court of Appeals 24 October 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State.

Purser, Cheshire, Parker, Hughes & Dodd, by Joseph B. Cheshire V, for defendant-appellant.

PARKER, Judge.

Defendant was tried and convicted of extortion under G.S. 14-118.4.

Defendant brings forward three assignments of error. Defendant first contends that the trial court erred in denying his motion to dismiss for insufficient evidence. Defendant next contends that the trial court erred in portions of its charge to the jury. Defendant's final argument is that the trial court erred in failing to find certain statutory factors in mitigation of punishment.

The State's evidence tended to show the following. In late September or early October of 1986, defendant contacted the Chapel Hill Police Department to complain of harassing telephone calls. Defendant told the police that he had contacted the telephone company and the company traced five calls to a Chapel Hill address through the use of a pen register. Ali Mobarakeh, a dental student at the University of North Carolina, resided at that

address. Defendant previously had contacted the sheriff's office in Chatham County, where defendant resided, and the Chatham County authorities told defendant to take the matter to the Chapel Hill Police.

The police took no immediate action, but defendant continued to report that he was receiving harassing calls. On 14 January 1987, a meeting was arranged between defendant, Ali Mobarakeh, Morbarakeh's brother, and Lieutenant Arthur Summey of the Chapel Hill Police Department. The meeting was held to see if defendant could identify Mobarakeh's voice. Defendant identified Mobarakeh as the caller, and told Lieutenant Summey he wanted to wait overnight before signing an arrest warrant.

The next day, defendant called Mobarakeh and indicated that he would not press charges if Mobarakeh would offer him money. Mobarakeh refused, and he recorded defendant's call on his answering machine. Mobarakeh took the recording to Lieutenant Summey. Defendant had told Mobarakeh that he would call back at 11:00 P.M., and Summey instructed Mobarakeh to refuse any offers and to record that call as well. Mobarakeh returned the next morning, 16 January 1987, and gave Summey a recording of the second call. Later that morning, defendant signed three warrants for Mobarakeh's arrest.

The recordings of defendant's calls and transcripts of the calls were offered into evidence by the State. Defendant testified that Mobarakeh had initially offered a cash settlement but that this portion of the conversation had not been recorded. Defendant also testified that he had believed that he could settle the matter in the manner of a civil suit.

The jury found defendant to be guilty of extortion. The trial court made findings of factors in aggravation and mitigation of punishment and found that the factors in aggravation outweighed the factors in mitigation. From a judgment imposing a six-year prison term, defendant appeals.

Defendant first argues that the trial court erred in denying his motion to dismiss the charge against him at the close of all the evidence. The crime of extortion is defined by statute:

> Any person who threatens or communicates a threat or threats to another with the intention thereby wrongfully to

> obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and such person shall be punished as a Class H felon.

G.S. 14-118.4. Defendant contends that the State failed to present sufficient evidence that defendant (i) communicated a threat and (ii) did so with the intent to wrongfully obtain something of value. To survive defendant's motion to dismiss, the State had to present substantial evidence of each element of the offense charged. *State v. Green*, 310 N.C. 466, 467, 312 S.E. 2d 434, 435 (1984).

[1] Defendant does not contend that the State's evidence failed to show that he threatened to initiate criminal proceedings against Mobarakeh or offered to refrain from initiating those proceedings in exchange for cash. Rather, defendant contends that these actions do not constitute the elements of a threat and wrongful intent within the meaning of G.S. 14-118.4. Defendant argues that threatening an individual with criminal prosecution is not a threat within the meaning of the statute and, even if it is, such a threat is not made with wrongful intent if the maker of the threat reasonably believes that the threatened party is guilty. Defendant also argues that there is no wrongful intent where the maker of the threat reasonably believes that he is entitled to the property he seeks to obtain.

We first consider defendant's argument concerning the element of communication of a threat. Our courts have not previously defined the elements of extortion under G.S. 14-118.4. Defendant relies on *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E. 2d 838 (1987). In *Harris*, this Court cited G.S. 14-118.4 in holding that an allegation of a threat to file a civil action if not paid a claimed amount does not state a claim for relief in tort. *Id.* at 675-76, 355 S.E. 2d at 843. *Harris* is not relevant to the present case, which is a criminal action and involves a threat of criminal prosecution. Research discloses only one case construing the term "threat" as used in G.S. 14-118.4. In *Tryco Trucking Co. v. Belk Stores Services*, 634 F. Supp. 1327 (W.D.N.C. 1986), the court held that a threat of economic harm constituted a threat under the statute. *Id.* at 1333-34.

The common-law crime of extortion did not emcompass threats to accuse the victim of a crime, but almost all jurisdictions have included such threats in statutory definitions of extor-

tion. Note, *A Rationale of the Law of Aggravated Theft*, 54 Colum. L. Rev. 84, 94 (1954); 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.12 at 461 (1986). The definition of extortion in G.S. 14-118.4 covers any threat made with the intention to wrongfully obtain "anything of value or any acquittance, advantage, or immunity." Defendant's action in making the telephone call in which he offered to refrain from pressing criminal charges in exchange for money amounted to threatening criminal prosecution and clearly comes within the purview of the broad language, "a threat."

[2] Since defendant's challenge to the denial of his motion to dismiss raises the question of a fatal variance between the proof and the indictment, *State v. Cooper*, 275 N.C. 283, 286-87, 167 S.E. 2d 266, 268 (1969), we note that defendant's conduct is also punishable as a misdemeanor under G.S. 14-118, the blackmail statute. This statute specifically proscribes accusing or threatening to accuse a person of a crime punishable by imprisonment with the intent to "extort or gain" from that person any chattel, money or valuable security. The offense of blackmailing under G.S. 14-118 has been codified in substantially the same form since 1854. Revised Code Ch. 34, § 110 (1854). General Statute 14-118.4 was enacted in 1973. 1973 N.C. Sess. Laws Ch. 1032. Although repeals by implication are not favored, the following rules govern construction of criminal statutes:

> [W]hen a new penal statute practically covers the whole subject of a prior penal act, and embraces new provisions, plainly and manifestly showing that it was the legislative intent for the later act to supersede the prior act, and to be a substitute therefor, comprising the sole and complete system of legislation on the subject, the later act will operate as a repeal of the prior act.

State v. Lance, 244 N.C. 455, 457, 94 S.E. 2d 335, 337 (1956). A later penal statute repeals a former one when it covers the same acts but fixes a different penalty or substantially redefines the offense. *United States v. Yuginovich*, 256 U.S. 450, 463, 41 S.Ct. 551, 554, 65 L.Ed. 1043, 1047 (1921); 1A N. Singer, Sutherland Statutory Construction § 23.26 (4th ed. 1985).

Applying the above rules of construction to the circumstances of the present case, we find that G.S. 14-118.4 supersedes

G.S. 14-118. Accordingly, we hold that defendant was indicted and tried under the proper statute.

[3] We next consider defendant's arguments concerning the element of wrongful intent. Defendant contends that the evidence shows that defendant lacked the requisite intent because he reasonably believed that (i) the victim was guilty of the crime upon which defendant's threat was based and (ii) he was entitled to the money he sought to obtain as compensation for the discomfort resulting from the harassing phone calls. Defendant's argument is premised on the language of G.S. 14-118.4 which requires that the threat be made "with the intention wrongfully to obtain anything of value . . . ." Defendant contends that his intent was not "wrongful" within the meaning of the statute. We disagree.

Defendant's belief in the victim's guilt is not relevant. The wrongful intent required by the statute refers to the obtaining of property and not to the threat itself. Even if the victim were guilty, this would not entitle defendant to demand money in exchange for refraining from initiating criminal proceedings. The majority of jurisdictions that have considered the matter have held that the victim's guilt of the crime of which he is accused is no defense to a charge of extortion. 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.12 at 461 (1986).

Defendant also argues that, because he believed he was entitled to the money he sought to obtain, he did not communicate a threat with the intent to "wrongfully" obtain the property. There is a split of authority on the question of whether a defendant's reasonable belief that he is entitled to the property he seeks to obtain constitutes a defense to a charge of extortion. *See* Annotation, *Extortion In Collecting Claim*, 135 A.L.R. 728 (1941). Those states that have refused to recognize the defense have done so on the theory that their statutes prohibit the means used to obtain the property and, therefore, it is no defense that the defendant believed he was entitled to the property. Note, *A Rationale of the Law of Aggravated Theft*, 54 Colum. L. Rev. 84, 99 (1954). Several states, however, have included the "claim of right" defense in their statutes. 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.12, at 461-62 n.24 (1986). In the absence of such a statutory provision, however, the majority of jurisdictions do not recognize the defense. *See United States v. Zappola*, 677 F. 2d 264,

268-69 (2d Cir.), *cert. denied*, 459 U.S. 866, 103 S.Ct. 145, 74 L.Ed. 2d 122 (1982) and cases cited therein.

Among those jurisdictions that have recognized the defense, it has most often been recognized in cases where, assuming that the victim was in fact guilty, the defendant was clearly entitled to some form of compensation. The cases cited by defendant are illustrative. In *State v. Burns*, 161 Wash. 362, 297 P. 212, *aff'd per curiam on rehearing*, 1 P. 2d 229 (1931), the defendant demanded the return of funds that had been embezzled by the victim. In *Mann v. State*, 47 Ohio St. 556, 26 N.E. 226 (1890), the defendant demanded compensation for property destroyed by the victim. In the present case, however, defendant's entitlement to any money from the victim would depend upon defendant's ability to prevail in a civil action for damages. Even assuming that defendant could prevail in such an action, the amount of damages he would recover is a matter of speculation; yet the evidence shows that defendant asked for the specific sums of $750 and $500.

Because this issue has been raised in the context of the trial court's denial of defendant's motion to dismiss, we must consider the evidence in the light most favorable to the State. *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). Under the facts of this case, we find no error in the trial court's denial of defendant's motion.

[4] Defendant next contends that the trial court erred in instructing the jury that "[s]tating that one will obtain arrest warrants for some alleged crime unless one is paid some money is a threat." The record shows that defendant made no specific objection to that portion of the charge and failed to include an exception in the record as required by Rule 10(b)(2) of the N.C. Rules of Appellate Procedure. Defendant has therefore waived his right to assign error to that portion of the charge. In view of our previous discussion concerning the meaning of "threat" in G.S. 14-118.4, the quoted portion of the charge is a correct statement of the law. Accordingly, we find no merit in defendant's contentions that the statement was an expression of opinion by the trial court or that it constituted an irrebuttable presumption in favor of the State.

Defendant also contends that the trial court erred in instructing the jury on the distinction between civil and criminal cases. The court instructed the jury that parties may not settle criminal

cases but that an offer to settle a civil case is not unlawful. Although defendant made an objection to the form of this instruction, the grounds for the objection are unclear. Defendant appears to be contending that the instruction is erroneous because it fails to state that defendant lacked the requisite intent if he mistakenly believed that criminal cases could be settled in the same manner as civil actions. Without deciding the validity of defendant's theory, we find no error in the trial court's charge. The trial court's instructions were adequate to enable the jury to apply the law to the substantive features of the case and, if defendant desired further elaboration on a particular point, he needed to request additional instructions. *See State v. Atkinson*, 39 N.C. App. 575, 581, 251 S.E. 2d 677, 682 (1979).

[5] Defendant's final argument is that the trial court erred in failing to find two statutory factors in mitigation of punishment. Under the Fair Sentencing Act, the defendant has the burden of persuasion on mitigating factors and the trial court's failure to find a mitigating factor is reversible error only when the evidence of its existence is both uncontradicted and manifestly credible. *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E. 2d 451, 455 (1983). Defendant contends that the trial court erred in failing to find that he "has been a person of good character or has had a good reputation in the community in which he lives," G.S. 15A-1340.4(a)(2)(m), and that he "reasonably believed that his conduct was legal." G.S. 15A-1340.4(a)(2)(k).

At the sentencing hearing, defendant's character witness testified that defendant is honest, he helps people, and he was taking care of an abused child. The witness did not testify as to defendant's reputation in the community. Although the testimony was uncontradicted evidence of good character, it was not manifestly credible so as to require the trial court to find a mitigating factor. The witness testified that she and defendant were "very good friends" and she had known defendant for only five months. The witness's relationship to defendant and the fact that she knew him for only a short period of time are factors which detract from the credibility of her testimony. The trial court was free to accept or reject the testimony based on its assessment of the witness's credibility. *State v. Benbow*, 309 N.C. 538, 548, 308 S.E. 2d 647, 653 (1983); *State v. Taylor*, 309 N.C. 570, 578, 308 S.E. 2d 302, 308 (1983).

The only evidence to support a finding that defendant reasonably believed that his conduct was legal was defendant's own testimony to the effect that he thought he could settle the matter in the manner of a civil action. Although there is no evidence directly contradicting this testimony, it is not supported by the circumstances of the case. The evidence shows that defendant never raised the issue of a settlement in the presence of the authorities but only discussed it with the victim over the telephone. When requesting payment, defendant made clear to the victim that the matter could not be settled after defendant signed the arrest warrants; thus indicating that he knew that a criminal prosecution could not be settled. Under these circumstances, the mitigating factor was not shown by substantial, uncontradicted, and manifestly credible evidence and the trial court did not err in refusing to find a factor in mitigation of punishment. *See State v. Lane*, 77 N.C. App. 741, 745, 336 S.E. 2d 410, 412-13 (1985).

For the foregoing reasons, we hold that defendant's trial and sentence were free of reversible error.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

ERNEST L. BUMGARNER AND GEORGE GRIFFIN v. A. CLYDE TOMBLIN

No. 8829SC157

(Filed 17 January 1989)

1. Fiduciaries § 2— existence of fiduciary relationship and breach—sufficiency of evidence

Evidence was sufficient to show that there was a fiduciary relationship between the parties and that defendant violated his duty as a fiduciary where the evidence tended to show that the parties entered into an oral contract to buy two tracts of land, to resell them for a profit, and to divide the profits equally; defendant held legal title to both tracts of land purchased for the mutual benefit of the parties; he had represented both plaintiffs as their attorney in previous transactions and in these transactions drew the deeds and other legal documents, negotiated both purchases, handled all sales, received the sale proceeds, and accounted for them to plaintiffs; defendant blocked plaintiffs' efforts to sell either tract or the timber and turned away prospec-

tive purchasers they had solicited; though a profit was made on the sale of one lot, defendant did not pay either plaintiff his fair share of the proceeds and sold eleven other parcels from that tract without accounting for the proceeds; he used the funds obtained from a deed of trust on the property to pay off his personal obligations; and he blocked plaintiffs' efforts to auction off the remaining acreage.

2. **Fraud § 12— breach of fiduciary duty—constructive fraud—profit to fiduciary immaterial—punitive damages proper**

In an action for constructive fraud based upon breach of fiduciary duty, it was immaterial whether defendant profited from transactions which he performed as fiduciary; furthermore, punitive damages were authorized where all the elements of constructive fraud were found by the jury, and additional elements of aggravation were not necessary.

3. **Fraud § 11— damages—evidence of fair market value of land not inappropriate**

In an action for breach of contract and constructive fraud based upon breach of fiduciary duty, the trial court did not err in permitting both plaintiffs to testify as to the fair market value of both properties involved at different times, even if fair market value was not the standard for the damages claimed, since there was no requirement that damages testimony be couched in the terms of the applicable measure of damages, and evidence as to fair market value was material to the issue and helpful to the jury in resolving it.

APPEAL by defendant from *Hairston, Judge*. Judgments entered 16 September 1987 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 6 September 1988.

Plaintiffs' action, based on two Rutherford County real estate ventures that the parties engaged in, is for breach of contract, constructive fraud based upon a breach of fiduciary duty, and punitive damages. The facts are more fully stated in *Bumgarner v. Tomblin*, 63 N.C. App. 636, 306 S.E. 2d 178 (1983), where an order of summary judgment dismissing the complaint was vacated. For this appeal, except as stated in the opinion, it is sufficient to state that in the court below evidence was presented which indicates that: In 1973 the parties entered into an oral contract to buy two tracts of Rutherford County real estate, to resell them for a profit, and divide the profits equally; one tract was known as Cherry Mountain, the other as Bills Creek. In acquiring the tracts the parties made certain payments, legal title was vested in defendant, and the purchase price balances were secured by deeds of trust on them; and later other deeds of trust were placed on the properties to secure loans obtained for developing them. A foreclosure proceeding was brought against the Cherry Mountain property in 1978 because defendant, a local lawyer who agreed to

arrange the financing, failed to do so and during the proceeding the property was sold without benefit to either of the parties; and the Bills Creek project, though some profitable sales were made from it, was also a disappointment because defendant discouraged prospective purchasers from buying various portions of it.

In the prior appeal we held that the depositions and other materials before the court raised issues of fact for the jury on plaintiffs' claims and in the trial that followed the verdict upon which judgment was entered was as follows:

ISSUE NUMBER ONE:

At the time of the transactions relative to Cherry Mountain and Bills Creek, did a relationship of trust and confidence exist between the plaintiffs, Ernest L. Bumgarner and George Griffin, and the defendant, A. Clyde Tomblin?

ANSWER: Yes

ISSUE NUMBER TWO:

If so, were the business transactions open, fair and honest?

ANSWER: No

ISSUE NUMBER THREE:

If not, how much, if any, was the plaintiff, Ernest L. Bumgarner, damaged as a result of the defendant Tomblin's breach of his fiduciary duty of trust?

A. Compensatory damages

ANSWER: 75,000.00

B. Punitive damages

ANSWER: 175,000.00

ISSUE NUMBER FOUR:

If not, how much, if any, was the plaintiff, George Griffin, damaged as a result of defendant Tomblin's breach of his fiduciary duty of trust?

A. Compensatory damages

ANSWER: 117,000.00

B. Punitive damages

ANSWER: 175,000.00

Hamrick, Mauney, Flowers, Martin & Deaton, by W. Robinson Deaton, Jr., and Yelton, Farfour & McCartney, by Charles E. McCartney, Jr., for plaintiff appellees.

Robert W. Wolf and Hamrick, Bowen, Nanney and Dalton, by Louis W. Nanney, Jr., for defendant appellant.

PHILLIPS, Judge.

In seeking to overturn the judgment entered against him defendant appellant, having abandoned assignment of error 6, brought forward and separately argued twelve assignments of error. Eight of these assignments have no proper foundation and are overruled without discussion. Five of the assignments (nos. 7, 8, 9, 10 and 11) concern instructions to the jury to which no exceptions were taken, as Rule 10(b)(2) of our appellate rules requires. Two others (nos. 1 and 2 for denying his motions for a directed verdict at the end of the plaintiffs' evidence and at the end of all the evidence) are redundant because they raise precisely the same legal question as assignment 4 based upon the denial of his motion for judgment notwithstanding the verdict, *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973), which is discussed later. The exception to the directed verdict ruling at the end of plaintiffs' evidence was of course waived when he put on evidence, *Overman v. Gibson Products Company of Thomasville, Inc.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976); and, as has been said in many cases, one assignment of error, properly supported by exceptions, is enough to raise any legal question, including the sufficiency of the evidence to support a verdict. *Pate v. Thomas*, 89 N.C. App. 312, 365 S.E. 2d 704, *disc. rev. denied*, 322 N.C. 482, 370 S.E. 2d 227 (1988). And still another assignment (no. 5) is based upon the illusory and essentially untenable ground that the verdict was against the greater weight of the evidence. For though appellate courts often state that verdicts "manifestly contrary to the greater weight of the evidence" can be upset on appeal, 5A C.J.S. *Appeal and Error* Sec. 1648 (1958), the fact is that verdicts are hardly ever upset on that ground for the obvious

reason that appellate courts are incapable of satisfactorily determining the weight and credibility of evidence presented in a trial court and hardly ever attempt to do so. Indeed, if an appellate court in this State has ever presumed to determine that a verdict was against the greater weight of evidence when the trial judge ruled to the contrary, our search of the reports failed to discover it. In any event, no basis for overruling the experienced trial judge on this point appears in the record and the contention is overruled.

[1] Of the four assignments of error that were properly based, we discuss first assignment 4, which questions the sufficiency of the evidence to support the verdict. In arguing that the evidence does not show either that he was a fiduciary or violated his duty as such, defendant views both the fiduciary relationship and the evidence concerning it too narrowly. A fiduciary relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Evidence presented which indicates that a position of trust did exist between the parties includes the following: Defendant held legal title to both tracts of land purchased for the mutual benefit of the parties; he had represented both plaintiffs as their attorney in previous transactions, and in these transactions drew the deeds and other legal documents, negotiated both purchases, handled all sales, received the sale proceeds, and accounted for them to plaintiffs. Under our law a breach of fiduciary duty raises a presumption of constructive fraud, *Miller v. First National Bank of Catawba County*, 234 N.C. 309, 67 S.E. 2d 362 (1951), and defendant's breach of his fiduciary duty is indicated by evidence that: He blocked plaintiffs' efforts to sell either the Cherry Mountain tract or the timber and turned away prospective purchasers they had solicited; though a profit was made on the Peek sale from the Bills Creek tract defendant did not pay either plaintiff his fair share of the proceeds and sold eleven other parcels from that tract without accounting for the proceeds; he used the funds obtained from a deed of trust on the property to pay off his personal obligations, and blocked plaintiffs' efforts to auction off the remaining acreage after the Peek sale.

[2] Defendant's argument that no breach of fiduciary duty could have occurred in regard to the Cherry Mountain property because he did not profit from the transaction was ruled upon and rejected in the prior appeal, wherein we held that "[t]he facts that defendant did not benefit from the deals on the land and that he no longer has an interest in the land are no barrier to a constructive fraud claim." *Bumgarner v. Tomblin*, 63 N.C. App. 636, 641, 306 S.E. 2d 178, 183 (1983). Nor is the punitive damages award unsupported by evidence as defendant argues. All the elements of constructive fraud having been found by the jury punitive damages were authorized, *Newton v. The Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); additional elements of aggravation were not necessary. *Stone v. Martin*, 85 N.C. App. 410, 355 S.E. 2d 255, *disc. rev. denied, appeal dismissed*, 320 N.C. 638, 360 S.E. 2d 105 (1987); *Bumgarner v. Tomblin, supra.*

[3] By assignment of error 3 defendant contends that the trial court erred to his prejudice in permitting both plaintiffs to testify as to the fair market value of both properties involved at different times. They testified that the fair market value of the Cherry Mountain property when it was foreclosed on 21 April 1978 was $650 per acre; that the fair market value per acre of the Bills Creek property remaining after the Peek sale was $650 just after the sale, $1,000 when defendant began to convey various parcels in 1975, and $750 at the time of trial. The contention is not that they were unqualified to so testify, as owners of property are nearly always qualified to testify to the value of their property, *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E. 2d 204 (1983), but that "fair market value was not the standard" for the damages claimed. Which was no reason for the court to reject the testimony, as there is no requirement that damages testimony be couched in the terms of the applicable measure of damages. Furthermore, in *Newby v. Atlantic Coast Realty Co.*, 180 N.C. 51, 103 S.E. 909 (1920) where, as here, the measure was the lost profits that resulted from defendant's breach of duty, it was held that evidence as to the fair market value of the lands involved was material to that issue and helpful to the jury in resolving it.

By assignments of error 12 and 13 defendant contends that issues as to constructive trust, resulting trust, and unjust enrichment should have been submitted to the jury and that the issues

as to the respective causes of action should have been severed. The contentions as to the extra issues stated have no bearing on the case, as the record contains neither allegation nor evidence as to a constructive or resulting trust and whether defendant was unjustly enriched by his breach of fiduciary duty is legally irrelevant, as we ruled earlier. And framing and severing issues is a discretionary function of the trial judge; a function that was performed as the law requires, since the issues submitted were sufficient to enable the jury to fairly resolve the controversy in accord with the evidence and the principles of law pertaining thereto. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505 (1967).

No error.

Judge EAGLES concurs.

Judge BECTON concurs in the result.

STATE OF NORTH CAROLINA v. MADELINE TAYLOR

No. 883SC493

(Filed 17 January 1989)

Schools § 13— teacher's promise to give passing grade in exchange for VCR—no criminal conduct

N.C.G.S. § 14-118.2 is directed toward those outside the school system who give unfair aid to students by, among other things, taking exams for them or writing papers for them, and it does not make criminal a teacher's offer to give a student a passing grade in exchange for a VCR.

Judge COZORT dissenting.

APPEAL by defendant from *Wright, Judge*. Judgment entered 16 November 1987 in Superior Court, PITT County. Heard in the Court of Appeals 2 November 1988.

Defendant was charged with violating N.C.G.S. § 14-118.2 by giving one of her students a passing grade in exchange for a video cassette recorder.

On appeal in Superior Court the State's evidence tended to show the following.

During the spring semester of 1987 Andre Love was advised by John Walter Leech, the school guidance counselor, that he was in jeopardy of not graduating. Later that day, Leech went to see defendant who was Love's English teacher and Leech told defendant that Love needed some extra credit points to enable him to graduate. That same afternoon, Love went by defendant's schoolroom and was told by her that if he would get her a video cassette recorder (VCR) she would pass him.

Upon the advice of friends, Love went to the police and told them of defendant's offer. At the police's suggestion, Love went back to defendant and asked her if she still wanted a VCR, to which she replied yes, and that she would pass him in return. Defendant also told Love to rewrite a paper he had previously written for her in the event anyone questioned the passing grade.

Defendant told Love to bring the VCR to her house. Love was given a VCR by the police which he took to defendant and taped his conversation with her. Love asked defendant why she required a VCR to pass him, and she replied that she had to "get something out of the deal."

Defendant was arrested and her house was searched but no VCR was found. She later testified that upon learning of the police investigation she disposed of the VCR.

Defendant offered evidence that she agreed to help Love with a paper for extra credit, and that since she was doing this on her own time, she asked him to help find her a VCR for $100-150. She testified she never intended to trade a passing grade for the VCR, but that she intended to pay for it. The jury found defendant guilty as charged and from judgment sentencing her to six months suspended sentence conditioned on a thirty-day active term, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General David M. Parker, for the State.

Fitch, Butterfield & Wynn, by Leland Q. Towns and Milton F. Fitch, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant first contends that the trial court erred in failing to grant defendant's motion to dismiss because her conduct was not prohibited by N.C.G.S. § 14-118.2. We agree.

N.C.G.S. § 14-118.2 reads as follows:

> (a) It shall be unlawful for any person, firm, corporation or association to assist any student, or advertise, offer or attempt to assist any student, in obtaining or in attempting to obtain, by fraudulent means, any academic credit, or any diploma, certificate or other instrument purporting to confer any literary, scientific, professional, technical or other degree in any course of study in any university, college, academy or other educational institution. The activity prohibited by this subsection includes, but is not limited to, preparing or advertising, offering, or attempting to prepare a term paper, thesis, or dissertation for another and impersonating or advertising, offering or attempting to impersonate another in taking or attempting to take an examination.
>
> (b) Any person, firm, corporation or association violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Provided, however, the provisions of this section shall not apply to the acts of one student in assisting another student as herein defined if the former is duly registered in an educational institution and is subject to the disciplinary authority thereof.

The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the language of the statute, the spirit of the act, and what the act seeks to accomplish should be considered. *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). Moreover, a criminal statute must be strictly construed in favor of defendants, although the court is to keep in mind the evil the statute was intended to suppress and not force an unduly narrow reading of the statute. *See State v. Richardson*, 307 N.C. 692, 300 S.E. 2d 379 (1983); *see also Matter of Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978).

It is our opinion that N.C.G.S. § 14-118.2 is not intended by the legislature to make criminal actions like those of defendant. This statute reads, in part: "[T]he activity prohibited by this subsection includes, but is not limited to, preparing or advertising, offering, or attempting to prepare a term paper, thesis, or dissertation for another and impersonating or advertising, offering, or attempting to impersonate another in the taking or attempting to take an examination." N.C.G.S. § 14-118.2(a). Although these examples are qualified by the language "includes, but is not limited to," the direction of the statute is chiefly concerned with the professional paper writer or examination taker, and not a teacher.

One who takes, or offers to take, an examination for another, must do so where he or she will not be recognized as an improper examinee. Only a "mass testing" such as an aptitude test or a professional entrance examination provides the opportunity for an improper examinee to go unnoticed. The normal classroom situation ordinarily would not present the opportunity for this type of fraud. Similarly, N.C.G.S. § 14-118.2(b) focuses on those papers written by persons who are not classmates, when it excepts from coverage one student assisting another.

The State points out that the legislature makes no exception for teachers in the statute's coverage, as it does for students. While we note the lack of exception for teachers, we are not persuaded that the legislature intended to criminally punish this type of misconduct by a teacher. We believe the statute was designed to punish those persons outside the school system who give unfair aid to students.

Although we condemn the actions by defendant as unethical and undesirable, N.C.G.S. § 14-118.2 does not make them criminal. *See Richardson*, 307 N.C. 692, 300 S.E. 2d 379 (1983); *see also Matter of Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978).

Defendant was improperly convicted under N.C.G.S. § 14-118.2 and we do not need to address her second assignment of error.

For the reasons stated above, the judgment below is

Vacated.

Judge WELLS concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

While I agree with the majority that the primary purpose of N.C. Gen. Stat. § 14-118.2 appears to make criminal the actions of professional paper writers and examination takers, I do not agree that the actions of the defendant below are outside the unlawful conduct as set forth in the statute.

The conduct prohibited is the fraudulent procurement of academic credit; and, in my opinion, I believe a teacher who helps a student obtain that credit by offering a passing grade in exchange for an article of value has, in the words of the statute, "assist[ed] [a] student . . . in attempting to obtain, by fraudulent means, . . . academic credit . . . ." N.C. Gen. Stat. § 14-118.2(a) (1988).

I believe *State v. Richardson*, 307 N.C. 692, 300 S.E. 2d 379 (1983), relied on by the majority, is distinguishable. The specific issue there was whether masturbation for hire was a crime under the prostitution statutes. The Supreme Court held it was not, explaining that N.C. Gen. Stat. § 14-203 limited prostitution specifically to "sexual intercourse." No such specific limitation appears in the statute at issue here.

I vote no error in the trial below.

MARILYN M. DUNLAP v. CLARKE CHECKS, INC., AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8826SC604

(Filed 17 January 1989)

1. Master and Servant § 108.1— unemployment compensation—inadvertent mistakes—failure of Commission to make findings

In a proceeding for unemployment compensation where claimant was discharged for allowing two batches of checks with incorrect logos to be mailed to customers within a one-year period, the ESC erred in failing to make

findings as to whether claimant's mistakes were "inadvertent" within the meaning of N.C.G.S. § 96-14(2A) and therefore would not constitute "substantial fault" which would disqualify her from receiving unemployment compensation benefits.

2. **Master and Servant § 110— unemployment compensation—evidence that claimant is disqualified—only one opportunity for employer to present evidence**

Where there is evidence in the record which could support a conclusion on a material issue, the superior court may not grant an employer more than one opportunity before the Employment Security Commission to produce other evidence to prove that a claimant is disqualified from receiving unemployment benefits; rather, the superior court may order the taking of additional evidence only in the unusual circumstances of newly discovered evidence.

APPEAL by claimant from *Snepp, Judge.* Judgment entered 17 March 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 November 1988.

Marilyn M. Dunlap (claimant) brought this action for unemployment compensation benefits after her employer, Clarke Checks, Inc., fired her. Clarke Checks (employer) prints checks and other items for financial institutions. Claimant worked for employer for about three and one-half years as a validator. Her duties were to examine newly printed checks and other documents to ensure that they were printed with the proper information before the employer shipped them to its customers. Employer had a written policy which stated that if a validator allowed to be shipped, inadvertently or otherwise, two incorrect "logos" on new checks inspected within a one year period, severe disciplinary action would be taken, to include termination. On 27 February 1987 and on 27 April 1987 claimant validated incorrect "logos" on checks. In accordance with its written policy employer fired claimant on 27 April 1987.

Soon thereafter claimant filed a claim for unemployment compensation benefits. An Employment Security Commission (ESC) adjudicator determined that employer discharged claimant for substantial fault connected with her work. Claimant appealed and the appeals referee also concluded that "claimant was discharged for substantial fault on his [sic] part connected with the work." Pursuant to G.S. 96-14(2A), the referee disqualified claimant from receiving unemployment compensation benefits for nine weeks. Upon claimant's appeal to ESC, Chief Deputy Commissioner McGhee affirmed and adopted the referee's decision. Again, claimant

appealed. The Superior Court judge ruled that "the facts found by the Commission . . . are insufficient to support the conclusions and resultant decision of the Commission and that additional evidence must be taken." From the Superior Court judgment, claimant appeals.

Legal Services of Southern Piedmont, Inc., by Thomas W. Brudney and Theodore O. Fillette, for claimant-appellant.

T. S. Whitaker, Chief Counsel, and James A. Haney, for Employment Security Commission of North Carolina, respondent-appellees.

Robinson, Bradshaw & Hinson, by Richard A. Vinroot; Mathews and Branscomb, by James H. Kizziar, Jr. (San Antonio, Texas) for Clarke Checks, Inc., respondent-appellees.

EAGLES, Judge.

In this unemployment compensation case claimant argues that the superior court erred in its review in two respects. First, she contends that the court should have concluded that the facts as found by ESC fall within one of the enumerated exceptions to G.S. 96-14(2A) and, therefore, she is not disqualified from receiving unemployment compensation benefits as a matter of law. She further argues that the superior court erred in remanding the case to ESC. We hold that the court erred in ordering that additional evidence be taken upon remand; otherwise, we affirm.

In reviewing ESC decisions the superior court must determine whether the facts found by the Commission are supported by any competent evidence and whether those facts support the Commission's conclusions of law. *Employment Security Comm. v. Young Men's Shop*, 32 N.C. App. 23, 231 S.E. 2d 157, *disc. rev. denied*, 292 N.C. 264, 233 S.E. 2d 396 (1977). Additionally,

> [i]f the findings of fact made by the Commission, even though supported by competent evidence in the record, are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding should be remanded to the end that the Commission make proper findings.

In re Bolden, 47 N.C. App. 468, 471, 267 S.E. 2d 397, 399 (1980). Furthermore, if ESC has found all the material facts necessary to

resolve the issue, any remand to ESC is error. *Tastee Freez Cafeteria v. Watson*, 64 N.C. App. 562, 307 S.E. 2d 800 (1983).

[1] G.S. 96-14(2A) mandates that an individual be disqualified from receiving unemployment compensation benefits for a period of four to thirteen weeks if his discharge from employment is due to "substantial fault on his part connected with his work not rising to the level of misconduct." The statute further defines substantial fault

> to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) *inadvertent mistakes made by the employee*, nor (3) failures to perform work because of insufficient skill, ability, or equipment. [Emphasis added.]

G.S. 96-14(2A).

Claimant argues that the Commission's finding of fact number 7 establishes, as a matter of law, that her violation of company policy was inadvertent and, therefore, she should not be disqualified from receiving unemployment compensation benefits. The Commission found, in part,

> 7. The claimant violated the above job requirement(s) because claimant's [sic] states that these are inadvertent errors caused by the pressure of the job, although she admits that she had been asked to slow down in order to improve the quality of her work.

This finding merely restates the claimant's testimony that her mistakes in not correcting the wrong "logos" on the checks were inadvertent errors. The Commission here failed to make the key finding in this case, i.e., determining whether the claimant's conduct was inadvertent. Findings of fact that merely restate a party's contentions or testimony without finding the facts in dispute are not adequate. It is the duty of the fact finder to resolve conflicting evidence. *Wall v. Timberlake*, 272 N.C. 731, 158 S.E. 2d 780 (1968). Neither the superior court nor this court may act as finders of fact in unemployment compensation cases. If the Commission fails to find a material fact, the case must be remand-

ed to ESC for a proper finding. *In re Baptist Children's Homes v. Employment Security Comm.*, 56 N.C. App. 781, 290 S.E. 2d 402 (1982). Accordingly, we affirm that portion of the judgment remanding the case to ESC for additional findings.

[2] Claimant next argues that her employer failed to meet its burden of proving disqualification and, therefore, she should be entitled to receive unemployment compensation. The Commission has not made the material factual finding which would support a conclusion either way. However, we hold that where there is evidence in the record which could support a conclusion on a material issue, that the superior court may not grant an employer more than one opportunity before the Commission to produce other evidence to prove that a claimant is disqualified. Accordingly, we vacate that portion of the judgment ordering that additional evidence be taken upon remand to ESC.

Our Supreme Court has ruled that a discharged employee is presumed to be entitled to unemployment compensation benefits and that the employer has the burden of rebutting the presumption by proving disqualification. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E. 2d 357, 359 (1982). Taking additional evidence upon remand would allow employers repeated opportunities to meet their burden of proving that an employee should be disqualified.

Moreover, the scope of judicial review on appeals from ESC is the same as the scope of review in cases from the Industrial Commission. *In re Enoch*, 36 N.C. App. 255, 243 S.E. 2d 388 (1978). In *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E. 2d 28 (1968), our Supreme Court stated that the superior court could order the taking of additional evidence only in the unusual circumstances of newly discovered evidence. We hold that this rule applies in Employment Security Commission matters.

For the foregoing reasons we modify and remand the superior court's judgment.

Modified and remanded.

Judges BECTON and GREENE concur.

Cruise v. Cruise

GAYE H. CRUISE, PLAINTIFF v. BILLY H. CRUISE, DEFENDANT

No. 885DC459

(Filed 17 January 1989)

Divorce and Alimony § 30; Social Security and Public Welfare § 1— Social Security benefits not distributable under Equitable Distribution statute

Federal law precludes North Carolina from distributing Social Security benefits under North Carolina's Equitable Distribution statute.

APPEAL by defendant from *Tucker, Judge.* Judgment entered 26 January 1988 in District Court, NEW HANOVER County. Heard in the Court of Appeals 2 November 1988.

Plaintiff wife and defendant husband were married on 18 April 1952. The parties separated on 1 August 1986. Defendant was married thirty-two of the thirty-six years that he was employed at Dupont, that is, eight-ninths of his career at Dupont. Defendant retired from Dupont in August of 1984. Plaintiff wife has worked only two years since 1958. The only child of the marriage is emancipated.

At the time of separation the defendant had vested in a pension plan at Dupont now worth a net value of $1,365.93 per month. Since 1 September 1987, the defendant has received monthly Social Security benefits of $679.00. The trial court awarded the plaintiff 4/9ths of the value of defendant's pension plan through Dupont, and 4/9ths of defendant's Social Security beginning 1 September 1987. Defendant appeals the award of four-ninths of his Social Security benefits to the plaintiff.

Sperry & Cobb, by George H. Sperry, for plaintiff appellee.

Shipman & Lea, by James W. Lea, III, for defendant appellant.

ARNOLD, Judge.

Federal law precludes North Carolina from distributing Social Security under North Carolina's Equitable Distribution statute. The test for pre-emption has been set out by the U.S. Supreme Court:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. *Wetmore v. Markow*, 196 U.S. 68, 77, 49 L.Ed. 390, 25 S.Ct. 172 (1904). A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. *United States v. Yazell*, 382 U.S. 341, 352, 15 L.Ed. 2d 404, 86 S.Ct. 500 (1966).

Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 59 L.Ed. 2d 1, 11, 99 S.Ct. 802, 808 (1979).

In *Hisquierdo* the husband appealed the wife's offset award of presently available community property to compensate her interest in petitioner's expected Railroad Retirement Act benefits. The *Hisquierdo* court held that the Federal Statute pre-empted an award based on the wife's interest in the husband's Railroad Retirement benefits under California community property law. *Hisquierdo*. That ruling controls the decision in this case. In its analysis the Court analogized the Railroad Retirement Act to the Social Security Act and relied on an anti-assignment section of the Railroad Retirement Statute. *Id.* at 585, 59 L.Ed. 2d at 13, 99 S.Ct. at 810. *See* 45 U.S.C. § 231m. The anti-assignment section of the Railroad Retirement Act is quite similar to one included in the Social Security Act.

The Social Security Act provides a comprehensive scheme for how Social Security benefits are to be awarded divorced spouses. Since 1977 a divorced wife has been eligible to receive Social Security benefits on account of her former spouse if she had attained age 62 and also had been married to her insured spouse for at least 10 years. *Cahoon v. Heckler*, 574 F. Supp. 1021, 1022 (D. Mass. 1983), *aff'd*, 740 F. 2d 953 (1st Cir. 1984). *See* Social Security Coordinator § 24044 (1986 & Supp.). The current provision is summarized below:

> A divorced husband or a divorced wife of an individual entitled to social security retirement or disability benefits is entitled to spousal benefits if he or she:
>
> (1) applies for such benefits;

(2) is at least 62 years old;

(3) is not entitled to his or her own primary benefit in an amount equal to or greater than one-half due his or her spouse; and

(4) is not married.

§ 24280 Social Security Coordinator 1986. *See* 42 U.S.C. § 402(b)(1), § 402(c)(1), § 416(d)(1).

In addition to the provisions cited above which specifically describe the entitlement of a divorced spouse to a worker's benefits the Act prohibits assignments of benefits:

> The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, *or other legal process* . . . [emphasis added].

42 U.S.C. § 407(a).

Congress has made an exception to § 407(a) in 42 U.S.C. § 659(a) which allows that Social Security benefits "payable . . . to any individual . . . shall be subject . . . to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments." Congress has made it clear that property transfers which result from equitable distribution are not alimony. 42 U.S.C. § 662(c).

The federal statutory scheme is complete. It provides certain benefits for divorced spouses which are not dependent on the idiosyncrasies of each state's system of marital property law. *Richards v. Richards*, 659 S.W. 2d 746, 749 (Tex. Ct. App. 1983). The benefit payable to a divorced spouse of a covered worker does not reduce the benefit available to the worker. *Id.* *See* 42 U.S.C. § 403(a)(3). Division of Social Security benefits under North Carolina's Equitable Distribution Act would contradict the "direct enactment" of Congress and do major damage to the uniform disbursement of Social Security benefits under the federal Act. Were the trial judge's order to be followed in this case, the wife would be receiving benefits without making application to the Social Security system, before she was 62, and regardless of the

amount of her own benefit. The trial judge's order that the husband share one-half in the wife's anticipated benefits contradicts the Supreme Court's rationale in *Hisquierdo* which specifically prohibits the anticipation of benefits. *Hisquierdo* at 589, 59 L.Ed. 2d at 15, 99 S.Ct. at 812.

While we may be sympathetic to the plaintiff's position, Social Security benefits cannot be disbursed in an equitable distribution award. However, see *In the Matter of the Marriage of Swan*, 704 P. 2d 136 (Or. App. 1985); Valuation & Distribution of Marital Property § 18.03[3][f][v] (1988 Cum. Supp. p. 18-50).

For the reasons cited above the order of the trial court is reversed and remanded for further proceedings as required by this opinion.

Reversed and remanded.

Judges WELLS and COZORT concur.

L. GENE GRAY v. CARL V. VENTERS, JR.

No. 883SC348

(Filed 17 January 1989)

Uniform Commercial Code § 28— text of notes in conflict with schedules—text controlling

In a declaratory judgment proceeding to determine the amount plaintiff owed defendant under the notes he admittedly signed or assumed, the trial court properly ruled that the text of the notes, which was in conflict with schedules stating in dollars and cents the installments to be paid, governed, and the court properly reformed the installment schedules so that the final installments of both notes amounted to the principal which remained unpaid after all payments had been credited in accord with the terms of the notes requiring 8% interest on unpaid principal, rather than the miscalculated figures called for in the installment schedules. N.C.G.S. § 25-3-118.

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 30 September 1987 in Superior Court, PITT County. Heard in the Court of Appeals 4 October 1988.

James, Hite, Avery & Duke, by Melanie A. Hite and W. Russell Duke, Jr., for plaintiff appellant.

Everett, Everett, Warren & Harper, by C. W. Everett, Jr., for defendant appellee.

PHILLIPS, Judge.

Plaintiff brought this declaratory judgment proceeding to determine the amount he owes defendant under two notes he admittedly signed or assumed, and his appeal is from the determination made. The facts pertinent thereto follow:

In June 1978 plaintiff and H. Steve Hardy, under two identical written contracts (except that one was for 72 shares at their price and the other was for 69 shares), bought 141 shares of the capital stock of Farmville Broadcasting Co., Inc. from defendant for $258,622. As the contracts provided they paid $58,622 down and for their respective parts of the $200,000 purchase price balance they executed separate notes payable in 145 successive monthly installments, the last of which was a balloon installment. Except for the principal owed and the installments to be paid the notes were identical. They provided for the payment of the principal together with interest from date at the rate of 8% per annum in 145 successive monthly installments "of principal and interest . . . in such amount sufficient to pay the total amount of principal and interest then due"; and they contained schedules that stated in dollar and cent figures the installments to be paid, which varied from period to period during the first 144 months, and that stated final installments amounting to $56,000. Which, though the parties did not realize it, was about $70,000 less than the principal that would have been still unpaid if all 144 installments had been paid as scheduled; for the installment schedules were such that many installments were not even enough to pay the 8% interest due on the principal amount and many others reduced the principal but slightly. Thus, eight years later when plaintiff tendered defendant a check for the balance due according to the installment schedules, defendant calculated the balance due according to the text of the notes and refused to accept it, and this lawsuit followed.

After hearing the matter the court, upon findings and conclusions that include the above and that the final installments were

miscalculated and the result of a mutual mistake of fact, ruled that the text of the notes governed and reformed the installment schedules so that the final installments of both notes amounted to the principal that remained unpaid after all payments had been credited in accord with the terms of the notes requiring 8% interest on unpaid principal. The judgment is correct and we affirm it.

Both notes are negotiable instruments, the interpretation of which is governed by Article 3 of the Uniform Commercial Code. *Smith v. Rushing Construction Co.*, 84 N.C. App. 692, 353 S.E. 2d 692 (1987). The text of the notes is without ambiguity or conflict and cannot be misconstrued; the words employed obligated the makers without qualification to pay defendant $200,000 in principal, not some lesser sum, together with 8% interest on the unpaid amount in successive monthly installments "sufficient to pay the total amount of principal and interest then due." The only conflict in the notes is that the final installments stated in the schedules were not sufficient to pay "the total amount of principal and interest then due," as the text required. G.S. 25-3-118 provides that when conflicts in a negotiable instrument occur between unambiguous words and figures "words control figures." Thus, the court's conclusion that the miscalculated figures in the installment schedules are overcome by the unambiguous words of the notes requiring the payment of $200,000, together with interest on it, and that the installment figures should be reformed to comply with the words, is correct as a matter of law.

The interpretation of the notes that plaintiff appellant seeks —that they required the makers to pay only the amounts stated in the miscalculated installment schedules—is not only contrary to the statute governing the construction of negotiable instruments, it is also contrary to reason. For such an interpretation would leave unpaid a substantial part of the principal that the makers unqualifiedly promised to pay and would enable him to acquire the stock purchased at substantially less cost than was agreed to, not only in the notes, but in the contracts upon which they were based.

Affirmed.

Judges EAGLES and PARKER concur.

ALICE NELSON, EMPLOYEE, PLAINTIFF v. FOOD LION, INCORPORATED, EMPLOYER, SELF-INSURED, (ALEXSIS, INCORPORATED) DEFENDANTS

No. 8810IC501

(Filed 17 January 1989)

1. **Master and Servant § 94.1— workers' compensation—relation of injury to previous injury—failure of Commission to make required findings**

Findings of fact by the Industrial Commission were insufficient because they did not address whether plaintiff's knee injury was caused by or related to her earlier ankle injury for which she had received workers' compensation benefits.

2. **Master and Servant § 77.2— workers' compensation—timeliness of request for change of condition—affirmative defense**

Defendant's defense in a workers' compensation case that plaintiff's action was a request for a change of condition regarding her earlier injury and was therefore barred because it was not timely brought pursuant to N.C.G.S § 97-47 could not be raised for the first time on appeal; rather, it should have been affirmatively raised prior to a hearing on the merits.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered on 21 January 1988. Heard in the Court of Appeals 27 October 1988.

Plaintiff, Alice Nelson, brought this action to recover workers' compensation benefits for injuries sustained on or about 21 June 1986 to her right ankle and right knee while working for Food Lion, Incorporated (defendant). The evidence here tended to show that while working at defendant's store on 21 June 1986 plaintiff was in the office counting the money in the cash register tills. As she left the office to get another till, she had to take a step or two down because the office was elevated above the main floor level. While stepping onto the floor plaintiff testified that "my ankle and my knee gave away." Consequently, plaintiff sprained her ankle and twisted her knee. She was able to maintain her balance without falling to the floor. Her doctor subsequently discovered damage to her knee which he attributed to plaintiff's history of multiple ankle sprains. In order to repair plaintiff's knee she underwent two arthroscopic operations.

Defendant, a self-insurer, denied coverage under the Workers' Compensation Act (Act). Plaintiff requested a hearing. On 16 April 1987 Deputy Commissioner Tamara R. Warstler heard the

case and ruled that plaintiff was not entitled to receive workers' compensation benefits. The Deputy Commissioner found that plaintiff's injury "was not caused by an accident," but rather "was caused solely by an idiopathic condition, *i.e.*, right ankle instability." Plaintiff appealed to the full Commission which affirmed and adopted Deputy Commissioner Warstler's opinion as its own. Plaintiff appeals.

Leigh Rodenbough for plaintiff-appellant.

Smith Helms Mulliss & Moore, by Jeri L. Whitfield and J. Donald Cowan, Jr., for defendant-appellees.

EAGLES, Judge.

[1] In this workers' compensation action plaintiff argues that the Industrial Commission (Commission) should have found that the ankle injury she suffered on 21 June 1986 was compensable under the Act because it was a direct and natural result of a previous compensable ankle injury. We hold that the Commission's findings of fact are insufficient because they do not address whether or not plaintiff's injury was caused or related to her earlier injury for which she had been compensated. Accordingly, we vacate and remand for additional findings of fact.

The standard of review in workers' compensation cases is limited. We may determine only whether the findings of fact are supported by any competent evidence and whether they, in turn, support the Commission's conclusions of law. *Hollar v. Furniture Co.*, 48 N.C. App. 489, 269 S.E. 2d 667 (1980). If, however, the Commission's findings of fact do not determine all of the issues arising from the action, we must remand the case to the Industrial Commission for additional findings. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952).

Plaintiff argues that the ankle injury she suffered on 21 June 1986 was a direct result of an earlier work related injury. Her first injury occurred on 5 July 1983 when she fell from a milk crate while stocking shelves at defendant's store. Plaintiff testified that she severely sprained her ankle and received workers' compensation benefits for her injuries caused by this fall. She contends that this first injury never properly healed because of numerous subsequent ankle sprains. Further, her doctor, Dr.

Maultsby, stated that these later sprains were directly related "to some instability that [plaintiff] had in her ankle from her first injury." Dr. Maultsby also observed that once a person sprains an ankle it requires "little provocation" to resprain it. Plaintiff contends that this evidence shows that her 21 June 1986 injury was directly caused by her 5 July 1983 injury.

In *Starr v. Paper Co.*, 8 N.C. App. 604, 612, 175 S.E. 2d 342, 347, *cert. denied*, 277 N.C. 112 (1970), we held "that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." *See also Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 323 S.E. 2d 29 (1984), *disc. rev. denied*, 313 N.C. 329, 327 S.E. 2d 890 (1985). Here plaintiff presented sufficient evidence that a fact finder might determine that the 5 July 1983 injury was the proximate cause of the 21 June 1986 injury. A finding in plaintiff's favor on this issue would entitle her to workers' compensation benefits irrespective of the other issues raised here. The Commission's findings of fact, however, are silent on the proximate cause issue. Accordingly, we vacate and remand to the Industrial Commission for additional findings of fact.

[2] Defendant further argues that plaintiff's action is a request for a change of condition regarding her 5 July 1983 injury and, therefore, is barred because it was not timely brought pursuant to G.S. 97-47. Assuming *arguendo* that G.S. 97-47 applies, we hold that defendant may not raise this technical defense for the first time on appeal. This defense must be affirmatively raised prior to a hearing on the merits or it is waived. *Gragg v. Harris & Son*, 54 N.C. App. 607, 284 S.E. 2d 183 (1981). Our holding here makes it unnecessary to address plaintiff's additional assignment of error.

Vacate and remand.

Judges BECTON and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 30 DECEMBER 1988

BATTEN v. N.C. DEPT. OF CORRECTION No. 8810SC556	Wake (87CVS8019)	Appeal Dismissed
CHANDLER v. MAYNOR No. 8810IC860	Ind. Comm. (654396)	Affirmed
HATCHER v. HATCHER No. 884DC839	Onslow (87CVD1964)	Affirmed
IN RE BILLINGS TRUCKING CO. v. MILLER No. 8825SC554	Caldwell (87CVS1032)	Affirmed
IN RE LOCKLEAR No. 8816DC616	Robeson (81J006)	Affirmed
IN RE ROOK No. 8810DC482	Wake (86J314)	Affirmed
IN RE WEST v. WEST No. 8814DC699	Durham (85CVD2444)	Dismissed
LAWS v. SCROGGS No. 8823SC588	Wilkes (86CVS84)	No Error
LAXTON CONSTRUCTION v. MOEHRING INVESTMENTS No. 8826SC262	Mecklenburg (87CVS6163)	Affirmed
MOORE v. GREENBRIAR HOMES, INC. No. 8821SC562	Forsyth (87CVS169)	Dismissed
PARKER v. ESTATE OF WINSTEAD No. 887SC657	Wilson (87CVS519)	Affirmed
PUCKETT ENTERPRISES v. NICHOLSON No. 8821SC614	Forsyth (86CVS4241)	Vacated
R. R. & E., INC. v. CABARRUS CONSTRUCTION No. 8825SC385	Catawba (86CVS941)	Affirmed
SMITH v. CAROLINA & NORTHWESTERN RAILWAY No. 8812SC525	Cumberland (85CVS0670) (85CVS0671)	Dismissed

STACK v. COUNTY OF JACKSON No. 8830SC755	Jackson (81CVS361)	Affirmed
STATE v. ALBERTY No. 8822SC851	Davidson (87CRS4852) (87CRS4853)	Affirmed
STATE v. BECKHAM No. 8814SC611	Durham (86CRS38712)	No Error
STATE v. BRADDY No. 8821SC601	Forsyth (87CRS14475)	No Error
STATE v. DILLINGHAM No. 8825SC594	Burke (87CRS6618) (87CRS6619)	No Error
STATE v. DOGGETT No. 8818SC878	Guilford (86CRS085609)	No Error
STATE v. HACKETT No. 8818SC816	Guilford (86CRS82407) (86CRS82408) (86CRS82409)	No Error
STATE v. HAITH No. 8815SC737	Alamance (87CRS20174) (87CRS20175) (87CRS20176) (87CRS20177) (87CRS20190) (87CRS20191)	Judgments Arrested
STATE v. HAMLIN No. 886SC652	Halifax (87CRS4466-A)	No Error
STATE v. JEMISON No. 8818SC966	Guilford (87CRS54954)	No Error
STATE v. LIGON No. 8828SC688	Buncombe (87CRS8704)	Affirmed
STATE v. McLEAN No. 8827SC646	Gaston (87CRS12697)	No Error
STATE v. MACKEY No. 8827SC651	Gaston (87CRS657)	No Error
STATE v. MAXFIELD No. 8821SC905	Forsyth (88CRS8505)	No Error
STATE v. MAYNOR No. 8812SC838	Cumberland (87CRS11338) (87CRS20704)	No Error

STATE v. MEADERS No. 8820SC807	Union (87CRS8142) (87CRS8143)	No Error
STATE v. MOSES No. 8821SC861	Forsyth (87CRS31513)	No Error
STATE v. NICHOLS No. 8813SC817	Columbus (87CRS1066)	No Error
STATE v. STACEY No. 8826SC855	Mecklenburg (87CR62443)	No Error
STATE v. STETSON No. 889SC575	Vance (86CRS6622)	No Error
STATE v. TAYLOR No. 8820SC844	Union (87CRS004899) (87CRS004898)	No Error
STATE v. THORPE No. 887SC624	Nash (87CRS7060) (87CRS12916) (87CRS12917)	No Error
STATE v. WEATHERFORD No. 8816SC972	Scotland (85CRS6155) (85CRS6156) (85CRS6543) (86CRS830) (86CRS832) (86CRS833)	Vacated & Remanded
TIMBERLYNE ASSOCIATES v. AETNA CASUALTY & SURETY No. 8810SC336	Wake (87CVS5546)	Affirmed
UTLEY v. UTLEY No. 8812DC579	Cumberland (81CVD3307) (82CVD3022)	Appeal Dismissed
WARD v. NEW BERN-CRAVEN COUNTY BD. OF EDUCATION No. 8810IC625	Ind. Comm. (TA-9522)	Reversed & Remanded
WATKINS v. GENTRY No. 8817SC438	Surry (87CVS484)	Affirmed
WHICHARD v. BD. OF ADJUSTMENTS No. 882SC559	Martin (87CVS159)	Vacated & Remanded

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 JANUARY 1989

BARTLETT v. INGLES MARKETS, INC. No. 8830SC379	Jackson (86CVS23)	No Error
BROADWAY & SEYMOUR, INC. v. CONTROL DATA CORP. No. 8826SC432	Mecklenburg (86CVS5576)	Affirmed
BROOKS v. BROOKS No. 8815DC969	Alamance (88CVD114)	Affirmed
CHAPMAN v. BEAMAN No. 888SC912	Greene (86CVS161)	Affirmed
COUCH v. AMERICAN REPUBLIC No. 8823SC631	Yadkin (87CVS208)	Affirmed
GRAVES v. CONE MILLS No. 8818SC589	Guilford (86CVS7883)	Affirmed
HOOTS v. N.C. DEPT. OF CORRECTION No. 8810IC959	Ind. Comm. (TA-8384)	Affirmed
IN RE ISSACS No. 8810DC791	Wake (88SPC43)	Appeal Dismissed
IN RE SHERLOCK No. 881DC964	Camden (88J2)	Affirmed
JOHNSON v. SPRINKLE No. 8821SC378	Forsyth (85CVS5403)	Reversed in part and affirmed in part
LOWDER v. ALL STAR MILLS No. 8820SC1060	Stanly (79CVS015)	Dismissed
MACGREGOR DOWNS COUNTRY CLUB v. THE HARLON GROUP No. 8810SC630	Wake (87CVS10061)	Dismissed
MARTIN v. WILLIAMSON No. 8819SC870	Randolph (88CVS139)	Affirmed
MOORE/ROLLINGER v. RAHENKAMP No. 8818DC460	Guilford (87CVD8443)	Affirmed

SEARCY v. MANGRUM No. 8826DC783	Mecklenburg (82CVD10731)	Affirmed
STATE v. ADAMS No. 8826SC701	Mecklenburg (87CRS28678) (87CRS28680)	No Error
STATE v. BALLARD No. 8825SC852	Catawba (87CRS14385) (87CRS14387) (87CRS14390)	No Error
STATE v. BATCHELOR No. 884SC765	Onslow (87CRS15376)	No Error
STATE v. BURNETTE No. 8815SC864	Orange (88CRS7616)	Affirmed
STATE v. CLAYTON No. 8819SC904	Rowan (88CRS595) (88CRS596) (88CRS703)	Affirmed
STATE v. HINTON No. 8810SC600	Wake (87CRS16920)	No Error
STATE v. JACOBS No. 8816SC915	Robeson (87CR17319)	Remanded for resentencing
STATE v. JAMES No. 8826SC993	Mecklenburg (87CRS55692)	Affirmed
STATE v. KEARNEY No. 887SC936	Wilson (87CRS5940)	Affirmed
STATE v. LARKINS No. 8826SC990	Mecklenburg (86CRS55367)	Affirmed
STATE v. LOVE No. 8816SC979	Robeson (87CRS16962)	Affirmed
STATE v. MEADERS No. 8826SC991	Mecklenburg (86CRS47460)	Affirmed
STATE v. RICHARDSON No. 8819SC980	Randolph (86CRS8112)	Affirmed
STATE v. ROBINSON No. 8826SC989	Mecklenburg (87CRS11735)	Affirmed
STATE v. SANCHO No. 888SC917	Wayne (87CRS8882)	Affirmed
STATE v. STURGILL No. 8825SC357	Caldwell (87CRS1120)	No Error

STATE v. TOBIAS No. 8826SC992	Mecklenburg (86CRS52127)	Affirmed
STATE v. TOLLIVER No. 8821SC1065	Forsyth (87CRS23318)	Affirmed
STATE v. WILLIAMSON No. 8818SC763	Guilford (87CRS47943)	No Error
TRANSYLVANIA COUNTY DEPT. OF SOCIAL SERVICES v. GRIFFITH No. 8829DC453	Transylvania (87CVD222)	Affirmed
WATTS REALTY v. DAVIS No. 8826DC748	Mecklenburg (88CVM1997) (88CVD3331)	Affirmed

DEIDRE V. BATCH v. TOWN OF CHAPEL HILL

No. 8815SC340

(Filed 7 February 1989)

1. **Municipal Corporations § 31.2— denial of subdivision application—forum for appeal**

Plaintiff's complaint in an action arising from the denial of her subdivision application was properly before the superior court, which properly entertained the motion for summary judgment reviewed here. Denial of a subdivision application may be reviewed by certiorari, or an aggrieved plaintiff may bring an original complaint, or join causes of action as permitted by N.C.G.S. § 1A-1, Rule 18(a).

2. **Municipal Corporations § 30.22— review of subdivision application denial—summary judgment—properly granted**

The trial court correctly concluded in an action arising from the denial of plaintiff's application for a subdivision permit that there was no dispute of material fact and that plaintiff's plan complied with all applicable requirements of the town's development ordinance except that plaintiff failed to indicate an intent to dedicate a right of way for proposed parkways; plaintiff failed to indicate an intent to dedicate to the town an additional ten feet of right of way and to add twelve feet of pavement width as well as curb and gutter along the property's road frontage; and plaintiff failed to indicate an intent to extend water and sewer lines to the property.

3. **Municipal Corporations § 30.8— review of denial of subdivision application—applicable legal principles**

The legal principles applied in review of zoning applications are relevant to subdivision application denial cases because zoning ordinances and subdivision ordinances both limit private property rights.

4. **Constitutional Law § 23.1— exactions—test for determining regulatory taking**

Though North Carolina has not yet adopted a test which determines when an exaction would be the equivalent of a regulatory taking under the Fifth Amendment takings clause, statutory authority leads to the conclusion that the North Carolina legislature has indicated that the rational nexus test is the proper test to be adopted in North Carolina. The rational nexus test provides that a subdivider can be required to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision.

5. **Municipal Corporations § 30.10— denial of subdivision application—failure to accommodate proposed parkway—denial without statutory authority**

In an action arising from the denial of plaintiff's subdivision application, the trial court's conclusion that the town's requirement that plaintiff dedicate a right of way or "accommodate" a subdivision plan to the proposed alignment of a parkway was unsupported by statutory authority was consistent with the subdivision enabling statute; the need for the proposed parkway arose not as a

result of plaintiff's subdivision plan, but because of preexisting traffic congestion created by the general community. Additionally, plans for the parkway are indefinite both as to financing and timing.

6. Constitutional Law § 23.1— exactions—rational nexus test

To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; and (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the courts shall then determine (4) whether the condition imposed advances that interest; *and* (5) whether the condition imposed is proportionally related to the impact of the development.

7. Constitutional Law § 23.1— denial of subdivision application—requirement of parkway dedication—unconstitutional taking

In an action arising from the denial of plaintiff's subdivision application in part because she failed to incorporate the alignment of a proposed parkway right of way into the subdivision plan, the trial court correctly invalidated the parkway condition by recognizing plaintiff's claim for inverse condemnation. The town had no standing to impose the condition unless it could meet the exaction test, which it could not.

8. Constitutional Law § 23.1— subdivision application denied—violation of due process

The denial of plaintiff's subdivision application on the basis of her refusal to accommodate a proposed parkway deprived plaintiff of due process of law in violation of Art. I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the U.S. Constitution in that the imposition of the parkway condition exceeded the statutory authority delegated to the town in N.C.G.S. § 160A-174. There was further evidence of substantive due process violations in the vague and general reasons for the denial given by the town.

9. Constitutional Law § 23.1— denial of subdivision application—requirement of dedication for right of way—remanded

In an action arising from the denial of plaintiff's subdivision application in part because plaintiff failed to dedicate property for a minor arterial right of way, the trial court's summary judgment for plaintiff was reversed in order for the trial court to hear evidence and make findings on this issue in light of this opinion.

10. Municipal Corporations § 29— denial of subdivision application—requirement of water and sewer line—invalid

In an action arising from the denial of plaintiff's subdivision application, the trial court correctly invalidated the town's requirement that plaintiff extend water and sewer lines to her property where plaintiff had received preliminary approval from the Orange County Health Department for septic tank systems on each of the proposed lots. The complete and integrated statutory scheme regulating sanitary sewage systems set out in N.C.G.S. §§ 130A-333 to 130A-337 delegates the power to approve septic tank systems to the local board of health. N.C.G.S. § 160A-174.

11. Constitutional Law § 23.1— denial of subdivision application—requirement of water and sewer lines—not an unconstitutional taking of entire tract

In an action arising from the denial of plaintiff's subdivision application, plaintiff's argument on cross-appeal that the trial court erred in refusing to recognize that denial of a subdivision application on the basis of plaintiff's refusal to extend water and sewer lines to the property constituted an unconstitutional taking of the entire tract was rejected.

APPEAL by defendant from *Brannon, Judge.* Orders entered 31 December 1987 in Superior Court, ORANGE County. Heard in the Court of Appeals 25 October 1988.

On or about 16 September 1986, plaintiff applied to the Town of Chapel Hill for a permit to subdivide a twenty acre tract into eleven lots within the extraterritorial planning jurisdiction of the town.

After reviewing plaintiff's subdivision application, the town staff informed the plaintiff that the application was, in the planning staff's judgment, inconsistent with the Town's development ordinance in eight (8) specific respects. In response to the planning staff's review, plaintiff submitted revisions to her application correcting all but three of the deficiencies. Defendant's planning staff recommended denial of the revised subdivision application on the following three (3) bases:

1. Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the Town of Chapel Hill a right-of-way through her property for the proposed Laurel Hill Parkway.

2. Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the Town an additional ten (10) feet of right-of-way along Old Lystra Road and to improve Old Lystra Road by adding an additional twelve (12) feet of pavement width as well as curb and gutter along the property's approximately 973 feet of frontage on that road.

3. Plaintiff failed to indicate in her subdivision application an intent to extend public water and sewer lines to her property, such extension estimated to cost in excess of $750,000.00.

On 9 March 1987, the Chapel Hill Town Council unanimously adopted its staff's recommendation and denied the plaintiff's ap-

plication. The following reasons were given for denial of the application:

> 1. Is not consistent with the orderly growth and development of the Town as outlined in the Comprehensive Plan of the Town and, in particular the Land Use Plan, as required by Section 6.5.1 of the Development Ordinance.
>
> 2. Does not have streets which coordinate with existing and planned streets and highways as required by Sections 7.7.1 and 6.5.1 of the Development Ordinance.
>
> 3. Does not create conditions essential to the present and future public health, safety and general welfare as required by the Development Ordinance.
>
> 4. Does not provide for the construction of Community service facilities in accordance with the municipal policies and standards as set out in the Comprehensive Plan and as required by Section 7.7.1 of the Development Ordinance.

On 8 April 1987, plaintiff filed a Petition for Writ of Certiorari and a Complaint, seeking a declaration that the denial of her application was neither required by the town ordinance, authorized by statute nor constitutional. Plaintiff asserted claims including: (1) violation of due process; (2) taking of property; (3) denial of equal protection; (4) temporary taking; (5) violation of civil rights pursuant to 42 U.S.C. § 1983; (6) inverse condemnation pursuant to N.C.G.S. § 40A-51.

Plaintiff asked the court for an injunction to require approval of her application, damages for unconstitutional deprivation of property and denial of equal protection, and compensation for a temporary taking of her property, including costs and attorneys' fees.

The trial court ruled that the Writ of Certiorari and plaintiff's complaint were properly joined. Upon plaintiff's motion for summary judgment, the court heard argument, and reviewed the record of the proceedings before the Town, supplemented by affidavits. By its order dated 31 December 1987, the court found that the plaintiff had been deprived of her constitutional and civil rights, and that her property had been temporarily taken. The court ordered the Town to approve the applicant's subdivision

plat, reserved for trial the question of plaintiff's damages, and assessed the costs of the action including reasonable attorneys' fees against the defendant. The Town appealed.

Michael B. Brough & Associates, by Michael B. Brough and Frayda S. Bluestein, for appellee.

Ralph D. Karpinos, Town Attorney for the Town of Chapel Hill; and Hunter & Wharton, by John V. Hunter III, for defendant appellant.

ARNOLD, Judge.

Summary judgment granted by the trial court recognized plaintiff's claims for violation of due process, taking, temporary taking, town action which exceeded statutory authority, inverse condemnation, and damages under 42 U.S.C. §§ 1983, 1988. Issues for decision by this Court are whether the trial court properly entertained the motion for summary judgment and, if so, whether it determined correctly that there existed no genuine issue as to any material fact and that the plaintiff was entitled to judgment as a matter of law.

Procedure

[1] As an initial matter it is necessary to resolve whether the trial court erred in allowing the plaintiff to proceed in one action with a petition for certiorari and a complaint. We find that it was an acceptable way to proceed under the North Carolina Rules of Civil Procedure.

Generally, North Carolina allows for liberal joinder of claims:

> A party asserting a claim for relief as an original claim, counterclaim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

N.C. Rules of Civ. Proc. 18(a). The rule has been interpreted as removing "all restrictions on the number or kinds of claims that may be joined by a party . . . it should no longer be possible to have a misjoinder of claims or causes of action as under the former practice." Shuford, *N.C. Civ. Prac. & Proc.* § 18-3 (3rd Ed. 1988).

Proper procedure in this case can be distinguished from zoning case denials because the statutory scheme governing zoning ordinances provides that when a municipality denies a special use or conditional use permit, "every such decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C.G.S. §§ 160A-381, 160A-388. *See Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379, *reh. denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980) (conditional use permit denied); *see Charlotte Yacht Club v. County of Mecklenburg*, 64 N.C. App. 477, 307 S.E. 2d 595 (1983) (denial of special use permit affirmed).

There is no similar statutory mandate for review of town decisions on subdivision applications. *See* N.C.G.S. §§ 160A-371-376. Further, the North Carolina Supreme Court in *Town of Nags Head v. Tillet*, 314 N.C. 627, 336 S.E. 2d 394 (1985), cautioned against relying on "the broad enforcement provisions of N.C.G.S. 160A-389, a zoning statute, as the statutory basis for denying a building permit to one whose lot violates . . . subdivision requirements." *Tillet* at 631, 336 S.E. 2d at 397. Similarly, it would be incorrect to limit review of subdivision application denials based on the procedure authorized for zoning application denials.

Though it is true that the Town of Chapel Hill Development Ordinance 7.6.1.11 allows for superior court review "in the nature of certiorari" within thirty days, this provision cannot limit plaintiff's right to bring a complaint against the Town. "Authority to establish rules governing the procedure and practice in superior courts is vested in the General Assembly unless such authority is delegated to the Supreme Court." N.C. Const. art. IV, § 13.(2). *See White Oak Properties v. Town of Carrboro*, 313 N.C. 306, 311, 327 S.E. 2d 882, 885 (1985).

When a Board of County Commissioners denied a homeowner association petition to prohibit a developer from using duplicative names in violation of the county subdivision ordinance, plaintiff association filed a complaint and petition to be treated in the alternative as a petition for judicial review or petition in the nature of a writ for certiorari, and sought an injunction or restraining order prohibiting use of the names. This Court found that the " 'judgment' of the board disregarded" a county ordinance and thus the decision of the Board of Commissioners was

reversed. *Springdale Estates Assoc. v. Wake County*, 47 N.C. App. 462, 467, 267 S.E. 2d 415, 418 (1980). In analyzing the procedural posture of the case, the court adopted the procedure established in zoning cases:

> Ordinarily, a municipal body, when sitting for the purpose of review, is vested with quasi-judicial powers, and a decision of the board, while subject to review by the courts upon certiorari, will not be disturbed in the absence of arbitrary, oppressive, or manifest abuse of authority, or disregard of the law. The findings of fact made by the commissioners, if supported by evidence introduced at the hearing before the board, are conclusive. But when the findings of the board are not based on competent evidence, the proceedings must be remanded.

Id., citing Refining Co. v. Board of Aldermen, 284 N.C. 458, 469, 202 S.E. 2d 129 (1974); *Jarrell v. Board of Adjustment*, 258 N.C. 476, 480, 128 S.E. 2d 879 (1963).

We agree that a decision of a town board must be disturbed if it is arbitrary, oppressive or manifests abuse of authority or disregard of the law. We do not agree with any implicit suggestion that review in subdivision cases can only be made upon certiorari as was the case in the zoning cases relied on by the *Springdale* court. *De novo* review is appropriate when a claim raises constitutional questions because "[t]he courts are the sole and final arbiters of the constitutionality of local and state legislation, regulations, and other governmental action." Schnidman, *Handling the Land Use Case* § 5.2 (1984 & Supp. p. 221). *See Hylton Enterprises v. Board of Supervisors*, 220 Va. 435, 258 S.E. 2d 577 (1979). (When a subdivider contends that disapproval of a plat was not properly based upon the applicable ordinances or was arbitrary or capricious, he may appeal to an appropriate court, which has authority to order approval of the plat.)

As stated in its order dated 4 September 1987, the Superior Court determined that the plaintiff's claims were properly joined:

> . . . [I]t is hereby determined that the writ of certiorari has been joined for the ancillary purpose of bringing up to the Superior Court the records that were before Defendant's Town Council at the hearing of the Plaintiff/Petitioner's ap-

plication for subdivision approval. This action shall proceed according to the rules of evidence and procedure governing a civil action at law rather than the rules applicable to a proceeding in the nature of certiorari.

The North Carolina Supreme Court has recognized as proper a superior court's exercise of appellate and original jurisdiction in one cause of action. *Wilson Realty Co. v. City and County Planning Board for the City of Winston-Salem and Forsyth County*, 243 N.C. 648, 656, 92 S.E. 2d 82, 87 (1956). In *Wilson* the court recognized that the writ of certiorari may be used "as an ancillary writ in a *mandamus* action for the purpose of bringing up from the inferior tribunal . . . records deemed necessary for use in the trial of the case on its merits." *Id.* at 656, 92 S.E. 2d at 87. *Mandamus* is an exercise of original, not appellate, jurisdiction. *Id. See* 35 N.C. L. Rev. 180-81 (1957).

Here the use of certiorari as ancillary to plaintiff's complaint is consistent with the definition of certiorari "to bring into superior court the record of the administrative or inferior judicial tribunal for inspection." Black's Law Dictionary (1968) (citations omitted). For reasons enunciated herein, we recognize that denial of subdivision applications may be reviewed by certiorari, or an aggrieved plaintiff may bring an original complaint, or join causes of action as permitted by N.C. Rule of Civ. Proc. 18(a). Therefore, plaintiff's complaint was properly before the superior court, which properly entertained the motion for summary judgment which we are asked to review here.

Summary Judgment

[2] Having determined that summary judgment was properly before the trial court, we must determine whether there is any genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). Upon motion for summary judgment a court may consider affidavits, depositions, answers to interrogatories, admissions on file "and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. National Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823 (1971). *See* Shuford, *N.C. Civ. Prac. & Proc.* § 56-8 (3rd Ed. 1988).

The trial court found no genuine dispute as to these material facts:

On 28 October 1986 plaintiff submitted to the defendant an application for approval of a preliminary plat to create a small subdivision consisting of 11 lots, one of which she intended to use as her personal residence. On 9 March 1987, the Chapel Hill Town Council adopted its staff's recommendation and denied plaintiff's application for the following three reasons:

> (1) Plaintiff failed to indicate on her subdivision [plat] an intent to dedicate to the Town of Chapel Hill a right-of-way [through her property] for the proposed Laurel Hill Parkway. (hereinafter "Parkway Condition")
>
> (2) Plaintiff failed to indicate on her subdivision plat an intent to dedicate to the town an additional ten (10) feet of right-of-way along Old Lystra Road and to improve Old Lystra Road by adding an additional twelve (12) feet of pavement width as well as curb and gutter along the property's approximately 973 feet [of] frontage on that road. (hereinafter "Lystra Rd. Condition")
>
> (3) Plaintiff failed to indicate in her subdivision application an intent to extend public water and sewer lines to her property, such extension estimated to cost in excess of $750,000.00. (hereinafter "Water and Sewer Condition")

Moreover, the court further concluded that there was no dispute of a material fact, and that, except as set forth above, plaintiff's subdivision application complied with all applicable requirements of the Town of Chapel Hill's development ordinance. Additional facts that the court concluded were undisputed will be discussed below in relevant sections of this opinion.

Defendant contends that there may have been other reasons that the subdivision application was denied. We disagree. Careful review of the affidavits in support of summary judgment, the record of the Town Council meeting of 9 March 1987, other documents properly before the court, and the transcript of the summary judgment hearing, support the Superior Court's conclusions as to why the application was denied. Defendant came forward with no evidence that the denial was for any other reason.

We affirm the portion of the trial court's order which identifies the reasons for denial of the subdivision application.

The trial court set out three conclusions of law in its summary judgment order. The first is set out below:

> Defendant's denial of Plaintiff's subdivision on the basis of Plaintiff's failure to dedicate right of way necessary to accommodate the proposed Laurel Hill Parkway is unsupported by any statutory authority, deprives Plaintiff of her property without due process of law, in violation of Article I, Section 19 of the North Carolina Constitution and the 14th Amendment to the United States Constitution and 42 U.S.C. Section 1983, constitutes a temporary taking of that portion of the Plaintiff's property shown within the proposed right of way alignment of the Laurel Hill Parkway in violation of Article 1, Section 19 of the North Carolina Constitution, and, unless compensation is paid pursuant to G.S. Chapter 40A, the town's denial is in violation of the 5th and 14th Amendments to the United States Constitution.

The second conclusion of law found that "[t]he denial of Plaintiff's subdivision application on the basis of Plaintiff's refusal to dedicate the right of way for and make improvements to Old Lystra Rd." was unlawful for the same reasons that a Parkway dedication would be unlawful.

The third conclusion of law determined that the application denial could not be based on plaintiff's refusal to extend public water and sewer lines because defendant "has no statutory authority to deny the use of individual well and septic tank systems that are approved by the Orange County Health Department pursuant to State regulations."

Defendant assigns error to all three conclusions of law.

Parkway Condition

1. Common Law

[3] Despite the fact that the zoning statutes do not limit how a subdivision applicant may seek judicial review, the legal principles applied in review of zoning applications are relevant to subdivision application denial cases because zoning ordinances and

subdivision ordinances both limit private property rights. *Application of Rea*, 272 N.C. 715, 718, 158 S.E. 2d 887, 890 (1968). One commentator states:

> Second only to zoning in importance in the land use regulatory picture is subdivision regulation. The official zoning map, along with the text of the zoning ordinance control *what* may be developed on a specific parcel of land; but the subdivision regulations direct *how* such development will occur. Subdivision regulation is the means by which the municipality ensures that the infrastructure necessary for proper functioning of the community . . . is planned and implemented.

Schnidman, *Handling the Land Use Case* § 1.4, pp. 21-22 (1984 & Supp. 1988).

When a town council reviews a subdivision application the council sits in a quasi-judicial capacity. *Springdale Estates.* Similarly, " 'when a board of aldermen, a city council, or zoning board hears evidence to determine the existence of facts and conditions upon which the [zoning] ordinance expressly authorizes it to issue a special use permit, it acts in a quasi-judicial capacity.' " *Humble Oil and Refining Co. v. Board of Aldermen*, 286 N.C. 170, 209 S.E. 2d 447, 449 (1974), *citing Humble Oil & Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). In the zoning review context the North Carolina Supreme Court enunciated the "two-step decision-making process" a town board had to follow in granting or denying an application for a special use permit:

> (1) When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, prima facie he is entitled to it.
>
> (2) A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Coastal Ready-Mix Concrete Co. v. Board of Commissioners, 299 N.C. 620, 625, 265 S.E. 2d 379, 382, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980) (conditional use permit denied) (citations omitted). Because of the similar issues involved in subdivision applica-

tions and zoning variance applications, the rules enunciated above logically extend to govern a subdivision application proceeding.

However, we agree with the defendant that if the denial of the application by the town council was valid for any of the three reasons previously listed, the denial of the subdivision application may stand. *Jennewein v. City of Wilmington*, 62 N.C. App. 89, 93, 302 S.E. 2d 7, 9, *rev. denied*, 309 N.C. 461, 307 S.E. 2d 365 (1983). Of course, a valid reason, by definition, must be "supported by competent, material and substantial evidence." *Jennewein* at 93, 302 S.E. 2d at 9.

2. Fifth Amendment

[4] Plaintiff urges this Court to recognize that the conditions imposed by the town were unlawful exactions of defendant's property and to apply the Fifth Amendment regulatory taking doctrine enunciated in *Nollan v. California Coastal Comm'n*, --- U.S. ---, 97 L.Ed. 2d 677, 107 S.Ct. 3141 (1987). In that case the United States Supreme Court held that the California Coastal Commission could not refuse its grant of permission to rebuild a beach house because the applicants refused to comply with a condition that they transfer to the public an easement across their beachfront property:

> [Though] [t]he access required as a condition of the permit is part of a comprehensive program to provide continuous public access . . . .
>
> [T]hat does not establish that the Nollans . . . alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," *see* U.S. Const. Amdmt V; but if it wants an easement across the Nollans' property, it must pay for it.

--- U.S. ---, 97 L.Ed. 2d at 692, 107 S.Ct. at 3150.

Nollan established that a heightened scrutiny "remoteness test" is to be used if a regulation is alleged to violate the takings clause of the Fifth Amendment: the regulation must "substantially advance" a "legitimate state interest." *Id.* at ---, 97 L.Ed. 2d at 687, 107 S.Ct. at 3146, *citing Agins v. Tiburon*, 447 U.S. 255, 260, 65 L.Ed. 2d 106, 100 S.Ct. 2138 (1980). When a takings claim

is made under the due process clause of the Fourteenth Amendment, a less strict, "rational basis" analysis is used. *See* R. Freilich, Finetuning the Taking Equation: Applying It to Development Exactions, 40 Land Use Law & Zoning Digest (March 1988). North Carolina has established a test of "reasonableness" to judge a due process challenge to governmental regulation of private property. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979). Plaintiff's substantive due process claim is addressed in another section of this opinion.

Defendant cites many cases for the proposition that "subdivision plans can be denied for failure to comply with a master plan." *Board of County Commissioners v. Gaster*, 285 Md. 233, 401 A. 2d 666 (1979). However, this rule cannot be isolated from constitutional issues presented in a case. Defendant asserts that this Court should not decide the case on constitutional grounds when it may be decided on other grounds. This maxim is wrongly applied to cases involving municipal ordinances. *State v. Scoggin*, 236 N.C. 1, 6, 72 S.E. 2d 97, 101 (1952) (strictly speaking rule only applies to Legislative Acts).

Like *Nollan* the "Parkway Condition" is an exaction with Fifth Amendment implications:

> [A]n exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid in lieu of compliance with dedication or improvement provisions; and (4) requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area.

Ducker, *"Taking" Found for Beach Access Dedication Requirement* 30 Local Gov't Law Bulletin 2, Institute of Government (1987).

Defendant's argument that this case does not raise constitutional issues fails. Specifically focusing on the condition that plain-

tiff set aside a right-of-way for Laurel Hill Parkway the defendant argues that it did not necessarily require a dedication of land, but mere accommodation or coordination of a right-of-way with the town's thoroughfare plan. The *Nollan* court categorically refutes defendant's position that a requirement that the plaintiff set aside a right-of-way would not present a constitutional takings issue:

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice Brennan contends) "a mere restriction on its use," post at ---, n3, 97 L.Ed. 2d 696-97, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.

Nollan at ---, 97 L.Ed. at 685, 107 S.Ct. at 3145.

It is important to realize that unlike other takings cases, when an exaction amounts to a physical occupation of property the analysis focuses on whether the specific property right which would be relinquished to fulfill the condition amounts to a taking, regardless of whether the condition imposed " 'has only a minimal economic impact on the owner.' " *Id., citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 73 L.Ed. 2d 868, 102 S.Ct. 3164 (1982). In *Nollan* the question was whether the building permit condition imposed, dedication of an easement so the public could walk across the beachfront portion of plaintiff's property, amounted to a taking regardless of whether the condition detracted fron the economic value of plaintiff's lot. *Id.*

Not all exactions are constitutional takings. Though other state courts have enunciated a preference for one of three distinct tests to answer the question whether an exaction constitutes an unconstitutional taking, the question is one of first impression in North Carolina. *Ducker* at 2. A complete discussion of these tests can be found in Rathkopf, *The Law of Zoning and Planning* § 65.03 at 65-98 n.21 (1987). "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole.' " *Nollan*, --- U.S. ---,

97 L.Ed. 2d at 688, 107 S.Ct. 3147, n.4 (citing *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed. 2d 1554, 80 S.Ct. 1573 (1960). An exaction test identifies when an individual property owner should pay for a community improvement and when that cost more fairly lies with the "public as a whole."

In *Nollan*, the Court did not favor a single test to identify when an exaction amounts to a taking under the just compensation clause. In that case the defendant, California Coastal Commission, proposed a "reasonably related" test. Justice Scalia stated for the Court:

> We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.

Id. at ---, 97 L.Ed. 2d at 690, 107 S.Ct. at 3148. In *Nollan* the condition was struck because the court found that the condition did not substantially advance the legitimate government interest. *Id.* An exaction test is used to evaluate a taking only after it has been shown that the exaction "substantially advances a legitimate government interest." *Id.* The court implicitly recognized as valid all three exaction tests, but singled out the California "reasonably related test" as unique to that state. *Id.* at ---, 97 L.Ed. 2d at 690-91, 107 S.Ct. at 3149.

The narrowest exaction test requires that the benefit accruing from the exaction be "specifically and uniquely attributable" to the development. That is, the development creates an impact which causes the need for the exaction, and the benefit flowing from the exaction must inure "almost exclusively" to development residents. *Ducker* at 2. *Pioneer Trust & Saving Bank v. Mount Prospect*, 22 Ill. 2d 375, 176 N.E. 2d 799 (1961); *see Nollan* at ---, 97 L.Ed. 2d at 690, 107 S.Ct. at 3149.

The second and least demanding test is the "reasonably related" test which finds no exaction when the "proposed development is a contributing factor to the problem sought to be alleviated." *Holmes v. Planning Board of Town of New Castle*, 78 A.D. 2d 1, 433 N.Y.S. 2d 587 (1980); *see Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P. 2d 1 (1949). This test is justified by a municipality's police power to assure the general welfare. *Id.*

Last, the "rational-nexus" test provides that a subdivider can be required "to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision." *Longridge Bldrs. v. Planning Bd. of Twp. of Princeton*, 52 N.J. 348, 245 A. 2d 336, 337 (1968); *see Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N.W. 2d 442 (1966). *Cupp v. Board of Supervisors*, 227 Va. 580, 318 S.E. 2d 407 (Va. 1984). Though North Carolina has not yet adopted a test which determines when an exaction would be the equivalent of a regulatory taking, statutory authority leads us to conclude that the North Carolina legislature has indicated that the "rational-nexus test" is the proper test to be adopted in North Carolina.

Statutory Provisions

The North Carolina legislature has delegated to municipalities the power to enact subdivision ordinances. N.C.G.S. § 160A-174. The introductory language of the subdivision enabling statute, N.C.G.S. § 160A-372 states:

> A subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas *serving residents of the immediate neighborhood within the subdivision or*, alternatively, for provision of funds to be used to acquire recreation areas *serving residents of the development or subdivision or more than one subdivision or development within the immediate area*, and rights-of-way or easements for street and utility purposes including the dedication of rights-of-way . . . . (Emphasis added.)

The emphasized language indicates that the legislature contemplated that any dedication or reservation for recreation areas would directly benefit the subdivision from which the reservation or dedication would be exacted. The statute allows that funds to acquire recreation areas may serve the residents of the subdivision or "more than one subdivision or development *within the immediate area*." However, the statute further states that:

> Any formula enacted to determine the amount of funds that are to be provided [by the developer to the city to acquire

recreational areas] . . . shall be based on the value of the development or subdivision for property tax purposes.

Id. This fund formula proviso comports with rational-nexus theory which provides that: "[t]he cost burden to the developer generally cannot exceed the prorated portion of the costs of providing facilities that can fairly be attributed to the development." *Ducker* at 2.

Concerning exactions for road construction N.C.G.S. § 160A-372 states:

> The ordinance may provide that in lieu of required street construction, a developer may be required to provide funds that the city may use for the construction of roads to serve the occupants, residents, or invitees of the subdivision or development and these funds may be used for roads which serve more than one subdivision or development within the area. . . . Any formula adopted to determine the amount of funds the developer is to pay in lieu of required street construction shall be based on the trips generated from the subdivision or development.

Here the statute clearly ties any exaction for street development to the traffic generated by the subdivision.

However, N.C.G.S. § 160A-372 provides very different instructions when a reservation of a school site shall be required. In that case:

> The ordinance may provide for the reservation of school sites in accordance with comprehensive land use plans approved by the council or the planning agency. . . . Whenever a subdivision is submitted for approval which includes part or all of a school site to be reserved under the plan, the council or planning agency shall immediately notify the board of education and the board shall promptly decide whether it still wishes the site to be reserved. If the board of education does not wish to reserve the site, it shall so notify the council or planning agency and no site shall be reserved. If the board does wish to reserve the site, the subdivision shall not be approved without such reservation. The board of education shall then have 18 months beginning on the date of final approval of the subdivision within which to acquire the site by

> purchase or by initiating condemnation proceedings. If the board of education has not purchased or begun proceedings to condemn the site within 18 months, the subdivider may treat the land as freed of the reservation.

Thus, when a reservation is required for a school, a project which is for the good of the general community, the statute contemplates that a municipality shall exercise its power of eminent domain in a timely fashion. *See* N.C.G.S. § 40A-3.

[5] The portion of the trial court's first conclusion of law which found that the condition that plaintiff dedicate a right-of-way or "accommodate" her subdivision plan to the proposed alignment of the Laurel Hill Parkway was unsupported by statutory authority is consistent with our analysis of the subdivision enabling statute. The need for the proposed parkway arises not as a result of the plaintiff's subdivision plan, but because of pre-existing traffic congestion on Highway 15-501 created by the general community, not plaintiff's proposed subdivision. In addition, plans for the parkway are indefinite both as to financing and timing.

Reading the subdivision enabling statute N.C.G.S. § 160A-372 in its entirety it is clear that the introductory language allowing "for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways . . ." is modified by the formula provision: "[a]ny formula . . . shall be based on the trips generated from the subdivision or development." The forecast of the evidence showed that no car trips from the subdivision were likely to be made on the parkway since the proposed road likely would be limited access. In addition, the impact on 15-501 traffic was expected to be minimal. The Chapel Hill Planning Staff report dated 6 January 1987 states:

> *Traffic Analysis.* The proposed Old Lystra subdivision will generate approximately 110 trips per day. This project will have the most impact on the intersection of Old Lystra and Mt. Carmel Church Roads. During the am peak, which is the most critical at this intersection, vehicles turning onto Mt. Carmel Church Road experience a level C of service. *The addition of traffic from this project will not significantly lower the existing level of service.* (Emphasis added.)

The town's own report makes no connection between the need for Laurel Hill Parkway and the plaintiff's subdivision. Therefore, we agree that N.C.G.S. § 160A-372 does not authorize the town of Chapel Hill to impose a condition that the plaintiff dedicate a right-of-way to accommodate the proposed alignment of the Laurel Hill Parkway.

Defendant relies on dicta in *Messer v. Town of Chapel Hill*, 59 N.C. App. 692, 297 S.E. 2d 632 (1982), *rev. den.*, 307 N.C. 697, 301 S.E. 2d 390 (1983), for the proposition that the subdivision of property is "a privilege and not a right." *Id.* at 696, 297 S.E. 2d at 634. Any such notion was refuted in *Nollan*: " 'The right to build on one's own property . . . cannot remotely be described as a "governmental benefit" and the payment of a fee, dedication of land, etc. does not constitute a constitutionally valid "exchange" for a permit to build.' " L. Bozung, "The 1987 Land Use Trilogy: Keystone, First English and Nollan" presented August 1988, ABA annual meeting. *Citing Nollan* at --, 97 L.Ed. 2d at 687, 107 S.Ct. at 3146, n.2. In *Messer* the contested condition required relocation of a recreation area for the use of the immediate subdivision neighborhood. Unlike this case, the *Messer* court found that the town's condition for approval of a subdivision plat was within the grant of authority of N.C.G.S. § 160A-371.

In August of 1987, after plaintiff filed her subdivision application, the legislature enacted the Roadway Corridor Official Map Act (hereinafter Map Act), comprehensive legislation addressing how and when a comprehensive planning map for roads may affect a subdivision developer. Though the Map Act does not specifically affect plaintiff's application, we are guided by its policies in our determination of how to test when an exaction is a taking. The Map Act at N.C.G.S. § 136-44.50 states:

> (a) A roadway corridor official map may be adopted or amended by the governing board of any city within its corporate limits and the extraterritorial jurisdiction of its building permit issuance and subdivision control ordinances or by the Board of Transportation.
>
> * * * *
>
> (c) No roadway corridor or any portion thereof placed on an official map shall be effective unless:

(1) The roadway corridor or a portion thereof appears on the Transportation Improvement Program adopted by the Board of Transportation under G.S. 143B-350(f)(4); or

(2) The roadway corridor or a portion thereof appears on the street system plan adopted pursuant to G.S. 136-66.2, and the adopting city or town has adopted a capital improvements plan of 10 years or shorter duration which shows the *estimated cost of acquisition and construction of the designated roadway corridor and the anticipated financing for that project.* [Emphasis added.]

The Transportation Improvement Program provides for a comprehensive schedule of funded improvements within seven years. N.C.G.S. § 143B-350(f)(4). At N.C.G.S. § 136-44.51(b) the Map Act states that

(b) No application for building permit issuance or subdivision plat approval shall be delayed by the provisions of this section for more than three years from the date of its original submittal.

This last provision was added to assure that an applicant's property rights would not be affected by an indefinite thoroughfare plan.

Exaction

Reading the subdivision enabling statute as a whole, particularly in conjunction with the policies set out in the Official Map Act and the Eminent Domain statutes, it is clear the legislature contemplated that exactions can only be imposed without compensation when the exaction condition meets a need created by the development and that as a result of the exaction there will be a commensurate benefit to the subdivision. However, when a school or road planning scheme for the general community requires an exaction the legislature has contemplated that cities and towns shall exercise their power of eminent domain in a timely and lawful fashion.

[6] Thus, the following rational nexus test is adopted to guide the trial court in evaluating when an exaction is tantamount to a taking under the just compensation clause. The test is based on

the principles enunciated in *Nollan*, the rationale of the North Carolina subdivision enabling statute, and the policy underlying the Map Act. To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; *and* (5) whether the condition imposed is proportionally related to the impact of the development.

This last condition when applied to large planned unit developments has been restated to ask whether "the economies of scale attributable to the magnitude of the development provide the basis for the municipality to require the developer to dedicate land needed for major public improvements or even to build certain improvements." *Schnidman* § 1.4.2 at 24.

[7] In addition to invalidation because of lack of statutory authority the trial court invalidated the Laurel Hill Parkway condition by recognizing the plaintiff's claim for inverse condemnation, stating that unless compensation is paid as required by the eminent domain statutes a taking will occur.

In its 6 January 1987 report to the Chapel Hill Planning Board the Chapel Hill Planning Department recommended a denial of plaintiff's subdivision application because "the applicant does not incorporate the alignment of the Laurel Hill Parkway right-of-way into the proposed preliminary plan." This memorandum exposes an elemental misconception of the meaning of right-of-way. A right-of-way is "a mere easement in the lands of others obtained by *lawful condemnation to public use or purchase.*" Black's Law Dictionary (1968) (emphasis added).

As there had been no lawful condemnation or purchase, there was no right-of-way, and therefore no legal standing to impose the condition unless the condition could meet the exaction test outlined above. First, the condition identified is that plaintiff dedicate, accommodate or reserve a right-of-way to coordinate her plan with the Town of Chapel Hill Thoroughfare Plan and Map, specifically the alignment of the Laurel Hill Parkway.

Second, the regulations relied on by the Chapel Hill Town Council to impose the condition are found at § 6.5.1 and § 7.7.1 of the Chapel Hill Development Ordinance:

> The type and arrangement of streets and driveways within the development shall be in compliance with and coordinate to Chapel Hill's Transportation Plan. § 6.5.1.
>
> The subdivision should be designed with a street network which provides safe, adequate access to all lots within the subdivision, and to properties adjoining the subdivision where such access is deemed desirable for the orderly future development of these properties. However, the design of the street network in a subdivision should not encourage through traffic (the origins and destination of which are external to the subdivision) to use local roads in a subdivision. Further, the various streets, utilities, recreation areas and other community facilities serving a subdivision should be sized and located in conformity with the Comprehensive Plan. § 7.7.1.

The test then asks whether the regulation substantially advances a legitimate state interest. *Nollan.* Like the *Nollan* court we accept for argument's sake that a condition of subdivision approval that a dedication of a right-of-way to preserve the alignment of the proposed parkway substantially advances the legitimate government purpose of placing streets in conformity with the Comprehensive Plan. *See id.* at ---, 97 L.Ed. 2d at 688, 107 S.Ct. at 3147.

It is the last step of the test which the Laurel Hill Parkway condition fails to meet because though the condition meets the fourth requirement in that it seems to substantially advance the preservation of the proposed parkway plan, the condition is not proportionally related to the impact of the development, and there is no commensurate benefit to the subdivision for its forfeit of land to preserve the Parkway Plan. Thus, to impose the exaction under these circumstances would deprive the plaintiff of the "economically viable use of her land." *Id.* at ---, 97 L.Ed. 2d at 687, 107 S.Ct. at 3146, and in this instance, an imposition of the condition amounts to a taking.

Due Process

[8] The trial court also found that the denial of the plaintiff's subdivision on the basis of her refusal to comply with the Parkway condition deprived the plaintiff of "due process of law in violation of Article I, Section 19 of the North Carolina Constitution, the Law of the Land clause, and the 14th Amendment to the United States Constitution and 42 U.S.C. Section 1983 . . . ."

"The terms 'law of the land' and 'due process of law' are synonymous." *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E. 2d 444, 448 (1979). *But see Henry v. Edmisten*, 315 N.C. 474, 480, 340 S.E. 2d 720, 725 (1986). In *A-S-P Associates* a developer alleged that a zoning ordinance creating an historic district was constitutionally invalid. In that case the North Carolina Supreme Court set out several principles to guide an evaluation of a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power:

> First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable? [Citations omitted.] This second inquiry is two-pronged: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?

Id. at 214, 258 S.E. 2d at 448-9.

Police power can be lawfully exercised to protect the public safety, health, and general welfare. N.C.G.S. § 160A-174. "The police power may be delegated by the State to its municipalities whenever deemed necessary by the Legislature." *A-S-P Associates* at 213-14, 258 S.E. 2d at 448 [citations omitted]. In an earlier portion of this opinion we held that the imposition of the Parkway condition exceeded the statutory authority delegated to the Town of Chapel Hill in 160A-174. Though the Chapel Hill Development Ordinance at § 6.5.1. and § 7.7.1 appears facially lawful, to interpret it as authorizing the parkway condition in this case would put it beyond the scope of the delegated police power.

Further evidence of substantive due process violations in this case are found in the vague and general reasons for denial given by the town:

> 1. Is not consistent with the orderly growth and development of the Town as outlined in the Comprehensive Plan of the Town and, in particular the Land Use Plan, as required by Section 6.5.1 of the Development Ordinance.
>
> 2. Does not have streets which coordinate with existing and planned streets and highways as required by Sections 7.7.1 and 6.5.1 of the Development Ordinance.
>
> 3. Does not create conditions essential to the present and future public health, safety and general welfare as required by the Development Ordinance.
>
> 4. Does not provide for the construction of Community service facilities in accordance with municipal policies and standards as set out in the Comprehensive Plan and as required by Section 7.7.1 of the Development Ordinance.

"Substantive due process involves the clarity, specificity, and reasonableness of the organic laws, ordinances, and other restrictions on the use of private property." *Schnidman* § 3.1.3 at 101-02. When permit applicants challenged denial of a special exception under zoning ordinance the North Carolina Supreme Court stated:

> [T]he commissioners cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, a mobile-home park would 'adversely affect the public interest.' The commissioners must also proceed under standards, rules and regulations, uniformly applicable to all who apply for permits.

Application of Ellis, 277 N.C. 419, 425, 178 S.E. 2d 77, 81 (1970); *see Woodhouse v. Board of Commissioners of Nags Head*, 299 N.C. 211, 261 S.E. 2d 882 (1980) (denial of application for a special use permit reversed).

The Chapel Hill Town Council made no findings of fact when it denied plaintiff's subdivision application. The reasons given for denial were vague and imprecise, though the record clearly indicates the three reasons for denial of the application. In fact,

§ 7.7.1, which is relied on by the town in its denial calls for a street network within subdivisions which does not encourage through traffic. It is inconsistent to rely on such a provision to fault an applicant for refusing to accommodate a major thoroughfare which would carry external traffic. For the foregoing reasons we affirm that portion of the trial court's order which found that the imposition of the parkway condition violated the plaintiff's due process rights.

Lystra Road

[9] In its second conclusion of law the trial court found that the Lystra Road condition was unsupported by state statute, violated due process, and constituted a temporary taking for which compensation is due. This condition requires the plaintiff to dedicate, according to town requirements, a total of 9,735 square feet of her property for a minor arterial right-of-way. We reverse this portion of the court's summary judgment order to allow the lower court to hear evidence and make findings in light of our discussion of due process, *Nollan*, and the rational nexus test set forth above.

Water and Sewer Condition

In its third conclusion of law the trial court found:

> The denial of Plaintiff's subdivision application on the basis of Plaintiff's refusal to extend public water and sewer lines to her property is unsupported by Defendant's ordinance and is *ultra vires* since Defendant has no statutory authority to deny the use of individual well and septic tank systems that are approved by the Orange County Health Department pursuant to State regulations.

[10] North Carolina adheres to Dillon's Rule, that a local government possesses and can exercise only the following powers and no others: those granted in express words, those necessarily or fairly implied, and those essential to the objects and purposes of the municipal corporation. Any fair, reasonable doubt as to the existence of power is resolved by the courts against the municipality. *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E. 2d 231 (1975). The *Greene* court invalidated a municipal ordinance that required sprinkler systems in high-rise buildings. In that case the State Building Code statute required that any local building regu-

lations be approved by the state's Building Code council or be void. *Id.* at 71, 213 S.E. 2d at 237.

N.C.G.S. § 160A-174 was relied on by the *Greene* court to invalidate the sprinkler ordinance:

> General ordinance-making power.
>
> (a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.
>
> (b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
>
> * * * *
>
> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

Regulation of sanitary sewage systems is set out at N.C.G.S. §§ 130A-333 to 130A-337. The complete and integrated statutory scheme delegates the power to approve septic tank systems to the local board of health. N.C.G.S. § 130A-335(c). In this case the trial court concluded that the plaintiff had received preliminary approval from the Orange County Health Department for septic tank systems on each of the 11 proposed lots. Given the statutory scheme mandated by the legislature, we affirm the portion of the lower court's order invalidating the water and sewer condition.

[11] Finally, we reject plaintiff's argument on cross appeal that the trial court erred in refusing to recognize that denial of the subdivision application on the basis of plaintiff's refusal to extend public water and sewer lines to the property constitutes an unconstitutional taking of plaintiff's entire tract.

For the reasons stated above that portion of the trial court's Conclusions of Law numbered (1): "Parkway Condition" and numbered (3): "Water and sewer condition" are affirmed. We remand for trial evaluation of the "Lystra Rd. condition" in light of our

discussion of *Nollan*, exactions, and due process. Only if the plaintiff prevails at trial in proving the invalidity of the "Lystra Rd." condition will it be appropriate to consider plaintiff's remedies.

For the reasons stated above the order of the trial court is affirmed in part, reversed in part and remanded.

Affirmed in part, reversed in part and remanded.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. GRAYSON RILEY DAVIS

No. 8819SC439

(Filed 7 February 1989)

1. **Narcotics § 4.4— trafficking in cocaine and methadone—constructive possession—insufficiency of evidence**

Evidence of defendant's possession of cocaine found in the bathroom of a mobile home and methadone found in the front bedroom of the mobile home was insufficient for submission to the jury of charges of trafficking in those controlled substances, although evidence of defendant's presence in the mobile home along with a bottle of prescription drugs with his name on it sitting on a table next to him may have raised a strong suspicion that defendant had control of the mobile home and was therefore in constructive possession of substances found therein, where there was no evidence that defendant owned, leased, or otherwise exercised any control over the mobile home.

2. **Narcotics § 4.4— drugs found in outbuilding—outbuilding not within curtilage of mobile home where defendant was found**

Evidence was insufficient to show that an outbuilding in which controlled substances were found was within the curtilage of a mobile home occupied by defendant, and the evidence was thus insufficient to show constructive possession, where the State did not show the distance of the outbuilding from the mobile home or whether there was any type of enclosure surrounding the mobile home and the outbuilding, and the outbuilding was not locked and did not contain anything sufficient to show a function of convenience or comfort.

3. **Narcotics § 4.4— drugs in outbuilding—constructive possession—insufficiency of evidence**

Evidence was insufficient to show that defendant exercised control over an outbuilding and therefore had constructive possession of drugs found there where there was no evidence as to whether the outbuilding was located on defendant's property; evidence was presented that defendant did not own the

land upon which a nearby mobile home was located; there was no evidence that defendant had ever used or been seen near the outbuilding; and evidence of footprints from the mobile home to the outbuilding, without a showing that those prints were defendant's, did not tend to show that defendant had ever used or been in the building.

Judge EAGLES dissenting.

APPEAL by defendant from *Ross (Thomas W.), Judge.* Judgment entered 10 December 1987 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 1 November 1988.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant.

GREENE, Judge.

Defendant was indicted on six counts of trafficking in the controlled substances of dilaudid, codeine, cocaine, methadone, morphine, and anileridine in violation of N.C.G.S. Sec. 90-95(h) (1985), and indicted on one count of possession of the controlled substance diazapam in violation of N.C.G.S. Sec. 90-95(a)(3) (1985).

The defendant pled not guilty and was found guilty by a jury on all charges. Defendant was sentenced to a life sentence and fined $500,000.00 and court costs for each of the four counts of trafficking in dilaudid, trafficking in morphine, trafficking in methadone, and trafficking in anileridine. For the offense of trafficking in codeine, defendant was sentenced to a term of thirty years and fined $100,000.00 and court costs. All the life sentences and the thirty-year sentence for trafficking in codeine were to be served concurrently. For the offense of trafficking in cocaine, defendant was sentenced to a term of fifteen years, to be served at the expiration of the concurrent life sentence and the thirty-year sentence for trafficking in codeine, plus a fine of $50,000.00 and court costs. For the offense of possession of diazapam, defendant was sentenced to a term of five years to be served at the expiration of the concurrent life sentences, the codeine trafficking sentence, and the cocaine trafficking sentence. The defendant appeals.

The State's evidence at trial tended to show that on 27 February 1987, seven law enforcement officers entered a mobile home in Randolph County pursuant to a search warrant. Upon gaining entry, the officers discovered several adults seated in the living room. The defendant, Grayson Riley Davis (hereinafter "the defendant"), and his wife Patricia were two of those present. The defendant was fifty-eight years old and physically disabled to the extent of having to rely upon a walker for mobility.

When the officers entered the home one man, Vernon Lundsford, ran down a hall towards the bathroom. An officer pursued Lundsford and entered the bathroom as he flushed the toilet. The officer retrieved several plastic bags containing a white powder substance and several white large rocks by reaching his arm into the commode up to his elbow while the commode was still in the process of flushing. Lundsford was thereafter taken into custody. All the other people in the mobile home were then seated and instructed to remain seated unless the officers needed to search them individually.

The officers next searched the mobile home and the area outside. In the same bathroom where the officer had followed the fleeing man, officers found laying on the floor beside the commode a blue Crown Royal liquor bag that contained a plastic baggy with white powder, a plastic baggy with white tablets, a plastic bottle with yellow and blue capsules, a glass bottle with yellow tablets, a plastic baggy end with a white powder substance, a plastic bottle with white tablets, and a glass bottle with a white powder substance.

Charles E. Hatley, a special agent with the State Bureau of Investigation, testified that he searched the front bedroom of the mobile home and found a sales contract in a wooden box on the dresser in that bedroom. The agent further testified as follows:

Q. And do you recall whose name was on that sales contract?

A. As I recall it was Grayson Davis.

Q. And do you recall a date on that sales contract?

A. I can from my notes but not independent of my notes; the date being March 27th, 1986.

Q. Did the contract contain a description of the mobile home as to the brand and VIN number?

A. It did; yes, sir.

Q. And did you, in the course of your search, look at the mobile home itself which you were searching?

A. Yes, sir; we—yes.

Q. And did the description and the contract match the mobile home that you were searching?

A. As far as I could determine. I didn't compare any numbers on the contract with any numbers on the mobile home.

. . .

Q. Mr. Hatley, you don't know who owns the land, do you?

A. No, sir; I do not.

Q. You know Grayson Davis doesn't own that land, don't you?

A. I don't know that of my own knowledge, but I don't think that he does.

Q. Do you know who was paying the rent for the trailer space there?

A. No, sir.

Also found on the top of the dresser in the bedroom were two plastic bottles containing white tablets later identified as methadone.

In the living room, on the floor and under one of the end tables next to the chair in which defendant was sitting, officers found a brown glass bottle containing tablets. The coffee table on the right-hand side of defendant was searched and a white plastic bottle containing tablets and a brown plastic bottle containing tablets were found there. Also found on this coffee table were several plastic bottles of prescription drugs. One of the prescription bottles had a label with the defendant's name on it. The defendant himself was searched and several white tablets were recovered from his pants pockets and from between defendant's legs in the seat of his chair. Throughout the mobile home,

paraphernalia such as scales, syringes, smoking pipes, screen wire, and rolling paper were discovered and taken into custody.

The officers next searched the area outside the mobile home. James Allred, a lieutenant detective with the Randolph County Sheriff's Department testified in pertinent part as follows:

> A. I went outside with another officer; there was snow on the ground, to look and see if there were any tracks leading from the trailer in any direction.
>
> Q. What did you observe out there?
>
> A. I found some tracks leading from the front door out by the side of the trailer up to the little yard area to an outbuilding.
>
> Q. Did you go out to the outbuilding at that time?
>
> A. Yes I did.
>
> Q. Just describe the outbuilding, if you would.
>
> A. The best I remember it was—the size of the building looked to be about twelve (12) foot wide and maybe twenty (20) foot long. It had a door, some windows that had been broken out, or maybe shutters that was [sic] open; I couldn't tell if the window was all opened, and it was just a storage building; some pieces of furniture, some other containers like buckets, maybe parts of a motor; I believe there was a motorcycle in there.
>
> Q. Was the door locked?
>
> A. No it was standing partly open.

Inside the outbuilding, the officers discovered a gray plastic bag and a white plastic bag containing a black cloth bag which had various bottles of liquid substance and tablets.

Chemical analysis conducted by an expert in the field of forensic chemistry employed by the State Bureau of Investigation revealed that the items which were collected and recovered at the mobile home included 28.1 grams of undiluted cocaine and 21.7 grams of a white powder substance that contained approximately thirty per cent cocaine both of which were found in the bathroom, 51.7 grams of the opiate methadone which was found in the front

bedroom, 49.2 grams of the opiate morphine, 2,055 tablets containing diazapam, 31 grams of the opiate hydromorphone whose trade name is dilaudid, 27.2 grams of the opiate codeine, and 28 grams of the opiate anileridine, all of which were found in the outbuilding.

At the end of the State's evidence, the defendant moved to dismiss all the charges, which motion was denied by the court. After the defendant offered no evidence, the defendant then renewed his motions to dismiss, which motions were again denied.

Four of the six trafficking charges refer to controlled substances found in the unlocked outbuilding. One trafficking charge refers to methadone tablets found on the dresser in the front bedroom of the mobile home. The remaining trafficking charge refers to cocaine found in the bathroom of the mobile home. This includes the cocaine Vernon Lundsford attempted to flush down the toilet as well as the second bag containing cocaine which was found on the floor beside the toilet. The charge of possession refers to the controlled substance diazapam found in the outbuilding. No charges were brought against the defendant relating to the tablets found in the pockets of defendant's pants or his chair. Likewise, no charges were brought against the defendant relating to the paraphernalia recovered throughout the mobile home.

The issues presented for review are whether the trial court I) erred in denying defendant's motion to dismiss the charges of trafficking in cocaine (controlled substance found in the bathroom of the mobile home) and trafficking in methadone (controlled substance found in the front bedroom of the mobile home); and II) erred in denying defendant's motion to dismiss the trafficking and possession charges which related to the controlled substances seized in the outbuilding.

I

[1] A conviction for "trafficking in cocaine" requires the sale, manufacture, delivery, transportation, or possession of twenty-eight grams or more of the substance. N.C.G.S. Sec. 90-95(h)(3) (1985). The State relies on the defendant's constructive "possession" of cocaine found in the bathroom of the mobile home to

charge him with this offense. Defendant argues in his brief that the evidence at trial failed to show he was trafficking in cocaine, more specifically that all the evidence tended to show the cocaine at issue was not in his actual or constructive possession but instead was in the actual physical possession of another person, Vernon Lundsford, who ran to the bathroom of the mobile home upon the officers' entry.

"The doctrine of constructive possession applies when a person lacking actual physical possession nevertheless has the intent and capability to maintain control and dominion over a controlled substance." *State v. Baize*, 71 N.C. App. 521, 529, 323 S.E. 2d 36, 41 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E. 2d 34 (1985). The requirements of intent and capability "necessarily imply that a defendant must be aware of the presence of an illegal drug if he is to be convicted of possessing it." *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E. 2d 61, 62 (1973), *cert. denied*, 284 N.C. 618, 202 S.E. 2d 274 (1974). However, a "defendant's knowledge can be inferred from the circumstances." *State v. Casey*, 59 N.C. App. 99, 117, 296 S.E. 2d 473, 484 (1982). Where controlled substances are found on premises under the defendant's exclusive control, this fact alone may be sufficient to give rise to an inference of constructive possession and take the case to the jury. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E. 2d 636, 638 (1987). Where possession of the premises by the defendant is nonexclusive, "constructive possession . . . may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E. 2d 585, 589 (1984).

In ruling on a motion to dismiss, all the evidence admitted must be considered in the light most favorable to the State with inconsistencies and contradictions therein disregarded. *State v. Scott*, 323 N.C. 350, 353, 372 S.E. 2d 572, 575 (1988). In order to survive a motion to dismiss, there must be "substantial evidence of each essential element of the crime charged." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

Considering the evidence in the light most favorable to the State, there is no substantial evidence the mobile home was under the exclusive or nonexclusive control of the defendant. First, there is no evidence of ownership of the mobile home. The evi-

dence of a sales contract matching the general description of the mobile home in issue, which did not reveal whether defendant was a buyer or seller, is not sufficient to carry the issue of ownership to the jury. Furthermore, there is no evidence defendant leased the premises or otherwise exercised any control over the mobile home. *See State v. Leonard*, 87 N.C. App. 448, 456, 361 S.E. 2d 397, 402 (1987), *disc. rev. denied*, 321 N.C. 746, 366 S.E. 2d 867 (1988) (sufficient control shown in the absence of evidence of ownership or leasehold interest where defendant first granted and later denied permission to search the premises, ordered officers off the premises and locked the door); *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E. 2d 321, 323 (1987) (sufficient control shown where defendant was seen on the premises the evening before the search, seen cooking dinner on the premises on the night of the search, mail was found on the premises addressed to the defendant and insurance policy listing the premises in question as the defendant's residence was also found on the premises); *State v. Allen*, 279 N.C. 406, 412, 183 S.E. 2d 680, 684 (1971) (sufficient control shown where utilities at the residence were in defendant's name, personal papers including an army identification card bearing defendant's name were found on the premises and evidence that drugs belonged to defendant and were being sold at defendant's direction); *Brown*, 310 N.C. at 569-70, 313 S.E. 2d at 589 (sufficient control shown where defendant had on his person a key to the residence being searched and on every occasion the police observed the defendant prior to the date of the search, defendant was at the residence in question).

While the presence of the defendant in the mobile home along with a bottle of prescription drugs with his name on the bottle sitting on the table next to him may be sufficient to raise a strong suspicion that the defendant is the perpetrator of the crime charged, that strong suspicion is not substantial evidence. *McLaurin*, 320 N.C. at 147, 357 S.E. 2d at 638. Accordingly, it was error not to grant the defendant's motion to dismiss the trafficking in cocaine charge relating to the controlled substances found in the bathroom of the mobile home and the trafficking in methadone charge relating to the controlled substance found in the front bedroom of the mobile home.

II

Defendant next argues the trial court erred in denying his motion to dismiss the trafficking and possession charges related to the controlled substances seized in the outbuilding because there was no evidence that he was in possession of the drugs.

[2] If the outbuilding was within the curtilage of the mobile home and if the mobile home was under the control of the defendant, an inference of knowledge and possession of the drugs in the outbuilding would be created and would be sufficient to carry the case to the jury. *See State v. Courtright*, 60 N.C. App. 247, 251, 298 S.E. 2d 740, 743, *disc. rev. denied*, 308 N.C. 192, 302 S.E. 2d 245 (1983) (car parked within the curtilage of home which was under defendant's control gives inference of possession of narcotics found in car and may be sufficient to carry the case to the jury). The State did not present any evidence that the outbuilding was located within the curtilage of the mobile home. The question of curtilage is to be resolved with reference to four factors:

(1) the proximity of the area claimed as curtilage to the home;

(2) whether the area is included within an enclosure surrounding the home;

(3) the nature of the uses to which the area is put; and

(4) the steps taken by the resident to protect the area from observation by people passing by.

State v. Washington, 86 N.C. App. 235, 240, 357 S.E. 2d 419, 423-24 (1987), *cert. denied*, 322 N.C. 485, 370 S.E. 2d 235 (1988). From the evidence presented by the State, we are unable to determine the distance of the outbuilding from the mobile home or whether there was any type of enclosure surrounding the mobile home and the outbuilding. The outbuilding was not locked and did not contain anything sufficient to show a function of convenience and comfort. *Cf. State v. Fields*, 315 N.C. 191, 194-96, 337 S.E. 2d 518, 520-21 (1985) (tools, garden equipment, freezer and nonperishable food items in an outbuilding are insufficient to show function of comfort and convenience which is necessary to show building within curtilage). Furthermore, we have determined there is insufficient evidence that the defendant exercised control and dominion over the mobile home.

[3] Nonetheless, the State can prevail on these charges, independent of the charges related to the drugs located in the mobile home, if it can show constructive possession of the drugs in the outbuilding.

The State argues the defendant exercised control over the outbuilding and therefore had constructive possession of the drugs found there. As previously stated, where controlled substances are found on premises under the defendant's exclusive control, this fact alone may be sufficient to give rise to an inference of constructive possession and take the case to the jury. *McLaurin*, 320 N.C. at 146, 357 S.E. 2d at 638. Where possession of the premises by the defendant is nonexclusive, "constructive possession . . . may not be inferred without other incriminating circumstances. *Brown*, 310 N.C. at 569, 313 S.E. 2d at 589. The defendant maintains there is no evidence he exercised any control, exclusive or nonexclusive, over the outbuilding or its contents. We agree.

There was no evidence concerning whether the outbuilding was located on defendant's property. Evidence was presented, however, that defendant did not own the land upon which the mobile home was located. *See State v. Wiggins*, 33 N.C. App. 291, 293, 235 S.E. 2d 265, 267, *cert. denied*, 293 N.C. 592, 241 S.E. 2d 513 (1977) (constructive possession of marijuana not found where no evidence was presented concerning whether flower bed and cornfield in which marijuana was located were on defendant's property or otherwise under his control). Likewise, there was not any evidence that defendant had ever used or been seen near the outbuilding. *Cf. State v. Spencer*, 281 N.C. 121, 129-30, 187 S.E. 2d 779, 784 (1972) (marijuana found in pig shed 20 yards from defendant's residence; court deemed it significant defendant had been seen in the outbuilding which was near home on numerous occasions).

Although the State presented evidence of footprints between the mobile home and the outbuilding, such evidence does not in any way incriminate the defendant. There was evidence tending to show defendant was so severely handicapped that he would almost certainly have been unable to get to the outbuilding on his own. Defendant required the assistance of his walker simply to stand to be searched. On the day the search took place, snow and

ice covered the ground making walking treacherous. Several officers slipped while investigating outside and once he was arrested, police had to carry defendant from the mobile home to the police car. Therefore, the presence of footprints in the snow, without evidence of walker prints, does not tend to show that defendant had ever used or been in the outbuilding.

To withstand a motion to dismiss, "there must be substantial evidence of all material elements of the offense charged." *Wiggins*, 33 N.C. App. at 294, 235 S.E. 2d at 268. When the evidence is considered in the light most favorable to the State, no evidence was presented to show that the outbuilding was under *defendant's* control. *See Scott*, 323 N.C. at 353, 372 S.E. 2d at 575 (a motion to dismiss in a criminal case requires consideration of the evidence in the light most favorable to the State). If evidence is sufficient only to raise suspicion of conjecture as to identity of defendant as perpetrator of offense, motion to dismiss should be allowed. *McLaurin*, 320 N.C. at 147, 357 S.E. 2d at 638. Accordingly, we conclude the trial judge should have granted defendant's motion to dismiss the charges relating to the drugs found in the outbuilding.

III

Therefore all of defendant's convictions and sentences are

Reversed.

Judge BECTON concurs.

Judge EAGLES dissents in part.

Judge EAGLES dissenting.

I respectfully dissent from the portion of the opinion which reverses the convictions on the trafficking in methadone charge based on methadone found in the dresser in the front bedroom of defendant's mobile home and the trafficking in cocaine charge arising out of the cocaine seized in the mobile home's bathroom.

The majority states correctly the law regarding constructive possession and that it can be shown from circumstantial evidence. Likewise the law is clear that exclusive control of the premises

where the drugs are found is sufficient to take the case to the jury. *State v. McLaurin*, 320 N.C. 143, 357 S.E. 2d 636 (1987). Even where possession of the premises is non-exclusive, constructive possession may be shown by incriminating circumstantial evidence. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

Here the majority errs by disregarding the cumulative effect of a number of discrete pieces of circumstantial evidence and by dwelling on the shortcomings of the evidence. Admittedly, the showing of constructive possession could have been stronger if more explicit indicia had been introduced. Here, however, we are examining the adequacy of the evidence to show constructive possession of the mobile home premises and the substantial quantities of controlled substances therein. Our function does not include weighing the evidence or assessing its persuasiveness, but rather determining whether the State has presented substantial evidence of each element of the offenses charged. *McLaurin* at 146, 357 S.E. 2d at 638.

Indicating defendant's constructive possession of the controlled substances seized in the mobile home, there is evidence in the record tending to show the following:

(1) This evidence was discovered in a search pursuant to a search warrant. The basis urged in the motion to suppress did not challenge defendant's ownership or control of the mobile home but was focused on the illegal hearsay nature of the supporting data from law enforcement informants.

(2) On the day the search warrant was served there was snow on the ground outside rendering the areas outside slippery, to the extent that at least one officer fell while walking around outside.

(3) Defendant, who is physically crippled and not able to walk without the use of a walker, was present and seated in the living room in the mobile home with his wife and several others.

(4) There were no walker tracks in the snow.

These facts would support the logical inference that on a cold, snowy, slippery day in February the defendant, who had difficulty in walking, was prudently staying *at home* out of the inclement weather.

In addition, there was evidence tending to support defendant's ownership of the mobile home, i.e., though the bill of sale itself is not in this record, there is evidence that a bill of sale for the mobile home bearing defendant's name was found in a wooden box in a dresser drawer in the front bedroom of the mobile home.

Further supporting the defendant's ownership and permanent residence in the mobile home is evidence that while the defendant had in his pockets a number of loose white pills, there was a prescription pill bottle bearing defendant's name on a table in the living room of the mobile home.

From this circumstantial evidence, I would hold that exclusive possession and control of the mobile home could be found by a jury. For this reason I dissent and vote to find no error in the two charges 87CRS2796 and 87CRS2797.

As to the charges relating to controlled substances found in an unsecured outbuilding of indeterminate distance from defendant's mobile home and on land not owned by defendant, I agree with the majority that the evidence establishing constructive possession by the defendant is too tenuous to submit to the jury and should be reversed.

STATE OF NORTH CAROLINA v. DAVID EUGENE RUSSELL

No. 8828SC444

(Filed 7 February 1989)

1. Searches and Seizures § 10— warrantless search of vehicle improper—defendant not prejudiced

Though the trial court erred in denying defendant's motion to suppress evidence obtained from a warrantless seizure of his automobile, since there were no exigent circumstances and the car did not come within the plain view exception, such error was not prejudicial to defendant, since defendant admitted in his initial meeting with the police that he had been wearing a Dracula costume on the night of the crimes; he was seen in the Fast Fare where some of the crimes took place earlier in the evening wearing that costume; the victim recognized defendant as a regular customer and was able to give a detailed description of him the night of the rape; the victim positively and unwaveringly identified defendant both in a pretrial photographic showing and at the voir dire hearing; money found in defendant's room was traced back to the Fast Fare, whereas the roll of nickels found in his car was not; Dracula

teeth found in the car only corroborated what defendant had admitted early on; and defendant confessed to the crimes.

2. Criminal Law § 75.14— diminished mental capacity—defendant capable of making voluntary confession

There was no merit to defendant's contention that, because of his diminished mental capacity, he was unable to confess voluntarily and waive his Fifth Amendment rights.

3. Searches and Seizures § 16— mother's consent to search of defendant's room

Evidence was sufficient to support the trial court's finding that there was valid third party consent to search defendant's residence where it tended to show that defendant's mother, who owned the residence, lived there with him, and apparently had common authority over the premises with her son, gave the police permission to search the residence, including defendant's bedroom. N.C.G.S. § 15A-222(3).

4. Criminal Law § 66.16— pretrial photographic identification—independent origin of in-court identification

The trial court did not err in denying defendant's motion to suppress an out-of-court photographic identification and subsequent in-court identification of defendant by the victim where the victim was with her assailant for several hours at the time of the crime and had ample time to view him.

5. Rape and Allied Offenses § 4.2— physical condition of prosecutrix—denial of motion to continue to obtain medical records

The trial court in a rape case did not err by not granting a motion to continue a voir dire in order that the victim's medical records could be obtained for the purpose of cross-examining her doctor more fully, since defendant had ample opportunity to prepare his case but failed to subpoena the records until the day of the voir dire hearing to suppress the witness's identification; defendant sought the records in order to show that the victim's physical condition, or medications administered, diminished her perceptual abilities when she identified defendant's photograph; though the doctor could not relate what medications the victim had been given at any one time, he could and did testify as to her condition during her hospital stay; and the victim's in-court identification was clear and convincing and was made independent of any impermissible identification procedure.

6. Criminal Law § 138.14— mitigating factor of good reputation—insufficiency of evidence

The trial court did not err in refusing to find as a statutory mitigating factor that defendant had a good reputation in the community, since defendant's only evidence as to his good reputation in the community was the testimony of his mother, and defendant had been away from the community for ten years and had returned only two or three months prior to the crime. N.C.G.S. § 15A-1340.4(a)(2)(m).

7. Constitutional Law § 30; Criminal Law § 145.5— consideration of aggravating and mitigating circumstances—refusal of court to review defendant's parole records

The trial court did not err in refusing to review, *in camera*, defendant's parole records during both suppression and sentencing hearings, and to grant defendant access to those records, since the material in defendant's parole records was privileged, and the only way it could be obtained was for defendant to follow the procedures of N.C.G.S. § 15-207.

8. Criminal Law § 75.1— statements made to officers—defendant not in custody—statements voluntary

There was no error in the trial court's denial of defendant's motion to suppress statements he made to law enforcement officers, since a reasonable person in defendant's circumstances would not have felt himself in custody, and the statements were voluntarily made.

APPEAL by defendant from *Lewis, Robert D., Judge.* Judgment entered 18 September 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 5 December 1988.

On 31 October 1986, while working at a Fast Fare convenient mart, Monica Rauls was abducted at knifepoint and later raped by defendant. After raping Ms. Rauls, defendant stabbed her repeatedly and beat her with a stick. Ms. Rauls was eventually able to elude defendant and made her way to a farmhouse where help was called.

Ms. Rauls told the police that a man whom she recognized as a regular customer, and who was wearing a "Dracula" costume, robbed the Fast Fare, raped and beat her.

Upon learning that defendant had been seen earlier in the evening at the same Fast Fare wearing a Dracula costume, Detectives Smith and Wolfe, accompanied by a uniformed officer, went to defendant's home. They spoke to defendant briefly about their investigation and asked him to accompany them to the police station to have a photograph made. Defendant freely consented, stating that he wanted to be cooperative.

At the police station defendant gave to Detective Smith an account of his whereabouts the previous day and evening. After discerning some discrepancies in defendant's story, Detective Smith informed defendant of his *Miranda* rights and defendant signed a waiver form. Defendant had become increasingly agitated and nervous, and upon being read his rights and waiving

them, told Detective Smith that he did not know why he had committed this act and that this was going to kill his mother.

Detective Wolfe entered the room where defendant and Detective Smith were, and defendant refused to say anything further while Detective Wolfe was in the room. When she exited the room, defendant told Smith that he, defendant, was the man they were looking for, that he was the man who had committed this act, but he could not talk about it. He then asked for an attorney and the conversation ceased.

Later that day, Detective Smith and other officers returned to defendant's residence which he shared with his mother and grandmother. Smith called the mother, who owned the residence, and obtained her consent to search it. She met the police at the residence and signed a consent form.

In defendant's room was found money, consisting of dollar bills, and several rolls of coins, one of which was later identified as part of the money stolen from the Fast Fare. Also found in the room was a pair of black boots, black pants, blue jeans and a blouse in a laundry basket in another part of the house.

Defendant's car, parked in his driveway, was impounded by the police and searched without a warrant two days later. Seized from the inside of the car was a plastic extractor, Dracula teeth, a roll of nickels, and a roll of twine. Inconclusive tests for blood and fiber were performed on the car.

Two days after defendant confessed and was arrested, Detectives Smith and Wolfe interviewed Ms. Rauls while she was in the hospital. They obtained a complete statement from her and showed her six pictures of men fitting her earlier description of her assailant. She immediately picked defendant's picture out as her attacker.

Defendant made motions to suppress (1) defendant's statement to the police, (2) money and clothing seized during the search of his house and room, (3) physical evidence obtained from the search of his car, (4) the pre-hearing identification of defendant by Ms. Rauls, and later (6) the in-court identification of defendant by Ms. Rauls. The trial court denied all of these motions.

Pursuant to N.C.G.S. § 15A-979(b), defendant entered pleas of guilty to the offenses of: first degree rape, first degree sexual offense, first degree kidnapping, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill. He also entered a plea of no contest to a separate charge of first degree sexual offense. Defendant was sentenced to cumulative sentences of life plus ninety (90) years.

From the denial of defendant's motions and the sentences imposed, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General John H. Watters and Doris J. Holton, for the State.

David Belser, Assistant Public Defender, for defendant appellant.

ARNOLD, Judge.

[1] Defendant argues that the trial court erred in denying his motion to suppress the evidence obtained from the warrantless seizure of his automobile. Absent consent, or some form of exigent circumstances, a warrant based on probable cause is required for a valid search and/or seizure under the Fourth Amendment. United States Constitution, Fourth Amendment. The United States Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), held that no exigent circumstances justified the failure of the police to obtain a warrant for the seizure and search of an automobile parked in the defendant's driveway, because the police knew the car was there and planned to seize it when they went to defendant's house.

A plurality of the Court fashioned a three-part test to determine if a search and/or seizure comes within the "plain view" doctrine established by this case. First, the initial intrusion that brings the evidence into plain view must be lawful. Second, the discovery of the evidence must be inadvertent. Third, it must be immediately apparent to the police that the items observed constitute evidence of a crime or are otherwise subject to seizure. *Id.* Our Supreme Court adopted this three-part analysis of warrantless seizures or searches. *See State v. Williams*, 315 N.C. 310, 338 S.E. 2d 75 (1986).

In the case *sub judice*, as in *Coolidge*, defendant was in custody when his car was seized without a warrant. The police had probable cause, but they had no warrant. There were no exigent circumstances, the car did not come within the "plain view" exception, and thus the seizure was a violation of defendant's Fourth Amendment rights.

While the trial court committed error in denying defendant's motion to suppress the evidence obtained from the search of the car, the error in this case is harmless. Even error contravening one's constitutional rights can be harmless. *Chapman v. California*, 386 U.S. 18 (1967); N.C.G.S. § 15A-1443(b); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080 (1982), and *cert. denied*, 479 U.S. 940 (1986).

The United States Supreme Court has applied the harmless error analysis to guilty pleas based on ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52 (1985). For a defendant to show that ineffective counsel was harmful, he must show that there is a reasonable probability that, but for counsel's error, he would not have entered a plea of guilty. *Id.* at 58.

Error committed at trial infringing upon one's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b); *Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982). This harmless error analysis has been applied to violations of the Fourth Amendment, and we see no reason why the analysis should not be applicable to guilty pleas partly based on evidence that should have been suppressed. *See State v. Autry*, 321 N.C. 392, 364 S.E. 2d 341 (1988).

In no way does this decision set precedent for denial of a motion to suppress to be considered harmless error because defendant, pursuant to G.S. 15A-979(b), pled guilty. It is because there is a full evidentiary record before us that gives this Court full benefit of all the evidence, admissible and inadmissible, that we are able to say, beyond all reasonable doubt, that failure to suppress evidence obtained from the car could not have affected defendant's decision to plead guilty in light of the overwhelming evidence of his guilt.

The evidence presented at *voir dire* which showed that defendant was guilty of the crimes charged was overwhelming. Defendant admitted in his initial meeting with the police that he had been wearing a Dracula costume the night before. He was seen in the same Fast Fare earlier in the evening wearing that costume. The victim recognized defendant as a regular customer and was able to give a detailed description of him the night of the rape. The victim positively and unwaveringly identified the defendant both in a pre-trial photographic showing, and at the *voir dire* hearing.

The evidence found in defendant's room was much more incriminating than that found in the car. The money found in the room was traced back to the Fast Fare, whereas the roll of nickels found in the car was not. The Dracula teeth found in the car only corroborated what defendant admitted early on. Lastly, and most importantly, as the State argues, defendant confessed to the crimes.

[2] Defendant further argues that because of his diminished mental capacity, he was unable to confess voluntarily and waive his Fifth Amendment rights. Standing alone, subnormal mental capacity does not render a confession incompetent, if it is in all other respects voluntarily and understandingly made. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975). In *Thompson*, the Supreme Court stated further:

> If a person has the mental capacity to testify and to understand the meaning and effect of statements made by him, he possesses sufficient mentality to make a confession. Nevertheless, his mental capacity, or his lack of it, is an important factor to be considered in determining the voluntariness of a confession.

Id. at 318, 214 S.E. 2d at 752 (1975) (citing *Blackburn v. Alabama*, 361 U.S. 199 (1960)).

The trial judge here made findings that defendant had been diagnosed as mildly retarded. He noted, however, that such diagnosis was not a part of the evaluation of defendant made by Dorothea Dix State Hospital.

Defendant may have had a low mental IQ, however, he was not so diminished as to make his confession involuntary. *See*

Thompson, 287 N.C. 303, 214 S.E. 2d 742 (1975). The trial court, therefore, did not commit error in finding that defendant confessed voluntarily.

[3] Defendant next assigns as error the finding by the trial court that there was valid third party consent to search defendant's residence.

N.C.G.S. § 15A-222(3) states that, "[T]he consent needed to justify a search and seizure . . . must be . . .: By a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises." This issue of common authority was addressed by the United States Supreme Court in *U.S. v. Matlock*, 415 U.S. 164 (1974), stating:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

415 U.S. at 171.

This Court has held that N.C.G.S. § 15A-222(3) is "consistent with the language in *Matlock* . . . that permission may be 'obtained from a third party who possessed common authority or other sufficient relationship to the premises or effects sought to be inspected.'" *State v. Washington*, 86 N.C. App. 235, 246, 357 S.E. 2d 419, 427 (1987), *cert. denied*, 322 N.C. 485, 370 S.E. 2d 235 (1988) (quoting *State v. Kellum*, 48 N.C. App. 391, 397, 269 S.E. 2d 197, 200; *Matlock*, 415 U.S. at 171) (emphasis deleted).

Findings of fact by the trial court show that defendant's mother, who owned the residence and lived there with him, gave the police permission to search the residence, including defendant's bedroom. When asked if defendant was paying rent, she replied "No," but she also said defendant was "paying his way." From these and other findings, the trial court concluded that de-

fendant's mother had common authority over the premises with her son, that she owned the residence, and that she was apparently entitled to give or withhold consent to the search of the premises.

The trial court's findings of fact were supported by competent evidence. There may have been evidence to the contrary, but it is the responsibility of the trial court to determine what evidence will be fact.

[4] Defendant next assigns as error the trial court's denial of his motion to suppress the out-of-court photographic identification and subsequent in-court identification of the defendant by the victim.

Assuming arguendo that if the pre-hearing photographic identification by the victim was suggestive, and we do not believe that it was, it was nevertheless reliable under the totality of circumstances. *See Matter of Stallings,* 318 N.C. 565, 350 S.E. 2d 327 (1986), *reh'g dismissed,* 319 N.C. 669, 356 S.E. 2d 339 (1987); *Neil v. Biggers,* 409 U.S. 188 (1972); *see, also, Manson v. Brathwaite,* 432 U.S. 98 (1977).

We likewise conclude that even if the pre-hearing identification were unduly suggestive, the victim's in-court identification was free from taint. *See State v. Yancey,* 291 N.C. 656, 231 S.E. 2d 637 (1977). The victim was with defendant for several hours and had ample time to view her assailant. Moreover, her identification of him in court was unwavering.

Defendant next assigns as error the trial court's alleged refusal to allow defense counsel to cross-examine Detective Smith regarding defendant's emotional state at the time of his confession and regarding the circumstances of the removal of defendant from his home. This is a feckless argument.

Defendant particularly claims that defense counsel was denied cross-examination of Detective Smith about whether he and the other officers had their guns unholstered when they went to defendant's residence. The trial court did deny this cross-examination initially; however, any possible error was corrected when defense counsel was allowed to fully question the Detective about his and the other officers' weapons.

Defendant further contends that defense counsel was prohibited from effectively cross-examining the Detective about his motives in requesting defendant to accompany the police to the station. Detective Smith admitted that he preferred to have defendant at the station for the questioning. Defense counsel continued in this line of questioning, after the detective's acknowledgment of his motives, and the trial court correctly stemmed the redundant questions. *See State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911 (1980) (ruling on allowance of questioning by counsel is within discretionary power of trial court). There was no abuse of discretion by the trial court here. *See id.*

Even if defense counsel had been denied effective cross-examination of Detective Smith about his motives, "any subjective intent the officers may have had to arrest defendant is immaterial because their subjective intent is irrelevant to the question of whether a reasonable person in the defendant's position would believe himself to be in custody." *State v. Braswell*, 312 N.C. 553, 557, 324 S.E. 2d 241, 245 (1985).

[5] Defendant next contends that the trial court erred by refusing to allow defense counsel to cross-examine the victim's doctor regarding the medical records and condition of the victim when she identified defendant's picture. Defendant also argues that the court erred by not granting a motion to continue the *voir dire* in order that victim's medical records could be obtained with which more fully to cross-examine the doctor.

From the record defendant clearly had ample time and opportunity to prepare his case. The medical records in question were known from the very beginning, however, defendant only subpoenaed them the day of the *voir dire* hearing to suppress the witness's identification. A trial judge is fully justified in his discretionary denial of a last-minute continuance when it should have been made before extensive preparation for trial had been completed and the *voir dire* hearing begun. *See State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970).

Defendant sought the medical records, and a continuance to obtain the records, in order to cross-examine defendant's doctor, and to show that victim's physical condition, or medications administered, diminished her perceptual abilities when she iden-

tified defendant's photograph. Although without the medical records sought, the doctor could not relate what medications the victim had been given at any one time, he could and did testify as to her condition during her hospital stay.

The doctor did have before him some medical records, and these, coupled with his knowledge of his treatment procedure, enabled the doctor to testify sufficiently for the court to conclude the victim was alert and perceptive enough to identify the defendant.

Even assuming that the pre-hearing identification was unnecessarily suggestive, or that the victim was not alert, her in-court identification was clear and convincing and was made independent of any impermissible identification procedure. *See Yancey,* 291 N.C. 656, 231 S.E. 2d 637 (1977); *see, also, State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972).

[6] Defendant next assigns as error the trial court's refusal to find a statutory mitigating factor under N.C.G.S. § 15A-1340.4(a)(2)(m) and that is that defendant had a good reputation in the community.

The test for determining when a trial court must find a statutory mitigating factor is two-pronged. First, the evidence must so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn. Secondly, the credibility of the evidence must be manifest as a matter of law. *State v. Jones,* 309 N.C. 214, 306 S.E. 2d 451 (1983). Further, uncontradicted, quantitatively substantial, and credible evidence may simply fail to establish, by a preponderance of the evidence, any factor in aggravation or mitigation. *State v. Michael,* 311 N.C. 214, 316 S.E. 2d 276 (1984).

Whether factors are mitigating or aggravating, they still must be proven by a preponderance of the evidence. *Id.* Defendant's only evidence as to his good reputation in the community was the testimony of his mother. Defendant had been away from the community for ten years and had returned only two or three months prior to the crime.

Although a witness related to a defendant is not necessarily incredible, the trial court has the discretion to reject testimony of biased witnesses. *See State v. Taylor,* 309 N.C. 570, 308 S.E. 2d

302 (1983); *see, also, State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983). The trial court did not err in declining to find, as a statutory mitigating factor, defendant's good reputation in the community.

[7] Finally, defendant assigns as error the trial court's refusal to review, *in camera*, defendant's parole records during both the suppression and sentencing hearings.

N.C.G.S. § 15-207 states that:

> All information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to any other than the judge or to others entitled under this Article to receive reports, unless and until otherwise ordered by a judge of the court or the Secretary of Correction.

Defendant requested, in a motion for discovery, any "psychological or psychiatric records, files, information or knowledge in the possession of the State or any of its agents, including the Department of Corrections, Division of Prisons, Pre-Release & Aftercare or Parole Officer James Bellamy or Investigators Van Smith or Barbara Wolfe. . . ."

The trial court stated in the suppression hearing that N.C.G.S. § 15-207 requires a court order to obtain probation records to protect their confidentiality, and that this applied to defendant. The court stated further that if defense counsel would follow the procedure under this statute, he might be allowed access to defendant's file.

The material in defendant's probation records was not in the possession of the State's attorney, and the only way it could be obtained was through N.C.G.S. § 15-207. Defendant's discovery motion, therefore, was not applicable to defendant's probation records in question.

We conclude that the trial court did not err in refusing to grant defendant privileged information, regardless of the fact that it pertained to defendant. Had defense counsel followed the statutory procedure under N.C.G.S. § 15-207, he possibly could

have gained access; as it was, he was no more entitled than the State or anyone else to those confidential records.

[8] Finally, there was no error in the trial court's denial of defendant's motion to suppress the statements he made to the law enforcement officers. In short, a reasonable person in defendant's circumstances would not have felt himself in custody. The court found that defendant was not in custody, and that defendant's statements were voluntarily made. Findings of fact supported as they are here by the record are binding on this Court. *State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982).

"Voluntariness" with which we are concerned in a case like this is the freedom from compelling influences that force a person to say what he otherwise would not say. *See Rhode Island v. Innis*, 446 U.S. 291 (1980). That type of compelling influence simply was not present in this case.

We find no error in the trial court's rulings at defendant's suppression hearings.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. PATRICK N. AGUBATA

No. 8810SC332

(Filed 7 February 1989)

1. Criminal Law § 73— letters written by unavailable declarant—hearsay—properly excluded

The trial court did not err in a prosecution for trafficking in heroin by excluding letters received by defendant after his arrest in which the writer apologized for "whatever has happened" and states that "such product" is "mine." The letters were not admissible under N.C.G.S. § 8C-1, Rule 804(b)(3) as statements against an unavailable witness's interest, even assuming that the statements in the letters qualify as statements against penal interest, because there were no corroborating circumstances clearly indicating the statements' trustworthiness.

2. Criminal Law § 73— letters from unavailable third party—hearsay—not admissible under catchall exception

The trial court in a prosecution for trafficking in heroin properly excluded letters from an unavailable witness in which the writer admitted that he owned the controlled substances found at defendant's residence and apologized for any inconvenience caused defendant. The letters were not admissible as exceptions to the hearsay rule under N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(5), even though the court incorrectly concluded that proper notice had not been given to the prosecutor, because there was a lack of evidence confirming the purported declarant's existence.

3. Narcotics § 4— trafficking in heroin—heroin mixed with other substances—evidence sufficient

The trial court properly denied defendant's motion to dismiss charges of trafficking in heroin based on possession of fourteen grams or more but less than twenty-eight grams of heroin where methaqualone made up the majority of the weight of the mixture of controlled substances. The plain language of N.C.G.S. § 90-95(h)(4) provides that possession of "any mixture" weighing four grams or more which contains heroin may be the basis of a charge of trafficking in heroin.

4. Narcotics § 4.7— trafficking in heroin—instruction on felonious possession of heroin denied—no error

The trial court did not err in a prosecution for trafficking in heroin based on possession of fourteen grams or more by not submitting to the jury the possible verdict of felonious possession of heroin where an S.B.I. agent who analyzed the substances testified that of the mixture seized, the total amount of pure heroin was 2.545 grams. The "any mixture" language in N.C.G.S. § 90-95(h)(3) allows for a conviction based on the total weight of cocaine mixed with another substance, and there is no basis to define differently the term "any mixture" in N.C.G.S. § 90-95(h)(4). Additionally, whether the mixture contains a controlled substance and neutral cutting agents or is made wholly of controlled substances is of no legal significance.

5. Narcotics §§ 4.5, 3— trafficking in heroin—constructive possession—actual knowledge of .6 grams

The defendant in a trafficking in heroin prosecution was not entitled to an instruction on felony possession of heroin based on the lack of evidence that he knew of the presence of any of the heroin packages except one containing .6 grams. The evidence for the State tended to show that the defendant had control of the premises where the packages of the heroin mixture were found, and there was no basis on which the jury could have found a lesser offense was committed.

6. Criminal Law § 92.5— trafficking in heroin—husband and wife—motion to sever denied

The trial court did not err in a prosecution for trafficking in heroin by denying defendant's motion to sever his trial from that of his codefendant wife where defendant had made his motion to sever at the first day of trial and was required to renew his motion at the close of all the evidence but did not do so. N.C.G.S. § 15A-927(a)(2).

7. Criminal Law § 92.1— trafficking in heroin—husband and wife—joinder for trial—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for trafficking in heroin by ordering the joinder of defendant's case for trial with that of his codefendant wife where the defendants were charged with trafficking in heroin based on controlled substances found in the home they shared, both defendants originally consented to joinder through their prior counsel, the joinder was made prior to defendants' marriage to each other, defendant would not have been the proper person to attempt to assert his wife's spousal privilege, and defendant offered no evidence at trial which would have implicated her as the owner of the controlled substances.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 14 January 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 25 October 1988.

Defendant was charged with trafficking in heroin based on possession of fourteen (14) grams or more than but less than twenty-eight (28) grams of heroin under G.S. 90-95(h)(4)(b). The charge arose out of the seizure of controlled substances during a search of defendant's residence pursuant to a valid search warrant. Defendant and his codefendant girlfriend were married after their arrest but prior to their joint trial. At trial the evidence tended to show that defendant and his codefendant girlfriend were residing in the house named in the search warrant. During the search of the house, packages containing a brown powder substance were found. One package, with contents which weighed 18.7 grams, was found in a wooden box inside a kitchen cabinet. A State Bureau of Investigation agent who analyzed the contents of the package testified that the powder was a mixture of heroin, cocaine, phenobarbital and methaqualone. All of these substances are controlled substances. The contents of a second package, found in a record cabinet in the living room, weighed 0.6 grams. The contents were a mixture of heroin, methaqualone, and phenobarbital. In addition, four small bags, each containing heroin, cocaine, methaqualone and phenobarbital mixed together, were found in a lady's pocketbook in a bedroom in the house. The total weight of the powder substance found in the pocketbook was 2.8 grams. Defendant's testimony was that he knew nothing of the controlled substances found, that a male friend had been residing in the house, and that defendant was in the process of moving into the house when the search was conducted. Defendant was

found guilty of trafficking in heroin. From judgment entered on the verdict, defendant appeals.

Attorney General Thornburg by Assistant Attorney General Thomas D. Zweigart for the State.

Johnny S. Gaskins for the defendant-appellant.

EAGLES, Judge.

Among the errors argued, defendant asserts that the trial court erred when it refused to admit into evidence letters the defendant alleges were sent to him from another who purportedly confessed to owning the controlled substances found in defendant's home. Defendant also alleges that because the most prevalent controlled substance in the powder was methaqualone, the proper charge was felony possession of methaqualone, not trafficking in heroin, and that he was entitled to a jury instruction on the lesser included offense of felonious possession of heroin. Finally, defendant asserts the trial court erred when it denied his motion to sever his trial from his wife's trial. For the reasons stated below, we find no error.

I

[1] Defendant attempted to introduce two letters he allegedly received after his arrest. They purportedly were written by one Patrick Babatundi. In those letters signed "Pat" and "Patty," the author apologizes to defendant for "whatever has happened" and states that "such product" is "mine." Defendant asserts these letters are admissible as exceptions to the hearsay rule, and assigns as error the trial court's refusal to admit them.

Specifically, defendant contends the letters are statements against an unavailable witness's interest and are admissible under Rule 804(b)(3). Alternatively, defendant contends the letters are admissible under the "catchall" provisions of Rule 804(b)(5) or 803(24) because they are sufficiently trustworthy and proper notice was given the opposing party prior to the trial. The trial court refused to admit the letters based on its finding that proper notice had not been given and that the statements were not sufficiently trustworthy.

G.S. 8C-1, Rule 804(b)(3) provides that, if the declarant is not available as a witness, statements against the declarant's interest are not excluded by the hearsay rule. The unavailability requirement is satisfied here because the defendant was unable to procure the purported declarant's attendance by process. G.S. 8C-1, Rule 804(a)(5). Defendant issued a subpoena for Patrick Babatundi at his last known address. It was returned unserved. A statement against interest is one which "at the time of its making . . . so far tended to subject him [the declarant] to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." G.S. 8C-1, Rule 804(b)(3). However, "[a] statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.*

Defendant asserts that in order to determine whether hearsay statements are trustworthy, the trial court should examine the factors listed in *State v. Triplett*, 316 N.C. 1, 340 S.E. 2d 736 (1986). Defendant's reliance on *Triplett* guidelines is misplaced. In *Triplett* our Supreme Court was concerned with the "circumstantial guarantees of trustworthiness" under Rule 804(b)(5), not Rule 804(b)(3). "Rule 804(b)(3) requires a two-pronged analysis." *State v. Wilson*, 322 N.C. 117, 134, 367 S.E. 2d 589, 599 (1988). First, the trial court must be satisfied that the statement is against the declarant's penal interest. Second, corroborating circumstances must clearly indicate the trustworthiness of the statement. G.S. 8C-1, Rule 804(b)(3). Assuming *arguendo* that the imprecise and vague statements in the letters purporting to be from a Mr. Babatundi qualify as statements against his penal interest, the second prong in the analysis has not been satisfied. In this case there are no corroborating circumstances clearly indicating the statements' trustworthiness. The only evidence that Mr. Babatundi even exists are the defendant's statements to that effect. Mr. Babatundi was not produced at trial and no one other than defendant was produced to testify that Mr. Babatundi existed or ever lived at the house as defendant asserts. Therefore, the letters were not admissible under Rule 804(b)(3), and the trial court committed no error in excluding them on that basis.

[2] Defendant also asserts the letters are admissible as exceptions to the hearsay rule under Rules 803(24) and 804(b)(5). These

are the "other exceptions" or "catchall" provisions which require that the proponent give written notice to the opposing party and show "equivalent circumstantial guarantees of trustworthiness." G.S. 8C-1, Rule 803(24); G.S. 8C-1, Rule 804(b)(5). Under Rule 803 the declarant's availability is immaterial while under Rule 804 the declarant must be unavailable to testify. As we have noted, the purported declarant here satisfies the unavailability requirement.

Because of the residual, "catchall" nature of Rule 803(24) and Rule 804(b)(5) hearsay exceptions, the exceptions do not contemplate "an unfettered exercise of judicial discretion." *State v. Smith*, 315 N.C. 76, 91, 337 S.E. 2d 833, 844 (1985). Accordingly, evidence proffered for admission pursuant to these exceptions must be carefully scrutinized by the trial court within the framework of the rules' requirements. *Triplett*, 316 N.C. at 8, 340 S.E. 2d at 740; *Smith*, 315 N.C. at 92, 337 S.E. 2d at 844. When evidence is offered pursuant to Rules 803(24) and 804(b)(5), the trial judge is required to analyze its admissibility by undertaking a six-part inquiry. *Triplett*, 316 N.C. at 8, 340 S.E. 2d at 741; *Smith*, 315 N.C. at 92, 337 S.E. 2d at 844.

Specifically, the trial court must determine the following: first, that proper notice was given of the intent to offer hearsay evidence under Rules 803(24) or 804(b)(5); second, that the hearsay evidence is not specifically covered by any of the other hearsay exceptions; third, that the hearsay evidence possesses certain circumstantial guarantees of trustworthiness; fourth, that the evidence is material to the case at bar; fifth, that the evidence is more probative on an issue than any other evidence procurable through reasonable efforts; and sixth, that admission of the evidence will best serve the interests of justice. *Triplett*, 316 N.C. at 9, 340 S.E. 2d at 741; *Smith*, 315 N.C. at 92-96, 337 S.E. 2d at 844-47.

Here the trial court found that proper notice was not given, "that the statement is not trustworthy under the purposes of the rules," and "the interest [sic] of justice will not be served by the admission of the statements in evidence." The trial court incorrectly found that defendant failed to give the proper written notice to the prosecutor. However, the trial court's finding that the defendant did not satisfy the requirement that "equivalent circumstantial guarantees of trustworthiness" be shown and the

finding that the interests of justice would not be served by the letters' admission into evidence were proper. Therefore, the trial court's exclusion of the letters was proper.

Defendant's counsel wrote to the prosecutor on December 10, 1987, advising her of his plan to introduce the letters from Mr. Babatundi under Rules 803(24) and 804(b)(5). Since this notice was given a full month prior to trial, it was timely. *See State v. Nichols*, 321 N.C. 616, 623, 365 S.E. 2d 561, 565 (1988) (notice sufficient when opponent ascertained declarant's identity five weeks before introduction of statements into evidence); *State v. Triplett*, 316 N.C. at 13, 340 S.E. 2d at 743 (notice sufficient when opponent received oral notice three weeks prior to trial and written notice on first day of trial).

In addition, while copies of the letters were not tendered, the "particulars" of the hearsay statements were included in defense counsel's letter to the prosecutor. Defense counsel stated that Mr. Babatundi had admitted he owned the controlled substances found at 509 S. Saunders Street and apologized to the defendant for any inconvenience caused by him. Although the address of the declarant was not provided as required by *State v. Smith*, 315 N.C. at 92, 337 S.E. 2d at 844 (1985), defense counsel's letter informed the prosecutor that the declarant's address was unknown. Under the facts and circumstances of this case, where the prosecutor did not request additional information about the letter or a copy of the letter prior to trial, the notice provided by defense counsel was sufficient to provide the prosecution with a fair opportunity to prepare to meet the statements. The trial court's finding to the contrary was error. For the reasons stated, however, the error was harmless.

The trial court also concluded that the letters were not trustworthy under the purposes of the rules. In determining whether a statement proffered under the "catchall" exceptions possesses circumstantial guarantees of trustworthiness, certain factors are significant in guiding trial courts. Among these factors are (1) assurance of personal knowledge of the declarant of the underlying event; (2) "the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the statement"; and (4) the reasons, within the meaning of Rule 804(a), for the declarant's unavailability. *State v. Triplett*, 316 N.C. at 10-11,

340 S.E. 2d at 742; *State v. Smith*, 315 N.C. at 93-94, 337 S.E. 2d at 845.

There are other factors relevant to the determination of whether a particular statement is sufficiently trustworthy, *State v. McLaughlin*, 316 N.C. 175, 179, 340 S.E. 2d 102, 105 (1986), which include the presence of corroborating evidence, and the degree to which the proffered statement has "elements of enumerated exceptions to the hearsay rule." *See State v. Nichols*, 321 N.C. at 625, 365 S.E. 2d at 567. The single most important factor here is the lack of evidence confirming the purported declarant's existence. Other than the defendant's uncorroborated statements that Mr. Babatundi was a friend of his brother and that Mr. Babatundi had lived for a time in the house at 509 S. Saunders Street, there is no evidence of his existence. The officers who searched the premises testified that they did not recall finding anything with Mr. Babatundi's name on it in the house. Even the letters the defendant purportedly received are signed merely "Pat" or "Patty." Nowhere on the letters does the name Babatundi appear. Given all the facts and circumstances here, the trial court was correct in its determination that the statements were not sufficiently trustworthy to be admitted and their exclusion was proper.

II

[3] Defendant's next two assignments of error focus on the mixture of controlled substances found. Defendant asserts that the charge of trafficking in heroin should have been dismissed and the State should have been limited to charging the defendant with felony possession of methaqualone. Defendant argues that since methaqualone made up the majority of the weight of the mixture of controlled substances, the mixture must be denominated methaqualone. Furthermore, defendant asserts he was entitled to the requested instruction on felonious possession of heroin since the total weight of pure heroin found (excluding the other controlled substances in the mixture) was less than four grams. We find no merit in defendant's arguments.

The plain language of the statute provides that possession of "any mixture" weighing four grams or more which contains heroin may be the basis of a charge of trafficking in heroin. G.S. 90-95(h)(4). Defendant argues that when a mixture contains only

controlled substances, as here, the State should be limited to charging the defendant with an offense based on the substance which makes up the majority of the mixture. Defendant asserts that otherwise the State has unbridled discretion in determining under which criminal violation a person is to be charged. We find nothing in the statute at issue here or in the law of North Carolina to support his argument. Therefore, defendant's motion to dismiss was properly denied.

[4] Defendant also argues that the trial court erred in failing to submit to the jury the possible verdict of felonious possession of heroin. Defendant argues that because the weight of the pure heroin contained in the mixture was less than the 4 grams required to prove trafficking in heroin under G.S. 90-95(h)(4), he was entitled to an instruction on the lesser included offense of felonious possession of heroin. Defendant bases his argument on testimony from the SBI agent who analyzed the substances. The agent testified that of the 18.7 grams of powder found in the kitchen only 11% (2.057 grams) was pure heroin, that 14% (.392 grams) of the powder mixture weighing 2.8 grams was heroin, and that 16% (.096 grams) of the powder mixture weighing 0.6 grams was heroin. The total amount of pure heroin found was 2.545 grams. We have held that the "any mixture" language in G.S. 90-95(h)(3) allows for conviction based on the total weight of cocaine mixed with another substance. *State v. Tyndall*, 55 N.C. App. 57, 284 S.E. 2d 575 (1981) (evidence that defendant sold powdery mixture weighing 37.1 grams and containing 5.565 grams of pure cocaine, the remainder of the powder being noncontrolled substances, sufficient to convict defendant of trafficking in cocaine by selling more than 28 grams). There is no basis to define differently the term "any mixture" in G.S. 90-95(h)(3) and the same language in G.S. 90-95(h)(4). Additionally, whether the "mixture" contains a controlled substance and neutral "cutting agents" or is made wholly of controlled substances is of no legal significance under the statute. We hold that defendant was not entitled to any instruction on felony possession of heroin based on the mixture involved here. Such an instruction has no basis in our law and was properly denied.

III

[5] The defendant also argues he was entitled to an instruction on felony possession of heroin based on the lack of evidence that

he knew of the presence of any of the heroin packages, except the one found in the stereo cabinet. The defendant asserts that only the 0.6 grams of the mixture found in the stereo cabinet was in "plain view." Furthermore, because the remaining 18.7 grams (found in a kitchen cabinet) and 2.8 grams (found in his codefendant's pocketbook) were not in plain view, defendant asserts it is reasonable to conclude that defendant was not aware of their presence. We disagree.

Only when there is evidence of a lesser included offense is the judge required to charge on a lesser offense. *State v. Siler*, 66 N.C. App. 165, 311 S.E. 2d 23, *modified and affirmed*, 310 N.C. 731, 314 S.E. 2d 547 (1984). To prove trafficking in heroin, G.S. 90-95(h)(4) requires proof of possession of heroin or any mixture containing heroin in an amount of four grams or more. The evidence for the State tends to show that the defendant had control over the premises where the three packages of the heroin mixture were found. This evidence is sufficient to support an inference of defendant's constructive possession of the heroin mixtures found. The defendant's testimony was that he knew nothing of any of the controlled substances found in the house. There is no basis on which a jury could find that a lesser offense was committed. At trial the defendant denied knowledge of all of the controlled substances, not just those not in "plain view." Therefore, the trial court did not err in refusing to instruct the jury on a lesser included offense of felonious possession of heroin.

IV

[6] Defendant also asserts that the trial court committed reversible error when it denied defendant's motion to sever his trial from the trial of his codefendant wife. Defendant had agreed to a joint trial on 12 October 1987. Defendants' new counsel made motions to sever, based on defendant's recent marriage to his codefendant and defendant Patrick Agubata's assertion that he would feel "awkward" asserting as his defense that his codefendant wife owned the controlled substances.

A trial court's denial of a motion to sever will not be disturbed on appeal absent an abuse of discretion. *State v. Brower*, 289 N.C. 644, 659, 224 S.E. 2d 551, 562 (1976). Further, G.S. 15A-927(a)(2) provides that when a pre-trial motion to sever is made, failure to renew the motion "before or at the close of all the evidence" affects a waiver of any right to severance. Our Su-

preme Court held in *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981), that failure to renew a motion to sever as required by G.S. 15A-927(a)(2) waived any right to severance and that review on appeal was limited to whether the trial court abused its discretion in ordering joinder at the time of the trial court's decision to join. *Id.* at 128, 282 S.E. 2d at 453. Because the defendant made his motion to sever at the first day of trial, he was required to renew his motion at the close of all of the evidence. The defendant failed to renew his motion at the close of all the evidence as required by G.S. 15A-927(a)(2) and therefore waived his right to sever. The question remains then whether joinder of defendants' cases for trial was an abuse of discretion.

[7] G.S. 15A-926(b)(2) provides that charges against two or more defendants may be joined for trial when each of the defendants is charged with accountability for each offense. In this case both of the defendants were charged with trafficking in heroin based on controlled substances found in the home they shared. We find no abuse of discretion in the trial court's decision to allow joinder. We note the joinder originally was consented to by both defendants through their prior counsel. Further, the joinder was made prior to the defendants' marriage to each other. Although in his brief the defendant Patrick Agubata alludes to a spousal privilege which might preclude his testimony against his wife, on these facts he was not the proper person to attempt to assert the spousal privilege. Defendant's argument is essentially that he would tend to incriminate his wife by offering a defense that would implicate her as the owner of the controlled substances found by the police. Defendant offered no such defense at trial. Furthermore, if he had, his codefendant wife would have been the party prejudiced if anyone was prejudiced. *See State v. McKenzie*, 46 N.C. App. 34, 264 S.E. 2d 391 (1980).

Defendant failed to argue the one remaining assignment of error in his brief. Accordingly, he is deemed to have abandoned it. Rule 28(b), N.C. Rules of App. Proc.

Accordingly, we find defendant's trial was free of reversible error.

No error.

Judges BECTON and GREENE concur.

IN THE MATTER OF: BISHOP, MINOR CHILDREN; BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLEE v. DIXIE MARIE JAMES BURKS, RESPONDENT-APPELLANT

No. 8828DC405

(Filed 7 February 1989)

1. Parent and Child § 1.5— termination of parental rights—counsel's advice—respondent not denied effective assistance of counsel

In a proceeding to terminate parental rights, there was no merit to respondent's contention that she was denied effective assistance of counsel when counsel advised her to consent to orders which provided that her children would remain in foster care, while she never wanted to give up custody of her children and the orders incorrectly indicated that she "willfully" left the children in foster care, since the attorney who advised respondent with regard to the prior orders did not represent her at the termination hearing because he testified as a witness for her; he testified that respondent had always indicated to him that she wanted custody of the children; and he testified that he had asked the court to indicate respondent's desires in the orders, two of which did state that respondent wanted custody of the children.

2. Parent and Child § 1.5— *termination of parental rights*—court's denial of counsel's motion to continue or withdraw—respondent not denied effective assistance of counsel

In a proceeding to terminate parental rights, there was no merit to respondent's contention that she was denied effective assistance of counsel when the trial court denied counsel's motion to continue or withdraw from the case, since the record showed that counsel was unable properly to represent respondent, not because of a lack of time for trial preparation, but because respondent failed to cooperate with her counsel by making herself unavailable for consultation.

3. Parent and Child § 1.6— termination of parental rights—children left in foster care more than 18 months—sufficiency of evidence

Evidence was sufficient to support a termination of respondent's parental rights under N.C.G.S. § 7A-289.32 in that she willfully left her children in foster care for more than eighteen months where the evidence showed that respondent voluntarily left her children in foster care; she had been unable to care for her children and had not demonstrated the ability to do so despite the efforts of petitioner; although respondent was mildly retarded, this should not in itself have prevented her from obtaining employment and becoming an adequate parent; and though respondent participated to some extent in programs designed to improve her ability to work and her parenting skills, she made only limited progress and was unable to keep a job or significantly improve her parenting skills.

4. Parent and Child § 1.6— termination of parental rights—no progress by parent in correcting conditions—sufficiency of evidence

In a proceeding to terminate parental rights, evidence was sufficient to support findings that respondent had not made reasonable progress in correcting the conditions which led to the removal of her children, nor had she shown a positive response to petitioner's efforts to strengthen the parental relationship and provide constructive planning for the children's future, since the evidence showed that, since the children were removed from her custody, respondent held two jobs for short periods of time, but she quit both jobs; she was unable to obtain her own housing but lived in her parents' mobile home when not traveling; respondent's own expert witness testified that, as of the time of the hearing, she would not be a suitable mother and that one of the reasons for her failure to improve was her lack of motivation; and observers of her visits with the children testified that her relationships with them were not good.

5. Parent and Child § 1.5— termination of parental rights—events occurring after filing of petition—consideration by trial court proper

In a proceeding to terminate parental rights, the trial court did not err in admitting evidence of events which occurred after the filing of the petition, since part of the evidence in question consisted of psychological evaluations of respondent which were clearly relevant and admissible, and the other evidence concerning respondent's actions after the petition was filed was clearly relevant to determine the existence of the factors justifying termination under N.C.G.S. § 7A-289.32(3).

APPEAL by respondent from *Roda (Peter L.), Judge.* Order entered 31 August 1987 in District Court, BUNCOMBE County. Heard in the Court of Appeals 26 October 1988.

This is a proceeding to terminate parental rights. Respondent is the mother of four minor children. On 29 October 1984, petitioner, the Buncombe County Department of Social Services, filed a petition alleging that the children were neglected and obtained a non-secure custody order for the children. Petitioner placed the children in four separate foster homes. On 28 December 1984, the parties consented to an order that gave petitioner custody of the children pending respondent's compliance with certain conditions. In an order entered 1 August 1985, the district court found that respondent was complying with the prior order and had entered into an agreement with petitioner to work towards the return of her children. In subsequent orders entered 13 December 1985, 28 August 1986, and 12 January 1987, the court found that respondent had failed to meet the conditions required for the return of the children and continued petitioner's custody of the children.

On 5 February 1987, petitioner filed a petition for termination of the parental rights of respondent and the fathers of the children. An amendment to the petition alleged that the father of one of the children was deceased. The father of the other three children never filed any answer or response to the petition and his parental rights were terminated by order entered 4 June 1987. Respondent filed a response to the petition which denied all allegations as they related to respondent. After a hearing, the trial court concluded that grounds for termination of parental rights existed under G.S. 7A-289.32(3) and ordered that respondent's parental rights be terminated. Respondent appeals.

Rebecca B. Knight for petitioner-appellee.

Richard Schumacher for guardian ad litem-appellee.

Robert G. Karriker for respondent-appellant.

PARKER, Judge.

Many of respondent's thirty-eight assignments of error and forty exceptions are not supported by arguments in respondent's brief and, therefore, are taken as abandoned. Rule 28(b)(5), N.C. Rules App. Proc. The remaining assignments of error are grouped under five questions in respondent's brief. Respondent first contends that she was denied effective assistance of counsel in violation of her constitutional and statutory rights. Respondent's next two arguments are that the trial court erred in concluding that certain grounds for termination of parental rights existed under G.S. 7A-289.32(3). Respondent then argues that the trial court erred in admitting evidence of occurrences after the filing of the petition and that many of the trial court's findings of fact are not supported by sufficient evidence.

The parents' right to counsel in a proceeding to terminate parental rights is now guaranteed in all cases by statute. G.S. 7A-289.23. A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2160, 68 L.Ed. 2d 640, 650 (1981). By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation. If no remedy is provided for inade-

quate representation, the statutory right to counsel will become an "empty formality." *See State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867, 871 (1974). Therefore, the right to counsel provided by G.S. 7A-289.23 includes the right to effective assistance of counsel.

[1] Respondent first contends that she was denied effective assistance of counsel when counsel advised her to consent to orders which provided that her children would remain in foster care. Respondent's parental rights were terminated under G.S. 7A-289.32(3), which provides for termination when the parent has "willfully left the child in foster care for more than 18 months" and certain other conditions exist. Respondent argues that she never wanted to give up custody of her children and that the orders incorrectly indicate that she "willfully" left the children in foster care. This argument is without merit.

To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive her of a fair hearing. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E. 2d 241, 248 (1985). The attorney who advised respondent with regard to the prior orders did not represent her at the termination hearing because he testified as a witness for respondent. The witness testified that respondent always had indicated to him that she wanted custody of the children, but as her attorney, he did not object to leaving the children in foster care because he felt that respondent's living situation at the time did not provide ample room for the children. He also testified that he had asked the court to indicate respondent's desires in the orders. Two of the orders do state that respondent wanted custody of the children.

Under these circumstances, counsel's performance was not deficient and any prejudicial effect the previous orders may have had was negated by his testimony. The question of whether the evidence in this case supports a finding that respondent willfully left her children in foster care will be addressed later in this opinion.

[2] Respondent also contends that she was denied effective assistance of counsel when the trial court denied counsel's motion to continue or withdraw from the case. The motion was made on the day of the termination hearing by the attorney representing re-

spondent at the hearing. The motion stated that counsel had only met with respondent on two or three occasions, respondent had not contacted counsel for two and one-half to three months, counsel had been unable to locate respondent, and counsel had not had adequate communication with respondent to properly represent her. Respondent was not present for the first two days of the hearing but was present on the final two days.

A trial court's ruling on a motion to continue ordinarily will not be disturbed absent a showing that the trial court abused its discretion, but the denial of a motion to continue presents a reviewable question of law when it involves the right to effective assistance of counsel. *See State v. McFadden*, 292 N.C. 609, 611, 234 S.E. 2d 742, 744 (1977). The right to effective assistance of counsel includes, as a matter of law, the right of client and counsel to have adequate time to prepare a defense. *State v. Maher*, 305 N.C. 544, 550, 290 S.E. 2d 694, 697-98 (1982). Unlike claims of ineffective assistance of counsel based on defective performance of counsel, prejudice is presumed in cases where the trial court fails to grant a continuance which is "essential to allowing adequate time for trial preparation." *Id.*

In the present case, however, there was ample time for trial preparation and respondent simply failed to cooperate with her counsel. The motion to continue states that counsel made repeated efforts to contact respondent but was unable to do so. Respondent concedes in her brief that she conferred with counsel concerning her response, which was filed on 18 March 1987. The record shows that the matter was originally scheduled for hearing on 4 June 1987, was continued at respondent's request to 20 July 1987, and was then continued at her request to 20 August 1987. Respondent's social worker testified that respondent was traveling during much of the time between the filing of her response and the final hearing.

Under these circumstances, we find little merit in respondent's contention that she had no notice of the hearing. Where the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue. *See State v. Sampley*, 60 N.C. App. 493, 299 S.E. 2d 460, *disc. rev. denied and appeal dismissed*, 308 N.C. 390, 302 S.E. 2d 257 (1983); *State v. McDiarmid*, 36 N.C. App. 230, 243 S.E. 2d 398 (1978). Accord-

ingly, we hold that respondent was not denied effective assistance of counsel.

[3] Respondent next contends that there was insufficient evidence to support a termination of her parental rights under G.S. 7A-289.32. The trial court's order of termination was based upon the following grounds:

> The parent has willfully left the child in foster care for more than 18 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 18 months in correcting those conditions which led to the removal of the children or without showing positive response within 18 months to the diligent efforts of a county Department of Social Services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the child on account of their poverty.

G.S. 7A-289.32(3). The burden was on petitioner to prove the facts justifying termination by clear and convincing evidence. G.S. 7A-289.32(3a). In this case, respondent does not dispute that she left the children in foster care for more than eighteen months. Respondent contends that the evidence does not show that she did so "willfully." She also contends the evidence shows that she made reasonable progress in correcting the conditions which led to the removal of the children and that she exhibited a positive response to petitioner's efforts to enable her to care properly for her children.

Some background information is required for a full understanding of this case. Respondent is mildly mentally retarded with an I.Q. of sixty-nine. Her four children were born in 1979, 1982, 1983, and 1984. The father of one of the children died in 1982. The father of the three remaining children had abused the children and was incarcerated for food stamp fraud in April 1984. Although he was released from prison in October 1985, he apparently had no further contact with the family.

Petitioner first began working with respondent in February 1984 after receiving reports expressing concern for the children. At that time, the family was living with respondent's parents in a small house owned by her parents. An initial investigation revealed that the children were not receiving adequate medical care. After efforts to improve the situation failed, petitioner obtained custody of the children in October 1984. Since that time, petitioner has attempted to reunify the family. A primary goal has been to enable respondent to secure employment and obtain proper housing for her children. The failure to achieve this goal led petitioner to seek termination of respondent's parental rights.

Respondent contends that, although she left her children in foster care, she did not do so "willfully" within the meaning of G.S. 7A-289.32(3). For the purposes of termination based on willful abandonment under G.S. 7A-289.32(8), this Court has held that the word "willful" connotes purpose and deliberation. *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E. 2d 511, 514 (1986). Willfulness under G.S. 7A-289.32(3), however, is something less than willful abandonment. *In re Harris*, 87 N.C. App. 179, 183-84, 360 S.E. 2d 485, 487-88 (1987). In *In re Wilkerson*, 57 N.C. App. 63, 291 S.E. 2d 182 (1982), the parents contended that willfulness under G.S. 7A-289.32(3) was not shown where they were unable to remove their child from foster care due to their lack of education, inability to find employment, and alcoholism. This Court rejected that argument, holding that the requirement of willfulness was met because the parents had the ability to overcome their problems but had failed over a period of six years to take steps to improve their situation. *In re Wilkerson*, 57 N.C. App. at 68, 291 S.E. 2d at 185.

In the present case, respondent may not have wanted to leave her children in foster care, but it is clear that she did so voluntarily. It is equally clear that she has been unable to care for her children and has not demonstrated the ability to do so despite the efforts of petitioner. Although she is mildly retarded, the record shows that this should not in itself prevent her from obtaining employment and becoming an adequate parent. In this sense, the circumstances of the present case are similar to those of *In re Wilkerson, supra.* There are, however, some important distinctions. The parents in *Wilkerson* had refused to cooperate with the petitioner's efforts to improve their situation. In this

case, respondent has participated to some extent in programs designed to improve her ability to work and her parenting skills. She has made limited progress in these areas, but has not been able to keep a job and the improvement in her parenting skills is not significant.

Although the evidence in this case does show some efforts on the part of respondent to regain custody of her children, we hold that the evidence supports a finding of willfulness under G.S. 7A-289.32(3). The fact that some efforts were made does not preclude a finding of willfulness. *In re Tate*, 67 N.C. App. 89, 94, 312 S.E. 2d 535, 539 (1984). The record shows that, although respondent initially participated in programs designed to improve her situation, she has largely abandoned these efforts. She has not followed through on her program of vocational training. Since the petition in this case was filed, respondent has been traveling, her visitation with the children has been very infrequent, and her social worker has had difficulty in contacting her.

We are not insensitive to respondent's contentions that her inability to improve her situation stems from her mental disability, her poverty, and other personal problems. The avowed legislative policy with respect to termination of parental rights, however, is that the interests of the child take precedence over conflicting interests of the parent. G.S. 7A-289.22(3). Accordingly, we are of the opinion that a finding of willfulness under G.S. 7A-289.32(3) does not require a showing of fault on the part of the parent. Willfulness may be found where the parent, recognizing her inability to care for the child, voluntarily leaves the child in foster care. In this case, respondent has been afforded almost double the statutory eighteen-month period in which to demonstrate her willingness to correct the conditions which led to the removal of her children. Her failure to do so supports a finding of willfulness regardless of her good intentions. A contrary conclusion would impermissibly give priority to the interests of the parent where they clearly conflict with the interests of the child.

[4] Respondent also contends that the evidence is not sufficient to support findings that she has not (i) made reasonable progress in correcting the conditions which led to the removal of her children nor (ii) shown a positive response to petitioner's efforts to strengthen the parental relationship and provide constructive

planning for the children's future. Petitioner had the burden to prove both lack of reasonable progress and lack of positive response. *In re Harris*, 87 N.C. App. at 185, 360 S.E. 2d at 488. We hold that petitioner met its burden to prove both factors by clear and convincing evidence.

The evidence clearly shows that, although respondent has made some progress in the areas of job and parenting skills, such progress has been extremely limited. Since the children were removed from her custody, she has held two jobs for short periods of time, but she quit both jobs. She has been unable to obtain her own housing and continues to reside in her parents' mobile home when she is not traveling. Respondent's own expert witness testified that, as of the time of the hearing, she would not be a suitable mother and that one of the reasons for her failure to improve was her lack of motivation. Observers of her visits with the children testified that her relationships with them were not good. The children displayed stress and confusion in their mother's presence. The little progress she has made has been in the area of caring for herself as opposed to her children.

Respondent does not contend that petitioner failed to make diligent efforts to assist her in improving her situation. In order to show a "positive response" to these efforts, there must be evidence of positive results. *In re Tate*, 67 N.C. App. at 94, 312 S.E. 2d at 539. In this case, petitioner's efforts have not led to positive results nor has respondent made reasonable progress in meeting the terms of petitioner's plan for reunification. Therefore, the trial court correctly concluded that grounds for termination of parental rights existed under G.S. 7A-289.32(3).

[5] Respondent next contends that the trial court erred in admitting evidence of events which occurred after the filing of the petition. The petition in this case was filed 5 February 1987, but the matter was not heard until 20 August 1987. Much of the evidence introduced at the hearing concerned the time period between the filing and hearing dates.

This argument is without merit. Part of the evidence in question consists of psychological evaluations of respondent. The trial court is empowered by statute to order such evaluations at the time of the hearing. G.S. 7A-289.30(b). Although the evaluations in this case were not court-ordered, they clearly were relevant and

admissible. The other evidence in question concerns respondent's actions after the petition was filed and was clearly relevant to determine the existence of the factors justifying termination under G.S. 7A-289.32(3). In cases concerning termination of parental rights based upon neglect, the trial court must consider evidence of changes in conditions up to the time of the hearing. *In re Ballard*, 311 N.C. 708, 715, 319 S.E. 2d 227, 232 (1984); *In re White*, 81 N.C. App. 82, 90, 344 S.E. 2d 36, 41, *disc. rev. denied*, 318 N.C. 283, 347 S.E. 2d 470 (1986). Such evidence is also admissible in proceedings to terminate parental rights under G.S. 7A-289.32(3).

In her final argument, respondent contends that many of the trial court's findings of fact are not supported by clear and convincing evidence. Based upon our review of the record and consideration of respondent's contentions, we hold that any errors in the trial court's findings of fact would not be prejudicial. There was sufficient clear and convincing evidence to support the essential findings required to justify terminating respondent's parental rights under G.S. 7A-289.32(3).

Therefore, we hold that the trial court did not err in concluding that grounds existed to terminate respondent's parental rights and the order of termination is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. GILMER EUGENE KINNEY

No. 8818SC557

(Filed 7 February 1989)

1. Assault and Battery § 15.7— assault with a deadly weapon—instruction on self-defense 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 refusing to give a self-defense instruction where there was no evidence that defendant reasonably believed it necessary to kill his brother to protect himself from death or great bodily harm. Evidence that his brother had physically abused defendant in the past and had threatened to beat defendant approximately thirty minutes

before the shooting was not sufficient to show that at the time of the shooting defendant was in actual or apparent danger of death or great bodily harm, there was no evidence that at the time of the shooting the brother tried to strike defendant or attack him physically, defendant testified that he did not intend to shoot his brother and denied pointing a gun at him, defendant's evidence showed that the gun discharged when the brother tried to take the shotgun from defendant, and testimony from a police investigator that after the shooting, defendant remarked that he shot his brother before his brother shot him did not in and of itself indicate a reasonable belief on defendant's part that his life was in jeopardy or that great bodily harm was imminent considering the lack of any evidence to show that the brother threatened defendant with a gun or dangerous weapon.

2. Criminal Law § 128.1— assault—defendant nervous on day of trial—mistrial denied

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by denying defendant's motion for a mistrial, which was based on his physical and mental condition on the second day of trial. According to a physician's testimony, defendant was able to proceed and his nervousness and anxiety were considered normal for a person facing trial. Moreover, defendant testified at trial and there was nothing in his testimony which would support his argument that his allegedly impaired condition prevented him from effectively testifying in his own defense.

3. Criminal Law § 138.34— assault—mitigating factors—physical and mental condition

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by failing to find as a mitigating factor that defendant was suffering from physical and mental conditions insufficient to constitute a defense but significantly diminishing his culpability for the offense where, although there was testimony that defendant had been in mental hospitals on numerous occasions, it was never made clear that defendant had been diagnosed as suffering from any specific condition, there was no medical evidence regarding the state of defendant's mental and physical condition other than testimony as to his condition during the trial, and, assuming that there was sufficient evidence to show that he was suffering from a particular condition, there was no evidence that the condition was such as to reduce his culpability.

4. Assault and Battery § 15.2— assault with a deadly weapon—instruction on defense of accident—no plain error

There was no plain error in the court's instruction on the defense of accident in a prosecution for assault with a deadly weapon inflicting serious injury where the court instructed the jury that pointing a gun at a person is not lawful conduct, but the only issue before the jury was whether the shooting was accidental or intentional and there could hardly have been any question as to the gun having been pointed at the victim. The verdict would have been the same without the surplusage in the instruction that pointing a gun at someone is not lawful conduct.

State v. Kinney

APPEAL by defendant from *Rousseau (Julius A., Jr.), Judge.* Judgment entered 16 December 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 January 1989.

Defendant was properly indicted on 2 March 1987 for assault with a deadly weapon with intent to kill inflicting serious injury in violation of G.S. 14-32(a). After a jury trial, defendant was convicted as charged and sentenced to an active term of twenty years. Defendant appeals.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant.

LEWIS, Judge.

Defendant was charged and convicted of assaulting his brother Talmadge Kinney (Tim) with a shotgun with the intention of killing him and inflicting serious injury. The events surrounding the shooting are disputed.

The State's evidence generally tended to show the following. Around 11:00 a.m. on 11 October 1986 Tim was at his mother's house in Greensboro where defendant also resided. He and Timothy Chilton (Chilton) were attempting to repair Tim's dump truck which defendant had wrecked earlier in the week. Defendant arrived at the scene accompanied by Frank McDaniel (McDaniel) and bringing with him a just-purchased hood latch for the truck. Defendant and McDaniel then proceeded to attach the latch, which did not fit, using an eight to ten pound sledgehammer. Tim stopped the two men, and smelling alcohol on their breath, told McDaniel to go home and defendant to go in the house and sleep it off. Defendant subsequently went inside. Approximately thirty minutes later Tim went into the house to get some paper towels. At the time he was carrying a can of WD-40 lubricant in his hand and a pocketknife on his pouch saddle. When Tim entered the kitchen he was confronted by defendant sitting in a chair next to the sink and holding a shotgun. Tim testified that defendant then stood and said " '[y]ou're a dead son of a bitch.' " Tim hit the gun and it fired. The discharge hit Tim and knocked him up against the wall and to the floor. Defendant then placed the gun at Tim's

neck and stated " 'I got to kill you now. I don't need a witness, and they don't convict crazy people.' " The two struggled for the gun and Tim managed to make his way outside where he yelled for help. Chilton ran up, helped Tim to the car and took him to the hospital. Defendant followed Tim outside and unsuccessfully tried to pull Tim out of the car.

Rebuttal evidence by the State tended to show that after the shooting and while at the hospital defendant told a police investigator, " 'Well, I shot him before he shot me. He came there last night, raising hell. I told him I was tired of his raising hell at my house. I shot him before he would have shot me. I ain't sorry, 'cause he would have shot me.' "

Defendant's testimony tended to show that on the morning of the shooting defendant was attempting to assist Tim repair his truck. Defendant had not consumed any alcohol. Tim became verbally abusive to defendant and threatened to beat him if he did not go in the house. Defendant went in the house and lay down on the couch for several minutes. Shortly thereafter defendant went to the kitchen to take two Valium tablets and looking through the kitchen window saw Tim throw a wrench across the yard and hurriedly start toward the house. Defendant testified that Tim was carrying what appeared to be a pull bar in his hand. Fearing his brother was coming to beat him, defendant grabbed the loaded shotgun he kept next to the couch. When Tim came into the kitchen defendant backed away from Tim when Tim reached to get the gun and the gun discharged. Defendant testified he never pointed the gun at his brother, never intended to shoot him and does not remember pulling the trigger. Immediately after the shooting defendant helped his brother to the car so that he could be taken to the hospital.

Charles Jayne (Jayne) testified for the defense that on the morning of the shooting Tim had threatened to beat defendant if defendant did not go inside. After defendant went inside Tim continued to berate defendant stating, *inter alia*, "I should kill that son of a bitch." Shortly thereafter Tim threw down the wrench he had in his hand and quickly walked inside. Jayne further stated that he did not witness the actual shooting but heard Tim say "God damn 'Jitterbug' [defendant]" just before he heard the gunshot. After the shooting Jayne saw both brothers come out of the

house with Tim carrying the shotgun. Defendant took the shotgun from Tim, helped him into the car, and walked back in the house.

Defendant brings forward four assignments of error. First, he contends that the trial court erred in failing to submit a self-defense instruction to the jury. Second, defendant assigns as error the court's refusal to grant a mistrial based on defendant's alleged agitated physical and mental condition on the second day of trial. Third, defendant contends that the court erroneously failed to find G.S. 15A-1340.4(2)(d) as a mitigating factor in sentencing. Fourth, defendant asserts as plain error the trial court's statement to the jury that pointing a gun at a person was not lawful conduct. We have reviewed the record in this case and find no prejudicial error.

[1] Defendant contends that the trial court erred in refusing to give a self-defense instruction because evidence was presented from which a jury could find that he was acting in self-defense when the gun fired. A defendant may use deadly force to repel a felonious assault only if it reasonably appears necessary to protect himself from death or great bodily harm. *State v. Hunter*, 315 N.C. 371, 338 S.E. 2d 99 (1986). However, a defendant may not use deadly force to protect himself from mere bodily harm or offensive physical contact and use of deadly force to prevent harm other than death or great bodily harm is excessive as a matter of law. *Id.* An assault with intent to kill is justified under self-defense if a defendant is in actual or apparent danger of death or great bodily harm. *State v. Dial*, 38 N.C. App. 529, 248 S.E. 2d 366 (1978).

A self-defense instruction is required if any evidence is presented from which it can be determined that it was necessary or reasonably appeared necessary for a defendant to kill the victim to protect himself from death or great bodily harm. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). It is for the trial court to determine in the first instance whether as a matter of law there is evidence to require a self-defense instruction. *Id.* The court must consider the evidence in the light most favorable to the defendant and where there is evidence of self-defense, the court must give the instruction even if there are discrepancies or contradictions in the evidence. *State v. Blackmon*, 38 N.C. App. 620, 248 S.E. 2d

456 (1978), *disc. rev. denied*, 296 N.C. 412, 251 S.E. 2d 471 (1979); *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974).

To merit a self-defense instruction, two questions must be answered in the affirmative: "(1) Is there evidence that the defendant in fact formed a belief that it was necessary to *kill* his adversary in order to protect himself from death or great bodily harm, and (2) if so, was the belief reasonable?" *Bush*, 307 N.C. at 160, 297 S.E. 2d at 569. (Emphasis added.) If the answer to either question is "no" then a self-defense instruction is not required. *Id.*

The facts and circumstances surrounding the assault and not a defendant's stated belief are the determinative factors as to whether a defendant acted as an aggressor or in his own defense. *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947). Here, the facts and circumstances do not warrant a self-defense instruction in that there is no evidence that defendant reasonably believed it necessary to kill his brother to protect himself from death or great bodily harm. Defendant's evidence that Tim had physically abused defendant in the past and had threatened to beat defendant approximately thirty minutes before the shooting is not sufficient to show that at the time of the shooting defendant was in actual or apparent danger of death or great bodily harm. *See Hunter, supra.* There is no evidence that at the time of the shooting Tim tried to strike defendant or attack him physically. Defendant testified that he did not intend to shoot Tim and denied pointing a gun at him. Also, defendant's evidence showed that the gun discharged when Tim tried to take the shotgun from defendant.

To support his argument that he acted in self-defense defendant points to the testimony of a police investigator that after the shooting defendant remarked that he shot his brother before his brother shot him. We do not believe that this testimony in and of itself indicates a reasonable belief on defendant's part that his life was in jeopardy or that great bodily harm was imminent considering the lack of any evidence to show that Tim threatened defendant with a gun or dangerous weapon at the time of the shooting. Defendant himself testified at trial that Tim did not have a gun either before or at the time of the shooting. Based on the foregoing, the trial court did not err in refusing to submit a self-defense instruction to the jury.

[2] Defendant next assigns as error the court's refusal to grant a mistrial based on defendant's physical and mental condition on the second day of the trial which defendant contends prevented him from effectively defending himself. The record reveals that on the evening of 11 March 1987, the first day of trial, defendant was taken to the emergency room of the local hospital and examined for unspecified complaints. Medical tests were taken and the results were normal. The next morning before court convened the judge was informed that defendant was perspiring profusely and experiencing difficulty in breathing. Dr. Timothy Davis, present in court to testify for the State, briefly examined defendant and testified in the following manner regarding defendant's ability to proceed:

> DR. DAVIS: From my perspective as a general surgeon, his heart rate was faster than normal. He was perspiring, and stated that he felt quite nervous and anxious. But I could see or find nothing in my brief examination that was totally out of the ordinary. . . .
>
> THE COURT: Well, would you have any recommendation as to whether you think he's able to proceed to trial or needs some further examination?
>
> DR. DAVIS: It would seem to me that he would be able to proceed. He's very nervous and anxious, which in my opinion, is not out of the ordinary for this morning.
>
> THE COURT: In other words, you think about anybody that's got a case in court's a little nervous and anxious?
>
> DR. DAVIS: Absolutely. . . .
>
> MR. RAY: Dr. Davis, keeping in mind that Mr. Kinney will be a key witness . . . do you feel he would have the ability . . . to effectively defend himself by testifying under oath as to the facts and circumstances of this case?
>
> DR. DAVIS: Probably not, in his state this morning. . . .
>
> MR. GREESON: That could happen from now till the day he died, getting nervous and not being able to take the stand, couldn't it?
>
> DR. DAVIS: I think that's a very good possibility.

Defendant's subsequent motion for a mistrial was denied by the court.

G.S. 15A-1061 provides:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial . . . if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

"Mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial trial." *State v. Stocks*, 319 N.C. 437, 441, 355 S.E. 2d 492, 494 (1987). Whether to grant a mistrial is within the trial judge's discretion and this court will not reverse that decision unless the defendant demonstrates an abuse of the trial court's discretion. *Id.; State v. King*, 311 N.C. 603, 320 S.E. 2d (1984). Defendant here has failed to show that the trial court's refusal to grant a mistrial was an abuse of discretion or that such refusal irrevocably or substantially prejudiced defendant's case. According to testimony, defendant was able to proceed and his nervousness and anxiety were considered normal for a person facing trial. Defendant testified at trial and there is nothing in his testimony which would support his argument that his alleged impaired condition prevented him from effectively testifying in his own defense.

[3] Defendant next assigns as error the trial court's failure to find as mitigating factors that defendant was suffering from physical and mental conditions insufficient to constitute a defense but significantly diminishing his culpability for the offense. Finding that a mitigating factor exists is within the trial judge's discretion and will not be disturbed on appeal absent a showing that the court's ruling was so arbitrary that it could not be the result of a reasoned decision. *State v. Barts*, 321 N.C. 170, 362 S.E. 2d 235 (1987). Although testimony was received that defendant had been in mental hospitals on numerous occasions in the past, it was never made clear during the guilt or sentencing phases of the trial that defendant had been diagnosed as suffering from any specific mental or physical condition. There was no medical evidence regarding the state of defendant's mental and physical health other than Dr. Davis' testimony as to defendant's

condition during the trial. Additionally, assuming *arguendo* that there was sufficient evidence to show that defendant was suffering from a particular physical or mental condition, there is no evidence that the condition was such as to reduce his culpability in assaulting his brother. Thus, we find that the judge did not abuse his discretion.

[4] Defendant's fourth assignment of error is to the following portion of the trial judge's instruction to the jury: "An injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. Of course, pointing a gun at a person is not lawful conduct." Defendant contends that the last statement by the court allowed the jury to conclude that the judge had formed an opinion as to what the State had proven and that such a remark "virtually undercut the defense of accident." We do not agree.

Initially, we note that defendant failed to object to the trial judge's instruction although given the opportunity. App. R. 10(b)(2) prohibits a party from assigning as error any portion of the jury instruction not objected to before the jury returned and App. R. 10(a) limits this court's review to exceptions set forth in the record and made the basis of an assignment of error. Thus, under our appellate rules this assignment of error is not properly before us. However, in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), our Supreme Court adopted the "plain error" exception utilized in the Federal courts. Under this "plain error" exception, our court may review an alleged error in a court's instruction if the record indicates that such an error is a " 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *Id.* at 660, 300 S.E. 2d at 378, *quoting United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982). This rule is always applied cautiously and it is rare when an improper instruction merits reversal of a conviction when no objection was made at trial. *Id.*

In making a determination as to whether "plain error" exists this court must examine the whole record and decide whether the error had a probable effect on the jury's verdict of guilt. *Id.* This court must be convinced that the jury would decide differently absent the alleged error. *State v. Joplin*, 318 N.C. 126, 347 S.E. 2d 421 (1986). In the case before us, the State provided sufficient

evidence from which the jury could conclude that defendant intentionally shot his brother. The defendant was not charged with pointing a gun but rather with assault with a deadly weapon with the intent to kill, inflicting serious injury. The injury and the fact it resulted from a shooting is undisputed. The only issue before the jury was whether the shooting was accidental or intentional. There could hardly have been any question as to this gun having been pointed at the victim. The defendant presented evidence that he did not intentionally point the gun at the victim at all. The jury chose not to believe that portion of the evidence. The able and experienced trial judge correctly instructed the jury throughout the charge and in the final mandate. The surplusage in the instruction that pointing a gun at someone is not lawful conduct did not cause, in our opinion, the jury to find the defendant guilty. Without that statement, we believe the verdict would have been the same.

No error.

Judges EAGLES and PARKER concur.

LEWIS E. LAMB, JR. v. THEDA A. LAMB

No. 8821SC485

(Filed 7 February 1989)

1. Appeal and Error § 6.2— fewer than all issues decided—substantial right affected—immediate appeal allowed

The trial court's order dismissing defendant's counterclaims for the imposition of a constructive trust on certain monies in plaintiff's checking account affected a substantial right which would be prejudiced if immediate appeal was not granted, since the order did not adjudicate the issues raised in plaintiff's complaint; plaintiff's complaint for malicious prosecution and defendant's counterclaims requesting a constructive trust required resolution of the factual issue as to whether plaintiff did forge defendant's name on a check; and the possibility existed that a denial of this appeal could result in two juries in separate trials reaching different resolutions of the same issue.

2. Divorce and Alimony § 30; Election of Remedies § 4; Trusts § 15— request for equitable distribution—no election of remedies—no bar to action for constructive trust

Defendant, in requesting equitable distribution, did not make an election of remedies which barred her action for a constructive trust since there was no determination of whether the properties in question were marital or separate, whether the funds had been exchanged for some other property, whether the funds had been dissipated or wasted, and, if so, when; the trial court was therefore unable to determine from the record whether the equitable distribution action would allow redress of the injury complained of in the constructive trust proceeding; and the equitable distribution action itself had not yet been prosecuted to a final judgment.

APPEAL by defendant from *Seay (Thomas W., Jr.), Judge.* Judgment entered 12 January 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 November 1988.

D. Blake Yokley for plaintiff-appellee.

Davis & Harwell, P.A., by Joslin Davis, for defendant-appellant.

GREENE, Judge.

In this civil action plaintiff, Lewis E. Lamb, Jr., filed an action for malicious prosecution in response to the issuance and subsequent dismissal of a criminal warrant caused to be issued by this defendant against this plaintiff. In response to the plaintiff's action for malicious prosecution, the defendant filed counterclaims requesting the imposition of a constructive trust on certain monies received by the plaintiff and deposited in his own personal checking account and allegedly being the monies of the defendant. In response to a motion by the plaintiff, the trial court entered summary judgment for the plaintiff and dismissed the defendant's counterclaims. The defendant appeals.

The evidence before the trial court tended to show that during the marriage of the plaintiff and defendant, the parties purchased certain real property which was titled as tenants by the entireties. On 17 July 1979 the property was sold to a third party and the sale proceeds were payable in four installments with interest. The defendant contends she agreed to join in the sale and execute the deed only on the condition that plaintiff agree to disburse to her one-half of the proceeds upon receipt. The pay-

ments were to be made payable to both plaintiff and defendant. The first three installments of $11,865.64, $12,485.35 and $11,523.31 were all received by the plaintiff prior to February 1981 and were deposited in his personal checking account without the knowledge of the defendant and allegedly without her consent. The fourth payment of $10,603.39 was paid by the buyers to their attorney in February of 1982 and is presently being held in escrow by that attorney pending receipt of the note marked paid and satisfied in full.

Further, the plaintiff and defendant, as husband and wife, filed joint tax returns for 1978, 1980, 1981 and 1982. Refund checks were issued by the Internal Revenue Service made payable to both plaintiff and defendant and the checks were mailed to the plaintiff. The plaintiff deposited these refund checks totaling $10,613.23 in his personal account, after signing his wife's name on the back of the checks. The refund check for the year 1982 was deposited in plaintiff's account in September 1983.

On 30 June 1983 the plaintiff filed a complaint requesting a divorce from bed and board. The parties separated in July 1983. On 14 October 1983 the defendant in response to the action for divorce from bed and board filed a counterclaim for alimony. On 17 September 1984 defendant filed an action for equitable distribution, which action is pending in the district court.

On 17 January 1984 defendant caused to be issued a warrant against plaintiff for forging her name to one of the checks received by the plaintiff for the sale of the property. A district court judge found no probable cause and the warrant was dismissed.

The issues presented are: I) whether the dismissal of the counterclaim is appealable; and II) whether the defendant by the filing of an equitable distribution action is precluded from seeking a constructive trust.

I

[1] The trial court's summary judgment did not adjudicate the issues raised in the plaintiff's complaint. Therefore, as all the issues have not been adjudicated, the judgment is interlocutory and is generally not appealable. *J. & B. Slurry Seal Co. v. Mid-*

South Aviation, Inc., 88 N.C. App. 1, 4, 362 S.E. 2d 812, 814 (1987). However, if the order, here the summary judgment, affects a substantial right which will "be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order," the order is appealable. *Id.* at 6, 362 S.E. 2d at 815; *see* N.C.G.S. Sec. 7A-27(d)(1) (1986) and N.C.G.S. Sec. 1-277(a) (1983) (an appeal of right lies from an interlocutory order that "(1) [A]ffects a substantial right, or (2) In effect determines the action and prevents the judgment from which appeal might be taken, or (3) Discontinues the action, or (4) Grants or refuses a new trial."). " '[T]he right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right.' " *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E. 2d 593, 596 (1982) (quoting *Survey of Development in N.C. Law, 1978*, 57 N.C.L. Rev. 827, 908 (1979) (emphasis in original)).

The same factual issues are to some extent involved in the complaint for malicious prosecution and in the counterclaims requesting a constructive trust. *Id.* (parties can be prejudiced by different juries "rendering inconsistent verdicts on the same factual issue"). In the malicious prosecution action the plaintiff alleged the defendant knew there was no basis for the issuance of the criminal warrant which stated that plaintiff had forged defendant's endorsement on a check received by the plaintiff on 31 January 1981. The defendant denied that allegation. In the counterclaim for constructive trust, the defendant alleged the plaintiff forged defendant's name on certain checks, including the check which is the basis of the criminal warrant. The plaintiff in his reply to the counterclaim denied forging the defendant's name.

As the factual issue of whether the plaintiff did forge defendant's name on the check received by the plaintiff on 31 January 1981 is central to both the complaint and one of the counterclaims, there exists the possibility that a denial of this appeal could result in two juries in separate trials reaching different resolutions of this same issue. If this appeal is denied, there would be a trial on the complaint and a jury could determine plaintiff did not forge defendant's signature on the check at issue. After that trial, the dismissal of the counterclaims now at issue would be a final judgment and appealable. If on a subsequent appeal of the counterclaims, the appellate court determines the dismissal of the counterclaims was in error, the matter would be

remanded for a trial on the counterclaims. There a different jury could possibly determine in that action that the plaintiff did forge the defendant's signature, thereby resulting in conflicting resolution of the issue. Accordingly, we determine the trial court's order dismissing the defendant's counterclaims does affect a substantial right which would be prejudiced if immediate appeal is not granted.

II

[2] The defendant assigns as error the entry of the summary judgment dismissing the counterclaims. We first note the defendant in the record states no grounds or basis upon which the error is assigned. App. R. 10(c) (assignment of error shall state "plainly and concisely and without argumentation the basis upon which error is assigned"). However, our Supreme Court has held Rule 10(a) of the North Carolina Rules of Appellate Procedure does not require a party against whom summary judgment is entered to note any assignment of error in the record. *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E. 2d 479, 481 (1987). The appeal itself presents the question of whether the judgment is supported by the conclusions of law. *Id.* at 416, 355 S.E. 2d at 481-82. Here the trial court concluded "there is no genuine issue as to any material fact raised in the Counterclaims, and that the plaintiff is entitled to a judgment as a matter of law." A summary judgment is appropriately entered where there is "no genuine issue as to any material fact and one party is entitled to judgment as a matter of law." *Frye v. Arrington*, 58 N.C. App. 180, 182, 292 S.E. 2d 772, 773 (1982).

The plaintiff, while conceding there is a dispute in the facts, contends that defendant is nonetheless barred as a matter of law from prosecuting this action for a constructive trust. *See Virginia Elec. and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E. 2d 188, 190-91, *cert. denied*, 317 N.C. 715, 347 S.E. 2d 457 (1986) (summary judgment appropriate where movant "conclusively establishes a complete defense or legal bar to the non-movant's claim"). More specifically, the plaintiff asserts, consistent with his pleadings, that when in September 1984 the defendant filed a separate action for equitable distribution, she made an irrevocable election and cannot now proceed in this action for a constructive trust because the two remedies are inconsistent.

One is held to have made an election of remedies when he chooses with knowledge of the facts between two inconsistent remedial rights. *Redmond v. Lilly*, 273 N.C. 446, 450, 160 S.E. 2d 287, 290 (1968). This principle does not apply to "co-existing and consistent remedies." *Richardson v. Richardson*, 261 N.C. 521, 530, 135 S.E. 2d 532, 539 (1964). Generally, the purpose of the doctrine of election of remedies is to "prevent double redress for a single wrong." *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E. 2d 880, 885 (1954). Furthermore, an election is not generally deemed to have occurred unless there has been an entry of some final judgment. *See Wall Plumbing Co. v. Harris*, 266 N.C. 675, 685, 147 S.E. 2d 202, 209 (1966) (prosecution of remedial right to a judgment or decree constitutes a conclusive election barring subsequent prosecution of inconsistent remedial right); *Warren v. Susman*, 168 N.C. 538, 545, 84 S.E. 760, 763 (1915) (mere *filing* of a suit on one theory is not a conclusive election); N.C.G.S. Sec. 1A-1, Rule 8(e)(2) (1983) (party may plead separate inconsistent claims and defenses); *Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 344, 201 S.E. 2d 503, 506, *cert. denied*, 285 N.C. 85, 203 S.E. 2d 57 (1974) (party pleading inconsistent claims is not required to make an election prior to trial); *Allstate Ins. Co. v. James*, 779 F. 2d 1536, 1541 (11th Cir. 1986) (party may plead inconsistent facts and remedies without being barred by the election of remedies doctrine); *but see Redmond*, 273 N.C. at 450, 160 S.E. 2d at 290 (the institution of an action by a seller against the buyer for the collection of the purchase price is an election); *Economy Pumps, Inc. v. F. W. Woolworth Co.*, 220 N.C. 499, 502, 17 S.E. 2d 639, 641 (1941) (the filing of a notice of lien against subcontractor stops claimant from thereafter asserting inconsistent claims against contractor).

We now determine if the defendant in requesting equitable distribution has made an election of remedies which bars this action for constructive trust. Equitable distribution under N.C.G.S. Sec. 50-20 is an alternative means of property division and an *actual distribution* of marital properties pursuant to the equitable distribution statute precludes the parties from seeking other property division "rights granted by statute or recognized at common law or acquired under a separation agreement." *Hagler v. Hagler*, 319 N.C. 287, 292, 354 S.E. 2d 228, 233 (1987). A constructive trust is a common law property right arising in equity to prevent a person from holding property under circumstances

"making it inequitable for him to retain it." *Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 211, 171 S.E. 2d 873, 882 (1970). Therefore, under *Hagler* and the doctrine of election of remedies, defendant's action for the constructive trust is barred only if a distribution has been made in the equitable distribution action *and* the constructive trust remedy is inconsistent with the equitable distribution remedy. *See Hagler*, 319 N.C. at 292, 354 S.E. 2d at 233 (in absence of an equitable distribution ex-spouse may bring action for waste, ejectment, accounting, or partition); *but see Beam v. Beam*, 92 N.C. App. 509, 374 S.E. 2d 636 (1988) (ex-wife entitled to bring accounting action *after* final judgment in equitable distribution action even though property the subject of the accounting action was designated the separate property of husband in equitable distribution action).

In determining if the equitable distribution proceeding is inconsistent with the constructive trust action, the question is whether the equitable distribution statute redresses the injury complained of in the constructive trust action. The defendant claims in this constructive trust action that the plaintiff has taken monies being the property of the defendant and converted those funds to his own use. Therefore, if this alleged conversion of funds by the husband can be redressed in the equitable distribution action, the remedies are inconsistent. Generally, if the property which is the subject of the constructive trust action were classified as marital property, as defined by N.C.G.S. Sec. 50-20(b)(1) (1987), the trial court would be required to distribute the property, N.C.G.S. Sec. 50-20(a) (1987), or its substitute, *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E. 2d 260, 269, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985) (source of funds theory), in the equitable distribution action. If the property which is the subject of the constructive trust action were classified as marital property and had been dissipated after the date of separation and prior to the distributive award, the trial court would be required to consider that dissipation as a factor in distributing the other marital property, N.C.G.S. Sec. 50-20(c)(11a) (1987) (wasting of marital property during separation and before distribution shall be considered in making equitable distribution of remaining marital property). Therefore, if the property the subject of the constructive trust action is classified as marital, these procedures under the equitable distribution statute provide the de-

fendant with a redress. However, the equitable distribution statute does not allow redress of all matters that may be the subject of a constructive trust action. For example, the equitable distribution statute provides no remedy to the defendant for the wrongful conversion of her separate property. N.C.G.S. Sec. 50-20(a) (1987) (statute provides for equitable distribution of marital property only).

In this record, there has been no determination of whether the properties in question are marital or separate, whether the funds have been exchanged for some other property, or whether the funds have been dissipated or wasted and, if so, when. Accordingly, we are unable to determine from the record whether the equitable distribution action would allow redress of the injury complained of in the constructive trust proceeding. Nonetheless, as the equitable distribution action has not yet been prosecuted to a final judgment, the trial court erred in entering summary judgment for the plaintiff and dismissing the defendant's counterclaims for a constructive trust.

Vacated and remanded.

Judges BECTON and EAGLES concur.

GEORGE TERRY, PLAINTIFF v. PULLMAN TRAILMOBILE, A DIVISION OF PULLMAN, INC.; PULLMAN TRANSPORTATION CO., INC.; WILSON TRAILER SALES & SERVICE, INC.; WILSON TRUCKING COMPANY, INC.; GLASS CONTAINER TRANSPORT COMPANY; EUMA TRUCKING, INC.; MERCER BROS. TRUCKING COMPANY; LANE TRUCK LINES, INC.; TRAILER SERVICE AND REFRIGERATION CO.; AND GLOVER TRUCKING CORP., DEFENDANTS

No. 887SC396

(Filed 7 February 1989)

1. Appeal and Error § 6.2— partial summary judgment—appeal not premature

A partial summary judgment against plaintiff affected a substantial right and was immediately appealable where plaintiff was severely injured while operating a tractor-trailer in New York and brought an action in North Carolina for the defective design, manufacture, and assembly of the trailer; the trailer had been manufactured in Texas, sold in North Carolina to a Virginia

corporation as part of a shipment for a North Carolina corporation; and was eventually resold and retained by another North Carolina corporation. Summary judgment for fewer than all of the defendants affected a substantial right because it created the possibility of inconsistent verdicts in separate trials.

2. **Courts § 21.5— product liability action—tractor-trailer accident in New York—New York law governs**

The North Carolina statute of repose did not govern the disposition of negligence and strict liability claims arising from a tractor-trailer accident in New York. Under the lex loci delicti rule, plaintiff was injured in New York, so his substantive rights with regard to the negligence and strict liability claims must be determined on the basis of New York law.

3. **Courts § 21.6— accident in New York—warranty claims—North Carolina law governs**

The trial court properly applied the North Carolina statute of repose to an action for breach of express or implied warranties arising from a tractor-trailer accident in New York because the sale and distribution of the trailer occurred in North Carolina.

4. **Courts § 21— conflict of law between states—separate from personal jurisdiction**

The application of New York law to plaintiff's claims arising from a tractor-trailer accident in New York was not patently unfair even though New York could not assert personal jurisdiction because choice of law is a separate inquiry from personal jurisdiction. The minimum contacts test does not apply in resolving conflicts of law issues.

APPEAL by plaintiff from *Phillips, Herbert O., III, Judge.* Order entered 28 November 1987 in WILSON County Superior Court. Heard in the Court of Appeals 6 December 1988.

Plaintiff, a resident of Texas, was severely injured on 21 August 1984, while operating a tractor-trailer in the State of New York. Plaintiff alleges that the accident was caused by the defective design, manufacture, and assembly of the trailer, including the portion called the sliding tandem bogey. The trailer was manufactured in Texas by Pullman Trailmobile, which sold it through its Kernersville, North Carolina office to defendant Trailer Service and Refrigeration Company, a Virginia corporation, as part of a shipment for defendant Lane Truck Lines, Inc., a North Carolina corporation. Lane accepted delivery of the trailer on 5 February 1977. It was subsequently resold, and was eventually obtained by defendant Mercer Brothers Trucking Company, a North Carolina corporation. Plaintiff, an employee of Mercer

Brothers Trucking Company, was operating the tractor-trailer when the trailer's wheels came loose and resulted in a single vehicle accident.

Plaintiff filed this action seeking to recover against defendants on claims of negligence, strict liability, and breach of implied and express warranties on 11 August 1987. Defendants Pullman Trailmobile and Pullman Transportation Co., Inc. and defendant Trailer Service and Refrigeration Company (hereinafter defendant) moved for summary judgment under the North Carolina statute of repose, N.C. Gen. Stat. § 1-50(6) (1983), which prohibits actions for personal injury damages arising out of alleged product defects or failures more than six years after the date of initial purchase for use or consumption. The trial court held that North Carolina law applied to all of plaintiff's claims and granted defendants' motions. Prior to oral argument plaintiff settled with Pullman Trailmobile and Pullman Transportation Co., Inc., and withdrew their appeal as to those defendants.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe and Jennifer S. Brearley, for defendant-appellee Trailer Service and Refrigeration Co.; Maupin Taylor Ellis & Adams, P.A., by Thomas W. H. Alexander, James A. Roberts, III, and Jay A. Kania, for defendant-appellees Pullman Trailmobile, a Division of Pullman, Inc., and Pullman Transportation Co., Inc.

WELLS, Judge.

[1] As a preliminary matter we consider whether this appeal must be dismissed as premature. The trial court's order granting defendant's motion for summary judgment did not certify that there was no just reason for delay, so it is not immediately appealable unless it affected a substantial right. *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). The trial court confined its entry of summary judgment to the issue of whether North Carolina or New York law controlled the disposition of plaintiff's action, and effectively foreclosed plaintiff from bringing any of his claims against defendant.

We hold that the order granting summary judgment for fewer than all of the defendants affected a substantial right, because

it created the possibility of inconsistent verdicts in separate trials. As our Supreme Court explained this principle in *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982), if the case against the remaining defendants proceeded to trial, the jury could exonerate them by finding that the conduct of defendant Trailer Service and Refrigeration Co. caused plaintiff's injuries. Then, if the order of summary judgment in favor of defendant Trailer Service and Refrigeration Company was later reversed on appeal, at the ensuing trial the jury could find that the conduct of one or more of the previously-absolved defendants was responsible for the injury, and refuse to hold the defendant liable. The entry of summary judgment against plaintiff on the applicability of the North Carolina statute of repose affected a substantial right; therefore, this appeal is properly before the Court.

[2] Plaintiff contends that the North Carolina statute of repose does not apply to this case because New York law governs the disposition of his negligence, breach of warranty, and strict liability claims. The statute of limitations for an action for personal injuries grounded in negligence or strict products liability under New York law is three years, N.Y. Civ. Prac. L. & R. 214 (McKinney 1989), for breach of warranty claims is four years, *Calabria v. St. Regis Corp.*, 124 A.D. 2d 514, 508 N.Y.S. 2d 186 (1986), and New York law contains no statute of repose, so plaintiff's claims would not be time-barred under New York law.

North Carolina follows the lex loci delicti rule (law of the situs of the claim) in resolving choice of law for tort claims. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E. 2d 849 (1988). The law of the place where the injury occurs controls tort claims, because an act has legal significance only if the jurisdiction where it occurs recognizes that legal rights and obligations ensue from it. Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C.L. Rev. 243 (1970). "If a legal right arises at the locus [of the injury], this right vests in the injured party and he may enforce it not only at the locus but in the courts of other states and nations as well. If no right exists at the locus, there is none to enforce anywhere." *Id.* Plaintiff was injured in New York, so his substantive rights with regard to the negligence and strict liability claims must be determined on the basis of New York law.

The trial court granted summary judgment based on the North Carolina statute of repose, *supra*, determining that it barred the plaintiff's claim. We hold that because the substantive law of New York controls plaintiff's negligence and strict liability claims, and the statutes of repose are substantive provisions for purposes of choice of law, *Boudreau, supra*, the trial court erred in applying North Carolina's statute of repose to these claims.

[3] Plaintiff's breach of implied and express warranty claims, however, require a separate analysis. The choice of law provision applicable to these claims appears in the Uniform Commercial Code, N.C. Gen. Stat. § 25-1-105(1) (1986), and provides that North Carolina law "applies to transactions bearing an appropriate relation to this State." The North Carolina Supreme Court applied the appropriate relation test in *Bernick, supra*, to hold that North Carolina law governed the plaintiff's claims for implied and express warranties arising out of the injuries he suffered when his mouthguard, manufactured in Canada and purchased in Massachusetts, shattered during a college hockey game played in North Carolina.

Subsequently, the Supreme Court equated the Uniform Commercial Code "appropriate relation" test with the approach promulgated by the Restatement (Second) of Conflict of Laws, the "most significant relationship" test. *Boudreau, supra.* Therefore, to determine which state's law governs the breach of warranty claims we must discern which state "has the most significant relationship to the transaction and the parties. . . ." Restatement (Second) of Conflict of Laws § 188(1) (1971).

We note that the Court in *Boudreau, supra*, while adopting what it identified as the "most significant relationship" test, in actual application to the facts of the case departed from the policy-based analysis supplied by the Restatement (Second) to accompany that test and appeared to emphasize physical location of specific events instead. This interpretation does not expressly contradict the Restatement (Second) test, one portion of which inquires into locations of certain events, but concentration on other factors should be augmented in order to differentiate the new test from the stricter approaches previously followed in this State. The purpose for adopting G.S. § 25-1-105(1) (1986) was to

change North Carolina's adherence to the lex loci contractus approach, which focuses on the place of entering the contract and on the place of performance to determine which law governs contract disputes. By adopting the most significant relationship test the *Boudreau* Court appeared to move further away from the old approach, but its predominant inquiry into the "place of sale, distribution, delivery, and use of the product, as well as the place of injury," creates uncertainty regarding whether it fully embraced the integration of policy concerns with location factors that is the hallmark of that approach.

The *Boudreau* Court did indicate its intent to depart from the location-based lex loci contractus approach, however, and impliedly rejected the earlier interpretation of the appropriate relation test contained in *Bernick, supra.* Furthermore, the Court recited two policy rationales favoring the application of North Carolina law to disputes involving warranties: protecting the citizens of this State from defective goods and furthering our social and economic policies regarding warranties. We believe, therefore, that the Court's emphasis on physical location was not meant as a departure from the policy-based interpretation of the most significant relationship test as promulgated by the Restatement (Second) of Conflict of Laws.

In determining which state has the most significant relationship to the transaction and the parties, relevant factors to be considered include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2) (1971). In applying these principles the following should be considered:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 188(2) (1971).

With regard to the first consideration, it is important that the Uniform Commercial Code be applied uniformly throughout the United States in order to simplify interstate commercial transactions. Both North Carolina and New York have enacted the U.C.C., however, so the interest in promoting uniformity will be furthered by applying the relevant law of either state. This is also related to factor (g), ease in determining and applying the law; the provisions regarding warranties and statutes of repose are well-established in both states.

With respect to policies of the forum and other states, the state where the accident occurred has a greater interest in having its law apply in a tort case than in a breach of warranty action where the sale and distribution occurred elsewhere. Unlike the tort claim, where the place of personal injury is significant in determining whether there arose an actionable wrong, *Wurfel, supra,* personal injury is not the focal point when evaluating a contract for sale and accompanying warranties. Legal rights and obligations in the latter instance arose when the agreement was made, and although any ensuing personal injury is important in evaluating whether a breach of warranty actually occurred, any recovery stems from the warranties themselves.

Businesses have a justifiable expectation that the law of the state where the goods were sold and distributed will govern the warranties they impliedly or expressly extend. A different result would foster uncertainty as to the extent of their rights and obli-

gations, and also would undermine predictability and uniformity of result.

Basic policies underlying the field of warranties also support the application of the law of the place where sale and distribution occurred. In *Boudreau, supra,* the Court indicated that the state where the sale occurred "has a significant interest in applying the social and economic policies embodied in its own law of warranty." *Id.* (*citing Quadrini v. Sikorsky Aircraft Division,* 425 F. Supp. 81 (D. Conn. 1977)). These policies include protecting the State's citizens from commercial movement of defective goods into the State. *Id.* (*citing Oresman v. G. D. Searle & Co.,* 321 F. Supp. 449 (D. R.I. 1971)).

Because sale and distribution occurred in North Carolina, based upon the previous analysis we hold that the trial court properly applied North Carolina law to plaintiff's breach of warranty claims. Summary judgment was properly granted for the defendant, under the six-year statute of repose. We decline plaintiff's request to review the constitutionality of the statute of repose, and adhere to the North Carolina Supreme Court's decision in *Tetterton v. Long Manufacturing Co.,* 314 N.C. 44, 332 S.E. 2d 67 (1985) (G.S. § 1-50(6) is not unconstitutionally vague and does not deny equal protection).

[4] Finally, we address defendant's contention that applying the substantive law of New York to any of plaintiff's claims would be patently unfair because New York could not assert personal jurisdiction over it. Choice of law is a separate inquiry from personal jurisdiction and the two should not be confused. *Allstate Insurance Co. v. Hague,* 449 U.S. 302 (1981) (Stevens, J., concurring). The minimum contacts test used to determine whether a jurisdiction can assert personal jurisdiction over a defendant does not apply in resolving conflicts of law issues. *Id.*

We reverse the trial court's entry of summary judgment against plaintiff on his negligence and strict liability claims and remand for further proceedings. We affirm the trial court's entry of summary judgment against plaintiff on his breach of implied and express warranty claims.

Affirmed in part, reversed in part, and remanded.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. MILDRED WATKINS VANDIVER

No. 8812SC693

(Filed 7 February 1989)

1. **Criminal Law § 138.29— second degree murder—aggravating factor—premeditation and deliberation**

The State was not estopped from asserting premeditation and deliberation as an aggravating factor for second degree murder where the indictment charged only second degree murder and the jury did not pass on the element of premeditation and deliberation.

2. **Criminal Law § 138.14— second degree murder—aggravating factor not found by preponderance of evidence—no resentencing**

It is unlikely that the sentencing judge (who had not been the trial judge) at a resentencing hearing for second degree murder was able in fifteen minutes to give the pertinent portions of the entire trial transcript such adequate review as to allow him to find premeditation and deliberation by a preponderance of the evidence. Moreover, fundamental fairness and due process considerations require that this defendant not be required to again meet the risk of other findings in aggravation and the case was remanded for imposition of a sentence not to exceed the presumptive sentence.

Judge BECTON concurring in the result.

APPEAL by defendant from *Herring, D. B., Jr., Judge.* Judgment entered 25 February 1988 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 8 December 1988.

Defendant was charged with and convicted of second degree murder. The trial judge, Honorable Henry W. Hight, Jr., found as the sole factor in aggravation that defendant had perjured herself at trial and sentenced defendant to life imprisonment, a sentence in excess of the presumptive sentence. Upon appeal of that sentence to our Supreme Court, that Court held that perjury could no longer be used as a non-statutory aggravating factor in North Carolina and awarded defendant a new sentencing hearing. *See State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988).

Defendant's new sentencing hearing was held before Judge Herring. At that hearing, the district attorney urged the trial court to find the non-statutory factor of premeditation and deliberation. The trial court made this finding, found two mitigating factors, and sentenced defendant to thirty years' imprisonment, a

term in excess of the presumptive. Defendant now appeals from this sentence.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Edmond W. Caldwell, Jr., for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Staples Hughes, for defendant-appellant.

WELLS, Judge.

[1] Defendant presents two questions in this appeal. In her second argument, defendant contends that the State should be "estopped" from asserting premeditation and deliberation as an aggravating factor in sentencing on a conviction of second degree murder based on an indictment which only charges second degree murder. In support of this argument, defendant relies chiefly upon the reasoning and result reached by our Supreme Court in *State v. Marley*, 321 N.C. 415, 364 S.E. 2d 133 (1988). We find *Marley* to be inapposite to this case and reject defendant's argument.

In *Marley*, the defendant was charged with first degree murder and was tried for that offense, but was convicted of second degree murder. The trial judge then found as a factor in aggravation that Marley acted with premeditation and deliberation [in the murder of the victim] and sentenced Marley to imprisonment for life, a sentence in excess of the presumptive. In reversing the trial court on this factor, the Supreme Court reasoned as follows:

> To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself.
>
> We conclude that due process and fundamental fairness precluded the trial court from aggravating [the] defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder.

In the case now before us, this reasoning simply does not apply, because the jury in this case did not pass upon the element of premeditation and deliberation. We conclude that this question in this case is controlled by *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983), and its progeny, where the Court has approved the application of this factor in aggravation where defendants have pleaded guilty to second degree murder, *see Marley, supra*, and that in cases such as the one now before us, the factor can be used if supported by a preponderance of the evidence.

[2] Defendant also contends that at her resentencing hearing the disputed factor in aggravation—premeditation and deliberation—was not supported by a preponderance of the evidence. We agree. To properly dispose of this issue, it is necessary for us to relate in some detail the pertinent events which transpired at defendant's resentencing hearing. The players are Honorable Calvin W. Colyer, Assistant District Attorney for the Twelfth Judicial District; Stephen Freedman, Esquire, defendant's counsel; and Judge Herring.

> COURT: The State then may proceed with any evidentiary matter on the Sentencing Hearing.
>
> MR. COLYER: . . . The evidence for the State would be by way of directing the Court's attention to the trial transcript and portions there, testimony given under oath by certain witnesses and argument. We will have no formal presentation.
>
> COURT: Very well. Do you intend to read into the record certain portions of the trial transcript?
>
> MR. COLYER: Yes, sir. I will be very brief in that regard and attempt to direct those entries as per witness, page, and then just cite *relevant* (emphasis added) portions.
>
> COURT: Very well, sir.
>
> MR. COLYER: And I do have a copy of the transcript that I will be glad to pass up to the Court. . . .
>
> COURT: Very well. I will ask that you cite page and line number.
>
> . . .

MR. COLYER: . . . First of all, I would direct the Court's attention to page one eighty-four, this is in the transcript portion of the victim's mother, Shirley Haldven's testimony.

COURT: Line number?

MR. COLYER: . . . And for the record, I would quote transcript of page one eighty-four, line number seven in the middle of the line, 'The man hollered, he hollered and said, Go ahead and do it if you're going to do it and she comes [sic] out with a knife. She said, No [expletive] is going to tell me I am not allowed play [sic] my [expletive] music, and she come [sic] out and stabbed him.'

. . .

MR. COLYER: . . . On the next page, your Honor, of the transcript, page one eighty-five, beginning at line number fifteen: 'Where was Paul Hair, at the time?'

Line sixteen: ANSWER: 'He was in the room. He hollered and told her to go ahead and do it if you're going to do it.'

And then, at the bottom of that page, line twenty-four, when asked at line twenty-three, 'How was she holding it,' referring to the knife, and she said, and, again, this is Mrs. Haldven, line twenty-four, 'She just come [sic] back out of the room down the hall stabbing him (demonstrating).'

Your Honor, for purposes of this Resentencing Hearing, we would offer the testimony in the transcript as noted of Shirley Haldven . . . .

. . .

MR. COLYER: . . . Those would be the . . . entries in the trial transcript that we would offer by way of trial testimony . . . to support our argument for aggravating factors, the first one being premeditation and deliberation. . . .

To place the facts of this case in more complete context, we refer to the factual summary in our Supreme Court's opinion in *State v. Vandiver, supra,* and we note that the original trial transcript, consisting of three hundred eighty-two pages reflects a three day trial involving the testimony of ten witnesses for the State and one for the defendant.

In response to the State's position at the resentencing hearing, defendant's counsel argued vigorously and at length that it was not appropriate to find the factor in aggravation of premeditation and deliberation. We quote one very pertinent statement:

> MR. FREEDMAN: . . . Again, I think, to simply pick out portions of the transcript are [sic] not exactly what the Supreme Court had in mind when they found that aggravating factors has [sic] to be supported by the preponderance of the evidence.

Subsequent to the introduction of copies of the above-referenced pages of the trial transcript into evidence and further argument of counsel, the resentencing hearing transcript reflects the following events:

> COURT: I am going to take about fifteen minutes so I can review the case decision, as well as the *State v. Brewer* (emphasis in the original) before making findings. Court is in recess for about fifteen minutes.

Following the fifteen minute recess, the trial judge made the following pertinent remarks:

> COURT: . . . [T]aking into consideration the evidence presented both by the State and the Defendant and the argument of counsel, the Court finds . . . by a preponderance of the evidence that the crime was committed with premeditation and deliberation . . . .

N.C. Gen. Stat. § 15A-1340.4(a) (1988) (the Fair Sentencing Act) provides in pertinent part:

> . . . If the judge imposes a prison term . . . he must impose the presumptive term . . . unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term. . . . In imposing a prison term, the judge, under the procedures provided in G.S. 15A-1334(b), may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence . . . .

With respect to what meets the Fair Sentencing Act "preponderance" test, our Supreme Court provided the following standards in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983):

The sentencing judge's discretion to impose a sentence within the statutory limits, but greater or lesser than the presumptive term, is carefully guarded by the requirement that he make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence. We are guided in our definition of the term preponderance of the evidence by the following statement which, although generally applied in civil cases, is no less appropriate for a sentencing hearing where the judge sits in a dual capacity as judge and jury:

'This preponderance does not mean number of witnesses or volume of testimony, but refers to the reasonable impression made upon the minds of the jury by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias and means of knowledge, and other attending circumstances.' . . . There would seem to be great merit in the suggestion that what is meant by the formula is that the jury should be satisfied of the greater *probability* of the proposition advanced by the party having the burden of persuasion—i.e., that it is more probably true than not.

2 Stansbury's North Carolina Evidence § 212 (Brandis Rev. 1973).

The Fair Sentencing Act was not intended, however, to remove all discretion from our able trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony.

This standard must be applied even more stringently where the sentencing judge is not the trial judge, and more particularly to such a subjective element as premeditation and deliberation.

We agree with defendant's contention that it is unlikely that in fifteen minutes the sentencing judge in this case was able to give the pertinent portions of the entire trial transcript such adequate review as to allow him to find premeditation and delibera-

tion by a preponderance of the evidence. We therefore reverse this finding.

We further conclude that fundamental fairness and due process considerations require that this defendant not be required to again meet the risk of other findings in aggravation. As the sentencing court found two factors in mitigation which are not contested, we remand this case for resentencing, for the imposition of a sentence not to exceed the presumptive sentence. *See State v. Frazier*, 50 N.C. App. 547, 342 S.E. 2d 534 (1984), where we reversed the one factor found in aggravation, and there having been no factors found in mitigation, we remanded for imposition of the appropriate presumptive sentence.

Remanded for resentencing.

Judge JOHNSON concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

I am not convinced that *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983) controls and that *State v. Marley*, 321 N.C. 415, 364 S.E. 2d 133 (1988) is inapposite. Indeed, because it is easier, as a legal proposition, for a trial judge to find an aggravating factor using a "preponderance of the evidence" standard than it is for a juror to find premeditation and deliberation using a "beyond a reasonable doubt" standard, I am loathe to concur in an opinion that theoretically would permit the State, in a weak first degree murder case, to indict and convict a defendant of second degree murder and then, at sentencing, to convince the trial judge to find premeditation and deliberation as an aggravating factor. Nevertheless, I concur in the result reached by the majority, since the case is remanded for resentencing on other grounds.

NOVA ESTER COX, PLAINTIFF v. BYNUM McCOY COX, DEFENDANT

No. 8825DC447

(Filed 7 February 1989)

1. **Divorce and Alimony § 21.5— appeal of alimony award—award enforceable in trial court by contempt pending appeal**

There was no merit to defendant's contention that the trial court erred in finding him in contempt because his prior appeal to the Court of Appeals of the original judgment against him removed his case from the trial court's jurisdiction, since N.C.G.S. § 50-16.7(j) provides that an order for payment of alimony which has been appealed is enforceable in the trial court by contempt proceedings during the pendency of the appeal.

2. **Contempt of Court § 6— appearance of attorney at show cause hearing—defendant's presence required**

The trial court properly refused to recognize the appearance of defendant's counsel as sufficient to satisfy a show cause order which specifically ordered defendant to appear.

3. **Contempt of Court § 3.1— defendant's failure to appear at show cause hearing—indirect criminal contempt—holding defendant in contempt without hearing improper**

Defendant's failure to appear as ordered constituted indirect criminal contempt, since the trial judge had no direct knowledge of facts which would establish that defendant's failure to appear was willful, and the trial court therefore erred in summarily holding defendant in contempt without a hearing. N.C.G.S. §§ 5A-13(b), 5A-15(f).

APPEAL by defendant from *Jones, Jonathan L., Judge.* Order entered 2 December 1987 in District Court, CALDWELL County. Heard in the Court of Appeals 2 November 1988.

Michael P. Baumberger for plaintiff-appellee.

Wilson & Palmer, P.A., by W. C. Palmer, for defendant-appellant.

JOHNSON, Judge.

Defendant appeals from an order finding him in willful contempt of court for his failure to appear personally at a show cause hearing. Defendant was ordered to appear, on motion of the plaintiff, to show cause, if any, why he should not be held in contempt for his failure to comply with a previous court order to pay alimony to plaintiff.

On 26 February 1987, judgment was entered in district court granting plaintiff a divorce from bed and board from defendant, and ordering, *inter alia*, that defendant pay $600.00 per month to plaintiff as permanent alimony. Defendant gave timely notice of appeal to the Court of Appeals on 2 March 1987.

On 29 September 1987, plaintiff filed a motion in which she alleged that defendant had willfully violated the terms of the 26 February 1987 judgment by failing to pay the alimony ordered therein. Plaintiff's motion was granted on 29 September 1987, and defendant was ordered to appear in district court of Caldwell County on 2 December 1987 to show cause why he should not be held in contempt.

Defendant did not personally appear at the show cause hearing on 2 December 1987. However, his attorney was present and announced that he was prepared to proceed on behalf of his client. Defense counsel indicated that his client was having some medical problems, but offered no medical statement or excuse to justify defendant's absence. The trial court concluded as a matter of law that defendant was in contempt of court for his failure to appear personally as ordered by the court on 29 September 1987. Defendant was taken into custody pursuant to the contempt order and subsequently released on $2,000.00 bond. As of 2 December 1987, when defendant was found in contempt of court, his appeal of the initial 26 February 1987 judgment against him was still pending in the Court of Appeals.

[1] By his first Assignment of Error, defendant contends that the trial court erred in finding him in contempt on 2 December 1987 because his prior appeal to this Court of the original judgment against him removed his case from the trial court's jurisdiction. He argues that the trial court therefore lacked the authority to enter the contempt order or the initial show cause order from which it arose.

Defendant urges us to find that *Webb v. Webb*, 50 N.C. App. 677, 274 S.E. 2d 888 (1981) is controlling on this issue. In *Webb*, this Court held that the trial court in question was without jurisdiction to find the defendant father in contempt for failing to comply with a child visitation order while his appeal of that order was pending. In so holding, the Court relied on G.S. sec. 1-294 which states in pertinent part:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; . . .

This Court in *Webb* applied G.S. sec. 1-294 to the situation before it which concerned child visitation privileges. However, defendant Cox's reliance on *Webb* is misplaced because of the effect G.S. sec. 50-16.7(j) must have on our interpretation of G.S. sec. 1-294 in regard to alimony. G.S. sec. 50-16.7(j) provides in part:

> Notwithstanding the provisions of G.S. 1-294 or G.S. 1-289, an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal.

Our reading of G.S. sec. 1-294 in light of the quoted language of G.S. sec. 50-16.7(j) (which we note was not in effect at the time *Webb* was decided) dictates that the trial court was not without jurisdiction to issue the show cause order of 29 September 1987 or the subsequent contempt order, and that *Webb* is not applicable in this instance.

[2] By his second Assignment of Error, defendant contends that the trial court erred by refusing to recognize his appearance through counsel as sufficient to satisfy the requirement of the show cause order which required him to appear in court.

Ordinarily, a party to a civil action "may appear either in person or by attorney in actions or proceedings in which he is interested." G.S. sec. 1-11. Our Supreme Court clarified the law on this question somewhat when it stated the following:

> [O]ur research fails to disclose, and counsel has not cited, any statute, rule of court or decision which mandates the presence of a party to a civil action or proceeding at the trial of, or a hearing in connection with, the action or proceeding *unless the party is specifically ordered to appear.*

Hamlin v. Hamlin, 302 N.C. 478, 482, 276 S.E. 2d 381, 385 (1981) (emphasis added).

Defendant Cox was personally served with a show cause order by a Deputy of the Caldwell County Sheriff's Department. The order stated, in pertinent part, the following:

> IT IS THEREFORE ORDERED THAT the Defendant, Bynum McCoy Cox, appear in the District Court of Caldwell County located in the Courthouse in Lenoir, North Carolina, on the 2nd day of December, 1987, at 9:30 o'clock a.m., or as soon thereafter as the matter may be heard, and show cause, if any there may be, why he should not be held as for contempt of this court.

The unequivocal language ordering defendant Cox to appear leads us to the conclusion that his case falls within the exception in *Hamlin* that a party's personal presence is required if he is "specifically ordered to appear." *Id.* Therefore, the trial court properly refused to recognize the appearance of defendant's counsel as sufficient to satisfy the order. This assignment of error is overruled.

[3] By his third Assignment of Error, defendant contends that the trial court erred by finding him in contempt because its findings of fact were insufficient to support the conclusion that his failure to appear was due to his willful contempt of the court's order to appear.

We note at the outset that contempt in North Carolina may be of two types, civil or criminal, although the distinction between the two can often be unclear. *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E. 2d 370 (1985). In the order finding defendant Cox in contempt, the trial judge did not indicate whether he was finding defendant in civil contempt or criminal contempt. In answering that question we must first ask for what purpose the contempt power was exercised. *Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 N.C. 503, 169 S.E. 2d 867 (1969). If the contempt order is to punish disobedience of a court order, it is criminal contempt. If to enforce the rights of an injured party, it is generally civil. *Id.*

In the case before us the trial judge was punishing defendant for his failure to appear as ordered, rather than providing a remedy for plaintiff. *O'Briant, supra.* This exercise of the contempt power to preserve the court's authority must be classified as

criminal contempt. Accordingly, the court's action is governed by Article 1 of G.S. ch. 5A.

Since criminal contempts are crimes, one accused of criminal contempt must be afforded all appropriate procedural safeguards. *O'Briant, supra.* In ascertaining what process is due one accused of criminal contempt under our statutory scheme, we note that G.S. sec. 5A-13 distinguishes between direct and indirect criminal contempt.

> (a) Criminal contempt is direct criminal contempt when the act:
>
> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
>
> (3) Is likely to interrupt or interfere with matters then before the court.

G.S. sec. 5A-13(a)(1-3). G.S. sec. 5A-13(b) provides that "[a]ny criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15." G.S. sec. 5A-15 provides for a plenary hearing for indirect contempt (and for certain direct contempt), and establishes, *inter alia,* requirements of notice and a hearing. If a defendant is found guilty of contempt, the judge must make findings of fact beyond a reasonable doubt in support of the verdict. G.S. sec. 5A-15(f). In contrast to this process, one accused of direct contempt may generally be punished summarily if the punishment is "imposed substantially contemporaneously with the contempt." G.S. sec. 5A-14.

Therefore, the critical question before us is whether defendant's failure to appear as ordered on 2 December 1987 constituted direct or indirect criminal contempt. Our Supreme Court has stated that when "the court has no direct knowledge of the facts constituting the alleged contempt, in order for the court to take original cognizance thereof and determine the question of contempt, the proceedings must follow the procedural requirements

as prescribed for indirect contempt . . ." *Galyon v. Stutts*, 241 N.C. 120, 125, 84 S.E. 2d 822, 826 (1954).

The United States Supreme Court has stated that a formal hearing is not required when "a court acts immediately to punish for contemptuous conduct committed under its eye, . . ." *Groppi v. Leslie*, 404 U.S. 496, 504, 30 L.Ed. 2d 632, 639, 92 S.Ct. 582, 587 (1972). The Court in *Groppi* further stated that the contemnor is, of course, present in this situation, and the trial judge has personally observed the offensive conduct. Also, the contemnor generally is allowed to speak in his own behalf. *Id.*

Our reading of *Groppi* and *Galyon* leads us to the conclusion that defendant Cox's failure to appear at the show cause hearing must be classified as indirect criminal contempt. The trial judge had no direct knowledge of facts which would establish that defendant Cox's failure to appear was willful. Nonetheless, the judge summarily proceeded to hold defendant in contempt. His findings of fact established that defendant failed to appear, however, there was no finding of willfulness.

We note parenthetically that the trial judge could have properly *cited* defendant Cox for contempt and had him arrested pursuant to G.S. sec. 15A-305 to secure his appearance in court. *Mather v. Mather*, 70 N.C. App. 106, 318 S.E. 2d 548 (1984). This is, in effect, what the court did. However, the judge took the further step of actually *holding* defendant in contempt. This was in violation of defendant's due process rights. *Groppi; Galyon, supra.*

Defendant Cox was entitled to a hearing pursuant to G.S. secs. 5A-13(b) and 5A-15. Also, the judgment against him should have been supported by facts established beyond a reasonable doubt. G.S. sec. 5A-15(f). Because the trial judge erroneously failed to afford defendant these protections, the order holding him in contempt must be vacated and remanded for proceedings not inconsistent with this opinion.

Vacated and remanded.

Chief Judge HEDRICK and Judge PARKER concur.

MCGLADREY, HENDRICKSON & PULLEN, A PARTNERSHIP (FORMERLY A. M. PULLEN & CO.) v. SYNTEK FINANCE CORPORATION (FORMERLY THE WASHINGTON GROUP, INCORPORATED)

No. 8818SC274

(Filed 7 February 1989)

Corporations § 20; Compromise and Settlement § 1.1— action to recover dividend —release not applicable

Summary judgment was improperly granted for defendant, and should have been granted for plaintiff, in an action by a shareholder to recover a dividend paid by defendant corporation to all other Preferred A stockholders but not to plaintiff where defendant raised as a defense a release executed by the various defendants in other lawsuits, including the plaintiff and defendant here; the parties clearly intended the release to resolve and discharge all claims that were connected with or related to those cases and to leave undisturbed claims not so related; those lawsuits concern the manipulation of the market price of defendant's common stock and the dissipation of its pension and profit sharing plans; and plaintiff's rights to its Preferred A stock and the dividends were not connected with or related to those matters.

APPEAL by plaintiff from *Collier, Judge.* Order and judgment entered 2 December 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 October 1988.

Plaintiff's action, as the owner of 42,748 shares of Preferred A stock of defendant corporation to recover a dividend that defendant paid all other Preferred A shareholders on or about 10 July 1984, was dismissed by an order of summary judgment that also denied a similar motion by plaintiff. In its answer, defendant admitted that the dividend was issued and plaintiff did not receive it but denied that plaintiff was the record owner of the shares; and later in purporting to answer plaintiff's interrogatory concerning that same fact defendant unresponsively stated that its "contention was" that plaintiff "was not entitled to" the shares. But at the hearing on the motions except for a release alleged to bar plaintiff's claim, defendant offered no proof that plaintiff did not own the shares or was not entitled to them, though plaintiff presented materials that clearly show both its ownership and entitlement. With respect to the release and its effect the affidavits, exhibits and other materials presented to the court establish the following facts without contradiction:

In 1977 when The Washington Group, Inc. filed for reorganization under Chapter X of the Federal Bankruptcy Act, plaintiff had a claim against it for accounting and auditing services rendered. With the approval of the bankruptcy court the claim was settled in February 1982 by defendant issuing to plaintiff 42,748 shares of its Preferred A stock and plaintiff has held those shares ever since. On or about 10 July 1984 defendant declared the dividend involved and paid it to all Preferred A stockholders except plaintiff. At a meeting of defendant's shareholders on 20 December 1985 plaintiff voted all of its 42,748 shares without objection by defendant. Meanwhile, three lawsuits involving the decline of The Washington Group had been pending in the same federal court since 1978: The first, *Collins v. Bagley, et al.*, was a class action for shareholders that purchased defendant's common stock between 4 November 1972 and 20 June 1977; it was against The Washington Group, Inc., its principal officers, Bagley and Gilley, two stock brokerage concerns, two banks, and several others including the plaintiff, then known as A. M. Pullen & Co. The gist of the allegations against all the defendants other than Pullen was that during the period stated, contrary to federal securities law and regulations, they fraudulently maintained the market price of the company's *common stock* at an artificially high level by purchasing various quantities of the stock for fiduciaries, by inducing various company employees and other insiders to buy the stock, and by helping various purchasers of the stock to obtain loans to pay for it; the only allegation against Pullen was that it aided and abetted the subterfuge of the other defendants by filing inaccurate and misleading audit reports of the company's financial activities and affairs. The second suit, eventually styled *Syntek Investment Properties, Inc. v. Bagley, et al.*, was an offspring of the first and was severed from it after the reorganization trustee of the bankrupt Syntek, Richard A. Gilbert, was permitted to join in it as a party plaintiff, and his allegations of wrongdoing were identical to those in the parent case. The third case, *Fulk v. Bagley, et al.*, a class action suit on behalf of all eligible company employees, charged The Washington Group, Inc., its two principal officers, and two banks with dissipating and diverting the company's pension and profit sharing trust funds. On 31 August 1984 the various *defendants* in the three cases, including this plaintiff and defendant, executed an agreement which stated in pertinent part that each did:

> [H]ereby fully and unconditionally release and forever discharge each other from and of any and all claims, losses, liabilities, demands, actions or causes of action of any kind or character (including, without limitation, for attorneys' fees, costs and expenses) whether known or unknown, with knowledge that such may exist, whether at law or in equity, whether in contract, tort or under statute or otherwise, which they or any of them have or may have which in any way are related to or connected with the allegations asserted in, allegations which could have been asserted in, or the subject matter of, *Collins v. Bagley*, Civil Action No. C-78-335-WS, *Fulk v. Bagley*, Civil Action No. C-78-333-WS or *Syntek Investment Properties, Inc. v. Bagley*, Civil Action No. C-78-335(a)-WS (Such Claims) and it is agreed that these mutual releases apply to all Such Claims which have arisen or could have been asserted as of this date and to all Such Claims that may arise after this date.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Reid L. Phillips and Jeffrey A. Batts, for plaintiff appellant.

Petree Stockton & Robinson, by Norwood Robinson, Robert J. Lawing, and Jane C. Jackson, for defendant appellee.

PHILLIPS, Judge.

The only disputed issue in this case is the effect of the foregoing release upon plaintiff's status and rights as the owner of 42,748 shares of Preferred A stock in defendant corporation—plaintiff contending that it had no effect, defendant that it barred "every right of any kind" plaintiff had against defendant when the release was executed. Those being the contentions the order of summary judgment determining that the case has no genuine issue of material fact is arguably an adjudication that by executing the release plaintiff surrendered all of its rights in its shares. But whether the adjudication is viewed as cancelling all plaintiff's rights in the stock, or just its dividend rights, or just its right to the dividend declared before the release was signed, the adjudication is erroneous and we reverse; for the record does authorize summary judgment, but not for defendant.

Under our law a comprehensively phrased "general release," in the absence of proof of a contrary intent, is usually held to

discharge all and sundry claims between the parties. *Merrimon v. The Postal Telegraph-Cable Company*, 207 N.C. 101, 176 S.E. 246 (1934). Though defendant's brief repeatedly refers to the release in this case as a "general release," and cites many general release cases, it is not a general release, but a release specifically limited in scope. It does not purport to apply to all possible claims between the parties or even all outstanding claims, but expressly limits its application to claims that are "related to or connected with" . . . "in any way" the allegations made, or that could have been made in one of the three lawsuits named. That in a lawsuit it is possible to allege anything, however irrelevant or frivolous, does not make this a general release as defendant contends; for such a construction would make the limitation that the release is based upon meaningless, which it is not. And since the release does not even contain the words "shares," "dividends," or "rights" and the stock was not a claim, but property plaintiff had owned for three years, it cannot be construed as a surrender of plaintiff's rights either to the shares or the dividends on them.

Under our law what a release means depends upon the intention of the parties when they executed it, their intention is determined from the language used, the situation they were in, and the objects they sought to accomplish, *Moore v. Maryland Casualty Co.*, 150 N.C. 153, 63 S.E. 675 (1909), and its meaning is for the court to determine when the circumstances concerning its execution are not in dispute and its terms are free of ambiguity. *Briggs v. American & Efird Mills, Inc.*, 251 N.C. 642, 111 S.E. 2d 841 (1960). With respect to the meaning of the release in this case, the record indisputably shows that: All the parties to it were defendants in one or more of the three pending cases; the cases containing allegations of market price manipulation and plaintiff's deceptive audit reports were pending and had been for years when defendant settled plaintiff's claim for auditing services by issuing the Preferred A shares involved; the object of all the parties was to resolve all claims between them that were connected with or related "in any way" to those cases, they chose language suitable to accomplish that, and did not consider "re-settling" plaintiff's property rights in the Preferred A shares.

The only possible conflict concerns the discussion of plaintiff's stock and the dividend on it before the release was executed, a matter that was addressed by four affidavits. In two of

the affidavits Robert E. Payne, plaintiff's attorney, states upon personal knowledge that: He was present at and actively involved in all the settlement negotiations that led to the release; on one occasion during the negotiations defendant's then lawyer, Howard Manning, proposed that plaintiff return its stock, he immediately rejected the proposal, and during the rest of the negotiations preceding the execution of the agreement neither plaintiff's shares nor any dividends arising from them were mentioned. An affidavit by an executive partner of plaintiff states that the partnership did not learn about the dividend until the fall of 1985, a year after it was issued. The other affidavit, by defendant's vice-president, William S. Friedman, without saying or indicating that anything in it is within his personal knowledge, as Rule 56(e), N.C. Rules of Civil Procedure requires, states that: "During the settlement negotiations leading to the agreement and release, Syntek Finance Corporation discussed with McGladrey, Hendrickson & Pullen the fact that the release would bar any and all claims by McGladrey, Henrickson & Pullen against Syntek Finance Corporation which existed on the date the mutual release was signed. . . . It was intended that the release would bar every right of any kind by McGladrey, Hendrickson & Pullen against Syntek Finance Corporation including the Preferred stock and the dividend thereon." This affidavit, even apart from its failure to state that it is based on personal knowledge, does not contradict plaintiff's affidavits and thus raises no conflict. For what it states is that the corporate and partnership entities conversed or discussed, which they could not have done since corporations speak and act only through their officers, partners and other agents; and the affidavit says nothing about any person, in any capacity, saying, doing or hearing anything in regard to either the shares or the dividend. And the declaration that the parties intended "to bar every right of any kind" that plaintiff had against defendant is without effect since any such intent is clearly negated by the unambiguous language of the release, along with the other circumstances, including the fact that plaintiff's rights to the shares had been settled a year earlier, long after the cases settled by the release were filed, and the release does not mention those rights.

What the parties intended by the release, as it clearly states, was to resolve and discharge all claims that were connected with or related to either of the three cases whether the claims had

been asserted or not, and to leave undisturbed claims not so connected or related. Since the three cases concerned only the manipulation of the market price of defendant's common stock and the dissipation of its pension and profit sharing funds and plaintiff's rights to its Preferred A stock in defendant and the dividends on it are not connected with or related to either of those matters in any way, the release is no bar to the rights stated and judgment for plaintiff is required.

The order of summary judgment for defendant is therefore vacated and the matter remanded to the Superior Court for the entry of judgment for plaintiff in accord with this opinion. The arguments concerning attorney fees are not addressed since no ruling with respect thereto has been made by the trial court.

Vacated and remanded.

Judges EAGLES and PARKER concur.

TOLARAM FIBERS, INC. v. TANDY CORPORATION AND TANDY ELECTRONICS, INC.

No. 8820SC540

(Filed 7 February 1989)

1. **Courts § 21.7— last act creating lease executed in Texas—Texas law governs**

Texas law governed this case involving the lease of computer equipment and software since the last act involving the lease, the signing by one of defendant's representatives at defendant's home office in Fort Worth, took place in Texas; moreover, the lease documents explicitly stated that Texas law was to govern the agreements, and N.C.G.S. § 25-1-105(2) provides that parties may agree that the law of a state bearing a "reasonable relation" to the transaction shall govern the parties' rights and duties.

2. **Uniform Commercial Code § 3— lease of computer equipment—warranties of U.C.C. inapplicable**

Under Texas law which was applicable to this case, the relationship entered into between defendants and plaintiff was that of lessor and lessee, and the lease of computer equipment and software was outside the scope of the warranty provisions of Article 2 of the U.C.C.

3. Attorneys at Law § 7— entitlement to attorney fees—Texas law governs

The issue of a party's entitlement to attorney fees is a question of substantive law, and this issue was therefore determined by the law of Texas, the state where the last act to make a binding contract occurred.

4. Attorneys at Law § 7— attorney fees properly denied

The trial court did not err in denying defendants attorney fees where the language of the parties' lease could be read so as to provide defendants with a choice of remedies, only one of which called for attorney fees, and the trial court could have concluded that defendants did not pursue the remedy which provided attorney fees; furthermore, the prayer for relief in defendants' counterclaim did not explicitly ask for attorney fees.

APPEAL by plaintiff, cross-appeal by defendants, from *William H. Helms, Judge.* Judgment entered 27 January 1988 in Superior Court, ANSON County. Heard in the Court of Appeals 8 December 1988.

Taylor and Bower by H. P. Taylor, Jr. for plaintiff-appellant/ cross-appellee.

Leath, Bynum, Kitchin, and Neal, P.A., by Henry L. Kitchin and Stephan R. Futrell for defendant-appellants/cross-appellees.

BECTON, Judge.

In this lease contract dispute, plaintiff, Tolaram Fibers, Inc., alleges that defendants, Tandy Corporation and Tandy Electronics, Inc., breached express and implied warranties when they leased a computer system to plaintiff. At the close of plaintiff's evidence, the trial court directed a verdict in favor of defendants on their counterclaim for rental amounts due under the lease, for interest, and for a collection fee. The court denied defendants' request that they be awarded attorney fees. From the judgment directing a verdict in favor of defendants, plaintiff appeals. From the denial of attorney fees, defendants appeal. We affirm.

I

Tolaram Fibers ("Tolaram") is a North Carolina corporation with its principal place of business in Anson County. The corporation produces synthetic yarn and fabrics. The defendants are foreign corporations, domesticated to do business in this State. Tandy Corporation uses "Radio Shack" as its brand name and is a vendor of computer hardware and software. Tandy Electronics

leases computer hardware and software. Tolaram alleges that Tandy Corporation is the parent company of Tandy Electronics; defendants contend that the two are separate business entities. We express no view on this question.

In 1984, Tolaram needed a computer system that would be capable of rapidly processing inventory information. Essentially, Tolaram wanted a system that could store information about yarn shipments and print a corresponding bill of lading. A system Tolaram then had in use was unable to perform these functions quickly enough.

According to Tolaram, Burke Wallace Fox, Jr., Tolaram's controller, went to a Radio Shack store in Charlotte after reading Tandy Corporation literature. He met there with Patricia Gregory, a salesperson for Tandy Corporation. Tolaram alleges that Mr. Fox explained Tolaram's computer needs in detail to Ms. Gregory. Mr. Fox testified that Ms. Gregory recommended that Tolaram acquire Radio Shack's Profile 16 management program. He and Ms. Gregory had several more conversations, and Ms. Gregory at one point brought in Scott Walker, an independent computer programmer, to talk to Mr. Fox. Mr. Fox testified that Mr. Walker also said that the Profile 16 program would satisfy Tolaram's requirements. The evidence at trial unequivocally showed that Mr. Fox understood from Ms. Gregory and Mr. Walker that the new system would need expert programming in order to perform all of the functions Tolaram desired.

Tolaram alleges that based on Ms. Gregory's recommendations, on Mr. Walker's assurances, and upon Tandy Corporation advertising that suggested the Profile 16 program was "easy to use," it entered into a leasing contract with Tandy Electronics. Tolaram acquired two Radio Shack Model 16B computers, two printers, two data terminals, other hardware, Profile 16 software, and other software. The total lease price was $18,600, to be paid over 37 months and coupled with an initial deposit for the balance. On behalf of Tolaram, Mr. Fox signed two lease documents on 19 October 1984. Paragraph 19 of each document provided that the lease would not take effect until signed by a Tandy Electronics representative at Tandy's home office in Fort Worth, Texas. The paragraph also specified that, except for local filing requirements, Texas law was to govern the agreement. Defend-

ants contend that after Mr. Fox signed the lease applications, they were forwarded to Fort Worth and signed there by a vice-president of Tandy Electronics on 7 November 1984. Tolaram does not dispute this contention.

In June 1985, Tolaram ceased making rental payments on the computer system. Tolaram says it found the Profile 16 program to be unsatisfactory for three reasons. First, Tolaram alleges the new system could not perform any faster than could the one it replaced. In addition, Tolaram says it was not able to use the Profile 16 program from remote terminals; in other words, only the main unit could be used to run the program. Finally, Tolaram contends that Profile 16 is a very difficult program to use. The evidence at trial showed that Mr. Fox at first attempted to program the new computers himself and that Tolaram never hired an expert to adapt the system to meet Tolaram's needs.

Tolaram sued defendants after it offered to exchange the computers for a different system, but defendants refused. Defendants counterclaimed, praying specifically for the balance owing them under the lease agreements, and praying generally for "such other and further relief as the defendants may be entitled. . . ."

II

Tolaram assigns error to the trial court's directing a verdict against it on its claim of breach of the lease agreement. A directed verdict is not properly allowed unless it appears, as a matter of law, that plaintiff cannot recover upon any view of the facts reasonably established by the evidence. N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 50 (1983); *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E. 2d 678, 680 (1977). When this Court considers the sufficiency of evidence to withstand a motion for directed verdict, we view the evidence in the light most favorable to the nonmoving party. *Wilson v. Bob Robertson's Auto Service, Inc.*, 20 N.C. App. 47, 49, 200 S.E. 2d 393, 395-96 (1973).

Tolaram contends defendants breached implied warranties of merchantability and fitness, and that defendants breached express warranties that the computers would perform the tasks Tolaram desired in the manner it desired. As a threshold matter, we must determine whether the rights of these parties should be determined under the laws of this State or of Texas.

[1] Under North Carolina law, the substantive law of the state where the last act to make a contract occurs governs all aspects of the contract. *See Tanglewood Land Co., Inc. v. Wood*, 40 N.C. App. 133, 136, 252 S.E. 2d 546, 550 (1979). The evidence in this case indicates that the last act involving this lease took place in Texas. Moreover, the lease documents explicitly stated that Texas law was to govern the agreements. N.C. Gen. Stat. Sec. 25-1-105(1) (1986) provides that parties may agree that the law of a state bearing a "reasonable relation" to the transaction shall govern the parties' rights and duties. Therefore, we shall resolve this appeal by looking to the law of Texas.

[2] On appeal, Tolaram has argued its case chiefly under the warranty provisions of Article 2 of the Uniform Commercial Code. Texas has adopted the Code, and the warranty provisions in question are codified at Tex. Bus. & Com. Code Ann. Secs. 2.313, 2.314 and 2.315 (Vernon 1968). Tolaram has invited this Court to hold that the warranty provisions of Article 2 are applicable to the transactions involved in this case. We decline to so hold.

We agree with defendants that under Texas law, Article 2 of the Uniform Commercial Code does not apply to leases of personal property. *See U.S. Armaments Corp. v. Charlie Thomas Leasing Co.*, 661 S.W. 2d 197, 200 (Tx. Ct. App. 1983). Tolaram, however, asserts that this transaction, though denominated a lease, was the functional equivalent of a sale of the computer system. Thus, Tolaram maintains that Article 2 is applicable. We reject this argument.

Paragraph 6 of the lease terms and conditions states that Tolaram received no "right, title or interest in or to the Equipment." The documents further specified that at the end of the leasing period Tolaram was to return the computer system to Tandy Electronics. In *Armaments*, the lessee asserted, as does Tolaram, that a lease contract was, in fact, a purchase agreement. The Court said, "There is nothing in the agreement to indicate or suggest a sale of the described property, an option to purchase, or anything other than a lease of the listed property." 661 S.W. 2d at 200 (quoting *Three Bears, Inc. v. Transamerican Leasing*, 574 S.W. 2d 193, 198 (Tx. Civ. App. 1978)). Similarly, we find nothing in the agreement between Tolaram and defendants to indicate that their transaction was, in effect, a sale. We hold, therefore, that under Texas law the relationship entered into between de-

fendants and Tolaram was that of lessor and lessee and that the lease in this case was outside the scope of the warranty provisions of Article 2 of the Uniform Commercial Code.

Tolaram argues that as a matter of public policy lessors such as defendants should be responsible for providing their customers with goods that operate as warranted. Tolaram seems to be asking this Court to fashion from Texas law an equitable remedy and to do so by applying Article 2. We have carefully reviewed the record, and we do not find in the facts of this case an offense to public policy. To begin with, even when the evidence is considered in the light most favorable to Tolaram, we cannot conclude that any express or implied warranties were created by the lease agreement. The lease documents explicitly waived all warranties and provided that Tolaram was to accept the equipment "as is." Moreover, the evidence clearly showed that Tolaram understood that an expert would be needed to program the system so as to fulfill Tolaram's requirements. Rather than hire the expert, Mr. Fox tried to program the system. Tolaram does not appear to us to have been the victim of any duplicity by defendants, and thus we reject the policy argument advanced by Tolaram.

III

[3] Defendants assign error to the trial court's denial of attorney fees. Once again, we must first determine whether Texas or North Carolina law governs this issue. As we observed above, the substantive law of contracts is governed by the law of the state where the last act to make a binding contract occurs. *Tanglewood Land Co.*, 40 N.C. App. at 136, 252 S.E. 2d at 550. North Carolina law resolves questions of procedure. *Id.* We hold that the issue of a party's entitlement to attorney fees is a question of substantive law, and thus we will look, once more, to the law of Texas.

[4] The allowance of attorney fees is discretionary under Texas law. *See Rampy v. Rampy*, 432 S.W. 2d 175, 177 (Tx. Civ. App. 1968); *see also Caldwell & Hurst v. Myers*, 714 S.W. 2d 63, 65-66 (Tx. Ct. App. 1986) (trial court abuses discretion by denying award of attorney fees if party asserts claim and requests payment in accordance with statutory procedures). Defendants contend that the lease agreements explicitly called for Tolaram to pay attorney fees in the event defendants had to utilize legal avenues to collect deficiencies under the lease. In our view, the

lease language can be read so as to provide defendants with a choice of remedies, only one of which calls for attorney fees. The trial court could have concluded that defendants did not pursue the remedy that provided attorney fees. Furthermore, the prayer for relief in defendants' counterclaim does not explicitly ask for attorney fees. We do not find, therefore, an abuse of discretion by the trial court, and we overrule this assignment of error.

IV

The judgment of the trial court directing a verdict in favor of defendants and denying an award of attorney fees to defendants is

Affirmed.

Judges WELLS and JOHNSON concur.

WILLIAM B. CRUMPLER, PLAINTIFF v. LACY H. THORNBURG, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NORTH CAROLINA; F. K. HEINEMAN, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE RALEIGH POLICE DEPARTMENT; MAJOR R. N. CARROLL, IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE RALEIGH POLICE DEPARTMENT; CAPTAIN J. S. CARROLL, IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE RALEIGH POLICE DEPARTMENT; AND SGT. F. D. MCLAMB, IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE RALEIGH POLICE DEPARTMENT, DEFENDANTS

No. 8810SC354

(Filed 7 February 1989)

Appeal and Error § 9— declaratory judgment to permit picketing in front of Justice Building—moot question

An action seeking declaratory relief allowing plaintiff to picket on the sidewalk across from the Justice Building in Raleigh on the eve of an execution was moot where plaintiff received a temporary restraining order allowing him to picket on the eve of the execution and had neither been arrested nor refused another permit at the time of his summary judgment hearing, fourteen months later. The "capable of repetition, yet evading review" exception does not apply.

APPEAL by defendants from *Battle, Judge*, Order entered 15 December 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 5 December 1988.

Plaintiff is a licensed attorney who opposes the death penalty on moral and philosophical grounds. He serves on the Board of North Carolinians Against the Death Penalty. On 26 August 1987, plaintiff applied to defendants, members of the Raleigh City Police, for a permit to picket on the sidewalk of Morgan Street between the Capitol and the Justice Building on 18 September 1986, the eve of the execution of John Rook.

The permit was originally granted, but was voided about one week before the date of the proposed picket because the Raleigh Police believed that the proposed picket could be in violation of N.C.G.S. § 14-225.1 which prohibits picketing "with intent to interfere with, obstruct, or impede the administration of justice, or with intent to influence any justice or judge of the General Court of Justice . . . within 300 feet of an exit from any building housing any court of the General Justice. . . ."

Plaintiff instituted this action requesting a temporary restraining order, a preliminary and final injunction and declaratory relief regarding the constitutionality of N.C.G.S. § 14-225.1 as applied to plaintiff. Plaintiff maintains that he has a "First Amendment right to stand peacefully on the sidewalk across from the Justice Building in Raleigh with a sign expressing his views in opposition to capital punishment." He sought declaratory relief "to establish that right when threatened with arrest for carrying out such activity."

On 17 September 1986, Judge Donald L. Smith, presiding in Wake County Superior Court, issued a Temporary Restraining Order (TRO) restraining defendants from interfering with plaintiff's picket "for the sole reason that the plaintiff does not have the applicable permits issued by the Raleigh Police Department."

Fifty persons, including more than thirty attorneys, took part in the peaceful and dignified demonstration. The next day, John Rook was executed. There were no arrests made at the conclusion of the picket nor have there been any at any time since then. Plaintiff has not been denied a similar permit since that time. The TRO was dissolved on 22 September 1986.

Plaintiff filed a motion for summary judgment on 20 November 1987. The motion was heard by Judge Battle on 4 December 1987. The court granted plaintiff Declaratory Relief stating that

the plaintiff's "peacefully picketing with expressions of generalized opposition to the death penalty on the sidewalk across from the Justice Building in Raleigh is protected conduct under the North Carolina and United States Constitutions. Such conduct does not violate N.C.G.S. § 14-225.1." From this order defendants appeal.

Thorp, Fuller & Slifkin, by James C. Fuller and Margaret E. Karr, for plaintiff appellee, for the North Carolina Civil Liberties Foundation.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William P. Hart and Special Deputy Attorney General Christopher P. Brewer, for defendant appellants.

ARNOLD, Judge.

In their first assignment of error defendants contend that the trial court was without jurisdiction to hear plaintiff's summary judgment motion because there was no actual or real existing controversy between the parties. We disagree. Rather we find that the case was moot at the time Judge Battle ruled on the summary judgment motion and should have been dismissed.

> Jurisdiction under the Declaratory Judgment Act, G.S. 1-253 et seq., may be invoked "only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 . . . The existence of such genuine controversy between parties having conflicting interests is a "jurisdictional necessity." *Tryon v. Power*, 222 N.C. 200, 22 S.E. 2d 450.

Greensboro v. Wall, 247 N.C. 516, 519, 101 S.E. 2d 413, 416 (1958).

Plaintiff filed this action for Declaratory and Injunctive Relief on 17 September 1986 at a time when there was a genuine controversy between the parties. As the trial court noted in its Temporary Restraining Order dated 18 September 1986:

> Plaintiff will be injured irreparably if he does not receive a temporary restraining order as set forth herein in that, taking the allegations of the Complaint as true, he will be deprived of his freedom of speech and his right to assemble

under the Federal and State Constitutions by being denied the opportunity to protest the death penalty before the execution of John Rook, which is scheduled for the morning of September 19, 1986.

"Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events." *In re Peoples*, 296 N.C. 109, 146, 250 S.E. 2d 890, 911 (1978), *cert. denied, Peoples v. Judicial Standards Commission of North Carolina*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed. 2d 297 (1979). However, "[u]nlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court . . . become moot at any time during the course of the proceedings, the usual response should be to dismiss the action." *Id.* at 148, 250 S.E. 2d at 912.

"In state courts the exclusion of moot questions . . . represents a form of judicial restraint." *Id.* [Citations omitted.] That "[j]udicial resources should be focused on problems which are real and present rather than dissipated or abstract, hypothetical or remote questions, is fully applicable to the Declaratory Judgment Act." *Adams v. Dept. of Natural and Economic Resources*, 295 N.C. 683, 703, 249 S.E. 2d 402, 414 (1978) [citations omitted], *accord Pearson v. Martin*, 319 N.C. 449, 355 S.E. 2d 496 (1987). A moot question is not within the scope of the Declaratory Judgment Act. *Morris v. Morris*, 245 N.C. 30, 95 S.E. 2d 110 (1956).

Plaintiff argues that this case still presents a live controversy because he intends to picket on the eve of future executions, should they occur, and that he needs declaratory relief in order to assure that he will be allowed permits for similar pickets. He fears that he and others could be subjected to prosecution for violating the statute. However, the grant of the TRO resolved plaintiff's concern that he would be unable to picket on the eve of the execution of John Rook. Plaintiff had neither been arrested nor had he been refused another permit to demonstrate at the time the summary judgment motion came before Judge Battle in December of 1987, more than fourteen months after plaintiff was granted the TRO for the September 1986 demonstration.

Plaintiff relies on *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971), for the proposition that the Declaratory Judgment Act is a valid tool to find an act unconstitutional "when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees." *Id.* at 562, 184 S.E. 2d at 264. We agree. But, even this principle cannot override policy reasons which mandate judicial restraint in moot cases.

Without present genuine controversy a case that may once have been alive becomes moot. *In re Peoples; Benz v. Compania Naviera Hildalgo, S.A.*, 205 F. 2d 944 (1953) (court declined review characterizing the case as moot because it called for a rule to control conduct based on speculative assumptions). *See Adams v. Dept. of Natural and Economic Resources*, 295 N.C. 683, 703, 249 S.E. 2d 402, 414 (1978) (plaintiffs anticipated that all applications for development permits would be denied).

However, a case which is "capable of repetition, yet evading review" may present an exception to the mootness doctrine. *Leonard v. Hammond*, 804 F. 2d 838, 842 (4th Cir. 1986), *citing Southern Pacific Terminal v. ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 2d 310 (1911). There are two elements required for the exception to apply:

> (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Id. Our research reveals that the "capable of repetition, yet evading review" exception commonly employed in federal cases otherwise moot has been recognized in North Carolina in the single case of *In re Jackson*, 84 N.C. App. 167, 352 S.E. 2d 449 (1987). In *Jackson*, a district court order required a school board to provide schooling for a student who had been suspended for the duration of the school year as a result of an assault. *Id.* The case did not come before this Court until after the school year was completed. Recognizing the case as moot, this Court invoked the "capable of repetition, yet evading review" exception because:

> Children involved in delinquency proceedings are frequently guilty of misconduct at school and thus subject to school board [and District Court] disciplinary proceedings. . . . Until

> the conflict between a school system's right to suspend students for misconduct and the juvenile court's authority to fashion sensitive and appropriate dispositions . . . is resolved, it is not improbable that . . . local school boards will be repeatedly subject to orders like the one in the case *sub judice*. Because the suspension . . . can never be longer than the balance of the school year, the effect of an order overriding a suspension may always be too short a duration to allow full litigation of the issues prior to its expiration. Consequently, we exercise our discretion to decide the issues presented.

Id. at 171, 352 S.E. 2d at 452.

We do not find that this case presents as likely a possibility that the same complaining party would be subject to the same action again. It has been more than two years since plaintiff filed this suit and he has yet to be arrested or refused a permit for a similar demonstration. The case is moot now and was moot at the time it was before Judge Battle.

For the reasons explained the order of the trial court is vacated and the appeal is dismissed.

Vacated and dismissed.

Chief Judge HEDRICK and Judge ORR concur.

ROLLINWOOD HOMEOWNERS ASSOCIATION, INC. v. GRANT D. JARMAN AND WIFE, BRENDA M. JARMAN

No. 883DC477

(Filed 7 February 1989)

Easements § 7.2— landscaping easement next to subdivision—finding that easement was owned by plaintiff—evidence sufficient

Evidence was sufficient to support the trial court's conclusion that an easement for "maintaining landscaping and shrubbery" was an exclusive easement, solely and exclusively owned by plaintiff, and that defendants' construction and use of a driveway over the easement interfered with plaintiff's use and enjoyment of the easement.

APPEAL by defendants from *Martin, James E., Judge.* Judgment entered 28 April 1988 in PITT County District Court. Heard in the Court of Appeals 30 November 1988.

Plaintiff is a North Carolina corporation with its principal office in Pitt County, North Carolina, which was formed to provide maintenance for the Rollinwood subdivision in Pitt County. Defendants are citizens and residents of Pitt County. Plaintiff is owner of an easement along Rollinwood Drive which enters the Rollinwood subdivision. This easement was created and reserved by Rollins Clustered Homes, Inc., the plaintiff's predecessor in title, as part of a conveyance of the servient property to defendants' immediate predecessor in title. When defendants purchased the servient property they purchased the property subject to the easement. Plaintiff used the easement for the placement of shrubbery and for landscaping so as to beautify the entrance to Rollinwood subdivision. Defendants constructed a used car dealership on property adjacent to Rollinwood Drive. It is this property that serves as the servient property to plaintiff's easement. During construction of the building on defendants' property, defendants and their employees drove across a portion of the easement onto defendants' property. This activity damaged a planter, caused the grass to die, leveled a small mounded area and generally damaged a portion of plaintiff's easement. Defendants asked plaintiff to allow them to construct a paved driveway over plaintiff's easement. This request was denied.

In May 1987, defendants began construction of a paved driveway across the easement. This construction was begun without plaintiff's consent, permission or authority. Defendants informed plaintiff that they intended to use the driveway for business traffic associated with the used car dealership. The paved driveway was completed and used by defendants in connection with their business.

On 14 May 1987, plaintiff filed this action against defendants, requesting a temporary restraining order enjoining defendants from construction of the driveway and its use by defendants and others. Plaintiff also sought preliminary and permanent injunctions enjoining defendants from construction and use of the driveway and ordering defendants to remove the driveway and return the easement to its original condition. Plaintiff also sought

possession and exclusive use of the easement. Plaintiff alleged that the easement had been conveyed to it via deed and that defendants' actions constituted a trespass on the easement. Defendants filed an answer in which they admitted the construction and use of the driveway, but asserted that plaintiff was not the exclusive owner of the easement and that defendants were entitled to its use as a driveway to their property.

The matter came on for hearing on 7 December 1987 before Judge Martin, without a jury. The trial court entered a judgment in which the plaintiff was found to have sole and exclusive possession of the easement. The trial court signed its written judgment on 28 April 1988. Defendants were adjudged to have trespassed on plaintiff's easement and were ordered to remove the driveway and to reconstruct the portion of the easement destroyed by the placement and construction of the driveway. Defendants were further ordered to repair the damage done to the easement and were permanently enjoined from interfering with plaintiff's use and enjoyment of the easement. Defendants appealed from this judgment.

Patricia Gwynett Hilburn for plaintiff-appellee.

Williamson, Herrin, Barnhill & Savage, by Mickey A. Herrin; and L. Allen Hahn, P.A., by L. Allen Hahn, for defendant-appellants.

WELLS, Judge.

Defendants assign error to the trial court's findings of fact, conclusions of law and the signing and entry of judgment in this case.

"In cases where the trial judge sits as the trier of facts, he is required to (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly." *Gilbert Engineering Co. v. City of Asheville,* 74 N.C. App. 350, 328 S.E. 2d 849, *pet. for disc. rev. denied,* 314 N.C. 329, 333 S.E. 2d 485 (1985). "The facts required to be found are the ultimate facts established by the evidence which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Id.* at 364, 328 S.E. 2d at 857. "If supported by competent evidence, findings

of fact made by the trial judge sitting without a jury are conclusive upon review in an appellate court, the weight and credibility of the evidence being for the trial judge." *Waters v. Humphrey,* 33 N.C. App. 185, 234 S.E. 2d 462, *pet. for disc. rev. denied,* 293 N.C. 163, 236 S.E. 2d 707 (1977). A trial court's conclusions of law must be supported by the determinative facts as found by the trial court. *See Curd v. Winecoff,* 88 N.C. App. 720, 364 S.E. 2d 730 (1988). The conclusions of law must in turn support the judgment as rendered by the trial court.

Defendants contend that the trial court erred by concluding that the plaintiff was the exclusive owner of the easement at issue. Defendants also contend that they have not materially interfered with plaintiff's use and enjoyment of the easement. Defendants argue that the uses for which the easement were reserved are nontraditional and, as expressed in the deed creating the easement, ambiguous.

The easement was originally created in a deed from plaintiff's predecessor in title to defendants' predecessor in title in February, 1985. The provision in the deed which created the easement reads as follows:

> A 15 foot easement for placing and maintaining landscaping and shrubbery is hereby reserved over this property along either side of the right of way of Rollins Drive as shown on the above mentioned map.

This provision was included verbatim in the deed from defendants' predecessor in title to defendants. The easement was conveyed to plaintiff by plaintiff's predecessor in title in a deed using substantially the same language.

"An easement is an interest in land and is generally created by deed; an easement created by deed is a contract." *Leonard v. Pugh,* 86 N.C. App. 207, 356 S.E. 2d 812 (1987). As we stated in *Leonard*:

> The controlling purpose of the court in construing such contracts, is to determine the intent of the parties at the time it was made. Where the language of a contract granting an easement is clear and unambiguous, the construction of the agreement is a matter for the court and reference to matters

> outside the contract itself is not required for a correct construction.

Id. at 210, 356 S.E. 2d at 814 (citations omitted). When a court construes a conveyance of an easement, "the deed is to be construed in such a way as to effectuate the intention of the parties as gathered from the entire instrument." *Higdon v. Davis*, 315 N.C. 208, 337 S.E. 2d 543 (1985).

In the present case defendants argue that the trial court erred in concluding that plaintiff's easement was exclusive and that defendants' construction and use of the driveway across the easement interfered with plaintiff's use and enjoyment of the easement. Defendants contend that the term "landscaping" as used by the grantor of the easement in his conveyances is ambiguous and that plaintiff introduced no evidence at trial to show that defendants had interfered with the landscaping activities of the plaintiff. These contentions are without merit. The deed in which the easement was created clearly and unambiguously reserves an easement for "maintaining landscaping and shrubbery." This easement was reserved exclusively for the grantor, plaintiff's predecessor in title. Defendants received their parcel of land in a deed which recited verbatim the exclusive reservation of the easement. Defendants took their land subject to the easement. Plaintiff's predecessor in title conveyed "all right, title and interest" in its exclusive easement to plaintiff. We hold that this evidence was sufficient to support the trial court's conclusion that the easement was an exclusive easement, solely and exclusively owned by plaintiff.

In construing the provisions of a deed, an appellate court is "required to give the terms used therein their plain, ordinary and popular construction, unless it appears the parties used them in a special sense." *Lovin v. Crisp*, 36 N.C. App. 185, 243 S.E. 2d 406 (1978). The language used by the grantor in the deed conveying the easement to plaintiff in the present case is clear and unambiguous. Plaintiff's right to use the easement for the purpose of "placing and maintaining landscaping and shrubbery" along the sides of the entrance of the subdivision can be clearly and conclusively defined and understood. The term "landscaping" is readily susceptible to interpretation. There is competent evidence to support the trial court's conclusion that defendants' construc-

tion and use of the driveway interfered with plaintiff's use and enjoyment of the easement.

The trial court's findings of fact are supported by the evidence and these findings support the court's conclusions of law which in turn support the judgment entered. Accordingly, the judgment is

Affirmed.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. MATTHEW RAY BOOTH, DEFENDANT

No. 8810SC397

(Filed 7 February 1989)

Indictment and Warrant § 17.2— kidnapping—date of offense—fatal variance

There was a fatal variance between an indictment for kidnapping and the date shown by the State's evidence at trial where the indictment alleged that the kidnapping occurred on or about 10 March 1987, the State's evidence was that the offense in question took place sometime in January, perhaps on January 2, on February 2, or even shortly before Christmas in 1986; the victim recanted his testimony that the events took place on 10 March 1987; the investigating officer stated that he did not know how March 10, 1987 came to be the alleged date; and defendant's defense was that it was impossible for him to have kidnapped the victim on the date alleged in the indictment because the victim was continuously in custody from 25 February until 20 March. The defendant clearly relied on the date set forth in the indictment in preparing a reverse alibi defense.

APPEAL by defendant from Judgment of *Judge George M. Fountain* entered 11 January 1988 in WAKE County Superior Court. Heard in the Court of Appeals 1 November 1988.

Attorney General Lacy H. Thornburg by Associate Attorney General Randy L. Miller for the State.

Johnny S. Gaskins and J. Henry Banks, Jr., for defendant appellant.

COZORT, Judge.

Defendant appeals a twelve-year prison sentence imposed following his conviction of second-degree kidnapping. He contends

that his motion to dismiss the kidnapping charge should have been granted because there was a fatal variance between the date of the kidnapping alleged in the indictment and the date as shown by the State's evidence at trial. This contention has merit.

The bill of indictment alleged that, on or about 10 March 1987, defendant kidnapped William Bernell Keel by unlawfully removing him from one place to another without his consent and for the purpose of terrorizing him. At trial, the State presented the testimony of four witnesses—the alleged victim; two persons, Gary Edwards and Robert Vines, who were present during the alleged kidnapping and/or subsequent relevant events; and the investigating officer from the Wake County Sheriff's Department. Keel and Edwards repeatedly testified on direct and cross-examination that the incident in question took place on 10 March 1987. However, when Vines was called to the stand, he testified that the events took place in January, although no specific day was named. Finally, when the officer was questioned about the date, he first stated that Keel had informed him that the incident happened on 2 January 1987, and that Edwards had informed him that the events happened shortly before Christmas of 1986. He later stated that Keel had said it was 2 February 1987. The State introduced the warrant which was served on defendant, which stated the date of the offense as 10 March 1987. The officer stated that he did not know how the 10 March 1987 date came to be named.

After the officer had testified, the State recalled Keel and Edwards, who, over defendant's objections, changed their earlier testimony. Edwards stated that the incidents took place "something like January 2nd—January, February, something like that." Keel stated that it happened on "February the 2nd."

The sole evidence presented by the defense was the testimony of the Chief of Security for the Wake County Sheriff's Department. He testified that, according to subpoenaed records from the Wake County Jail, Keel, the victim of the alleged kidnapping, was continuously in custody from 25 February 1987 until 20 March 1987.

Defendant argues on appeal that the failure of the State's proof to match its allegations substantially impaired his ability to prepare and present his defense. We agree.

Ordinarily, the time stated in a bill of indictment is not an essential element of the crime charged, and the State may offer proof that the crime was committed on some other date not proscribed by the statute of limitations. N.C. Gen. Stat. § 15-155 (1988); *State v. Wilson*, 264 N.C. 373, 141 S.E. 2d 801 (1965). "But this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense." *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E. 2d 396, 403 (1961).

Time variances do not always prejudice a defendant so as to require dismissal, even when an alibi is involved. Thus, a defendant suffers no prejudice when the allegations and proof substantially correspond, *State v. Wilson;* when defendant presents alibi evidence relating to neither the date charged nor the date shown by the State's evidence, *State v. Locklear*, 33 N.C. App. 647, 236 S.E. 2d 376, *disc. review denied*, 293 N.C. 363, 237 S.E. 2d 851 (1977); or when a defendant presents an alibi defense for both dates. *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), *overruled on other grounds, State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984). However, when the defendant relies on the date set forth in the indictment and the evidence set forth by the State substantially varies to the prejudice of defendant, the interests of justice and fair play require that defendant's motion for dismissal be granted. *State v. Christopher*, 307 N.C. 645, 295 S.E. 2d 487 (1983).

In *Christopher*, the indictments alleged that the defendant had conspired to commit felonious larceny and feloniously received stolen goods "on or about the 12th day of December, 1980." Defendant had an alibi for that date. At trial the State offered no evidence of any criminal activity taking place specifically on 12 December 1980; instead, there was evidence tending to show that the defendant had received the stolen goods in late December and that he had conspired to steal those goods during conversations that took place sometime in October or November and in December. On appeal, this Court vacated the verdict on the receiving charge because the defendant had clearly relied on the date charged in the indictment in presenting his alibi defense. *State v. Christopher*, 58 N.C. App. 788, 295 S.E. 2d 487 (1982),

rev'd on other grounds, 307 N.C. 645, 300 S.E. 2d 381 (1983). On further appeal, the Supreme Court held that the defendant was entitled to a new trial on the conspiracy charge as well. The Court found that the "wide ranging discrepancies" between the indictment and the State's evidence forced the defendant to face a "trial by ambush." *Christopher*, 307 N.C. at 650, 300 S.E. 2d at 384. We believe that the facts before us are sufficiently similar to those in *Christopher*, which therefore controls our resolution of this issue.

Defendant clearly relied on the date set forth in the indictment in preparing what has been called a "reverse alibi" defense—namely, that he could not have kidnapped Keel on or about 10 March 1987 because Keel was in the Wake County Jail from 25 February 1987 until 20 March 1987. *See State v. Cameron*, 83 N.C. App. 69, 349 S.E. 2d 327 (1986). At trial the State's evidence was that the conduct in question took place sometime in January, perhaps on January 2, or on February 2, or even shortly before Christmas of 1986. The victim recanted his testimony that the events took place on 10 March 1987, and the investigating officer stated that he did not know how 10 March 1987 came to be the alleged date. We do not doubt that the State was surprised by the evidence. Nonetheless, the surprise to the State does not eliminate the prejudice to the defendant who has prepared his defense to show that it was impossible for him to have kidnapped the victim on the date alleged in the indictment. The defendant is entitled to a new trial, and we remand the case to the Wake County Superior Court for that purpose.

Defendant has raised other assignments of error which are not likely to occur at retrial, and we decline to discuss them here.

New trial.

Judges ARNOLD and WELLS concur.

Fowler v. N.C. Dept. of Crime Control & Public Safety

DAVID MITCHELL FOWLER, CO-PERSONAL REPRESENTATIVE OF THE ESTATES OF RICHARD C. CRUTCHFIELD, DECEASED, WENDIE CRUTCHFIELD, DECEASED, AND SALLIE CRUTCHFIELD, DECEASED, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY, DEFENDANT

No. 8810IC320

(Filed 7 February 1989)

1. **Highways and Cartways § 3; Sheriffs and Constables § 4; Appeal and Error § 67— protection for officers chasing violator—retroactive application of Supreme Court decision**

The purpose of *Bullins v. Schmidt*, 322 N.C. 580, to protect law enforcement officers engaged in pursuing and attempting to apprehend violators of the law, would best be served by a retroactive application of the decision.

2. **Highways and Cartways § 3; Negligence § 7; Sheriffs and Constables § 4— officer chasing violator—fatal accident—no gross negligence**

There was no gross negligence, that is, wanton conduct done with conscious or reckless disregard for the rights and safety of others, on the part of a state trooper who followed a speeding vehicle for at least eight miles around midnight on a rural two-lane highway in a sparsely populated area at speeds of approximately 115 m.p.h. without activating either his siren or flashing blue light.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion filed 22 January 1988 by the Full Commission. Heard in the Court of Appeals 9 January 1989.

Deputy Commissioner Rush found that Trooper L. W. Bjorklund, a Master Trooper with the State Highway Patrol, saw a vehicle travelling in an easterly direction at approximately eighty miles per hour on a section of Highway 24 and 27 near the Montgomery and Stanly County line. Trooper Bjorklund turned his marked patrol car around and attempted to overtake the speeding vehicle. The time was shortly before midnight on 4 August 1984 and weather conditions were clear.

The trooper followed an eastbound vehicle, the speed of which he eventually measured at approximately 115 miles per hour, until he closed the distance between them from approximately one-half to one-quarter of a mile. He was not in pursuit at this time, but was merely attempting to determine whether this was the same vehicle he had seen earlier. He continued attempting to overtake the vehicle without activating his siren or

flashing blue light. The trooper eventually requested by radio that a roadblock be set up outside the town limit of Troy. When he determined this to be the same vehicle he had seen earlier at the county line, he turned on the siren and blue light and began actual pursuit. Seconds later he saw a dull orange flash on the horizon and found that the pursued vehicle, a 1967 Chevrolet, had crossed the center line and collided with a vehicle travelling in a westerly direction. The driver of the pursued vehicle, David Furr, and all three occupants of the second vehicle, Richard, Wendie, and Sallie Crutchfield, died from the impact of the collision.

Bjorklund testified that he activated his speed detection unit shortly after he first saw the vehicle's taillights after turning around to follow it. He switched the unit off after following the vehicle approximately eight miles. He continued in an attempt to overtake until he closed the distance to within one-quarter of a mile, and then he activated the blue light. Three or four seconds later he saw the flash on the horizon.

On 5 August 1986, the co-personal representative of the estates of Richard, Wendie, and Sallie Crutchfield filed a tort claim against the North Carolina Highway Patrol (a division of the North Carolina Department of Crime Control and Public Safety) seeking damages for Trooper Bjorklund's alleged negligence. The deputy commissioner of the North Carolina Industrial Commission concluded that Bjorklund was not negligent and denied plaintiff's claims. The Full Commission affirmed the deputy commissioner's decision. Plaintiff appeals from the Full Commission.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Associate Attorneys General Meg Scott Phipps and Patricia F. Padgett, for defendant-appellee.

WELLS, Judge.

[1] At the outset we consider whether our Supreme Court's decision in *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E. 2d 601 (1988), which was filed 30 June 1988, applies to our decision in this case. In *Bullins* officers from the Greensboro Police Department pursued a speeding vehicle for about eighteen miles, travelling at

speeds up to 100 miles per hour. The driver of the pursued vehicle attempted to pass a vehicle in a no-passing zone, collided with the Bullins automobile, and killed both drivers. In response to the plaintiff's negligence action the North Carolina Supreme Court held that when a law enforcement officer's vehicle does not collide with another person, vehicle, or object, the officer will not be held liable for negligence unless his or her conduct constituted gross or wanton negligence. The Court held that plaintiffs failed to establish a *prima facie* case of gross or wanton negligence and remanded for the entry of an order directing a verdict for the defendants.

There is a presumption in North Carolina favoring retroactive application of a decision rendered by our Supreme Court that changes the existing law. The intervening decision will be applied unless compelling reasons exist for limiting its retroactive effect. *Cox v. Haworth*, 304 N.C. 571, 284 S.E. 2d 322 (1981). In balancing the countervailing interests this Court must consider whether the plaintiff was unfairly prejudiced by his reliance on prior law, whether the purposes of the intervening decision could be achieved solely by prospective application, and the impact of retroactive application on the administration of justice. *Id.*

Plaintiff contends that he relied on prior law and did not address the standard of care in his claims. We note, however, that the deputy commissioner found the evidence presented insufficient to establish even simple negligence. Because the facts did not support a finding of negligence under the lower standard of care in effect when he filed his claims, we do not believe that plaintiff would be unfairly prejudiced by retroactive application of *Bullins, supra.*

Bullins' purpose of protecting law enforcement officers engaged in "pursu[ing] and attempt[ing] to apprehend violators of the law," furthermore, would best be served by a retroactive application. Prospective application would thwart the public policy of protecting law enforcement officers attempting to apprehend motorists exceeding a safe speed limit.

We do not believe, moreover, that a retroactive application of *Bullins* would significantly impair the administration of justice. We hold, consequently, that the heightened standard of care announced in *Bullins, supra,* applies to our disposition of this case.

[2] Pursuant to that standard, a law enforcement officer will be held liable for damages proximately resulting from his or her gross negligence in deciding or continuing to pursue a violator of the law. *Id.; see also* N.C. Gen. Stat. § 20-145 (Cum. Supp. 1988). The *Bullins* Court defined gross negligence as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." A wanton act is one "done of wicked purpose [sic] or when done needlessly, manifesting a reckless indifference to the rights of others." *Siders v. Gibbs*, 39 N.C. App. 183, 249 S.E. 2d 858 (1978) (*quoting Wagoner v. North Carolina Railroad Company*, 238 N.C. 162, 77 S.E. 2d 701 (1953)).

Trooper Bjorklund followed a speeding vehicle for at least eight miles on a rural two-lane highway, at speeds of approximately 115 miles per hour, without activating either his siren or flashing blue light. Although we believe these facts to be more egregious than those of *Bullins, supra*, we cannot say that they constitute gross negligence. The incident occurred around midnight in a sparsely populated area. Bjorklund testified that he encountered no vehicles travelling in the opposite, or westerly, direction, and saw only one vehicle other than the 1967 Chevrolet, which turned off of the highway shortly before he activated his siren and light.

These circumstances do not exemplify the degree of conscious or reckless indifference toward the safety of others necessary to establish gross negligence. The evidence supports the Commission's opinion that there was no negligence on the part of defendant's employee, and we affirm that decision. We have considered plaintiff's other arguments and find them to be without merit.

Affirmed.

Judges BECTON and JOHNSON concur.

Lewis v. N.C. Dept. of Human Resources

THOMAS EARL LEWIS, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT-APPELLANT

No. 888SC527

(Filed 7 February 1989)

State § 12— employee grievance appeal filed one day late—dismissal proper

Dismissal of an employee grievance appeal by the State Personnel Commission because it was filed one day late was not arbitrary and capricious where the employee, at the same time he was given a termination letter by DHR, was given a letter and a copy of the DHR grievance policy which explained in plain language the time limit for perfecting his appeal; the letter even offered assistance in complying with appeal procedures; it was not necessary for the employee to obtain legal assistance, and legal representation was not allowed, at that stage of the grievance proceeding; eight days before the deadline an attorney encouraged the employee to get back to him quickly with regard to a decision about whether he wished to pursue the appeal; the employee waited until the deadline date to return to his attorney's office; and when he learned that his attorney was not there, he did not contact the employer to seek an extension of time, nor did he fill out and submit a grievance filing form.

APPEAL by respondent from *Jack B. Crawley, Jr., Judge.* Order entered 6 April 1988 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 January 1989.

Barnes, Braswell, Haithcock & Warren, P.A., by W. Timothy Haithcock, for petitioner-appellee.

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

BECTON, Judge.

Respondent-appellant, the Department of Human Resources ("DHR"), appeals from a superior court order which reversed as arbitrary and capricious the decision of the State Personnel Commission ("the Commission") to dismiss an employee grievance appeal. The grievance appeal was dismissed, initially by DHR and subsequently by the Commission, because it was filed one day late. We hold that the Commission decision was not arbitrary or capricious, and reverse the superior court order.

I

Petitioner-appellee, Thomas Earl Lewis, worked for 16 years at the O'Berry Center, a DHR institution. Mr. Lewis was dismissed on 3 March 1987 for leaving a resident unattended, an act deemed to constitute "patient neglect." At that time, Mr. Lewis was given a termination letter and a copy of "DHR Directive Number 33," the DHR employee grievance policy. The record indicates that a form for filing a grievance appeal was attached to the grievance policy.

The termination letter provided in relevant part:

> You have the right to appeal this action. *Written notification of appeal must be made within 15 calendar days* upon receipt of this letter. Should you wish to do so and need procedural assistance, you may contact [the following persons]. . . .

(Emphasis added.) The grievance policy likewise provided that notice of appeal had to be filed and received within 15 calendar days of the date of written notice of termination. Although it was not necessary to obtain legal assistance at the current (second) stage of the grievance proceeding, the grievance policy explained that an employee was free to do so. However, actual legal *representation* was permitted only at the third stage of the grievance proceeding.

One week after his termination, on 10 March, Mr. Lewis consulted with an attorney, but did not retain him. On 16 March, Mr. Lewis' father notified the attorney that he would pay the retainer fee. Mr. Lewis returned to the law firm on 18 March, the fifteenth day after the date of termination, but the attorney was out of town. The next day, on 19 March 1987, one day past the deadline, the attorney filed a notice of appeal on Mr. Lewis' behalf.

The director of O'Berry Center notified the attorney that since Mr. Lewis' appeal was one day late, it "was not timely filed," and Mr. Lewis' right of appeal was thereby forfeited. DHR's Division of Personnel Management Services upheld the appeal's dismissal, concluding that Mr. Lewis had been properly advised of his appeal rights but "simply failed to comply with the clear requirements for perfecting his appeal."

Mr. Lewis appealed to the State Personnel Commission. A Recommended Decision concluded as a matter of law that Mr. Lewis "failed to follow the grievance procedure established by his department as required by G.S. 126-34." The full Commission subsequently adopted the Recommended Decision. The Commission ordered that Mr. Lewis' appeal be "dismissed for failing to follow the grievance procedure established by his department."

Mr. Lewis appealed to superior court. The judge reversed and remanded the Commission decision, ruling that the "Commission's findings, conclusion and decision concerning the filing of the grievance are arbitrary and capricious." DHR appealed to this Court.

II

The right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal. *See, e.g., Smith v. Daniels Int'l*, 64 N.C. App. 381, 383, 307 S.E. 2d 434, 435 (1983) (notice of appeal filed two days after statutory deadline; appeal properly dismissed). Under N.C. Gen. Stat. Sec. 126-35, a State employee is permitted 15 days after receiving a statement of disciplinary action to appeal the action to the department head. Section 126-34 further provides that "[a]ny permanent State employee having a grievance arising out of . . . his employment . . . *shall . . . follow the grievance procedure established by his department or agency.*" N.C. Gen. Stat. Sec. 126-34 (1986) (emphasis added).

The DHR grievance policy, like the statute, required notice of appeal to be filed within 15 days. The grievance policy further provided:

> *A grievant who fails to comply with the . . . procedures set out in this directive . . . may be deemed to have abandoned his/her appeal.* The acts or omissions of any attorney retained by a grievant shall be deemed those of the grievant for purposes of determining compliance with procedures under this policy.

(Emphasis added.) Thus, DHR reserved the power to waive, in its discretion, the employee's noncompliance with procedural rules. The question presented here is whether, as the superior court concluded, the Commission permitted DHR to exercise that dis-

cretion arbitrarily and capriciously by deeming Mr. Lewis' appeal to be forfeited.

III

The court charged with reviewing an agency decision, here, the superior court, may reverse or modify that decision if, among other things, the decision is "arbitrary or capricious." N.C. Gen. Stat. Sec. 150B-51(b)(6) (1987). However, the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law. *Burton v. City of Reidsville*, 243 N.C. 405, 407, 90 S.E. 2d 700, 703 (1956) (quoted with approval in *Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 403-04, 269 S.E. 2d 547, 563, *pet. for reh'g denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980)).

The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," *id.*, or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ." *Comm'r of Ins. v. Rate Bureau*, 300 N.C. at 420, 269 S.E. 2d at 573 (citations omitted). Other jurisdictions have found that imposing procedural requirements—even those "within the letter of the statut[e]"—may be arbitrary and capricious if that imposition "result[s] in manifest unfairness in the circumstances." *Id.* (citing Cooper, 2 *State Administrative Law* 761-69 (1965)).

Mr. Lewis argues that enforcing the procedural deadline to deny him the right to pursue his grievance on the merits resulted in "manifest unfairness in the circumstances." While we find the result unfortunate, we cannot say it is manifestly unfair.

Mr. Lewis was given a letter and a copy of the DHR grievance policy which explained in plain language the time limit for perfecting his appeal. The letter even offered assistance in complying with appeal procedures. Significantly, it was not necessary for Mr. Lewis to obtain legal assistance—and legal *representation* was not allowed—at that stage of the grievance proceeding. Moreover, the record indicates that on 10 March, eight days before the deadline, the attorney "encouraged [Mr. Lewis] to get back to [him] quickly with regard to a decision" about whether he

wished to pursue the appeal. Mr. Lewis waited until 18 March, the deadline date, to return to his attorney's office. When he learned that his attorney was not there, he did not contact O'Berry Center to seek an extension of time. Nor did he fill out and submit a grievance filing form. We cannot say that under these circumstances DHR's exercise of discretion was in "bad faith," "whimsical," or "manifestly unfair." We conclude that DHR's adherence to the deadline for perfecting the appeal was neither arbitrary nor capricious.

Accordingly, we hold that the superior court judge erred as a matter of law in reversing the Commission decision. The order below is

Reversed.

Judges WELLS and JOHNSON concur.

ALLEN DAVID RUDISILL AND WIFE, MAXINE M. RUDISILL, PLAINTIFFS v. HAROLD J. ICENHOUR AND WIFE, SHELBY ICENHOUR, AND DAVID JAMES ICENHOUR, DEFENDANTS

No. 8825SC216

(Filed 7 February 1989)

Highways and Cartways § 6— unopened subdivision street—no right to enjoin use

The trial court erred by entering summary judgment for plaintiffs and by denying defendants' motion to dismiss in an action for an injunction preventing defendants from using an unopened subdivision street where defendants owned a tract of land on the south side of a subdivision; a 60 foot strip of land known as Ethel Street ran down the eastern boundary of the subdivision to defendants' tract; Ethel Street had never been opened, used as a public way, or accepted by any governmental body or public agency; plaintiffs owned property on either side of Ethel Street, including two lots in the subdivision, and have used that strip as part of their front yard; defendants notified plaintiffs that they were going to open and use Ethel Street in going to and from their tract outside the development; and the heirs of the developer conveyed to defendants an easement in Ethel Street. Plaintiffs, as purchasers of lots in the subdivision, acquired no interest in the subdivision streets other than the right to use them as streets; plaintiffs are not the owners of the unused, unopened part of Ethel Street by adverse possession under color of title because plaintiffs' deeds do not describe or purport to convey the street; the fee is still owned by the heirs of the developer, who have the right to convey additional

easements; defendants, having received an easement in Ethel Street, are entitled to use the street; and plaintiffs' only legal right in the street is to use it as a street.

APPEAL by defendants from *Sitton, Judge.* Order entered 20 October 1987 in Superior Court, BURKE County. Heard in the Court of Appeals 31 August 1988.

Rudisill & Brackett, by J. Richardson Rudisill, Jr. and Curtis R. Sharpe, Jr., for plaintiff appellees.

Mitchell, Blackwell, Mitchell & Smith, by Marcus W. H. Mitchell, Jr., for defendant appellants.

PHILLIPS, Judge.

Defendants' appeal is from an order of summary judgment permanently enjoining them from using an unopened subdivision street that borders plaintiffs' property and denying their motion to dismiss plaintiffs' action. The only conflict in the pleadings, affidavits, deeds, maps and other materials of record—that the materials, both parties, and the court sometimes refer to the principal defendant as *Harold* J. Icenhour and other times as *Howard* J. Icenhour—is immaterial to the case and should be resolved by the parties on their own. In other pertinent part the materials indicate the following without contradiction:

The platted and recorded Burke County subdivision known as "Wilson Heights," a development restricted to "residential purposes only," was established in June 1968 by the estate of Finley Wilson, whose will directed that his real estate be sold to pay his debts and the net proceeds distributed to his three children. The eastern boundary of the subdivision, approximately 900 feet long, is a 60 foot wide strip of land known as "Ethel Street"; it extends from State Road 1621 on the north to the boundary of defendants' 2.77 acre tract outside the development on the south. The subject of this case is the southernmost 300 feet of Ethel Street. This strip of land is bordered on both sides by lands belonging to the plaintiffs—on the west by subdivision Lots 45 through 56, on the east by a 2.3 acre tract outside the development—and has never been opened or used as a public way or accepted by any governmental body or agency. The 2.3 acre tract, where plaintiffs' dwelling house is situated, was acquired in 1976. The subdivision lots

were acquired in September 1982 and since then plaintiffs have used the 300 foot strip of Ethel Street as part of their front yard. On 8 August 1986, after some earlier discussions between the parties, defendants notified plaintiffs that they were going to open and use the 300 foot portion of Ethel Street in going to and from their 2.77 acre tract outside the development. Plaintiffs sued to enjoin them from doing so, alleging that they were also entitled to compensatory and punitive damages because of defendants' trespass. A few days thereafter the heirs of Finley Wilson conveyed to defendants an easement in Ethel Street.

The foregoing facts give rise to the following conclusions of law: (1) As purchasers of lots in the platted and recorded subdivision involved, plaintiffs acquired no interest in the subdivision streets other than the right to use them in getting to and going from their lots. *Russell v. Coggin*, 232 N.C. 674, 62 S.E. 2d 70 (1950). (2) As such lot owners plaintiffs are entitled to have the subdivision streets, including Ethel Street, kept open for their reasonable use *as streets*, but have no right to close or use any of them for other purposes. *Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E. 2d 30 (1964). (3) Though by recording its plat the estate of Finley Wilson offered to dedicate Ethel Street to the public use, the 300 feet in controversy have not been dedicated since they have not been accepted by the responsible public authority. *Wofford v. North Carolina State Highway Commission*, 263 N.C. 677, 140 S.E. 2d 376, *cert. denied*, 382 U.S. 822, 15 L.Ed. 2d 67, 86 S.Ct. 50 (1965). (4) The offer to dedicate the 300 feet of street involved has not been abandoned under the provisions of G.S. 136-96, as plaintiffs argue, for before an abandonment can occur under that statute the dedicator or someone claiming under him, unless the developer was a corporation that has ceased to exist, must file and cause to be recorded "a declaration withdrawing such strip . . . or parcel of land," and the record does not show that that has happened. (5) Plaintiffs are not the owners of the unopened, unused part of Ethel Street by adverse possession under color of title, as they argue but did not allege, because a deed is color of title for only the land described in it, *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 144 S.E. 2d 59 (1965), and plaintiffs' deeds describe only land that is bounded by the street, they do not describe or purport to convey the street. (6) Since Ethel Street has not been dedicated to the public and only an easement

in it was conveyed to the lot purchasers, the fee is still owned by the heirs of Finley Wilson, who have the right to use the street and to convey additional easements over it so long as such conveyances or use do not interfere with the easement of plaintiffs and the other lot owners. *Johnson v. Skyline Telephone Membership Corp.*, 89 N.C. App. 132, 365 S.E. 2d 164 (1988). (7) The heirs of Finley Wilson having conveyed an easement in Ethel Street to defendants they are entitled to use the street to the extent that their use does not interfere with the prior easements of plaintiffs and the other subdivision lot owners. *Johnson v. Skyline Telephone Membership Corp., supra.* (8) Since plaintiffs' only legal right in regard to Ethel Street is to use it as a *street* and to have such use not interfered with, their action to prevent the street from being opened and used as a street has no legal basis and should have been dismissed by summary judgment pursuant to defendants' motion.

Thus, the order enjoining defendants from using Ethel Street is vacated and the matter remanded to the trial court for the entry of an order dismissing plaintiffs' action and for a determination of defendants' damages, if any, as a consequence of being erroneously enjoined from using the street.

Vacated and remanded.

Judges WELLS and BECTON concur.

KENNETH E. DELLINGER, PLAINTIFF v. RICHARD O. MICHAL AND CAROLYN S. MICHAL, DEFENDANTS

No. 8826SC515

(Filed 7 February 1989)

Contracts § 6.1— unlimited general contractor's license acquired during construction—value of work not in excess of license limit

Where plaintiff contractor sought to recover funds allegedly due him for the construction of defendants' house and sought a lien on defendants' property, the trial court erred in dismissing plaintiff's claims with prejudice and ordering plaintiff's claim of lien cancelled, since the amount of the contract exceeded the amount of plaintiff's limited general contractor's license, but two months after execution of the contract, at a time when plaintiff alleged he had

done approximately $2,800.00 worth of work, he obtained an unlimited license, and the value of the work done by him was thus never in excess of his license limit.

APPEAL by plaintiff from *Snepp (Frank W.), Judge.* Judgment entered 14 March 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1989.

Mitchell & Rallings, by Thomas B. Rallings, Jr., and Robert W. Allen, for plaintiff-appellant.

Underwood, Kinsey & Warren, P.A., by C. Ralph Kinsey, Jr., and Richard L. Farley, for defendants-appellees.

LEWIS, Judge.

The record shows that on 17 May 1985 the parties entered into a contract for plaintiff to construct a house on defendants' land. The contract stated that "[t]he cost of the house will be figured on a cost plus 10% basis with a ceiling of $186,880.00." Plaintiff began construction around 10 June 1985 and continued construction through 2 March 1987. Several changes and additions were made to the contract after plaintiff began construction. Plaintiff alleged that the costs of construction and his contractor's fee totalled $237,259.01. Defendants paid plaintiff $154,553.60.

When the contract was executed and plaintiff began construction, plaintiff held a limited general contractor's license with a limitation of $175,000.00. On 17 July 1985, plaintiff obtained an unlimited license.

Plaintiff seeks to recover in excess of $82,705.41 plus interest and seeks a lien on defendants' property. In their counterclaim, defendants seek at least $49,329.57 for damages resulting from plaintiff's alleged breach of the construction contract. In a judgment captioned "PARTIAL SUMMARY JUDGMENT" the trial court dismissed plaintiff's claims with prejudice and ordered plaintiff's claim of lien cancelled. Defendants' counterclaim remains. Plaintiff appeals.

Plaintiff's sole assignment of error is to the signing and entry of judgment. Where the only question presented is whether the trial court erred in granting summary judgment, no other exceptions or assignments of error are necessary. *Ellis v. Williams*, 319

N.C. 413, 355 S.E. 2d 479 (1987); *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 326 S.E. 2d 316 (1985). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). Our review is limited to deciding whether the trial court properly concluded that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law. *Ellis, supra.* We have reviewed the record before us and determine that defendants are not entitled to the judgment entered as a matter of law.

In *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983), our Supreme Court adopted the rule that "a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license." *Id.* at 586, 308 S.E. 2d at 331. Thus, a contract entered into by an unlicensed contractor is illegal and unenforceable. In *Sample v. Morgan*, 311 N.C. 717, 319 S.E. 2d 607 (1984), a contractor with a $125,000.00 limited license entered into a construction contract for $115,967.81. The contractor and the homeowner agreed to changes and additions to the contract and the final construction cost was over $130,000.00. The Supreme Court specifically rejected previous cases that had denied recovery of any amount for contractors who exceed the amount of their license and allowed the contractor to recover an amount not to exceed the limit of his license. The Court stated that "until [the contractor] exceeded the allowable limit of his license, he was not acting in violation of G.S. [Section] 87-10." *Id.* at 723, 319 S.E. 2d at 611.

In this case, plaintiff was licensed up to $175,000.00 when the contract was executed. Two months later, plaintiff secured an unlimited license. Plaintiff began construction during the two-month period. He presented his affidavit that he had passed the unlimited general contractor examination when the contract with defendants was executed and that he had done approximately $2,800.00 worth of work before he was issued his unlimited license.

In *Sample v. Morgan, supra*, the Court stated:

> Clearly the statute contemplates a differing level of expertise for those applying for and receiving a license in the three enumerated categories. In enacting this statute, the legislature reasonably determined that as the cost of a structure increased, there would be additional demands of expertise and responsibilities from the contractor. To permit a general contractor to recover amounts in excess of the allowable limit of his license would vitiate the intended purpose of this statute: to protect the public from incompetent builders. We therefore hold that a general contractor is entitled to recover only up to that amount authorized by his license.

311 N.C. at 722, 319 S.E. 2d at 610-11. North Carolina adheres to a "bright line" rule "requiring strict compliance with the licensing provisions of G.S. [Section] 87-1, *et seq.*" *Id.* at 723, 319 S.E. 2d at 611. Since the reason for this "bright line" ("harsh" rule is to protect the public from incompetent builders and since "competence" in this context is measured by the extent of the contractor's license, we look to see whether the construction in this case was by one licensed while performing the work. Plaintiff exceeded the contract price estimate at the request of and with the consent of defendants. Since the value of the work done by plaintiff was never in excess of his license limit, plaintiff was not, as evidenced by his license, incompetent to perform the work. Thus, plaintiff should be allowed to prove his case if he can and is entitled if successful to recover to the extent of his unlimited license and defend the counterclaim.

Reversed.

Judges EAGLES and PARKER concur.

JAMES SIDNEY DAVIS v. WILLIAM S. HIATT, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 8810SC517

(Filed 7 February 1989)

1. **Automobiles and Other Vehicles § 2.4— revocation of license for driving while impaired—jurisdiction of superior court to review DMV**

The superior court had jurisdiction to review an order of revocation of a driver's license issued by the Division of Motor Vehicles to petitioner because N.C.G.S. § 150B-1(c) states that the provisions of Chapter 150B shall apply to every agency except where a statute makes specific provisions to the contrary, DOT/DMV is not excepted from the Article IV "judicial review" provisions and N.C.G.S. § 150B-43 therefore applies to DMV, N.C.G.S. § 150B-43 provides for judicial review of a final decision in a contested case after exhaustion of all administrative remedies unless adequate procedure for judicial review is provided by another statute, the DMV's order revoking petitioner's license was a final decision in a contested case, and N.C.G.S. § 20-25 does not provide for judicial review of mandatory revocations.

2. **Automobiles and Other Vehicles § 2.4— revocation of driving license—driving while impaired—effect of prior no contest plea**

A plea of no contest on a previous charge of driving while impaired did not qualify as a prior conviction for purposes of license revocation under N.C.G.S. § 20-17(2) and 20-19(e) because the no contest plea was not entered in the case at bar but in another charge some three and one-half years earlier. The no contest plea does not establish the fact of guilt for any other purpose than that of the case to which it is entered, so that DMV could have used the no contest plea as the basis for mandatory revocation only if petitioner had pled no contest to the offense which precipitated the revocation.

APPEAL by respondent from *McLelland, Judge.* Judgment entered 25 March 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 27 October 1988.

This is an appeal from an order reversing an order of the Division of Motor Vehicles (DMV). The record reveals that petitioner was charged with driving while under the influence of intoxicating liquor on 8 October 1978. After entering a plea of not guilty, petitioner was found guilty and judgment was entered. On 12 August 1983 petitioner was charged with driving while under the influence of intoxicating liquor. Petitioner pled no contest to that charge and judgment was entered. On 4 April 1987 petitioner was charged with driving while subject to an impairing substance. Petitioner pled guilty to the charge and judgment was entered on

19 October 1987. The trial court granted petitioner a limited driving privilege. The DMV notified petitioner that his driver's license was permanently revoked by the DMV pursuant to G.S. 20-17(2) and 20-19(e). Within thirty days of receiving written notice of the DMV's order, petitioner filed a petition in Wake County Superior Court for review of the revocation order issued by the DMV. The petitioner also obtained an order which temporarily restrained the DMV from suspending the limited driving privilege granted petitioner. After a hearing, the trial court found that the DMV's order of revocation was based on an error of law because the DMV considered a no contest plea on a charge of driving under the influence to be a prior conviction. The trial court reversed the order of revocation and remanded to the DMV for entry of an order for a one-year revocation as provided by law. Respondent DMV appeals.

George R. Barrett for the petitioner-appellee.

Attorney General Thornburg, by Assistant Attorney General Mabel Y. Bullock, for the Division of Motor Vehicles, respondent-appellant.

EAGLES, Judge.

[1] The threshold issue in this case is whether the superior court had jurisdiction to review the order of revocation issued by the Division of Motor Vehicles (DMV) to petitioner. G.S. 20-25 provides statutory authority for judicial review of drivers' license revocations by the DMV. The statute states that

> [a]ny person denied a license or whose license has been canceled, suspended or revoked by the Division, except where such cancellation is mandatory under the provisions of this Article, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court . . . .

G.S. 20-25.

G.S. 20-17(2) provides for mandatory revocation of a driver's license by the DMV when, among other things, DMV receives notice of the driver's conviction for impaired driving under G.S. 20-138.1. The period of revocation is provided in G.S. 20-19. G.S. 20-16 provides for instances when the DMV can exercise its dis-

cretion in suspending one's license. It is uncontroverted that the DMV revoked petitioner's license pursuant to G.S. 20-17(2) and 20-19(e), a mandatory revocation. Therefore, there is no provision in G.S. 20-25 giving petitioner the right to have his revocation reviewed by the superior court. *See Mintz v. Scheidt*, 241 N.C. 268, 84 S.E. 2d 882 (1954) (action of superior court in reversing DMV's mandatory revocation of petitioner's driver's license based on no contest plea was void *ab initio* because superior court was without jurisdiction).

Alternatively, petitioner contends that G.S. 150B-43 provides statutory authorization for review by the superior court of the DMV's action. Chapter 150B of the North Carolina General Statutes is the Administrative Procedure Act. G.S. 150B-1(c) states that the provisions of Chapter 150B "shall apply to every agency" except where a statute makes specific provisions to the contrary. G.S. 150B-1(d) makes specific exceptions. The only exceptions pertaining to the Department of Transportation, of which the DMV is a part, are exceptions from portions of the Rule Making and Administrative Hearings Articles. The DOT/DMV is not excepted from the Article 4 "Judicial Review" provisions. Accordingly, G.S. 150B-43 applies to the DMV.

G.S. 150B-43 provides for judicial review of a final decision in a contested case after exhaustion of all administrative remedies available to an aggrieved party. However, the provisions for review do not apply if "adequate procedure for judicial review is provided by another statute." G.S. 150B-43. The DMV's order revoking petitioner's license was a final decision in a contested case. The DMV alleged in its answer to petitioner's complaint that "G.S. 20-25 does not provide for an appeal" of petitioner's license revocation because the revocation was mandatory. A contested case is an agency proceeding that determines the rights of a party or parties. G.S. 150B-2(2); *Lloyd v. Babb*, 296 N.C. 416, 424-25, 251 S.E. 2d 843, 850 (1979). Furthermore, as we have stated, there is no provision for judicial review of "mandatory" revocations under G.S. 20-25. Therefore, pursuant to G.S. 150B-43, the superior court had jurisdiction to review the order of revocation.

[2] The issue presented to the superior court was whether a no contest plea on a previous charge of driving while impaired quali-

fied as a prior conviction for purposes of the DMV's permanent revocation under G.S. 20-17(2) and 20-19(e) for a third or subsequent conviction. A plea of no contest has the effect of a guilty plea for the purposes of that case only. *Winesett v. Scheidt*, 239 N.C. 190, 79 S.E. 2d 501 (1954). However, the basic characteristic of the plea of no contest that differentiates it from a guilty plea is that, while the no contest plea may be followed by a sentence, the no contest plea does not establish the fact of guilt for any other purpose than that of the case to which it is entered. *Id.* Had the offense for which petitioner pled no contest been the one that precipitated the DMV's mandatory revocation, there is no question that the DMV could use the no contest plea as the basis for its action. *See Fox v. Scheidt*, 241 N.C. 31, 84 S.E. 2d 259 (1954). Where mandatory revocation is achieved in the "same case" as the case where the no contest plea is entered, the DMV may base its revocation on the no contest plea. *Id.* In the case at bar, however, the no contest plea was not entered in the "same case" as the revocation proceeding. The revocation at issue here was ordered following petitioner's guilty plea on a charge of driving while impaired. The no contest plea was entered on another charge some three and one-half years earlier. Because the no contest plea was not entered in the same case as the revocation at issue here, it was incorrectly considered by the DMV as a prior conviction.

For the reasons stated, the order of the superior court reversing the DMV's order of revocation and remanding the case to the DMV for a one-year revocation as required by law is affirmed.

Affirmed.

Judges BECTON and GREENE concur.

STATE OF NORTH CAROLINA v. MICHAEL EUGENE WILLIAMS

No. 886SC301

(Filed 7 February 1989)

Criminal Law § 138.28— aggravating factor of prior conviction—finding based only on prosecutor's statement—finding improper

The trial court erred in finding as an aggravating factor that defendant had a prior conviction for a criminal offense punishable by more than sixty days' confinement where the finding was based entirely on the prosecutor's oral representation as to defendant's record, and it was immaterial whether the prosecutor was reading from the official records of the Clerk of Court of Northampton County and whether the original records were present and available in the courtroom, since defendant neither offered those records into evidence nor sought defendant's stipulation as to what those records would show; furthermore, defendant's failure to object to the prosecutor's statement at the sentencing hearing was not fatal, since error based on the insufficiency of evidence as a matter of law can be reviewed absent an objection. N.C.G.S. § 15A-1446(d)(5) (1988).

APPEAL by defendant from *Phillips, Herbert O., III, Judge.* Judgment entered 29 June 1987 in NORTHAMPTON County Superior Court. Heard in the Court of Appeals 9 January 1989.

Defendant pled guilty to robbery with a dangerous weapon and no contest to assault with a deadly weapon with intent to kill inflicting serious injury. The evidence tended to show that defendant entered a small country store in Galatia, North Carolina and struck its seventy-two-year-old operator, Mr. Blythe, across the face with a tire iron. Medical evidence indicated that the man was struck five times. Defendant took approximately $180 from the cash register and fled. Blythe's wife saw him run out to his vehicle, drop the money as he ran, and drive away. Defendant later turned himself in to authorities in Hobgood, North Carolina and eventually made a statement admitting his guilt.

During the sentencing proceedings the prosecutor stated that defendant had two prior convictions for offenses punishable by more than sixty days' imprisonment. Based solely on this oral representation the trial court found as an aggravating factor that defendant had a prior conviction for a criminal offense punishable by more than sixty days' confinement. The trial court also found that the factor in aggravation outweighed those in mitigation: namely, that defendant had voluntarily acknowledged wrongdoing

and surrendered himself to law enforcement authorities. Defendant was sentenced to a term of twenty years on the charge of robbery with a dangerous weapon, a term in excess of the presumptive sentence. Defendant was sentenced to the presumptive six-year term for assault with a deadly weapon with intent to kill inflicting serious injury.

Attorney General Lacy H. Thornburg, by Associate Attorney General Robert J. Blum, for the State.

Charles J. Vaughan for defendant-appellant.

WELLS, Judge.

Defendant first assigns error to the trial court's finding that he had a prior conviction, arguing that the prosecutor's oral representations were insufficient to prove this. The standard of proof required in order to find factors in aggravation or mitigation is preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.4(a) (1988). A prosecutor's mere unsworn assertion that an aggravating factor exists is insufficient proof for the trial court to find it. *State v. Swimm*, 316 N.C. 24, 340 S.E. 2d 65 (1986); *State v. Frazier*, 80 N.C. App. 547, 342 S.E. 2d 534 (1986); *see also State v. Mack*, 87 N.C. App. 24, 359 S.E. 2d 485 (1987), *disc. rev. denied*, 321 N.C. 477, 364 S.E. 2d 663 (1988).

The State asserts that the prosecutor did not simply recite the prior convictions from memory, but read them at the sentencing hearing directly from the original court files. In a supplement to the record filed in this appeal, the district attorney has filed an affidavit stating that when he presented defendant's record of prior convictions, he was reading from the official records of the Clerk of Court of Northampton County and that the original records were present and available in the courtroom. He neither offered those records into evidence nor sought the defendant's stipulation as to what those records would show. *See* N.C. Gen. Stat. § 15A-1340.4(e).

Defendant's failure to object to the prosecutor's statement at the sentencing hearing, furthermore, was not fatal; error based on the insufficiency of evidence as a matter of law can be reviewed absent an objection. N.C. Gen. Stat. § 15A-1446(d)(5) (1988); *see also State v. Mack, supra.*

While we recognize that upon resentencing, it is probable that this factor in aggravation will be properly established and considered, we must apply the law consistently and conclude that we are required to provide defendant with a new sentencing hearing. The trial court erred in finding the existence of the prior conviction based solely on the prosecutor's unsworn statement.

For the reasons stated, we vacate the sentence and remand for a new sentencing hearing.

Because of our disposition of this issue we do not consider defendant's other assignment of error.

Sentence vacated and remanded for resentencing.

Judges BECTON and JOHNSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 FEBRUARY 1989

BERRIER v. BERRIER No. 8821DC1144	Forsyth (81CVD4925)	Affirmed
BRADY v. GREAT AMERICAN INS. CO. No. 8820SC537	Anson (85CVS342)	Affirmed
BRANCH BANK & TRUST CO. v. REAL-VENTURE No. 8812DC617	Cumberland (85CVD3646)	Affirmed
BRASWELL v. BRASWELL No. 8812DC429	Cumberland (83CVD5243)	Reversed
BRUCE v. MEMORIAL MISSION HOSPITAL No. 8828SC452	Buncombe (85CVS3549)	No Error
EDWARDS v. CARTER No. 8822DC1048	Davie (87CVD165)	Affirmed in part; remanded for a new trial in part
HINTON v. PERDUE FOODS No. 886DC532	Bertie (85CVD144)	Affirmed
HULL v. HULL No. 8827DC311	Lincoln (87CVD249)	Affirmed
IN RE CRAIG v. ROY'S RENTAL UNIFORM SERVICE No. 8810SC622	Wake (87CVS7497)	Vacated & Remanded
IN RE ESTATE OF BRYANT No. 8821SC1107	Forsyth (87E-1296)	Affirmed
NOWICKI v. NOWICKI No. 8818DC1105	Guilford (86CVD1600)	Affirmed
STATE v. BAKER No. 8811SC673	Johnston (87CRS9368)	No Error
STATE v. BERRY No. 885SC521	New Hanover (87CRS13242) (87CRS13243) (87CRS13248) (87CRS13251) (87CRS13252) (87CRS13253) (87CRS13254) (87CRS15547)	No Error

STATE v. BULLARD No. 8816SC1053	Robeson (87CRS11377) (87CRS11378) (87CRS11379) (87CRS12549)	Affirmed
STATE v. CHRISP No. 889SC542	Granville (87CRS353) (87CRS354)	No Error
STATE v. COBB No. 888SC479	Lenoir (87CRS5890)	No Error
STATE v. COLVARD No. 8827SC578	Lincoln (87CRS2434) (87CRS2435)	No Error
STATE v. DIXON No. 8818SC498	Guilford (87CRS27382)	No Error
STATE v. FIELDS No. 8816SC335	Robeson (87CRS10759) (87CRS10761)	No Error
STATE v. GOODSON No. 8830SC470	Haywood (87CRS3012) (87CRS3013) (87CRS2142) (87CRS2143) (87CRS3315) (87CRS3317) (87CRS3320) (87CRS3322)	No Error
STATE v. HERRING No. 885SC422	New Hanover (86CRS24520)	No Error
STATE v. HILDEBRAN No. 8825SC297	Catawba (86CRS19796) (86CRS19798)	In Case No. 86CRS19796, the judgment on the conviction of larceny is vacated. In Case No. 86CRS19798, we find no error.

STATE v. JOSEY No. 8815SC511	Orange (87CRS7221) (87CRS8543) (87CRS8122) (87CRS8124) (87CRS8125)	As to defendant Ernest Marvin Josey, there is no error. As to defendant Lisa Rebecca Josey, the sentence is vacated and the matter is remanded to the trial court for a new sentencing hearing.
STATE v. KLOMSER No. 8815SC492	Chatham (87CRS3886) (87CRS3891) (87CRS3893)	No Error
STATE v. KUYKENDALL No. 883SC593	Pitt (87CRS6956) (87CRS6957)	No Error
STATE v. LEONARD No. 8817SC1093	Surry (87CRS537)	No Error
STATE v. LOCKLEAR No. 8816SC351	Robeson (87CRS10323) (87CRS10324) (87CRS10325)	Affirmed
STATE v. MOSELEY No. 887SC1092	Edgecombe (84CRS3738) (84CRS3740)	No Error
STATE v. SHUMATE No. 8823SC313	Wilkes (87CRS2395)	No Error
STATE v. SMITH No. 881SC443	Dare (87CRS8272) (87CRS8273) (87CRS8274)	No Error
WALSH v. HOLZ No. 883SC550	Carteret (87CVS125)	Affirmed

APPENDIX

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

PRESENTATION OF
BROCK PORTRAIT

ORDER ADOPTING AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 3, 4, 7, 9, 10, 11, 12, 15, 21, 25, 27, 31, 34, and 39 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 as follows:

Rules 15, 31 and 39: 1 January 1989;

Rules 25, and 34: 1 July 1989;

Rule 21: applicable to all cases in which the superior court order is entered on or after 1 July 1989; and

Rules 3, 4, 7, 9, 10, 11, 12, and 27: effective for all judgments of the trial division entered on or after 1 July 1989.

Adopted by the Court in Conference this 8th day of December 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 3

APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *RESERVED.*

(c) *Time For Taking Appeal.* Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions:

(1) a motion under Rule 50(b) for judgment *n.o.v.* whether or not with conditional grant or denial of new trial;

(2) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(3) a motion under Rule 59 to alter or amend a judgment;

(4) a motion under Rule 59 for a new trial.

If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a) 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.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 14 April 1976;
8 December 1988—3(a), (b), (c), (d)—effective for all judgments of the trial division entered on or after 1 July 1989.

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 filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 30 days after entry of the judgment or order or within 30 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) 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.

ADMINISTRATIVE HISTORY

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;

8 December 1988—4(a)—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 7

PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) *Ordering the Transcript.*

(1) **Civil Cases.** Within 10 days after filing the notice of appeal the appellant shall order, in writing, from the court reporter a transcript of such parts of the proceedings not already on file as he deems necessary. A copy of the order shall be filed with the clerk of the trial tribunal. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall file with the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be filed, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts ordered by the appellee. At the time of ordering, a party shall make satisfactory arrangements with the court reporter for payment of the cost of the transcript.

(2) **Criminal Cases.** Upon the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the trial tribunal shall order from the court reporter a transcript of the proceedings and shall file a certificate of such order. The clerk's order shall include the caption of the case; date or dates of trial; portions of transcript requested; number of copies required; the name, address and telephone number of appellant's counsel; and the trial court's order establishing indigency for the appeal, if any.

(b) *Preparation and Delivery of Transcript.*

(1) From the date of the reporter's receipt of an order for a transcript, the reporter shall have 60 days for preparation and filing of the transcript in civil cases and non-capital criminal cases and shall have 120 days for preparation and filing of the transcript in capitally tried cases. The trial tribunal, in its discretion, and for good cause shown by the reporter or by a party on behalf of the reporter may extend the time for preparation of the transcript for an additional 30 days. Where the clerk's order is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for preparation of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The reporter shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered. The appealing party shall retain custody of the original of the transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
REPEALED: JULY 1, 1978.
(See note following Rule 17.)
Re-adopted: 8 December 1988—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 9

THE RECORD ON APPEAL

(a) *Function; Composition of Record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim tran-

script of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

k. exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. exceptions and assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding defendant indigent for the purposes of the appeal and assigning counsel, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors as-

signed, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

j. exceptions and assignments of error set out in the manner provided in Rule 10.

(b) *Form of Record; Amendments.* The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p __)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate

court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(c) *Presentation of Testimonial Evidence and Other Proceedings.* Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence Narrated—How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate

that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented

by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) *Models, Diagrams, and Exhibits of Material.*

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the

Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 10

ASSIGNING ERROR ON APPEAL

(a) *Function in Limiting Scope of Review.* Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

(b) *Preserving Questions for Appellate Review.*

(1) **General.** In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel

taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(2) **Jury Instructions; Findings and Conclusions of Judge.** A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) **Sufficiency of the Evidence.** A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment as in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) *Assignments of Error.*

(1) **Form; Record References.** A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

(2) **Jury Instructions.** Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.

(3) **Sufficiency of Evidence.** In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question made regarding each such issue or finding or legal conclusion based thereon.

(4) **Assigning Plain Error.** In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial

action questioned is specifically and distinctly contended to amount to plain error.

(d) *Cross-Assignments of Error by Appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;
7 July 1983—10(b)(3);
27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 11

SETTLING THE RECORD ON APPEAL

(a) *By Agreement.* Within 35 days after the reporter's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal

constituted in accordance with the provisions of Rule 9. Within 15 days (30 days in capitally tried cases) after service of the proposed record on appeal upon him an appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By Judicial Order or Appellant's Failure to Request Judicial Settlement.* Within 15 days (30 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20

days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple Appellants; Single Record on Appeal.* When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) *RESERVED.*

(f) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), and (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—11(a), (b), (c), (e), and (f)—effective for all judgments of the trial division entered on or after 1 July 1989.

Note: Paragraph (e) formerly contained the requirement that the settled record on appeal be certified by the clerk of the trial tribunal. The 27 November 1984 amendments deleted that step in the process. Under the new version of the rules, once the record is settled by the parties, by agreement or by judicial settlement, the appellant has 15 days to file the settled record with the appropriate appellate court.

Rule 12

FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(a) *Time for Filing Record on Appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the Appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of Record on Appeal.* The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;

8 December 1988—12(a) and (c)—effective for all judgments of the trial division entered on or after 1 July 1989.

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, whether on petition of a party or on 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.

ADMINISTRATIVE HISTORY

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;
8 December 1988—15(i)(2)—effective 1 July 1989.

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 peti-

tion 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.

(f) *Petition for Writ in Post Conviction Matters—Death Penalty Cases.* A petition for writ of certiorari to review orders of the trial court denying motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition.

ADMINISTRATIVE HISTORY

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;
8 December 1988—21(f)—applicable to all cases in which the superior court order is entered on or after 1 July 1989.

Rule 25

PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) *Failure of Appellant to Take Timely Action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N.C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

(b) *Sanctions for Failure to Comply With Rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989.

Rule 27

COMPUTATION AND EXTENSION OF TIME

(a) *Computation of Time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional Time After Service by Mail.* Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) *Extensions of Time; By Which Court Granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division.** The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state. Such motions may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.** All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a) and (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial division entered on or after 1 July 1989.

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 for rehearing shall be addressed to the court which issued the opinion sought to be reconsidered. 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 30 days after the case is certified for rehearing, and the opposing party's brief, within 30 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. No reply brief shall be received on rehearing. 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.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—31(a)—effective 1 February 1985;
3 September 1987—31(d);
8 December 1988—31(b) and (d)—effective 1 January 1989.

Rule 34

FRIVOLOUS APPEALS; SANCTIONS

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division deems a sanction appropriate under this rule, the court shall order the person subject to sanction to show cause in writing or in oral argument or both why a sanction should not be imposed. If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989.

Rule 39

DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) *General Provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to be Kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that court, on paper, microform, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—39(b)—effective 1 January 1989.

PRESENTATION OF THE PORTRAIT
OF
THE HONORABLE WALTER E. BROCK
May 8, 1989

PRESENTATION ADDRESS
BY
THE HONORABLE EDWARD B. CLARK

Chief Judge Hedrick and Judges of the North Carolina Court of Appeals, it is with great pleasure that I present to the Court on behalf of Sarah Cahoon Brock and her family the portrait of The Honorable Walter E. Brock, who was a Judge of the Court from 1967 to 1973, and Chief Judge from 1973 to 1978. Chief Judge Hedrick and Judge Arnold now on the Court served with Judge Brock.

My only qualification for making this presentation is that he was a friend and a colleague on the Superior Court and Court of Appeals, but it is an honor for me to do so in the presence of the Supreme Court and Judge Brock's family and friends. Our friendship may be doubted by those who were present with us, for each delighted in tossing critical barbs at the other, but I was not as adept at applying the needle and was made painfully aware of my many judicial, social, and golfing ineptitudes.

Walter E. Brock was born in Wadesboro, North Carolina on March 21, 1916, the son of Walter E. Brock, Sr. and Elizabeth Brock. Walter, Jr. was the oldest of five children. When he was twelve years of age, his mother died. His father at that time was Judge of Superior Court. Young Walter went to live with his aunt, Mrs. Mary B. McDowell, and her husband in Scotland Neck. There he was known as "Buster." He graduated from the high school there in 1933. This was during the Great Depression. He had no money for college, so he worked for four years in a clothing store. In 1937 he borrowed $50.00 and entered the University of North Carolina at Chapel Hill. He was a self-help student, working at various jobs, including clerk and manager of the Carolina Inn. There he met Sarah Cahoon, a native of Plymouth, North Carolina, who was a secretary for the University. They were married on December 23, 1939. They had four children: Fran, who married Dan K. Moore, Jr., now of Lexington; Elaine, who married Don Rogers, now of Morganton; Walter, Jr.

who married Lynne Beazlie, now of Raleigh; and Beth, who married James F. Lovette, now of Winston-Salem.

His education was interrupted by World War II, and he served as flight instructor in the U.S. Army Air Corps from 1941 to 1945. Thereafter, he served in the Air Corps Reserve for many years, retiring as a lieutenant colonel.

He entered the UNC School of Law in 1945. His excellent scholastic record earned for him the position of Associate Editor of the North Carolina Law Review. He was awarded the J.D. degree in 1947.

His devotion to the University did not end with graduation. He devoted much time to serving it as Chairman of the Anson County Morehead Scholarship Committee from 1952 to 1967, on the District VIII Selection Committee from 1968 to 1971, and on the District IV Selection Committee as member and chairman from 1972 until 1982. He assisted the UNC School of Law in their moot court, appellate and trial advocacy programs.

After admission to the N.C. State Bar in 1947, he returned to Wadesboro, county seat of Anson County, for the practice of law. He had a wide practice there from 1947 to 1963, which prepared him well for his service on the bench.

He devoted much time to community service, serving as Chairman of the Anson County Red Cross in 1947, a member of the Civitan Club for twenty years, Director of the Chamber of Commerce, Piedmont Area Development Association and Recreation Commission. He was also active politically, serving as Chairman of the Anson County Democratic Executive Committee from 1957 to 1963, and as a member of the State Democratic Executive Committee. A dedicated Episcopalian, he was a member of the Calvary Episcopal Church and served as Member of Vestry, Junior Warden, Senior Warden, and Lay Reader; later in Raleigh he was Member of Vestry, Church of the Good Shepherd.

He was Judge of Anson County Criminal Court from 1952 to 1954. He was President of the 20th District Bar in 1950 and Councilor of the North Carolina State Bar, 1953-1955. Governor Sanford appointed him a Special Judge of the Superior Court in 1963 and he served until 1967, when he was named by Governor Moore as one of the original six judges of the North Carolina Court of Appeals, taking his seat on July 1, 1967.

He was a Judge of the Court until August 1, 1973 when he was designated Chief Judge by Chief Justice Bobbitt to succeed

retired Chief Judge Raymond Mallard. He held this position until December, 1978, when he left to take the office of Associate Justice of the North Carolina Supreme Court, which he won by election.

In the Court of Appeals, his first opinion was in *Tate v. Golding*, 1 N.C. App. 38 (21 February 1968), and his last in *Edwards v. Bank*, 39 N.C. App. 261 (2 January 1979). Judge Brock brought to the Court an analytical mind. His opinions were clear and concise. He was an advocate of judicial restraint. Rather than discard familiar legal principles, he sought to adapt them to meet new problems. His opinions reveal that he provided objective standards for the guidance of the bench, the bar, and the public.

Judge Brock did not limit his service to that of judge. He also helped in writing the Appellate Rules as a member of the Study Committee. He knew there was a good reason for them, and he believed they should be enforced, but tempered to preserve their spirit.

While on the Court, he was the first Chairman of the North Carolina Judicial Standards Commission, serving from 1973 through 1978. He prepared the rules of the Commission and directed its course so as to provide the State with an effective means for upholding the standards of the judiciary.

As Chief Judge, he applied common sense to the administration of the Court with its ever increasing caseload, supervising the staff, and prodding when necessary a dilatory judge.

Judge Brock took his office as Associate Justice of the North Carolina Supreme Court on January 2, 1979. The opinions he wrote in the Supreme Court are in volumes 296 through 299. There he continued his services as a distinguished and dedicated jurist until he had a severe heart attack in April 1980. He wanted to continue his service on the Court but had to retire on December 1, 1980.

His accomplishments as a lawyer and judge do not give you a full view of Judge Brock. He was noted for his keen sense of humor. He loved and referred often to his native county of Anson, usually with considerable exaggeration. He informed me that Anson was one of the original counties of the State and the largest, its western boundary extending to the South Seas. I found *A History of Anson County* in his home library and noted that Anson was formed from my native Bladen in 1749. He said the

history was wrong, that he meant to burn it years ago. He informed me that the mighty Pee Dee River ran through Anson, that he often saw sharks and whales in it, and that the H.M.S. Queen Elizabeth regularly docked at Wadesboro. I told him that the Little Pee Dee ran through Anson, and that I could jump it at flood stage. He told me that I had no better knowledge of history and geography than I had of the law.

No one escaped his good natured ribbing. He and Judge Frank Huskins were close friends, but their prolonged verbal feud was famous among the bench and bar. He came to his office in the Court of Appeals Building early one morning and observed Judge Huskins trudging across the Capital Square on his way to his Supreme Court office. Judge Brock telephoned and asked to speak to Judge Huskins. When the secretary told him that Judge Huskins had not arrived, he told her that he was a concerned taxpayer and that Judge Huskins' lack of attention to his public duties was a disgrace to the judiciary. The distraught secretary related the comment to Judge Huskins, who forthwith told her the call had come from Judge Brock, who was a moron.

For years Judges Brock and Huskins and I patronized the same small four-chair barbershop in Raleigh. The barbers would tell me with great glee how each had blasphemed the other.

A lawyer arguing before the Supreme Court addressed Judge Huskins as Judge Haskins. Thereafter, Judge Brock addressed him as Judge Haskins, or Judge Hooksin, or Judge Hiskins. Impartial observers would probably rule that the verbose combat ended in a tie.

The picture would not be complete without mentioning his beagle, Charlie Wall, a member of the family for fifteen years in Raleigh. Charlie Wall was no ordinary dog. He acted like a person and was treated like one. His quarters behind the house had wall-to-wall carpeting, a doorbell, and a telephone. One Saturday, Judge Brock brought him to the Court, sat him in the Presiding Judge's chair, dressed him in robe and bifocals, and photographed him. This picture thereafter occupied a prominent place in Judge Brock's office. he did not claim that Charlie Wall wrote any of his decisions, but he did say that he sought Charlie Wall's advice on knotty legal issues. You may have some doubt about this assertion, but if you ever saw Charlie Wall sitting in front of him listening to the remarks addressed to him and responding by a tail wag or bark, the doubts would fade. Charlie Wall was buried in the backyard with an appropriate mahogany grave marker.

Soon after his retirement in December, 1980, Judge Brock purchased a thirty-foot, diesel powered, Harkers Island trawler. Thereafter, he and Sarah spent most of their time at the coast, at or near Morehead City, where he became an accomplished skipper and fisherman. These last years in retirement under the watchful eye of his wife were peaceful and happy ones. Serving as nurse, dietitian, and first mate, her loving care prolonged and enriched his life. There is no better formula for retirement than a loving wife and children, caring friends, and a good boat.

Judge Brock died on June 13, 1987.

We present to the Court the portrait of Walter Edgar Brock. May those who view it recognize it as that of a devoted husband and father, a respected lawyer, an able and dedicated jurist, and as a symbol of strength and determination.

The talented artist who painted the portrait is Robert Keester.

The Clerk will escort John Walter Lovette and Valerie Brock, grandchildren of Judge Brock, forward for the unveiling.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

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WITNESSES

ADMINISTRATIVE LAW

§ 3. Authority of Administrative Agencies in General

The attempted grant of authority to the Secretary of the Department of Natural Resources in G.S. 113A-64 to assess a civil penalty of up to $100 per day for violations of the Sedimentation Pollution Control Act constitutes a legislative grant of judicial power prohibited by Art. IV, § 3 of the N.C. Constitution. *In the Matter of Appeal from Civil Penalty,* 1.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

An appeal from the denial of a preliminary injunction to enforce a covenant not to compete involved a substantial right. *Iredell Digestive Disease Clinic v. Petroza,* 21.

The denial of a motion for summary judgment is not appealable. *Iverson v. TM One, Inc.,* 161.

The trial court's entry of summary judgment for defendants on plaintiff's claim was not appealable before defendants' counterclaim for attorney's fees had been adjudicated. *T'ai Co. v. Market Square Limited Partnership,* 234.

The defendant in a medical malpractice case was not entitled to appeal from the trial court's interlocutory order prohibiting defendant's attorney from contacting plaintiff's non-party treating physicians and requiring the attorney to disclose the substance of prior conversations with the physicians. *Crist v. Moffatt,* 520.

The trial court's ruling on defendant's plea in bar was not immediately appealable. *Garris v. Garris,* 467.

The trial court's order dismissing defendant's counterclaims for the imposition of a constructive trust on certain monies in plaintiff's checking account affected a substantial right and was immediately appealable. *Lamb v. Lamb,* 680.

A partial summary judgment against plaintiff affected a substantial right and was immediately appealable. *Terry v. Pullman Trailmobile,* 687.

§ 9. Moot Questions

An action seeking declaratory relief allowing plaintiff to picket on the sidewalk across from the Justice Building in Raleigh on the eve of an execution was moot. *Crumpler v. Thornburg,* 719.

§ 24. Necessity for Assignments of Error

Appellees were not required to cross-assign error to the trial court's conclusions in order to argue on appeal that summary judgment in their favor was appropriate on grounds other than those stated by the trial court. *Cieszko v. Clark,* 290.

§ 24.1. Form of Exceptions and Assignments of Error

Plaintiff's exceptions upon which assignments of error are based are deemed abandoned where the assignments of error do not state the grounds upon which the errors are assigned. *Kimmel v. Brett,* 331.

§ 30.2. Form and Sufficiency of Assignments of Error

Defendants' arguments concerning plaintiff's doctor's testimony were without foundation because defendants' assignments of error did not state the basis upon which error was assigned and because substantially the same testimony was admitted elsewhere without objection. *Polk v. Biles,* 86.

APPEAL AND ERROR — Continued

§ 31.1. Necessity of Objections, Exceptions, and Assignments of Error

The plain error rule is inapplicable in civil cases. *Alston v. Monk*, 59.

§ 37. Agreement to Case on Appeal

Plaintiff's appeal is dismissed for failure to file a properly settled record on appeal. *McLeod v. Faust*, 370.

§ 41. Requirement of Transcript for Case on Appeal

A hearing on a motion for modification of a child custody order was a "trial" which was required by G.S. 7A-198 to be recorded, but the trial court's failure to have the hearing recorded did not relieve appellant of her burden to set forth the necessary evidence in the record on appeal in accordance with Appellate Rule 9(a)(1)(v) and to show prejudicial error. *Miller v. Miller*, 351.

§ 49. Harmless Error in Exclusion of Evidence

Defendants could show little if any prejudice from the exclusion of a memorandum from a roof manufacturer in a construction dispute because the memorandum would arguably have been of greater benefit to plaintiff than to defendants and because the jury decided in defendants' favor on their counterclaim. *Hedgecock Builders Supply Co. v. White*, 535.

§ 49.1. Sufficiency of Record to Show Prejudicial Error in Exclusion of Evidence

The trial court's refusal to permit one defendant during direct examination to examine plaintiff's hair could not be held erroneous where the record fails to show what such defendant's testimony would have been after her examination of plaintiff's hair. *Alston v. Monk*, 59.

§ 67. Force and Effect of Decisions of Supreme Court in General

The decision of *Bullins v. Schmidt*, 322 N.C. 80, making pursuing law officers liable only for gross negligence, will be applied retroactively. *Fowler v. N.C. Dept. of Crime Control & Public Safety*, 733.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

Plaintiff's limited participation in arbitration did not operate as a waiver of its right to object to the arbitrability of defendant's claims. *Ruffin Woody and Associates v. Person County*, 129.

General Condition 35 of the U.S. Dept. of Commerce Economic Development Administration providing that the architect's decisions were final and conclusive took precedence over the AID documents which provided that most of the decisions of the architect were subject to arbitration. *Ibid.*

§ 5. Scope of Inquiry by Arbitration

Disputes concerning an architect's performance were arbitrable. *Ruffin Woody and Associates v. Person County*, 129.

§ 9. Attack of Award

Where a motion to vacate an arbitration award has already been filed, G.S. 1-567.13(b) does not require the trial court to defer its ruling on a motion to confirm the award for the entire ninety day period during which a motion to vacate may be filed. *Ruffin Woody and Associates v. Person County*, 129.

The trial court did not err in denying plaintiff's motion to depose the arbitrators or to vacate the arbitration award because an arbitrator failed to disclose

ARBITRATION AND AWARD — Continued

prior dealings with defendant where two design projects which the arbitrator's firm completed for defendant were remote enough in time to dissipate any partiality on the arbitrator's part, consulting work performed for defendant by the arbitrator was insubstantial, and plaintiff had constructive knowledge of the arbitrator's prior contacts with defendant. *Ibid.*

ASSAULT AND BATTERY

§ 15.2. Instruction on Assault with a Deadly Weapon with Intent to Kill

The evidence was sufficient to support the court's instruction that it would be the duty of the jury to return a verdict of guilty of assault with a deadly weapon with intent to kill if it found that defendant intentionally choked the victim with a rope or cord. *S. v. Charles*, 430.

There was no plain error in the court's instruction on the defense of accident in a prosecution for assault with a deadly weapon inflicting serious injury where the court instructed the jury that pointing a gun at a person is not lawful conduct. *S. v. Kinney*, 671.

§ 15.7. Instruction on Self-Defense 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 refusing to give a self-defense instruction. *S. v. Kinney*, 671.

ATTORNEYS AT LAW

§ 7. Fees Generally

The issue of a party's entitlement to attorney fees was a question of substantive law governed by the law of Texas. *Tolaram Fibers, Inc. v. Tandy Corp.*, 713.

The trial court did not err in denying defendants attorney fees where the parties' lease provided defendants with a choice of remedies, only one of which called for attorney fees, and the trial court could have concluded that defendants did not pursue the remedy which provided attorney fees. *Ibid.*

§ 7.4. Fees Based on Provisions of Notes or other Instruments

The trial court properly awarded plaintiff attorneys' fees on the outstanding balance of an open account. *Hedgecock Builders Supply Co. v. White*, 535.

§ 7.5. Allowance of Fees as Part of Costs

The trial court erred by taxing attorney fees against plaintiff drainage district in an action to collect drainage assessments. *Northampton County Drainage District Number One v. Bailey*, 68.

AUTOMOBILES AND OTHER VEHICLES

§ 2.4. Revocation of Driver's License; Proceedings Related to Drunk Driving

The superior court had jurisdiction to review an order of revocation of a driver's license issued by the Division of Motor Vehicles. *Davis v. Hiatt*, 748.

A plea of no contest on a previous charge of driving while impaired did not qualify as a prior conviction for purposes of license revocation. *Ibid.*

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 45.1. Evidence of Criminal Conviction Arising out of Same Accident as Civil Action

The trial court in a wrongful death action erred in admitting defendant driver's testimony that he had never been convicted of a crime or traffic offense. *Hinnant v. Holland*, 142.

§ 50.4. Action for Negligent Operation of Vehicle; Sufficiency of Evidence of Injuries and Damages

The trial court did not err in an action arising from a collision between a garbage truck and an automobile by denying defendant's motions for a directed verdict and judgment n.o.v. *Polk v. Biles*, 86.

§ 51. Action for Negligent Operation of Vehicle; Sufficiency of Evidence of Excessive Speed

Negligence by defendant driver in a passenger's death was not established as a matter of law by his statement at trial that, on hindsight, he "was traveling a little bit too fast for the curve." *Hinnant v. Holland*, 142.

§ 90.1. Action for Negligent Operation of Vehicle; Failure of Instructions to Apply Law to Facts; Violation of Safety Statutes

Plaintiff was not prejudiced by the court's instruction that a violation of the statute prohibiting the driving of a vehicle at a speed greater than is reasonable and prudent is negligence rather than negligence per se. *Hinnant v. Holland*, 142.

§ 90.4. Action for Negligent Operation of Vehicle; Giving Instructions not Supported by Evidence

The trial court did not err in an action arising from the collision of an automobile with a garbage truck by instructing the jury that it could consider future pain and suffering, future medical expenses, and loss of use of part of plaintiff's body. *Polk v. Biles*, 86.

§ 90.9. Action for Negligent Operation of Vehicle; Failure to Give Instructions on Particular Issues

The trial court in a wrongful death action erred in refusing to instruct the jury regarding the duty to decrease speed under G.S. 20-141(m). *Hinnant v. Holland*, 142.

§ 90.10. Action for Negligent Operation of Vehicle; Failure to Give Instruction on Negligence

The trial court in a wrongful death action properly refused to give a peremptory instruction on negligence. *Hinnant v. Holland*, 142.

§ 94.7. Contributory Negligence of Passenger; Knowledge that Driver Is Intoxicated

Whether plaintiff was contributorily negligent in voluntarily riding in a car driven by an intoxicated defendant was a question for the jury. *Jansen v. Collins*, 516.

BILLS AND NOTES

§ 19. Actions on Notes; Defenses

The trial court in an action on a demand promissory note properly granted plaintiff's motion for directed verdict on the issues of impossibility and duress. *Mitchell v. Rothwell*, 460.

BILLS AND NOTES — Continued

§ 20. Actions on Notes; Sufficiency of Evidence

The evidence was insufficient to require the trial judge to submit to the jury an issue of conditional delivery of a demand promissory note. *Mitchell v. Rothwell*, 460.

The trial court properly instructed the jury on the issue of consideration in an action to recover on a demand promissory note. *Ibid.*

BLACKMAIL

§ 1. Generally

The extortion statute, G.S. 14-118.4, superseded the blackmail statute, G.S. 14-118. *S. v. Greenspan*, 563.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence

Defendant's unpermitted use of a key to enter the victim's apartment constituted first degree burglary. *S. v. Charles*, 430.

CONSPIRACY

§ 5.1. Admissibility of Statements of Co-conspirators

The trial court did not err in a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine by admitting codefendants' statements without removing all references to defendant where the statements were made during the course of and in furtherance of the conspiracy and were therefore admissible. *S. v. Fink*, 523.

§ 5.2. Necessity of Independent Evidence of Conspiracy

The trial court did not err in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine by admitting statements of co-conspirators without a prima facie showing of conspiracy before the statements were admitted. *S. v. Fink*, 523.

§ 7. Instructions

The trial judge erred by charging the jury as to two separate conspiracies to traffic in cocaine where the two conspiracies were so overlapped as to comprise one continuing conspiracy. *S. v. Fink*, 523.

CONSTITUTIONAL LAW

§ 10.3. Delegation of Judicial Power to Administrative Agencies

The attempted grant of authority to the Secretary of the Department of Natural Resources in G.S. 113A-64 to assess a civil penalty of up to $100 per day for violations of the Sedimentation Pollution Control Act constitutes a legislative grant of judicial power prohibited by Art. IV, § 3 of the N.C. Constitution. *In the Matter of Appeal from Civil Penalty*, 1.

§ 13. Police Power; Safety

The statute requiring the wearing of a seat belt is a proper exercise of the police power of the State. *S. v. Swain*, 240.

§ 17. Personal and Civil Rights Generally

The trial court properly dismissed plaintiff's complaint in a 42 U.S.C. sec. 1983 action against the Secretary of the Department of Correction, the chairman and the

CONSTITUTIONAL LAW — Continued

members of the Parole Commission, and the superintendent of plaintiff's prison unit based upon failure to determine plaintiff's eligibility for early release on parole. *Harwood v. Johnson*, 306.

§ 23.1. Scope of Protection of Due Process; Taking of Property

Statutory authority leads to the conclusion that the North Carolina legislature has indicated that the rational nexus test is the proper test to be adopted in North Carolina for determining when an exaction would be the equivalent of a regulatory taking under the Fifth Amendment takings clause. *Batch v. Town of Chapel Hill*, 601.

The trial court in a subdivision application denial case correctly invalidated a condition that plaintiff dedicate a right of way for a parkway by recognizing plaintiff's claim for inverse condemnation. *Ibid.*

The denial of plaintiff's subdivision application on the basis of her refusal to accommodate a proposed parkway deprived plaintiff of due process of law. *Ibid.*

The trial court did not err in a subdivision application case by refusing to recognize that denial of the application on the basis of the developer's refusal to extend water and sewer lines to the property constituted an unconstitutional taking of the entire tract. *Ibid.*

§ 26. Full Faith and Credit Generally

The trial court correctly granted summary judgment for plaintiff, upholding a Virginia judgment against defendant, where defendant transacted business in Virginia by having its automobiles restyled by plaintiff in Virginia. *Automotive Restyling Concepts, Inc. v. Central Service Lincoln Mercury, Inc.*, 372.

§ 30. Discovery

The State substantially complied with discovery statutes with regard to a check written by defendant and a partnership share breakdown. *S. v. Speckman*, 265.

Material in defendant's parole records was privileged and could be obtained only by following the procedures of G.S. 15-207. *S. v. Russell*, 639.

§ 60. Racial Discrimination in Jury Selection Process

The trial court did not err in finding that the State's explanations for its peremptory challenges of six prospective black jurors were sufficient to rebut any prima facie showing of purposeful discrimination. *S. v. Cannon*, 246.

CONSUMER CREDIT

§ 1. Generally

The trial court properly awarded plaintiff finance charges on the outstanding balance of an open account. *Hedgecock Builders Supply Co. v. White*, 535.

CONTEMPT OF COURT

§ 3.1. Acts Constituting Indirect Contempt

Defendant's failure to appear as ordered constituted indirect criminal contempt, and the trial court erred in summarily holding defendant in contempt without a hearing. *Cox v. Cox*, 702.

§ 6. Hearings on Orders to Show Cause

The appearance of defendant's counsel was insufficient to satisfy a show cause order which specifically ordered defendant to appear. *Cox. v. Cox*, 702.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors

Although the amount of a contract exceeded the amount of plaintiff's limited general contractor's license when it was entered, plaintiff could recover funds due him for construction and could enforce a lien on defendants' property where he obtained an unlimited license two months after execution of the contract at a time when he had done only $2,800.00 worth of work, and the value of the work done by him was thus never in excess of his license limit. *Dellinger v. Michal*, 744.

§ 10. Contracts Limiting Liability for Negligence

The owner of a cosmetology school and the school's instructors could not contract away their duty of reasonable care by having customers sign a release before receiving cosmetology services at the school. *Alston v. Monk*, 59.

CORPORATIONS

§ 1.1. Disregarding Corporate Entity

Plaintiff could not sue her decedent's co-employee individually in tort in an action arising from a construction cave-in where the co-employee was the sole shareholder in a construction company and was the alter ego of the corporate employer. *Woodson v. Rowland*, 38.

§ 20. Dividends

Summary judgment was improperly granted for defendant and should have been granted for plaintiff in an action by a shareholder to recover a dividend paid by defendant corporation to all other Preferred A stockholders but not to plaintiff where defendant raised in defense a release. *McGladrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 708.

COURTS

§ 9.4. Jurisdiction to Review Rulings of another Superior Court Judge; Motions for Dismissal

The trial judge's pretrial dismissal of plaintiffs' complaint on the ground that there was no disputed issue of fact in effect overruled another judge's prior denial of defendant's motion for summary judgment and must be vacated. *Iverson v. TM One, Inc.*, 161.

§ 21. Conflict of Laws between States

The application of New York law to plaintiff's claims arising from a tractor-trailer accident in New York was not patently unfair even though New York could not assert personal jurisdiction. *Terry v. Pullman Trailmobile*, 687.

§ 21.5. Conflict of Laws between States; Tort Actions

The North Carolina statute of repose did not govern the disposition of negligence and strict liability claims arising from a tractor-trailer accident in New York. *Terry v. Pullman Trailmobile*, 687.

§ 21.6. Conflict of Laws between States; Actions for Breach of Warranty

The trial court properly applied the North Carolina statute of repose to an action for breach of express or implied warranties arising from a tractor-trailer accident in New York. *Terry v. Pullman Trailmobile*, 687.

COURTS — Continued

§ 21.7. Conflict of Laws between States; Contract Actions

Texas law governed a case involving the lease of computer equipment where the last act to make a binding lease occurred in Texas. *Tolaram Fibers, Inc. v. Tandy Corp.*, 713.

CRIMINAL LAW

§ 15.1. Pretrial Publicity as Ground for Change of Venue

The trial court did not err in denying defendant's motion for a change of venue because of pretrial publicity about his various sex-related charges and convictions. *S. v. Scarborough*, 422.

§ 26.7. Former Jeopardy; Void and Defective Indictments

Collateral estoppel applied to require dismissal of an indictment against defendant for manslaughter in the death of a fetus. *S. v. Parsons*, 175.

§ 34.1. Evidence of Defendant's Guilt of other Offenses Inadmissible to Show Character and Disposition to Commit Offense

Testimony by the prosecutrix that she did not scream or fight defendant because she knew "what he had done to other girls" was improperly admitted because the probative value of the testimony was substantially outweighed by its prejudicial effect. *S. v. Scarborough*, 422.

§ 34.6. Admissibility of Evidence of other Offenses to Show Knowledge

Testimony by the victim that defendant stated "they are never going to take me in again alive" was admissible to show guilty knowledge even if the statement did refer to previous incarceration. *S. v. Charles*, 430.

§ 34.8. Admissibility of Evidence of other Offenses to Show Modus Operandi or Common Plan

The trial court did not err in a prosecution for taking indecent liberties with children by allowing the State to introduce into evidence acts of unprosecuted misconduct by defendant. *S. v. Fultz*, 80.

§ 43.5. Videotapes

A proper foundation was laid for the admission of a videotape of an armed robbery for either substantive or illustrative purposes. *S. v. Cannon*, 246.

§ 51.1. Qualification of Experts; Showing Required; Sufficiency

The trial court did not err in qualifying a social worker to testify as an expert in child abuse. *S. v. Ayers*, 364.

§ 64. Evidence as to Intoxication

Defendant was not prejudiced by the trial judge's observation that defense counsel gave defendant "correct legal advice" about the defenses of insanity and intoxication and the trial judge's statement that "intoxication is not defense to crime in North Carolina." *S. v. Attmore*, 385.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

The trial court properly denied defendant's motion to suppress a pretrial photographic identification and an in-court identification of defendant by a rape victim. *S. v. Russell*, 639.

CRIMINAL LAW — Continued

§ 66.20. Voir Dire to Determine Admissibility of In-Court Identification Findings of Court

The evidence and findings supported the court's denial of one defendant's motion to suppress an in-court identification on the ground that it was tainted by impermissibly suggestive pretrial procedures. *S. v. Cannon*, 246.

§ 73. Hearsay Testimony in General

The trial court did not err in a prosecution for trafficking in heroin by excluding letters received by defendant after his arrest in which the writer admitted that he owned the controlled substances found at defendant's residence and apologized for any inconveniences. *S. v. Agubata*, 651.

§ 73.2. Statements not within Hearsay Rule

The testimony of a sheriff's department investigator as to why he returned to the vicinity of a crime scene was a statement of fact and did not amount to hearsay. *S. v. Colvin*, 152.

A rape victim's statements to a doctor were properly admitted under the medical diagnosis and treatment exception to the hearsay rule. *S. v. Summers*, 453.

§ 73.3. Statements not within Hearsay Rule; Statements Showing State of Mind

The trial court did not err in a prosecution for conspiracy, robbery, and assault by denying defendant's objections to testimony concerning a prior bank robbery. *S. v. Colvin*, 152.

§ 75. Admissibility of Confessions in General

The trial court did not err in a prosecution for conspiracy, robbery, and assault by denying defendant's motion to suppress an incriminating written statement. *S. v. Colvin*, 152.

§ 75.1. Admissibility of Confession; Effect of Fact that Defendant Is in Custody

Statements made by defendant to law officers were admissible since a reasonable person in defendant's circumstances would not have felt himself in custody, and the statements were voluntarily made. *S. v. Russell*, 639.

§ 75.2. Admissibility of Confession; Effect of Officer's Statements

Defendant's confession was not rendered inadmissible by an officer's statement that a kidnapping and rape victim's "ass prints" might be found on the hood of defendant's car. *S. v. Chambers*, 230.

§ 75.13. Voluntariness of Confession Made to Persons other than Police Officers

Defendant's confession during testimony in his brother's earlier trial was not coerced because the testimony was given as a result of defendant's own attorney's advice to cooperate with the authorities. *S. v. Clinding*, 555.

§ 75.14. Defendant's Mental Capacity to Confess Generally

Defendant's confession was not involuntary because of his diminished mental capacity. *S. v. Russell*, 639.

§ 76. Determination of Admissibility; Presumptions and Burden of Proof

Defendant's motion to suppress his oral and written incriminating statements was timely where defendant showed that he had not been notified of the State's intention to use the statements at trial within twenty working days of trial. *S. v. Marshall*, 398.

CRIMINAL LAW — Continued

Defendant did not waive his right to contest the admissibility of incriminating statements by his failure to give a legal basis for his motion to suppress these statements where the trial judge exercised his discretion not to summarily deny the motion but conducted a voir dire hearing and made written findings and conclusions. *Ibid.*

§ 76.5. Voluntariness of Confession; Voir Dire Hearing; Findings of Fact; Necessity for Findings

The trial judge was not required to make findings on the collateral issue of whether a detective attempted to entice defendant into giving a statement on the condition that a bond would be set if the statement was given, and failure of the trial court to include in its written order a conclusion that the confession was voluntary was not fatal where the trial judge orally ruled in court that the statements were voluntarily made. *S. v. Marshall*, 398.

§ 76.6. Voluntariness of Confession; Voir Dire Hearing; Sufficiency of Findings of Fact

The trial court made adequate findings to support its ruling admitting defendant's testimony in an earlier trial of his brother which amounted to a confession of the crime charged in this case. *S. v. Clinding*, 555.

§ 85. When Character Evidence Relating to Defendant Is Admissible

The trial court did not err in a prosecution for taking indecent liberties with children by excluding evidence of defendant's general character and reputation. *S. v. Fultz*, 80.

§ 85.1. Character Evidence; What Questions and Evidence Are Admissible; Defendant's Evidence

Defendant was not prejudiced when the court refused to permit a witness to testify that she had always found defendant to be trustworthy where the witness made the same point by other testimony. *S. v. Chambers*, 230.

§ 86. Impeachment of Defendant

There was no prejudicial error in a prosecution for taking indecent liberties with children from the admission of evidence of defendant's use of profanity and bad temper. *S. v. Fultz*, 80.

§ 88.4. Cross-examination of Defendant

The trial court did not err in permitting the State to cross-examine the defendant in an embezzlement and false pretense case about various financial matters and his financial status. *S. v. Speckman*, 265.

§ 88.5. Recross-examination

The trial court erred in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine by sustaining an objection from one defendant to further cross-examination by the other defendant. *S. v. Hamad*, 282.

§ 89.3. Corroboration; Prior Statements of Witness

A statement of the prosecutrix to defendant, "I don't really want to do this," was properly admitted to corroborate the prosecutrix's testimony that she told defendant that they shouldn't have sex. *S. v. Scarborough*, 422.

The court's instructions did not allow the jury to consider the prosecutrix's prior statement as substantive evidence. *Ibid.*

CRIMINAL LAW — Continued

§ 91.4. Continuance to Obtain New Counsel

The trial court did not err in denying defendant's motion for a continuance to give him time to hire new counsel because his court-appointed lawyer failed to investigate an insanity defense. *S. v. Attmore*, 385.

§ 91.7. Continuance on Ground of Absence of Witness

Defendant failed to show prejudice in the denial of his motion to continue based on the absence of a psychiatric witness. *S. v. Attmore*, 385.

§ 92.1. Consolidation Held Proper; Same Offense

The trial judge did not abuse his discretion by joining defendant and his two brothers for trial for conspiring to traffic in cocaine and trafficking in cocaine. *S. v. Fink*, 523.

§ 92.3. Consolidation of Multiple Charges against Same Defendant

The trial court did not err by denying defendant's pretrial motion to sever charges of assault from charges of robbery and conspiracy. *S. v. Colvin*, 152.

§ 92.4. Consolidation of Multiple Charges against Same Defendant Held Proper

The trial court did not err by joining five charges of taking indecent liberties with children for trial. *S. v. Fultz*, 80.

§ 92.5. Severance

The trial court did not err in a prosecution for trafficking in heroin by denying defendant's motion to sever his trial from that of his codefendant wife. *S. v. Agubata*, 651.

§ 97.2. No Abuse of Discretion in not Permitting Additional Evidence

The trial court did not abuse its discretion in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine by refusing defendant's motion to reopen his case where a mistrial had been declared as to the other two defendants on a Friday, defendant rested his case, and defendant moved on Monday to reopen the case. *S. v. Fink*, 523.

§ 99.4. Court's Expression of Opinion; Conduct in Connection with Objections and Rulings Thereon

Nine rulings of the trial court sustaining the State's objections to questions propounded to the prosecuting witness concerning her prior statements did not give the jury the impression that whether the witness had made prior inconsistent statements under oath was unimportant. *S. v. Allen*, 168.

§ 99.6. Court's Expression of Opinion; Conduct in Connection with Examination of Witnesses

The trial judge's questions to a child rape victim were asked to clarify the child's answers and did not amount to an expression of opinion as to the witness's credibility or defendant's guilt. *S. v. Allen*, 168.

§ 101.2. Juror's Exposure to Evidence not Formally Introduced

The trial court did not err in denying defendant's motion for mistrial made on the ground that a juror had overheard testimony during a voir dire hearing that defendant had been arrested. *S. v. Marshall*, 398.

§ 101.4. Conduct During Jury Deliberation

There was no prejudice in a prosecution for conspiracy, robbery, and assault from the trial court's communicating with the jury by means of notes where the

CRIMINAL LAW — Continued

jury had sent notes to the trial judge requesting certain evidence to review. *S. v. Colvin*, 152.

§ 112.2. Instructions on Reasonable Doubt; Particular Charges

The trial court's instructions on the duty of the jury to ascertain the truth did not lower the State's burden of proof to less than proof beyond a reasonable doubt. *S. v. Ayers*, 364.

§ 112.6. Charge Concerning Burden of Proof on Defendant; Affirmative Defenses

Defendant's testimony that he was "zooted" from crack cocaine on the date of the crime was insufficient to require the trial court to instruct the jury on the defense of voluntary intoxication. *S. v. Attmore*, 385.

§ 114.3. No Expression of Opinion in Charge

Defendant in a rape case failed to show prejudice from the trial judge's reference to the prosecuting witness as a "victim" in his charge to the jury. *S. v. Allen*, 168.

§ 117.1. Charge on Credibility of Witnesses

The court's instructions concerning prior inconsistent statements were proper. *S. v. Allen*, 168.

§ 128.1. Mistrial

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by denying defendant's motion for a mistrial based on defendant's physical and mental condition on the second day of trial. *S. v. Kinney*, 671.

§ 138. Severity of Sentence and Determination Thereof

The trial court did not abuse its discretion and defendant's sentences for conspiracy, robbery, and assault were not cruel and unusual. *S. v. Colvin*, 152.

A defendant who was sentenced to 35 years for trafficking 400 grams or more of cocaine received the presumptive sentence set out in G.S. 90-95 and therefore had no right of appeal after a guilty plea. *S. v. Willis*, 494.

§ 138.7. Severity of Sentence; Particular Matters and Evidence Considered

Defendants were not entitled to a new sentencing hearing in an armed robbery case because of the trial court's statement, made to defense counsel after learning that defendants had refused to plea bargain, that "I hope that both of you gentlemen have indicated to your clients what I have indicated to you would be the penalty in the event of a conviction in this case" where the trial court imposed sentences in excess of the presumptive term based upon its findings of aggravating and mitigating factors. *S. v. Cannon*, 246.

§ 138.9. Severity of Sentence; Credit for Time Served

Defendant was not denied his statutory right to credit for time served where he was sentenced to 20 years on a cocaine trafficking charge, with credit for time served awaiting judgment, and to 14 years on consolidated conspiracy charges beginning at the expiration of the trafficking sentence. *S. v. Fink*, 523.

§ 138.14. Fair Sentencing Act; Consideration of Aggravating and Mitigating Factors in General

In a resentencing hearing for second degree murder, it is unlikely that the judge, who had not been the trial judge, was able in fifteen minutes to give the per-

CRIMINAL LAW — Continued

tinent portions of the entire trial transcript such adequate review as to allow him to find premeditation and deliberation by a preponderance of the evidence. *S. v. Vandiver*, 695.

The trial court did not err in refusing to find as a statutory mitigating factor that defendant had a good reputation in the community. *S. v. Russell*, 639.

§ 138.28. Sentence; Aggravating Factor of Prior Convictions

The trial court properly found that aggravating factors of defendant's previous guilty plea to second degree rape and his conviction of carrying a concealed weapon outweighed factors in mitigation. *S. v. Charles*, 430.

A thirty-year sentence for kidnapping was proper where the court found that a prior conviction aggravating factor outweighed mitigating factors of drug abuse and combat service in Viet Nam. *S. v. Attmore*, 385.

The trial court erred in finding the prior conviction aggravating factor on the basis of the prosecutor's oral representation as to defendant's record, and it was immaterial whether the prosecutor was reading from the official records and whether those records were present and available in the courtroom. *S. v. Williams*, 752.

§ 138.29. Sentence; Other Aggravating Factors

The trial court could properly find as an aggravating factor for taking indecent liberties with a minor to which defendant pled guilty that defendant was actually guilty of a first degree sex offense. *S. v. Parker*, 102.

The trial court's finding as an aggravating factor for taking indecent liberties that defendant is unremorseful was not supported by evidence that defendant laughed during the sentencing hearing while the prosecutor was reading the police report. *Ibid.*

The evidence supported the trial court's finding of premeditation and deliberation as a nonstatutory aggravating factor for felonious assault, and the same evidence necessary to prove an intent to kill was not also used to prove premeditation and deliberation. *S. v. Smith*, 500.

The State was not estopped from asserting premeditation and deliberation as an aggravating factor for second degree murder where the indictment charged only second degree murder. *S. v. Vandiver*, 695.

§ 138.30. Sentence; Mitigating Factors in General

The trial court did not err in a prosecution for conspiracy, robbery, and assault by not finding the mitigating factors of passive participation in the crimes, age and immaturity, caution exercised to avoid bodily harm, and voluntary acknowledgment of wrongdoing. *S. v. Colvin*, 152.

§ 138.34. Sentence; Mitigating Factor of Mental or Physical Condition

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by failing to find as a mitigating factor that defendant was suffering from physical and mental conditions insufficient to constitute a defense but significantly diminishing his culpability for the offense. *S. v. Kinney*, 671.

§ 138.35. Sentence; Mitigating Factor of Immaturity

The trial court did not err in failing to find that defendant's immaturity significantly reduced his culpability for an offense of taking indecent liberties with a minor. *S. v. Parker*, 102.

CRIMINAL LAW — Continued

§ 138.37. Sentence; Mitigating Factor of Cooperative Conduct

The trial court erred when sentencing a defendant for multiple counts of trafficking in cocaine and conspiracy by refusing to consider whether defendant had rendered substantial assistance to law enforcement officers based on testimony from defendant at trial which implicated his codefendant. *S. v. Hamad*, 282.

§ 138.41. Sentence; Mitigating Factor of Good Character or Reputation

The trial court in an extortion case did not err in failing to find in mitigation that defendant was a person of good character and that he reasonably believed his conduct was legal. *S. v. Greenspan*, 563.

§ 138.42. Sentence; Other Mitigating Factors

The evidence did not require the trial court to find as a mitigating factor for taking indecent liberties with a minor that defendant believed the victim was sixteen years old. *S. v. Parker*, 102.

§ 142.2. Probation and Suspended Sentences and Judgments; Form of Judgment; Period of Probation or Suspension

A purported modification of the conditions of defendant's probation was ineffective where defendant was not given written notice of the modification even though he received oral notice. *S. v. Suggs*, 112.

§ 145.5. Parole

Material in defendant's parole records was privileged and could be obtained only by following the procedures of G.S. 15-207. *S. v. Russell*, 639.

§ 148. Judgments Appealable

Defendant had no right to appeal the denial of his motion to dismiss a criminal charge on the ground of double jeopardy. *S. v. Joseph*, 203.

§ 162. Necessity for Objections

Defendant in a rape case waived his right to assert any error on appeal concerning a witness's unresponsive testimony that defendant had been in jail for rape before where he failed to object or make a motion to strike at trial. *S. v. Marshall*, 398.

The trial court in a rape case did not abuse its discretion in requiring defendant to object to the examining physician's testimony as it occurred at trial rather than ruling on defendant's motion in limine to exclude certain statements allegedly made by the victim during her examination. *S. v. Summers*, 453.

§ 169.3. Error Cured by Introduction of other Evidence

Defendant was not prejudiced by the admission of opinion testimony by a social worker that amnesia is a symptom of sexually abused children where a physician had previously given similar testimony without objection. *S. v. Ayers*, 364.

Where blood and saliva samples from a rape victim were introduced into evidence without objection, defendant lost the benefit of an earlier objection. *S. v. Marshall*, 398.

DAMAGES

§ 9. Mitigation of Damages

The evidence in an action to recover for the loss of plaintiff's hair after it was colored by defendants did not require the trial court to give defendants' requested instruction on avoidable consequences. *Alston v. Monk*, 59.

DECLARATORY JUDGMENT ACT

§ 4.3. Availability of Remedy in Insurance Matters

A declaratory judgment action was dismissed where plaintiffs alleged that the individual defendants were uninsured motorists and sought a judgment declaring the status and limits of the coverages available to them from other defendants. *McLaughlin v. Martin*, 368.

A declaratory judgment action by an insured to have the rights and relations between the insured and insurers clarified was proper despite the insurer's argument that a policy provision made the action premature. *W & J Rives, Inc. v. Kemper Insurance Group*, 313.

DIVORCE AND ALIMONY

§ 16. Alimony Generally

Voluntary sexual intercourse by a spouse with a third party during the period of separation required by G.S. 50-6 is adultery and is a ground for alimony. *Adams v. Adams*, 274.

§ 16.8. Alimony; Findings; Ability to Pay

The trial court's findings as to the standard of living, value of the parties' estates, and defendant's earnings were adequate. *Adams v. Adams*, 274.

§ 21.3. Enforcement of Alimony Awards; Evidence and Findings

Defendant husband was liable to plaintiff wife for the amount of support provided for in a separation agreement even after defendant obtained custody of the parties' minor child from the plaintiff. *Brandt v. Brandt*, 438.

There was sufficient evidence to support the trial court's findings that defendant was deliberately trying to depress his income and that he was capable of complying with the support provisions of a separation agreement. *Ibid.*

§ 21.5. Enforcement of Alimony Awards; Punishment for Contempt

An order for payment of alimony which has been appealed is enforceable in the trial court by contempt proceedings during pendency of the appeal. *Cox v. Cox*, 702.

§ 21.6. Enforcement of Alimony Awards; Effect of Separation Agreements

A provision in a separation agreement incorporated into a divorce judgment was an alimony order, not a property settlement, and the trial court could properly award attorney fees to defendant in a proceeding to enforce this provision. *Wells v. Wells*, 226.

§ 21.9. Enforcement of Alimony Awards; Equitable Distribution

The trial court erred in an equitable distribution action by holding that plaintiff's retirement rights had not vested and that plaintiff's military pension was separate property. *Milam v. Milam*, 105.

§ 24.1. Determining Amount of Child Support

The fact that defendant had sole custody of and furnished the sole support for one of the parties' three children while contributing to the support of the two children in plaintiff's custody justified the trial court's consideration of the statutory "shared custody" factor in a child support proceeding. *Morris v. Morris*, 359.

DIVORCE AND ALIMONY — Continued

§ 24.2. Child Support; Effect of Separation Agreements

When the trial court is called upon for the first time to determine the appropriate level of child support, the presumption of reasonableness of the amount of child support provided for in a separation agreement is one of evidence only. *Morris v. Morris*, 359.

A child support proceeding must be remanded for a proper determination of the amount of support where the trial court improperly weighed and relied upon the amount provided for in a separation agreement. *Ibid.*

§ 24.6. Child Support; Burden of Proof; Sufficiency of Evidence Generally

The evidence was sufficient to support the trial court's finding that plaintiff's poor health rendered her unable to work in order to help support the parties' minor child. *Brandt v. Brandt*, 438.

The trial court did not err in concluding that some of defendant's living expenses, including private school tuition for the parties' daughter, were not reasonable and necessary and that defendant was not entitled to any retroactive or prospective child support. *Ibid.*

§ 30. Equitable Distribution

The district court had jurisdiction over a wife's equitable distribution claim even though a divorce action was not pending at the time the claim was asserted. *McIver v. McIver*, 116.

There was no prejudice in an equitable distribution action where the court's recitation in the findings of the extramarital nature of the parties' premarital relationship suggests that the trial judge may have improperly considered fault. *Ibid.*

The trial judge did not err by considering the parties' premarital contributions in an equitable distribution proceeding. *Ibid.*

The trial judge in an equitable distribution action improperly relied upon the parties' premarital relationship in classifying certain property as marital. *Ibid.*

The trial court erred in an equitable distribution action by classifying certain property as marital property. *Ibid.*

The trial court erred in an equitable distribution action by making erroneous and insufficient findings of fact and conclusions of law regarding classification of property as marital or separate. *Ibid.*

An equitable distribution order was incomplete and erroneous where it failed to classify, value and distribute various bank accounts and household goods, it contained no findings of the net value of the total marital estate, the distributed properties, or tracts of maritally owned real estate, it made an unequal division without findings that statutory factors were considered, and it failed to distribute three tracts of marital real estate but declared that the parties owned each tract as tenants in common. *Carr v. Carr*, 378.

The trial court erred in an equitable distribution order in its valuation of defendant's closely-held corporation by failing to place a value on the corporation's goodwill and failing to find a value for the numerous pieces of equipment used in the operation of the trucking concern. *Locklear v. Locklear*, 299.

The trial court erred in an equitable distribution order in its classification of a parcel of land as marital property. *Ibid.*

The trial court did not err in an equitable distribution order by classifying home improvements, and thus fire insurance proceeds, as marital property. *Ibid.*

The trial court's findings of fact and conclusions of law in an equitable distribution order did not support an unequal division of the marital property. *Ibid.*

DIVORCE AND ALIMONY — Continued

Plaintiff had an absolute right to an accounting of the rental income from two pieces of commercial property prior to the time these properties were equitably distributed where the parties held the properties as tenants by the entirety until their divorce and as tenants in common thereafter. *Beam v. Beam*, 509.

The wife's evidence supported the trial judge's findings as to the character of certain personal property. *Taylor v. Taylor*, 413.

The trial court's error in finding "by the greater weight of the evidence" that real property conveyed by the husband to himself and the wife as tenants by the entirety was marital property was harmless error where the husband failed to rebut the marital presumption. *Ibid.*

Case is remanded for further findings where it could not effectively be determined whether certain real property in fact belonged to the marriage and whether defendant should have been assigned the sole obligation of paying off its debt. *Ibid.*

An order of equal division of marital property is vacated where the judgment did not contain any findings about the parties' health and income even though evidence on these matters was presented at trial. *Ibid.*

The trial court in an equitable distribution proceeding erred in finding that plaintiff wife would be entitled to one-half of any amounts recovered by defendant for lost wages and medical expenses in a lawsuit against his former employer. *Ibid.*

Federal law precludes North Carolina from distributing Social Security benefits under North Carolina's Equitable Distribution statute. *Cruise v. Cruise*, 586.

Defendant, in requesting equitable distribution, did not make an election of remedies which barred her action for a constructive trust. *Lamb v. Lamb*, 680.

DOMICILE

§ 6. Domicile of College Students

There was substantial evidence upon which the State Residence Committee could base its decision to deny petitioner's request for in-state tuition status. *Wilson v. State Residence Committee of U.N.C.*, 355.

The trial court did not err by not requiring the State Residence Committee to give specific reasons for its decisions. *Ibid.*

DRAINAGE

§ 4. Drainage Commissioners and Officers; Powers and Authority

Plaintiff drainage district was subject to the open meetings requirement, but failure to notify defendants of meetings did not deprive defendants of due process because defendants had the right to seek a declaratory judgment voiding the disputed action. *Northampton County Drainage District Number One v. Bailey*, 68.

There is no unconstitutional infirmity in G.S. 156-81(a) and (i) in permitting the Clerk of Superior Court to either appoint the commissioners or provide for their election. *Ibid.*

§ 8. Enforcement

Plaintiff drainage district's failure to levy the annual assessments for 1974 and 1983 by the first Monday in September of those years did not bar collection of the assessments. *Northampton County Drainage District Number One v. Bailey*, 68.

EASEMENTS

§ 5. Creation of Easements by Necessity

The law of this state will imply an easement by necessity in favor of a grantor over the land of a grantee. *Cieszko v. Clark*, 290.

A claim for an easement by necessity may be barred by the doctrine of laches. *Ibid.*

§ 7.2. Actions to Establish Easements; Verdict and Findings

Evidence was sufficient to support the trial court's conclusion that an easement for "maintaining landscaping and shrubbery" was exclusively owned by plaintiff, and that defendants' construction of a driveway over the easement interfered with plaintiff's use and enjoyment of the easement. *Rollinwood Homeowners Assoc. v. Jarman*, 724.

ELECTION OF REMEDIES

§ 4. Acts Constituting Election

Defendant, in requesting equitable distribution, did not make an election of remedies which barred her action for a constructive trust. *Lamb v. Lamb*, 680.

EMBEZZLEMENT

§ 5. Evidence

An attorney's testimony about attorney-client relationships and attorney trust accounts was relevant in a prosecution of an attorney for embezzlement of a client's money. *S. v. Speckman*, 265.

§ 6. Sufficiency of Evidence

The evidence was sufficient to support a verdict finding defendant attorney guilty of embezzlement of funds given to him by a client to purchase a share in a waterslide operation. *S. v. Speckman*, 265.

EQUITY

§ 2. Laches

The evidence in a summary judgment hearing presented issues of fact as to whether plaintiffs' delay in bringing an action to establish an easement by necessity was unreasonable and whether defendants were prejudiced by the delay. *Cieszko v. Clark*, 290.

§ 2.2. Applicability of Doctrine of Laches to Particular Proceedings

A claim for an easement by necessity may be barred by the doctrine of laches. *Cieszko v. Clark*, 290.

EVIDENCE

§ 22.1. Evidence at Trial of another Case Arising from Same Subject Matter

The trial court in a wrongful death action properly excluded the former testimony of an unavailable witness who had testified at defendant driver's criminal trial concerning other accidents at the curve where the fatal accident in question occurred. *Hinnant v. Holland*, 142.

EVIDENCE — Continued

§ 31. Best and Secondary Evidence Related to Writings

The trial court in an action arising from the installation of a roof correctly ruled that an internal memorandum from the manufacturer of the roofing panels could be used only to refresh the recollection of plaintiff's manager where the witness denied receiving the memorandum. *Hedgecock Builders Supply Co. v. White*, 535.

§ 50.4. Testimony by Medical Experts

A doctor's opinion testimony did not have to be expressed in terms of reasonable probability or certainty, and an orthopedic specialist was qualified to conclude whether a patient's reactions to tests were genuine or feigned. *Polk v. Biles*, 86.

EXTORTION

§ 1. Generally

Defendant's offer in a telephone call to refrain from pressing criminal charges in exchange for money violated the extortion statute even if defendant reasonably believed that the threatened party was guilty of a crime. *S. v. Greenspan*, 563.

The extortion statute, G.S. 14-118.4, superseded the blackmail statute, G.S. 14-118. *Ibid.*

The trial court's instruction in an extortion case that "stating that one will obtain arrest warrants for some alleged crime unless one is paid some money is a threat" was a correct statement of the law. *Ibid.*

FALSE PRETENSE

§ 3.1. Sufficiency of Evidence

The evidence was sufficient to support a verdict finding defendant attorney guilty of obtaining property from a client by false pretense based on a misrepresentation to the client of the financial status of a waterslide operation. *S. v. Speckman*, 265.

§ 3.2. Instructions

The trial court's instruction in a prosecution for obtaining property by false pretense that the intent to deceive must have been present at the time the statement was made, not when the funds were received, was a correct instruction. *S. v. Speckman*, 265.

FIDUCIARIES

§ 2. Evidence of Fiduciary Relationship

The evidence was sufficient to show that there was a fiduciary relationship between the parties concerning real estate purchased for resale and that defendant violated his duty as a fiduciary. *Bumgarner v. Tomblin*, 571.

FRAUD

§ 11. Competency and Relevancy of Evidence

Plaintiffs were properly permitted to testify as to the fair market values at various times of properties involved in a breach of fiduciary duty even though fair

FRAUD — Continued

market value was not the standard for the damages claimed. *Bumgarner v. Tomblin*, 571.

§ 12. Sufficiency of Evidence

The trial court properly entered summary judgment for defendant in an action for fraud in the sale of a used car that had been wrecked and rebuilt. *Ramsey v. Keever's Used Cars*, 187.

In an action for constructive fraud based upon breach of fiduciary duty, it was immaterial whether defendant profited from the transactions he performed as a fiduciary, and punitive damages were authorized where the jury found all the elements of constructive fraud. *Bumgarner v. Tomblin*, 571.

GRAND JURY

§ 3.3. Sufficiency of Evidence of Racial Discrimination

The trial court did not err in a prosecution for conspiracy, robbery, and assault by denying defendant's motion for a continuance to investigate the constitutionality of the indictment based on the information and belief that grand juries in Bladen County have had only one black foreman in the last forty years. *S. v. Colvin*, 152.

HABEAS CORPUS

§ 2.1. Availability of Writ of Habeas Corpus

The trial court did not err by denying petitioner's petition for a writ of habeas corpus where petitioner had initially been selected to participate in a parole program but his contract was rescinded after membership of the Parole Commission changed. *Freeman v. Johnson*, 109.

HIGHWAYS AND CARTWAYS

§ 3. Highway Patrol

The decision of *Bullins v. Schmidt*, 322 N.C. 80, making pursuing law officers liable only for gross negligence, will be applied retroactively. *Fowler v. N.C. Dept. of Crime Control & Public Safety*, 733.

A state trooper was not grossly negligent in following a speeding vehicle at midnight on a rural two-lane highway in a sparsely populated area at speeds of 115 m.p.h. without activating either his siren or flashing blue light. *Ibid.*

§ 6. Alteration of Routes and Abandoned Sections

The trial court erred by entering summary judgment for plaintiffs and by denying defendants' motion to dismiss in an action for an injunction preventing defendants from using an unopened subdivision street. *Rudisill v. Icenhour*, 741.

§ 9.2. Proceedings under the Tort Claims Act

The Industrial Commission did not err by dismissing a claim against the Department of Transportation for negligent planning and design of improvements to a bridge arising from injuries received by plaintiff after a third party threw or dropped a water hydrant cap from the bridge onto the car in which plaintiff was riding. *Stallings v. N.C. Dept. of Transportation*, 346.

HUSBAND AND WIFE

§ 1. Mutual Rights and Duties Generally

The trial court erred by granting defendant's motion for a Rule 12(b)(6) dismissal of an action in which plaintiff sought an award of support from her incompetent husband's estate. *Cline v. Teich*, 257.

§ 10. Requisites and Validity of Separation Agreement

The trial court had authority to incorporate a separation agreement into a divorce judgment and to find plaintiff in contempt for failing to make alimony payments required by the agreement and the divorce judgment even if the separation agreement was not properly acknowledged because the notary public taking the acknowledgment was defendant's attorney, was paid a fee by plaintiff, and thus had an interest in the agreement. *Wells v. Wells*, 226.

§ 10.1. Void Agreements

The trial court erred in determining as a matter of law that a separation and property settlement agreement was unconscionable before defendant had the opportunity to offer all of his evidence concerning the validity of the agreement. *Garris v. Garris*, 467.

INDICTMENT AND WARRANT

§ 8.4. Election between Offenses

The trial court erred in denying defendant's motion to require the State to elect between charges of embezzlement and obtaining property by false pretense where the same $7,500 was involved in both offenses, but such error was not prejudicial where a single judgment was pronounced on the verdicts. *S. v. Speckman*, 265.

§ 12.2. Amendments; Particular Matters

The trial court did not err in a prosecution for conspiracy, armed robbery, and assault by permitting the State to amend an unsigned indictment. *S. v. Colvin*, 152.

§ 17.2. Variance as to Time

There was a fatal variance between an indictment for kidnapping and the date shown by the State's evidence at trial. *S. v. Booth*, 729.

INJUNCTIONS

§ 16. Liabilities on Bonds

The trial court erred in failing to make findings and conclusions, after defendant so requested, on the amount of bond it required for issuance of a preliminary injunction. *Iverson v. TM One, Inc.*, 161.

INSANE PERSONS

§ 6. Support of Incompetent's Dependents

An action by a wife seeking support from her incompetent husband's estate should have been dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the action was filed in district court. *Cline v. Teich*, 257.

INSURANCE

§ 18.1. Avoidance of Policy for Misrepresentations as to Health

A life insurance applicant's negative answer to an ambiguous question as to whether he had consulted or been treated by a physician for any condition other than a routine physical examination within the preceding two years was neither false nor material as a matter of law where the insured had been treated for a lingering cold or minor respiratory illness which neither endangered his life nor restricted his activities or work, and the trial court erred in directing a verdict for defendant insurer on the ground that the policy was voided as a matter of law. *Cockerham v. Pilot Life Ins. Co.*, 218.

§ 87.2. Automobile Liability Insurance; "Omnibus" Clause; Proof of Permission to Use Vehicle

Plaintiffs' evidence was sufficient for the jury on issues as to whether a driver was in lawful possession of an automobile at the time of an accident and whether he was a resident of the same household as the owner so as to be covered by the owners' automobile liability policy. *Wilson v. State Farm Mut. Auto. Ins. Co.*, 320.

§ 100. Automobile Liability Insurance; Obligations of Parties after Accident; Duty of Insurer to Defend

Where defendant automobile liability insurer unjustifiably refused to defend an insured driver in an action brought by plaintiffs, the trial court had the authority to order defendant to pay the amount of a reasonable consent judgment entered in good faith by plaintiffs and the driver even though such amount exceeded the limits of the policy issued by defendant. *Wilson v. State Farm Mut. Auto. Ins. Co.*, 320.

§ 103. Automobile Liability Insurance; Forwarding of Summons or other Suit Papers to Insurer

Where an insured driver mailed a copy of the complaint to plaintiff insurer, and a default judgment for $200,000 was entered against the driver, the driver's failure to forward to plaintiff insurer the notice of entry of default and the notice of hearing on default and inquiry would not constitute a violation of the insurance contract which voided coverage above the compulsory amount. *Aetna Casualty & Surety Co. v. Welch*, 211.

§ 143. Construction of Property Damage Policies Generally

An exclusionary clause in an insurance policy for property damage did not apply. *W & J Rives, Inc. v. Kemper Insurance Group*, 313.

The trial court did not err in an action for a declaratory judgment against two insurance companies by granting summary judgment against Aetna on a claim that Aetna was to provide excess coverage and a defense. *Ibid.*

An excess insurer had a duty to defend despite policy language stating that the duty to defend only arose after the exhaustion of the underlying limit of liability by payment of claims. *Ibid.*

INTOXICATING LIQUOR

§ 14. Sufficiency of Evidence of Unlawful Sale

There was sufficient evidence of a transfer for consideration to support defendant's conviction of unlawful sale of an alcoholic beverage to an undercover officer. *S. v. Fletcher*, 50.

A defendant charged with the unlawful sale of an alcoholic beverage had the burden of proving that he possessed a permit to sell alcohol. *Ibid.*

JUDGMENTS

§ 35.1. Res Judicata in General

Where a prior suit between the parties involved only adjudication of whether plaintiff was in default for three payments under an agreement to purchase assets, res judicata did not preclude defendant's counterclaim in this action to collect the balance due under the contract. *Shaw v. LaNotte, Inc.*, 198.

JURY

§ 6.3. Propriety and Scope of Voir Dire Examination Generally

The trial court in a murder case abused its discretion in refusing to permit defense counsel to ask prospective jurors whether any of them "felt" defendant had to be guilty of some offense simply because he fired a gun which resulted in the death of another person, and to ask one prospective juror whether she "felt" that she would uphold her service as a juror equally well by returning a verdict of not guilty as she would by returning a verdict of guilty. *S. v. Parks*, 181.

§ 7.4. Challenge to the Array; Sufficiency of Evidence of Racial Discrimination

Defendant failed to make out a prima facie case of racial discrimination in the selection of the petit jury. *S. v. Attmore*, 385.

§ 7.7. Waiver of Right to Challenge for Cause

Defendant could not properly raise an issue as to whether the trial court erred in denying his challenge for cause of a prospective juror where defendant did not exhaust his peremptory challenges at trial. *S. v. Charles*, 430.

§ 7.14. Manner of Exercising Peremptory Challenges

The trial court did not err in finding that the State's explanations for its peremptory challenges of six prospective black jurors were sufficient to rebut any prima facie showing of purposeful discrimination. *S. v. Cannon*, 246.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

There was no merit to defendant's contention that the evidence did not establish a restraint separate and apart from the restraint used in committing a sexual offense when the kidnapping was based upon a confinement or removal to facilitate the commission of a sexual offense. *S. v. Chambers*, 230.

The victim was not released in a safe place so as to require the degree of kidnapping to be reduced. *Ibid.*

Defendant could be convicted of both first degree kidnapping and a sexual assault where defendant's failure to release the victim in a safe place and not the sexual assault raised the kidnapping charge to first degree. *Ibid.*

§ 1.3. Instructions

The trial court's instruction that the State must prove beyond a reasonable doubt that defendant confined, restrained or removed the victims for the purpose of facilitating an armed robbery was sufficient for the jury to understand that it must find that the confinement or removal was separate and apart from the robbery in order to find defendant guilty of kidnapping. *S. v. Clinding*, 555.

In a trial on an indictment charging kidnapping for the purpose of facilitating armed robbery, defendant was not prejudiced by the trial court's erroneous instruc-

KIDNAPPING — Continued

tion permitting the jury to find defendant guilty if it found the kidnapping was for the purpose of facilitating common law robbery. *Ibid.*

The trial court did not commit plain error in instructing the jury on restraint when the indictment alleged only removal and confinement as theories of kidnapping. *Ibid.*

LARCENY

§ 7. Sufficiency of Evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for larceny of a bank card and for financial transaction card theft. *S. v. Marshall*, 398.

LIMITATION OF ACTIONS

§ 1.1. Construction of Limitation Statutes Generally

The statute of limitations was not available to intervenors in an action by a drainage district to collect assessments. *Northampton County Drainage District Number One v. Bailey*, 68.

§ 12.1. New Action after Failure of Original Suit

Plaintiffs' failure to reinstate this action within one year of a voluntary dismissal did not bar the action where the general statute of limitation has not expired. *Cieszko v. Clark*, 290.

MASTER AND SERVANT

§ 11.1. Covenants not to Compete

The trial court properly denied a preliminary injunction to enforce a covenant not to compete between physicians where plaintiff would be unlikely to prevail at trial because the covenant was void as against public policy. *Iredell Digestive Disease Clinic v. Petrozza*, 21.

§ 21. Liability of Contractor for Injuries to Third Persons

Summary judgment was properly granted for defendant general contractor in an action arising from a construction cave-in where plaintiff, whose decedent was an employee of the subcontractor, was alleging liability based on negligent hiring of the subcontractor. *Woodson v. Rowland*, 38.

§ 21.1. Liability of Contractor for Injuries to Third Persons; Inherently Dangerous Work

The trial court properly granted summary judgment for defendant general contractor and project owner in a negligence action arising from a construction cave-in arising from the subcontractor's failure to comply with appropriate OSHA regulations for trench work. *Woodson v. Rowland*, 38.

§ 49. Workers' Compensation; "Employees" within the Meaning of the Act

A CETA program participant was employed by a county under a "contract of hire" and was also an "apprentice" so that he was an employee of the county within the purview of the Workers' Compensation Act. *Sutton v. Ward*, 215.

MASTER AND SERVANT — Continued

§ 50.1. Workers' Compensation; Who Are Independent Contractors; Determination

Plaintiff carpet installer was an independent contractor rather than an employee of defendant at the time of an accident and thus was not entitled to workers' compensation. *Ramey v. Sherwin-Williams Co.*, 341.

§ 55.6. Workers' Compensation; Relation of Injury to Employment Particularly as to "in the course of" the Employment

Plaintiff's accident arose out of but not in the course of his employment where he had been fired several hours earlier and was on the jobsite to obtain his paycheck as instructed by his supervisor, the supervisor was not in his trailer, plaintiff went up on the roof in search of him, and plaintiff fell through the roof to the floor below. *Byrd v. George W. Kane, Inc.*, 490.

§ 58. Workers' Compensation; Injuries Compensable; Intoxication of Employee

The evidence supported the Industrial Commission's determination that plaintiff's intoxication was not a proximate cause of his injury and thus did not prohibit the recovery of workers' compensation benefits. *Gaddy v. Anson Wood Products*, 483.

§ 65.2. Workers' Compensation; Back Injuries

Although claimant could point to no specific instant in time when his back began to hurt, the Industrial Commission erred in concluding that claimant suffered no injury as a result of a specific traumatic incident where claimant presented evidence that he repeatedly jumped on and off fire trucks, sometimes in full gear, for a fifteen hour period while fighting fires, and that his injury could have been caused by these events. *Richards v. Town of Valdese*, 222.

§ 69.1. Workers' Compensation; Meaning of "Incapacity" and "Disability"

The Industrial Commission erred in finding that because plaintiff reached maximum medical improvement she was not entitled to additional temporary total disability payments for the time her employer refused, out of concern for her safety, to allow her to return to work. *Watson v. Winston-Salem Transit Authority*, 473.

§ 73. Workers' Compensation; Loss of Specific Members

Plaintiff's injury resulted in the loss of more than one phalange, and plaintiff was entitled to an award for loss of a finger, where a physician excised a portion of the bone of the middle phalange in order to cover the remaining bone with tissue. *Gaddy v. Anson Wood Products*, 483.

§ 77.2. Workers' Compensation; Modification and Review of Award; Time for Application

Defendant's defense in a workers' compensation case that plaintiff's action was a request for a change of condition and was barred because it was not timely brought could not be raised for the first time on appeal. *Nelson v. Food Lion, Inc.*, 592.

§ 85.3. Workers' Compensation; Jurisdiction to Review and Amend Award

The full Industrial Commission erred in denying plaintiff's motion for the payment of future medical expenses on the ground that the issue of future medical expenses was not properly preserved under the Commission's rules. *Joyner v. Rocky Mount Mills*, 478.

MASTER AND SERVANT — Continued

§ 87. Claim under Workers' Compensation Act as Precluding Common Law Action

Plaintiff's remedy was limited to the Workers' Compensation Act in an action arising from a cave-in at a construction site where plaintiff alleged that the conduct of her decedent's employer was so grossly negligent as to be equivalent to an intentional tort. *Woodson v. Rowland*, 38.

§ 94.1. Workers' Compensation; Specific Instances where Findings of Fact Are Incomplete

Findings by the Industrial Commission were insufficient because they did not address whether plaintiff's knee injury was caused by or related to an earlier ankle injury for which she had received compensation benefits. *Nelson v. Food Lion, Inc.*, 592.

§ 96.1. Workers' Compensation; Scope of Review

Testimony by a doctor in a workers' compensation case as to whether the worker had a general bodily disability due to musculoskeletal injuries was irrelevant to the appeal where the proceeding below was conducted only to determine whether the worker's bruised kidney was permanently injured. *Fowler v. B. E. & K. Construction, Inc.*, 237.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

The ESC erred in failing to make findings as to whether mistakes for which claimant was fired were "inadvertent" so that they would not constitute "substantial fault" which would disqualify her from receiving unemployment compensation benefits. *Dunlap v. Clarke Checks, Inc.*, 581.

§ 110. Proceedings before Employment Security Commission

Where there is evidence in the record to support a conclusion on a material issue, the superior court may not grant an employer more than one opportunity before the ESC to produce other evidence to prove that a claimant is disqualified from receiving unemployment compensation. *Dunlap v. Clarke Checks, Inc.*, 581.

MUNICIPAL CORPORATIONS

§ 29. Nature and Extent of Municipal Police Power Generally

The trial court in a subdivision application case correctly invalidated the town's requirement that plaintiff extend water and sewer lines to her property where plaintiff had received preliminary approval from the county health department for septic tank systems. *Batch v. Town of Chapel Hill*, 601.

§ 30.6. Zoning; Special Permits

A 3-2 vote of a county zoning board which was affirmed by the appellate court resulted in the formal issuance of a special use permit for the operation of a quarry, and remand by the appellate court was for the purpose of requiring the zoning board to prepare a summary of the evidence heard at the initial hearing and set out findings of fact to support its grant of the special use permit. *Cardwell v. Smith*, 505.

Whether an amended zoning ordinance applied to defendants to preclude them from receiving building permits or whether defendants were entitled to building permits by virtue of the special use permit granted by the zoning board prior to amendment of the ordinance can be decided only after a final determination of the validity of the special use permit originally granted. *Ibid.*

MUNICIPAL CORPORATIONS — Continued

§ 30.8. Construction and Interpretation of Zoning Regulations

The legal principles applied in review of zoning applications are relevant to subdivision application denial cases because zoning ordinances and subdivision ordinances both limit private property rights. *Batch v. Town of Chapel Hill*, 601.

§ 30.10 Zoning; Particular Requirements and Restrictions

The trial court's conclusion that the town's requirement that plaintiff dedicate a right of way or accommodate a subdivision plan to a proposed parkway was unsupported by statutory authority was consistent with the subdivision enabling statute. *Batch v. Town of Chapel Hill*, 601.

§ 31.2. Scope and Extent of Judicial Review

Denial of a subdivision application may be reviewed by certiorari, or an aggrieved plaintiff may bring an original complaint, or join causes of action as permitted by G.S. 1A-1, Rule 18(a). *Batch v. Town of Chapel Hill*, 601.

§ 37. Regulations Relating to Safety

Defendant city acted without authority in ordering the demolition of a dwelling unfit for human habitation without giving the owner notice and an opportunity to be heard in the manner required by statute, and the city was liable in damages for the value of the building at the time of demolition irrespective of whether the owner had actual notice in time to have protected his rights. *Newton v. City of Winston-Salem*, 446.

NARCOTICS

§ 3.3. Opinion Testimony

Two law officers were properly permitted to give expert opinion testimony that the substance in a clear plastic bag provided by defendant was marijuana. *S. v. Fletcher*, 50.

§ 4. Sufficiency of Evidence

The State's evidence was sufficient for the jury in a prosecution for the sale of marijuana to an undercover officer. *S. v. Fletcher*, 50.

The trial court properly denied defendant's motion to dismiss charges of trafficking in heroin where methaqualone made up the majority of the weight of the mixture of the controlled substances. *S. v. Agubata*, 651.

§ 4.2. Sufficiency of Evidence in Cases Involving Sale to Undercover Narcotics Agents

The State's evidence was sufficient for the jury in a prosecution for possession of marijuana with intent to sell. *S. v. Fletcher*, 50.

§ 4.4. Insufficiency of Evidence of Constructive Possession

The evidence was insufficient to show that defendant had constructive possession of controlled substances found in the bathroom and bedroom of a mobile home so as to support submission to the jury of charges of trafficking in those controlled substances. *S. v. Davis*, 627.

Evidence was insufficient to show that defendant exercised control over an outbuilding and therefore had constructive possession of drugs found therein. *Ibid.*

§ 4.5. Instructions

The defendant in a trafficking in heroin prosecution was not entitled to an instruction on felony possession of heroin based on the lack of evidence that he knew

NARCOTICS — Continued

of the presence of any of the heroin packages except one containing .6 grams. *S. v. Agubata*, 651.

There was no prejudice in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine involving more than 400 grams from the court's instruction that defendant could be found guilty based on more than 200 but less than 400 grams. *S. v. Hamad*, 282.

§ 5. Punishment

Even if defendant did render substantial assistance in the identification and apprehension of others involved in the drug trade, whether to reduce his sentence was in the trial judge's discretion. *S. v. Willis*, 494.

The Rules of Evidence do not apply to a sentencing hearing under G.S. 90-95. *Ibid.*

§ 6. Forfeitures

The trial court erred in a prosecution for trafficking in cocaine and conspiracy to traffic in cocaine by ordering the forfeiture of unmarked currency seized from defendant's shirt pocket when he was arrested. *S. v. Fink*, 523.

NEGLIGENCE

§ 7. Wilful or Wanton Negligence

A state trooper was not grossly negligent in following a speeding vehicle at midnight on a rural two-lane highway in a sparsely populated area at speeds of 115 m.p.h. without activating either his siren or flashing blue light. *Fowler v. N.C. Dept. of Crime Control & Public Safety*, 733.

§ 13.1. Contributory Negligence; Knowledge and Appreciation of Danger

Plaintiff was not contributorily negligent as a matter of law in failing to have a patch test before she had her hair dyed by defendants. *Alston v. Monk*, 59.

§ 14. Contributory Negligence; Assumption of Risk

Plaintiff's claim for loss of hair allegedly caused by defendants' negligent performance of hair coloring services was not barred as a matter of law by assumption of the risk when plaintiff went to a cosmetology school which uses students to color and style hair. *Alston v. Monk*, 59.

§ 40. Instruction on Proximate Cause

The trial court's instruction on causation was supported by the opinion of plaintiff's expert that dye used in coloring plaintiff's hair caused her baldness. *Alston v. Monk*, 59.

§ 50.1. Negligence in Condition or Use of Land and Building; Other Conditions

The trial court erred in granting defendants' motions for summary judgment in a negligence action arising from the fall of a worker through a loading dock canopy. *Langley v. R. J. Reynolds Tobacco Co.*, 327.

§ 54. Contributory Negligence of Invitee

There were material questions of fact as to plaintiff's contributory negligence in an action arising from plaintiff's fall through a loading dock canopy. *Langley v. R. J. Reynolds Tobacco Co.*, 327.

PARENT AND CHILD

§ 1.5. Procedure for Termination of Parental Rights; Right to Counsel

Respondent was not denied effective assistance of counsel in a proceeding to terminate parental rights when counsel advised her to consent to orders which provided that her children would remain in foster care or when the trial court denied counsel's motion to continue or withdraw from the case. *In re Bishop*, 662.

The trial court in a proceeding to terminate parental rights did not err in admitting evidence of events which occurred after the filing of the petition. *Ibid.*

§ 1.6. Procedure for Termination of Parental Rights; Sufficiency of Evidence

Evidence was sufficient to support a termination of respondent's parental rights under G.S. 7A-289.32 in that she willfully left her children in foster care for more than eighteen months without making reasonable progress in correcting the conditions which led to the removal of her children. *In re Bishop*, 662.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 12.2. Duty and Liability of Pharmacists

The trial court erred by granting defendants' motion for a Rule 12(b)(6) dismissal in a wrongful death action against a pharmacy and pharmacist. *Ferguson v. Williams*, 336.

PLEADINGS

§ 37. Issues Raised by the Pleadings

Plaintiff's allegations admitted in defendants' answers will be taken as true and need not be proven. *Alston v. Monk*, 59.

PUBLIC OFFICERS

§ 9. Personal Liability of Public Officers to Private Individuals

A parole case analyst is a public employee rather than a public official and thus may be individually liable for negligence and false imprisonment. *Harwood v. Johnson*, 306.

The Secretary of the Department of Correction and the chairman and members of the Parole Commission are public officials and are immune from individual liability for allegedly negligent acts which are within the scope of their authority. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 3. Indictment

The addition of a rape victim's last name to one of four indictments involving the same victim was not an improper amendment of the indictment. *S. v. Marshall*, 398.

§ 4. Competency of Evidence

Defendant was not prejudiced by the trial court's erroneous admission of a doctor's opinion that an abrasion over the victim's urethra could have happened during intercourse performed at knife-point or under duress. *S. v. Marshall*, 398.

§ 4.1. Proof of other Acts and Crimes

Evidence of other sexual acts committed by defendant against the child victim was admissible under Rule of Evidence 404(b) to show motive, opportunity, intent, plan or identity. *S. v. Allen*, 168.

RAPE AND ALLIED OFFENSES — Continued

Testimony by the prosecutrix that she did not scream or fight defendant because she knew "what he had done to other girls" was improperly admitted because the probative value of the testimony was substantially outweighed by its prejudicial effect. *S. v. Scarborough*, 422.

The trial court in a first degree rape case did not err in allowing evidence of similar incidents committed by defendant against the child victim. *S. v. Summers*, 453.

§ 4.2. Physical Condition of Prosecutrix

The trial court in a rape case did not err by denying a motion to continue a voir dire in order that the victim's medical records could be obtained for the purpose of cross-examining her doctor more fully. *S. v. Russell*, 639.

§ 5. Sufficiency of Evidence

Testimony by an alleged child rape victim was sufficient to prove vaginal intercourse even though the victim did not identify with scientific accuracy the portions of her anatomy and that of defendant involved in the assault. *S. v. Allen*, 168.

Defendant could be convicted of both first degree kidnapping and a sexual assault where defendant's failure to release the victim in a safe place and not the sexual assault raised the kidnapping charge to first degree. *S. v. Chambers*, 230.

The State's evidence was sufficient for the jury in a prosecution of defendant for first degree rape and first degree sexual offense. *S. v. Marshall*, 398.

There was sufficient evidence that defendant used or threatened to use force to overcome the prosecutrix's will so as to support submission of an issue of second degree rape to the jury. *S. v. Scarborough*, 422.

The trial court did not err in failing to instruct on lesser included offenses of first degree rape where the victim's testimony showed penetration and evidence that defendant used a rope to choke the victim until she lost consciousness supported a reasonable inference that the rope as used by defendant was a dangerous weapon as a matter of law. *S. v. Charles*, 430.

The evidence was sufficient for the jury in a prosecution for first degree rape of an 11-year-old child even though the victim's testimony was not scientifically accurate. *S. v. Summers*, 453.

§ 19. Taking Indecent Liberties with Child

The indictments in a prosecution for taking indecent liberties with a child were sufficient. *S. v. Fultz*, 80.

Evidence was sufficient for the jury in a prosecution for taking indecent liberties with a child. *S. v. Allen*, 168.

ROBBERY

§ 4.3. Armed Robbery Cases where Evidence Held Sufficient

The State's evidence was sufficient for the jury to find that defendant was one of two armed men who robbed a cafe. *S. v. Cannon*, 246.

RULES OF CIVIL PROCEDURE

§ 15.2. Amendments to Conform to the Evidence

The issue of contributory negligence was tried by the implied consent of the parties. *Alston v. Monk*, 59.

RULES OF CIVIL PROCEDURE — Continued

§ 16. Pretrial Procedure

The trial court did not err in the admission during plaintiff's rebuttal of a photograph of plaintiff which had not been listed in the pretrial order. *Alston v. Monk*, 59.

§ 41.1. Voluntary Dismissal

Plaintiffs' failure to reinstate this action within one year of a voluntary dismissal did not bar the action where the general statute of limitation had not expired. *Cieszko v. Clark*, 290.

Plaintiffs could properly take a voluntary dismissal after the trial court heard argument of counsel for defendants at a summary judgment hearing where plaintiffs had submitted affidavits in opposition to defendants' summary judgment motion prior to the hearing, but plaintiffs' attorney had not presented additional evidence or argued his clients' position at the time of the voluntary dismissal. *Wesley v. Bland*, 513.

§ 56. Summary Judgment

Plaintiff was not prejudiced by the trial court's ruling on defendant's motion for summary judgment before plaintiff obtained service of process on a second defendant or served discovery on either defendant. *Ramsey v. Keever's Used Cars*, 187.

§ 56.5. Summary Judgment; Findings of Fact

A party cannot cure its failure to submit appropriate proof to support summary judgment by requesting findings based upon arguments to the trial court. *Cieszko v. Clark*, 290.

§ 65. Injunctions

The trial court erred in failing to make findings and conclusions, after defendant so requested, on the amount of bond it required for issuance of a preliminary injunction. *Iverson v. TM One, Inc.*, 161.

SCHOOLS

§ 13. Teachers

G.S. 14-111.2 is directed toward those outside the school system who give unfair aid to students and does not make criminal a teacher's offer to give a student a passing grade in exchange for a VCR. *S. v. Taylor*, 577.

SEARCHES AND SEIZURES

§ 10. Search and Seizure on Probable Cause

The warrantless search of defendant's automobile two days after his arrest was unlawful, but defendant was not prejudiced by the admission of items seized from the vehicle. *S. v. Russell*, 639.

§ 16. Consent to Search Given by Members of Household

Defendant's mother, who owned the residence where defendant lived, could give a valid consent to a search of the residence, including defendant's bedroom. *S. v. Russell*, 639.

SEARCHES AND SEIZURES — Continued

§ 21. Application for Warrant; Requisites of Affidavit; Tips from Informers

An affidavit was sufficient to provide probable cause for a search warrant even though it was based on hearsay from an unfamiliar confidential informant. *S. v. Barnhardt*, 94.

§ 23. Application for Warrant; Sufficiency of Showing Probable Cause

The trial court did not err in a prosecution for conspiracy, robbery, and assault by denying defendant's motion to suppress tangible evidence because the affidavit supporting the search warrant did not provide probable cause and the items seized were not specifically named in the warrant. *S. v. Colvin*, 152.

§ 24. Application for Warrant; Sufficiency of Showing Probable Cause; Information from Informers

An affidavit based on information from a confidential informant established probable cause for a magistrate to issue a warrant to search defendant's residence for cocaine. *S. v. King*, 75.

§ 44. Voir Dire Hearing on Motion to Suppress

Defendants' motion to suppress evidence is remanded to the trial court for a determination of whether information used to establish probable cause for issuance of a search warrant was unlawfully obtained in a break-in by a confidential informant. *S. v. King*, 75.

SHERIFFS AND CONSTABLES

§ 4. Civil Liabilities to Individuals

The decision of *Bullins v. Schmidt*, 322 N.C. 80, making pursuing law officers liable only for gross negligence, will be applied retroactively. *Fowler v. N.C. Dept. of Crime Control & Public Safety*, 733.

A state trooper was not grossly negligent in following a speeding vehicle at midnight on a rural two-lane highway in a sparsely populated area at speeds of 115 m.p.h. without activating either his siren or flashing blue light. *Ibid.*

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Federal law precludes North Carolina from distributing Social Security benefits under North Carolina's Equitable Distribution statute. *Cruise v. Cruise*, 586.

STATE

§ 4.2. Particular Actions against the State; Sovereign Immunity

There could be no monetary award for negligence and false imprisonment against the Secretary of the Department of Correction, the chairman and members of the Parole Commission, a parole analyst, and the Superintendent of the Rowan County Prison Unit in their official capacities. *Harwood v. Johnson*, 306.

§ 12. State Employees

Neither G.S. 126-35 nor relevant regulations required that petitioner be given any administrative warnings before disciplinary action was taken against him. *Meyers v. Dept. of Human Resources*, 193.

STATE — Continued

Though respondent's original notice clearly stated the specific acts underlying its decision to dismiss petitioner, the Secretary's notice that her decision to demote rather than dismiss petitioner was "based upon the information presented" was not an adequate statement of the specific acts or omissions underlying her decision to demote petitioner as required by G.S. 126-35. *Ibid.*

The State Personnel Commission's dismissal of an employee grievance appeal because it was filed one day late was not arbitrary and capricious. *Lewis v. N.C. Dept. of Human Resources*, 737.

TRESPASS

§ 2. Trespass to the Person

The trial court properly granted defendants' motion for summary judgment on a complaint for intentional infliction of emotional distress where plaintiff police officer was arrested and indicted for possessing and receiving stolen goods and was ultimately dismissed from his employment. *Hill v. City of Kinston*, 375.

TRIAL

§ 3.1. Motions for Continuance; Discretion of Trial Judge

The trial court in a medical malpractice action abused its discretion by denying plaintiff's motion to continue a summary judgment hearing. *Freeman v. Monroe*, 99.

§ 5. Course and Conduct of Trial in General

Plaintiffs failed to show prejudice in a medical malpractice action from the court's recessing of the trial several times during the presentation of their evidence. *Clark v. Dickstein*, 207.

§ 9. Duties and Powers of Court in General

There was no prejudicial error in an action for a preliminary injunction to enforce a covenant not to compete where the trial judge initiated an ex parte communication by telephone with an affiant to clarify his statement. *Iredell Digestive Disease Clinic v. Petrozza*, 21.

§ 15. Objections and Exceptions to Evidence

There was no prejudice in an action arising from a roof installation where defendants attempted to introduce an internal memorandum from the roof manufacturer, the trial judge commented that the witness had testified that he didn't remember getting the memorandum but never made a final ruling, and defendants did not try to introduce the exhibit again or seek a final ruling on its admissibility. *Hedgecock Builders Supply Co. v. White*, 535.

§ 18.2. Credibility of Witnesses

The trial court in a wrongful death action erred in admitting defendant driver's testimony that he had never been convicted of a crime or traffic offense. *Hinnant v. Holland*, 142.

§ 35.1. Particular Instructions on Burden of Proof

The trial court in a medical malpractice case did not err in instructing the jury that it should answer an issue against the plaintiffs "if you are unable to determine where the truth lies." *Clark v. Dickstein*, 207.

TRUSTS

§ 15. Actions to Establish Constructive Trusts; Limitations

Defendant, in requesting equitable distribution, did not make an election of remedies which barred her action for a constructive trust. *Lamb v. Lamb*, 680.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The trial court properly granted defendant's Rule 12(b)(6) motion for dismissal of plaintiff's claim for unfair trade practices based upon defendant's refusal to deal with plaintiff as a labor service contractor. *Telephone Services, Inc. v. General Telephone Co. of the South*, 90.

Plaintiff could not prevail on her claim for an unfair trade practice in the sale of a used car where she failed to allege and show that defendant dealer knew the vehicle had previously been declared a total loss and rebuilt. *Ramsey v. Keever's Used Cars*, 187.

UNIFORM COMMERCIAL CODE

§ 3. Application

The lease of computer equipment was outside the scope of the warranty provisions of Article 2 of the U.C.C. *Tolaram Fibers, Inc. v. Tandy Corp.*, 713.

§ 28. Commercial Paper; Definitions

The trial court properly ruled that the text of promissory notes governed over figures called for in the installment schedules. *Gray v. Venters*, 589.

UTILITIES COMMISSION

§ 6. Authority of Utilities Commission; Capital Issues

The Utilities Commission erred by adjusting Nantahala's rates to reflect tax savings in a rulemaking process. *State ex rel. Utilities Comm. v. Nantahala Power and Light Co.*, 545.

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§ 6. Evidence Competent to Impeach Witness

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