NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 93

21 FEBRUARY 1989

---

16 MAY 1989

RALEIGH
1989

CITE THIS VOLUME

93 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

R. A. HEDRICK

Judges

GERALD ARNOLD
HUGH A. WELLS
CHARLES L. BECTON
CLIFTON E. JOHNSON
EUGENE H. PHILLIPS
SIDNEY S. EAGLES, JR.
SARAH PARKER
JACK COZORT
ROBERT F. ORR
K. EDWARD GREENE
JOHN B. LEWIS, JR.

Retired Judges

FRANK M. PARKER
EDWARD B. CLARK
ROBERT M. MARTIN
CECIL J. HILL
E. MAURICE BRASWELL

Clerk

FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN E. FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. Herbert Small	Elizabeth City
	Thomas S. Watts	Elizabeth City
2	William C. Griffin	Williamston
3A	David E. Reid, Jr.	Greenville
3B	Herbert O. Phillips III	Morehead City
4A	Henry L. Stevens III	Kenansville
4B	James R. Strickland	Jacksonville
5	Napoleon B. Barefoot	Wilmington
	Ernest B. Fullwood	Wilmington
6A	Richard B. Allsbrook	Halifax
6B	Cy A. Grant	Windsor
7A		
7BC	Frank R. Brown	Tarboro
	G. K. Butterfield, Jr.	Wilson
8A	James D. Llewellyn	Kinston
8B	Paul Michael Wright	Goldsboro

Second Division

9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
10A-D	Robert L. Farmer	Raleigh
	Henry V. Barnette, Jr.	Raleigh
	Donald W. Stephens	Raleigh
	Howard E. Manning, Jr.	Raleigh
	George R. Greene	Raleigh
11	Wiley F. Bowen	Dunn
12A-C	Darius B. Herring, Jr.	Fayetteville
	Coy E. Brewer, Jr.	Fayetteville
	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
13	Giles R. Clark	Elizabethtown
14A-B	Anthony M. Brannon	Durham
	J. Milton Read, Jr.	Durham
	Orlando F. Hudson, Jr.	Durham
	Albert Leon Stanback, Jr.	Durham
15A	J. B. Allen, Jr.	Burlington
15B	F. Gordon Battle	Chapel Hill
16A	B. Craig Ellis	Laurinburg
16B	Joe Freeman Britt	Lumberton
	Dexter Brooks	Pembroke

Third Division

17A	Melzer A. Morgan, Jr.	Wentworth
17B	James M. Long	Pilot Mountain

DISTRICT	JUDGES	ADDRESS
18A-E	W. DOUGLAS ALBRIGHT	Greensboro
	THOMAS W. ROSS	Greensboro
	JOSEPH R. JOHN	Greensboro
	W. STEVEN ALLEN, SR.	Greensboro
	HOWARD R. GREESON, JR.	High Point
19A	JAMES C. DAVIS	Concord
19B	RUSSELL G. WALKER, JR.	Asheboro
19C	THOMAS W. SEAY, JR.	Spencer
20A	F. FETZER MILLS	Wadesboro
20B	WILLIAM H. HELMS	Monroe
21A-D	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
	JAMES A. BEATY, JR.	Winston-Salem
	JAMES B. BOOKER[1]	Winston-Salem
22	PRESTON CORNELIUS	Mooresville
	LESTER P. MARTIN, JR.	Mocksville
23	JULIUS A. ROUSSEAU, JR.	North Wilkesboro
	Fourth Division	
24	CHARLES C. LAMM, JR.	Boone
25A	CLAUDE S. SITTON	Morganton
25B	FORREST A. FERRELL	Hickory
26A-C	KENNETH A. GRIFFIN	Charlotte
	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
	W. TERRY SHERRILL	Charlotte
	SHIRLEY L. FULTON	Charlotte
	SAM A. WILSON III[2]	Charlotte
27A	ROBERT W. KIRBY	Gastonia
	ROBERT E. GAINES	Gastonia
27B	JOHN MULL GARDNER	Shelby
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30A	JAMES U. DOWNS, JR.	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGES

I. BEVERLY LAKE, JR.	Raleigh
MARVIN K. GRAY	Charlotte
SAMUEL T. CURRIN	Raleigh

EMERGENCY JUDGES

HENRY A. MCKINNON, JR.	Lumberton
SAMUEL E. BRITT	Lumberton

DISTRICT	JUDGES	ADDRESS
	JAMES H. POU BAILEY	Raleigh
	JOHN R. FRIDAY	Lincolnton
	D. MARSH MCLELLAND	Graham
	EDWARD K. WASHINGTON	High Point
	L. BRADFORD TILLERY	Wilmington
	ROBERT A. COLLIER, JR.	Statesville
	THOMAS H. LEE	Durham

1. Appointed 29 May 1989 to replace William Z. Wood.

2. Appointed 1 September 1989 to replace Frank W. Snepp, Jr., who resigned.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Manteo
2	HALLETT S. WARD (Chief)	Washington
	JAMES W. HARDISON	Williamston
	SAMUEL C. GRIMES	Washington
3	E. BURT AYCOCK, JR. (Chief)	Greenville
	JAMES E. RAGAN III	Oriental
	JAMES E. MARTIN	Grifton
	H. HORTON ROUNTREE	Greenville
	WILLIE LEE LUMPKIN III	Morehead City
	WILTON R. DUKE, JR.	Greenville
	DAVID A. LEECH	Greenville
4	KENNETH W. TURNER (Chief)	Rose Hill
	STEPHEN M. WILLIAMSON	Kenansville
	WILLIAM M. CAMERON, JR.	Jacksonville
	WAYNE G. KIMBLE, JR.	Jacksonville
	LEONARD W. THAGARD	Clinton
5	GILBERT H. BURNETT (Chief)	Wilmington
	CHARLES E. RICE	Wrightsville Beach
	JACQUELINE MORRIS-GOODSON	Wilmington
	ELTON G. TUCKER	Wilmington
	JOHN W. SMITH II	Wilmington
6	NICHOLAS LONG (Chief)	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston-Woodville
	HAROLD P. MCCOY, JR.	Scotland Neck
7	GEORGE M. BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	ALBERT S. THOMAS, JR.	Wilson
	QUENTIN T. SUMNER	Rocky Mount
	SARAH F. PATTERSON	Rocky Mount
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Goldsboro
	RODNEY R. GOODMAN, JR.	Kinston
	JOSEPH E. SETZER, JR.	Goldsboro
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	CHARLES W. WILKINSON, JR.	Oxford
	J. LARRY SENTER	Franklinton
	HERBERT W. LLOYD, JR.	Henderson
10	GEORGE F. BASON (Chief)	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
	L. W. PAYNE	Raleigh
	WILLIAM A. CREECH	Raleigh

DISTRICT	JUDGES	ADDRESS
	JOYCE A. HAMILTON	Raleigh
	FRED M. MORELOCK	Raleigh
	JERRY W. LEONARD	Raleigh
	DONALD W. OVERBY	Raleigh
	JAMES R. FULLWOOD	Raleigh
11	WILLIAM A. CHRISTIAN (Chief)	Sanford
	EDWARD H. MCCORMICK	Lillington
	O. HENRY WILLIS, JR.	Dunn
	TYSON Y. DOBSON, JR.	Smithfield
	SAMUEL S. STEPHENSON	Angier
12	SOL G. CHERRY (Chief)	Fayetteville
	ANNA ELIZABETH KEEVER	Fayetteville
	PATRICIA ANN TIMMONS-GOODSON	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
13	WILLIAM C. GORE, JR. (Chief)	Whiteville
	JERRY A. JOLLY	Tabor City
	D. JACK HOOKS, JR.	Whiteville
	DAVID G. WALL	Elizabethtown
14	DAVID Q. LABARRE (Chief)	Durham
	RICHARD CHANEY	Durham
	KENNETH C. TITUS	Durham
	CAROLYN D. JOHNSON	Durham
	WILLIAM Y. MANSON	Durham
15A	WILLIAM S. HARRIS, JR. (Chief)	Graham
	JAMES KENT WASHBURN	Burlington
	SPENCER B. ENNIS	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	PATRICIA HUNT	Chapel Hill
	LOWRY M. BETTS	Pittsboro
16A	WARREN L. PATE (Chief)	Raeford
	WILLIAM C. MCILWAIN[1]	Wagram
16B	CHARLES G. MCLEAN (Chief)[2]	Lumberton
	HERBERT LEE RICHARDSON	Lumberton
	GARY M. LOCKLEAR	Pembroke
	ROBERT F. FLOYD, JR.	Fairmont
	J. STANLEY CARMICAL[3]	Lumberton
17A	PETER M. MCHUGH (Chief)	Wentworth
	ROBERT R. BLACKWELL	Yanceyville
	PHILIP W. ALLEN	Yanceyville
17B	JERRY CASH MARTIN (Chief)	Mount Airy
	CLARENCE W. CARTER	King
18	J. BRUCE MORTON (Chief)	Greensboro
	ROBERT E. BENCINI	High Point
	WILLIAM L. DAISY	Greensboro
	EDMUND LOWE	High Point
	SHERRY FOWLER ALLOWAY	Greensboro
	LAWRENCE C. MCSWAIN	Greensboro

DISTRICT	JUDGES	ADDRESS
	WILLIAM A. VADEM	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	JOSEPH E. TURNER	Greensboro
19A	FRANK M. MONTGOMERY (Chief)	Salisbury
	ADAM C. GRANT, JR.	Concord
	CLARENCE E. HORTON, JR.	Kannapolis
	ROBERT M. DAVIS, SR.	Salisbury
19B	WILLIAM M. NEELY (Chief)	Asheboro
	RICHARD M. TOOMES	Asheboro
	VANCE B. LONG	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
	MICHAEL EARLE BEALE	Pinehurst
	TANYA T. WALLACE	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	ROBERT KASON KEIGER	Winston-Salem
	ROLAND HARRIS HAYES	Winston-Salem
	WILLIAM B. REINGOLD	Winston-Salem
	LORETTA BIGGS	Kernersville
	MARGARET L. SHARPE	Winston-Salem
22	ROBERT W. JOHNSON (Chief)	Statesville
	SAMUEL ALLEN CATHEY	Statesville
	GEORGE THOMAS FULLER	Lexington
	KIMBERLY T. HARBINSON	Taylorsville
	WILLIAM G. IJAMES, JR.	Mocksville
23	SAMUEL L. OSBORNE (Chief)	Wilkesboro
	EDGAR B. GREGORY	Wilkesboro
	MICHAEL E. HELMS	Wilkesboro
24	ROBERT HOWARD LACEY (Chief)	Newland
	ROY ALEXANDER LYERLY	Banner Elk
	CHARLES PHILIP GINN	Boone
25	L. OLIVER NOBLE, JR. (Chief)	Hickory
	TIMOTHY S. KINCAID	Newton
	RONALD E. BOGLE	Hickory
	JONATHAN L. JONES	Valdese
	NANCY L. EINSTEIN	Lenoir
	ROBERT E. HODGES	Morganton
26	JAMES E. LANNING (Chief)	Charlotte
	L. STANLEY BROWN	Charlotte
	WILLIAM G. JONES	Charlotte
	DAPHENE L. CANTRELL	Charlotte
	WILLIAM H. SCARBOROUGH	Charlotte
	RESA L. HARRIS	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	RICHARD ALEXANDER ELKINS	Charlotte
	MARILYN R. BISSELL	Charlotte
	RICHARD D. BONER	Charlotte
	H. WILLIAM CONSTANGY, JR.	Charlotte
	H. BRENT MCKNIGHT	Charlotte

DISTRICT	JUDGES	ADDRESS
27A	LAWRENCE B. LANGSON (Chief)	Gastonia
	TIMOTHY L. PATTI	Gastonia
	HARLEY B. GASTON, JR.	Belmont
	CATHERINE C. STEVENS	Gastonia
	DANIEL J. WALTON	Gastonia
27B	GEORGE HAMRICK (Chief)	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
	J. KEATON FONVIELLE	Shelby
28	EARL JUSTICE FOWLER, JR. (Chief)	Arden
	PETER L. RODA	Asheville
	ROBERT L. HARRELL	Asheville
	GARY S. CASH	Asheville
29	LOTO GREENLEE (Chief)	Marion
	THOMAS N. HIX	Mill Spring
	STEVEN F. FRANKS	Hendersonville
	ROBERT S. CILLEY	Brevard
30	JOHN J. SNOW (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

1. Appointed 1 July 1989 to a new position.

2. Appointed Chief Judge 3 May 1989 to replace John S. Gardner who died 19 April 1989.

3. Appointed 1 July 1989 to replace Charles G. McLean who became Chief Judge.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

LACY H. THORNBURG

Administrative Deputy Attorney General
JOHN D. SIMMONS III

Deputy Attorney General for Policy and Planning
ALAN D. BRIGGS

Deputy Attorney General for Training and Standards
PHILLIP J. LYONS

Chief Deputy Attorney General
ANDREW A. VANORE, JR.

Senior Deputy Attorneys General

JEAN A. BENOY
H. AL COLE, JR.
JAMES J. COMAN
ANN REED DUNN
WILLIAM W. MELVIN
EUGENE A. SMITH

Special Deputy Attorneys General

ISAAC T. AVERY III
DAVID R. BLACKWELL
GEORGE W. BOYLAN
CHRISTOPHER P. BREWER
ELISHA H. BUNTING, JR.
JOAN H. BYERS
LUCIEN CAPONE III
T. BUIE COSTEN
JAMES P. ERWIN, JR.
WILLIAM N. FARRELL, JR.
JANE P. GRAY
JAMES C. GULICK
RALF F. HASKELL
CHARLES M. HENSEY
I. B. HUDSON, JR.
RICHARD N. LEAGUE
DANIEL F. MCLAWHORN
CHARLES J. MURRAY
DANIEL C. OAKLEY
JAMES B. RICHMOND
HENRY T. ROSSER
JACOB L. SAFRON
JO ANNE SANFORD
TIARE B. SMILEY
JAMES PEELER SMITH
EDWIN M. SPEAS, JR.
RALPH B. STRICKLAND, JR.
REGINALD L. WATKINS
ROBERT G. WEBB
HAROLD W. WHITE, JR.

Assistant Attorneys General

ARCHIE W. ANDERS
WILLIAM H. BORDEN
WILLIAM F. BRILEY
STEVEN F. BRYANT
MABEL Y. BULLOCK
ROBERT E. CANSLER
KATHRYN J. COOPER
JOHN R. CORNE
KIMBERLY L. CRAMER
FRANCIS W. CRAWLEY
LAURA E. CRUMPLER
JANE T. FRIEDENSEN
DEBRA K. GILCHRIST
ROY A. GILES, JR.
MICHAEL D. GORDON
L. DARLENE GRAHAM
JEFFREY P. GRAY
RICHARD L. GRIFFIN
NORMA S. HARRELL
WILLIAM P. HART
JENNIE J. HAYMAN
WILSON HAYMAN
HOWARD E. HILL
RICHARD A. HINNANT, JR.
LEMUEL W. HINTON
ALAN S. HIRSCH
CHARLES H. HOBGOOD, JR.
DORIS A. HOLTON
LAVEE H. JACKSON
J. ALLEN JERNIGAN
DOUGLAS A. JOHNSTON
LORINZO L. JOYNER
GRAYSON G. KELLEY
DONALD W. LATON
M. JILL LEDFORD
FLOYD M. LEWIS
KAREN E. LONG
ELIZABETH G. MCCRODDEN
BARRY S. MCNEILL
RODNEY S. MADDOX
JOHN F. MADDREY
JAMES E. MAGNER, JR.
ANGELINE M. MALETTO
THOMAS L. MALLONEE, JR.
GAYL M. MANTHEI
THOMAS G. MEACHAM, JR.
DAVID S. MILLER
RANDY L. MILLER
THOMAS R. MILLER
DAVID R. MINGES
VICTOR H. E. MORGAN, JR.
LINDA A. MORRIS
MARILYN R. MUDGE
G. PATRICK MURPHY
DENNIS P. MYERS
DAVID M. PARKER
J. MARK PAYNE
ROBIN P. PENDERGRAFT
MEG S. PHIPPS
NEWTON G. PRITCHETT, JR.
WILLIAM B. RAY
GRAYSON L. REEVES, JR.
JULIA F. RENFROW
NANCY E. SCOTT
ELLEN B. SCOUTEN
BARBARA A. SHAW
ROBIN W. SMITH
T. BYRON SMITH
RICHARD G. SOWERBY, JR.
D. DAVID STEINBOCK, JR.
KIP D. STURGIS
SUEANNA P. SUMPTER
W. DALE TALBERT
DONALD R. TEETER
PHILIP A. TELFER
SYLVIA H. THIBAUT
JANE R. THOMPSON
MELISSA L. TRIPPE
JOHN C. WALDRUP
JAMES M. WALLACE, JR.
MARTHA K. WALSTON
JOHN H. WATTERS
JAMES A. WELLONS
TERESA L. WHITE
THOMAS B. WOOD
SARAH C. YOUNG
THOMAS J. ZIKO
THOMAS D. ZWEIGART

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. Williams, Jr.	Elizabeth City
2	Mitchell D. Norton	Washington
3A	Thomas D. Haigwood	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	William H. Andrews	Jacksonville
5	Jerry Lee Spivey	Wilmington
6	David H. Beard, Jr.	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	Donald M. Jacobs	Goldsboro
9	David R. Waters	Oxford
10	Colon Willoughby	Raleigh
11	John W. Twisdale	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Michael F. Easley	Bolivia
14	Ronald L. Stephens	Durham
15A	Steve A. Balog	Graham
15B	Carl R. Fox	Pittsboro
16A	Jean E. Powell	Raeford
16B	J. Richard Townsend	Lumberton
17A	Thurman B. Hampton	Wentworth
17B	H. Dean Bowman	Dobson
18	Horace M. Kimel, Jr.	Greensboro
19A	James E. Roberts	Concord
19B	Garland N. Yates	Asheboro
20	Carroll R. Lowder	Monroe
21	William Warren Sparrow	Winston-Salem
22	H. W. Zimmerman, Jr.	Lexington
23	Michael A. Ashburn	Wilkesboro
24	James T. Rusher	Boone
25	Robert E. Thomas	Newton
26	Peter S. Gilchrist III	Charlotte
27A	Calvin B. Hamrick	Gastonia
27B	William Carlos Young	Shelby
28	Robert W. Fisher	Asheville
29	Alan C. Leonard	Rutherfordton
30	Roy H. Patton, Jr.	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3A	ROBERT L. SHOFFNER, JR.	Greenville
3B	HENRY C. BOSHAMER	Beaufort
12	MARY ANN TALLY	Fayetteville
15B	J. KIRK OSBORN	Carrboro
16A	J. GRAHAM	Laurinburg
16B	ANGUS B. THOMPSON II	Lumberton
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27	ROWELL C. CLONINGER, JR.	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINION

CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
153A-345(e)	White v. Union County, 148
153A-348	White v. Union County, 148
160A-47	Wallace v. Town of Chapel Hill, 422
160A-48(c)(1)	Wallace v. Town of Chapel Hill, 422
160A-48(c)(2)	Wallace v. Town of Chapel Hill, 422
160A-48(c)(3)	Wallace v. Town of Chapel Hill, 422
160A-48(d)(1)	Wallace v. Town of Chapel Hill, 422
160A-48(d)(2)	Wallace v. Town of Chapel Hill, 422
160A-383.1	White v. Union County, 148

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

CASES
ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. HARRY BERT HEWETT

No. 8813SC499

(Filed 21 February 1989)

1. Rape and Allied Offenses § 4.2— child sexual abuse victim— denial of motion for independent medical examination—no error

The trial court did not err in a prosecution for first degree rape, first degree sexual offense, incest, and taking indecent liberties with a minor by denying defendant's motion for an independent medical examination of the two victims where defendant did not make a credible showing that the additional examinations would have been probative or necessary. A trial judge would have the discretionary power to permit a second physical examination of an alleged sexual abuse victim if the defendant showed the court that the examination would be probative, that it was necessary to the defendant's preparation of his defense, and if the victim or the victim's guardian consented to the examination.

2. Rape and Allied Offenses § 4.1— sexual abuse of daughters— prior incidents—admissible

The trial court did not err in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor involving defendant's two daughters by denying defendant's motion *in limine* asking that the State be allowed to present only evidence as to events on the two dates in the State's bill of particulars. The testimony was in line with the type of evidence our courts have permitted in the past

under the common scheme or plan exception, and weighing the probative value of the evidence against the prejudice to defendant was within the discretion of the judge. N.C.G.S. § 8C-1, Rule 404(b).

3. Rape and Allied Offenses § 5— first degree sexual offense with a child—evidence sufficient

The trial court correctly denied defendant's motion at the close of all the evidence to dismiss the charges of first degree sexual offense, which the bill of particulars listed as fellatio, where the jury could have found that fellatio was performed on defendant by one of his daughters from the daughter's testimony and by following the judge's instruction.

4. Rape and Allied Offenses § 19— taking indecent liberties with a child—evidence sufficient

The trial court correctly denied defendant's motion to dismiss the charges of taking indecent liberties with his two daughters where the testimony of the children more than adequately demonstrated that defendant took indecent liberties with them. Moreover, the instruction given in this case benefited defendant in that the State need not prove a touching of the child to prove the elements of indecent liberties; in this case, the evidence was that defendant disrobed in the children's presence and engaged in intercourse with each child in the presence of the other. The State would have adequately proven the elements of indecent liberties even if the charge had been based solely on defendant's causing the children to witness the sexual conduct.

5. Criminal Law § 134.2— sexual abuse of daughters—sentencing hearing—continuance denied

The trial court did not err by denying defendant's motion for a continuance before conducting the sentencing hearing after defendant was convicted of rape, first degree sexual offense, incest, and taking indecent liberties with his daughters. Although the judge indicated that he was denying the motion because he did not have any leeway in at least four of the sentences, the State explicitly asked for consecutive terms at the hearing and defendant explicitly asked that the sentences run concurrently. The Court of Appeals did not believe that the judge labored under a mistaken notion that our statutes mandated consecutive life sentences for four of defendant's

convictions, and did not believe that defendant demonstrated good cause to continue the hearing.

6. **Witnesses § 1.2— nine-year-old sexual abuse victim—recess to regain composure—no error**

There was no abuse of discretion in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor in allowing a nine-year-old victim to interrupt her testimony and leave the courtroom accompanied by a rape crisis counselor, the assistant district attorney prosecuting the case, and the district attorney. The judge acted properly by calling a recess to afford the victim an opportunity to regain her composure.

7. **Criminal Law § 86.8— child sexual abuse victim—prosecutor's question concerning her truthfulness—not character evidence**

There was no error in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor in allowing the prosecutor to ask a victim whether she recalled indicating that she understood what it meant to tell the truth and later if she had testified truthfully where the first question occurred at a point where the child was not responding to the State's questions and was simply an attempt to prompt the witness to speak, and the second followed a cross-examination in which the victim was asked if she had ever told a lie. Neither question produced improper character evidence in contravention of N.C.G.S. § 8C-1, Rule 608(a), and, even if error had resulted, the error would have been harmless.

8. **Criminal Law § 86.8— child sexual offense victims—questions concerning specific instances of untruthfulness not allowed—no error**

The trial court did not err in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor by not permitting a defense witness to testify as to specific instances of untruthfulness by the children.

9. **Rape and Allied Offenses § 19— child sexual abuse victim—use of anatomical dolls and drawings—no error**

There was no error in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor in allowing the victims to use anatomical dolls during their testimony, in allowing one victim to testify about a

drawing she had made, or in admitting that drawing into evidence.

10. Criminal Law § 89— sexual abuse of children—prior statements—admissible as corroboration

There was no error in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with children from the admission of corroborative testimony concerning statements made to a child medical examiner, a social worker, and a detective.

11. Criminal Law § 102.6— child sexual abuse—prosecutor's closing argument—no error

There was no error in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor where the district attorney during her closing argument attempted to read a passage from a Supreme Court opinion but defendant objected and the trial judge sustained the objection; the prosecutor was allowed to quote from the Bible during her argument to the jury; and defendant's objection that the assistant district attorney was implying that defendant had charged the State with fabricating its case was sustained.

12. Rape and Allied Offenses § 6— child sexual abuse—refusal to give defendant's requested jury instructions—no error

The trial court did not err in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor by not giving defendant's requested instructions on alibi, the credibility of child witnesses, and on expert witnesses where defendant's request for the instruction on expert testimony came after the judge had instructed the jury and was not in writing; defendant contended that the offenses had not occurred rather than that he was somewhere else at the time of the offenses; and the decision whether to instruct the jury on a child's credibility is a matter within the judge's discretion.

13. Jury § 7.8— excusal of juror—possible relationship to defendant—no error

There was no prejudice in an action for rape, first degree sexual offense, incest, and indecent liberties with a minor from the judge's excusing of a juror after the juror told the court he might be related to defendant because the State at that

time had one peremptory challenge left and could have exercised that challenge had the judge not removed the juror.

APPEAL by defendant from *Henry W. Hight, Jr., Judge.* Judgment entered 10 September 1987 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 6 December 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Ramos and Lewis, by Michael R. Ramos, for defendant-appellant.

BECTON, Judge.

On 10 September 1987, a jury convicted the defendant, Harry Bert Hewett, Jr., of two counts of first degree rape, two counts of first degree sex offense, two counts of incest, and two counts of taking indecent liberties with a minor. The victims of these crimes were defendant's daughters, whom we shall refer to as "A. H." and "T. H." The trial judge sentenced defendant to four consecutive life terms for the rape and sex offense convictions, to consecutive terms of four and one-half years for the incest convictions, and to consecutive three-year terms for the indecent liberties offenses. From this judgment, defendant appeals. We find no error.

The State's evidence tended to show that A. H. and T. H. were the natural daughters of defendant. Between January and June of 1987, the children resided with their grandmother, defendant's mother. On 14 February 1987, defendant, defendant's mother, his girlfriend, and the children went to a shopping center in Shallotte. A. H. testified that she and T. H. remained in the car with defendant while the women shopped. Defendant told A. H. to remove her clothing, and she did so. Defendant then touched A. H. on her vagina with his penis and hand. T. H. testified that she took down her panties, and defendant touched her on her vagina and on her "titty." She further testified that she and A. H. touched defendant's penis with their lips.

The State's evidence also showed that on 29 March 1987, defendant took A. H. and T. H. to his home. Both children testified that no one besides themselves and defendant were at defendant's residence at the time. A. H. and T. H. testified that they and defendant removed their clothing, and defendant got onto the bot-

tom bunk of the children's bunk beds. A. H. testified that defendant penetrated her vagina with his penis and with his finger. T. H. testified that she and her sister took turns "getting up on Daddy" and that each child took turns "ke[eping] an eye out to see if anybody would come." T. H. testified that defendant penetrated her vagina with his penis.

At the time of the incidents on 14 February and 29 March, A. H. was nine years old, and T. H. was eight.

Defendant testified that he had never been alone with the children in the automobile on 14 February. Defendant's mother and his girlfriend gave corroborative testimony on this point. Defendant also testified as to his whereabouts with the children on 29 March; at no time did he testify to taking them to his home on that date. Again, defendant's mother and his girlfriend offered corroborative evidence.

On appeal, defendant has brought forward 19 assignments of error. Additional facts relevant to issues defendant has raised will be set out as needed.

I

[1] Defendant assigns error to the trial judge's denial of his pretrial motion for an independent medical examination of A. H. and T. H.

A

On 10 April 1987, Dr. James Forestner, the child medical examiner for Brunswick County, examined the children at the request of the Brunswick County Department of Social Services. At the examinations, Dr. Forestner asked the children to describe what their father had done to them. He also conducted physical examinations. Dr. Forestner made two written reports—one report per child—of his findings. Defendant received copies of Dr. Forestner's reports through discovery.

Dr. Forestner wrote that A. H.'s hymenal ring, her vaginal opening, "f[ell] open to some 8 m[illemeters] and ha[d] a thickened internal edge." The ring "appear[ed] to have been injured and healed." T. H.'s vagina "gape[d] to 7 or 8 m[illemeters and the] edge of the hymenal ring [was] somewhat thickened and g[ave] the impression of having been irritated and healed." On both reports, Dr. Forestner wrote that the physical findings were consistent

with, but not diagnostic of, the kind of sexual abuse the children had described to him. Dr. Forestner testified that according to the "consensus group" of the American Medical Association, a vaginal gaping of ten millimeters is "pretty much proof of penetration" while "[a]nything over four millimeters . . . is very suggestive of penetration." On both of his reports, Dr. Forestner wrote that he believed the children had been sexually abused. He wrote, and repeated at trial, that he based his conclusion upon the physical findings coupled with what the children had told him.

On 8 July 1987, defendant filed a motion for additional medical examinations of the children, these to be done by an expert of defendant's choosing. Defendant claimed Dr. Forestner's conclusion that the children had been sexually abused did not follow from the physical findings which the doctor said were merely "consistent with" but not "diagnostic of" abuse. Defendant alleged that the findings and the conclusions were inconsistent with one another.

The court heard defendant's motion on 8 September. Defendant's brother, the court-appointed custodian of the children, testified that he did not object to the examinations taking place. The judge denied defendant's motion in a written order on 9 September. The judge found that the requested examinations "could compromise the mental health and well-being of the . . . children," that Dr. Forestner's findings were not inconsistent but were "simply a statement that the results of the physical examination could have several origins, one of which is consistent with sexual abuse," that defendant had made no showing to the court of a need for the additional examinations, and that the examinations would serve only to place the children in "a potentially embarrassing and traumatic situation without [producing] any benefit to defendant."

B

Defendant argues that the children's bodies are "physical evidence . . . susceptible to objective tests and examinations like any other physical evidence which is to be used at trial." He contends that this "evidence" is therefore discoverable under N.C. Gen. Stat. Sec. 15A-903(e) (1988), which in part provides that "upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence . . . available to the prosecutor if the State intends to offer the evidence . . . ." Defendant contends that the trial judge's refusal to grant him the opportunity to have

the children examined by a second expert denied him the right "to have available evidence which he might legitimately offer" to rebut or impeach Dr. Forestner's testimony.

Defendant argues that had he been arrested for possessing white powder, which the State subsequently tested and concluded to be cocaine, he would plainly have a right to have his own expert conduct a second test upon the substance. He argues that the examinations he requested in this case are no different. We reject defendant's analogy. Powder does not have dignity, and courts are rightly solicitous when a human being's privacy faces invasion. At the same time, we recognize that this defendant has been convicted of some of our most serious non-capital offenses, and our concern for his due process rights is, likewise, very strong. *See State v. Jones*, 85 N.C. App. 56, 65, 354 S.E. 2d 251, 256 (1987), *disc. rev. denied*, 320 N.C. 173, 358 S.E. 2d 62 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 404 (1987) (because Sec. 15A-903(e) does not specify type of testing procedures to be allowed, question must be decided by reference to due-process principles).

We have carefully reviewed the record, and we do not find that defendant made a credible showing to the trial judge that the additional examinations he requested would have been probative. The last alleged incidence of abuse was 29 March; the new examinations would have taken place some six months later. Defendant made no showing that dilations, in September, of less than four millimeters would demonstrate that no penetration had occurred in February and March. He made no showing that normal measurements would not have been the result of vaginal constriction rather than non-abuse.

Additionally, defendant made no showing that the new examinations were necessary. Had defendant submitted Dr. Forestner's report to a second physician, and had the physician opined that Dr. Forestner's conclusion was inconsistent with the physical findings, and had the physician indicated he needed to conduct additional examinations to effectively testify on defendant's behalf, then defendant would have made a strong showing of necessity both to the trial judge and on appeal. In this case, however, defendant never gave Dr. Forestner's report to a second expert. Consequently, it was merely defendant's opinion that the first examinations had produced inconsistent results, and it was merely defendant's opinion that additional examinations were needed. We hold, therefore,

that the trial judge properly found that the interests of the children required that defendant's motion be denied.

We do not imply that a defendant charged with offenses such as these is precluded, in all cases, from receiving an independent medical examination of the alleged victim. On appeal, both the State and defendant have focused on North Carolina cases in which criminal defendants have asked trial judges to compel witnesses to undergo psychiatric examinations. The law in this State is that a judge has no discretionary power to require an *unwilling* witness to submit to such an examination. *See State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978); *State v. Clontz*, 305 N.C. 116, 286 S.E. 2d 793 (1982). In our view, a trial judge would have the discretionary power to permit a second physical examination of an alleged sexual-abuse victim if the defendant shows the court that the examination would be probative, that it is necessary to the defendant's preparation of his defense, and if the victim or the victim's guardian consents to the examination. When, in a case such as this one, four life sentences are in part contingent on a distance of four millimeters, a defendant should not be absolutely foreclosed from having his own expert examine the alleged victim. In this case, however, defendant failed to make a preliminary showing to the judge that the examinations would be probative and were necessary, and thus we overrule this assignment of error.

II

A

[2] On 8 July 1987, defendant filed a motion for a bill of particulars. On that same day, he filed a motion *in limine* asking that the State be allowed to present only such evidence as related to the 14 February and 29 March offenses. The trial judge denied defendant's motion *in limine*. The judge ruled that the children's testimony concerning prior episodes of abuse would show that "defendant engaged in a scheme whereby he took sexual advantage of the availability and the susceptibility of his young daughters at the times they were left in his custody." In addition, the judge ruled that the probative value of the evidence of other sexual acts outweighed any unfair prejudice to defendant. At trial, the judge permitted A. H. and T. H. to answer questions such as "[h]as your father ever put his ding dong inside you in the past?" Both children testified to having been subjected to abuse by defendant on other occasions; A. H. claimed her father had molested them

for a "couple of years." Subsequent witnesses for the State testified about statements the children had made to them about defendant's history of abusive behavior.

B

Defendant contends that the judge committed reversible error by denying his motion *in limine*. He argues that the State's bill of particulars, which mentioned only the 14 February and 29 March incidents, precluded the State from introducing evidence of sexual conduct involving defendant and the children on earlier dates. Defendant claims he geared his defense to the charges specified in the bill of particulars and that it was impossible for him to present a defense to the "scatter gun of accusations and allegations" the judge allowed the State to put before the jury. Finally, he contends that the prejudicial nature of the evidence outweighed its probative value.

N.C. Gen. Stat. Sec. 8C-1, R. Evid. 404(b) (1988) in part says that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." As we observed in *State v. Patterson*, so many exceptions now exist to the general rule prohibiting evidence of other crimes "that it is difficult to determine which is more extensive, the doctrine of exclusion or its acknowledged exceptions." 66 N.C. App. 657, 658, 311 S.E. 2d 683, 684 (1984) (citations omitted). Rule 404(b) itself specifies that other-crime evidence is "admissible for . . . purposes [other than proving character], such as proof of . . . [a] plan." This "common scheme or plan" exception has been explained by our Supreme Court this way: "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. McClain*, 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954) (citations omitted).

In the view of Professor Brandis, some North Carolina cases may be criticized for the use of the common-scheme-or-plan exception to prove, in effect, that the defendant possesses the character to commit the crime for which he is being tried. Brandis, *1 Brandis on North Carolina Evidence* Sec. 92, n. 36 (1988). Notwithstanding, it is the practice in this State "liberally" to admit evidence of similar sex crimes under this exception. *See, e.g., State v. Frazier*,

319 N.C. 388, 390, 354 S.E. 2d 475, 477 (1987) (evidence of a continuing scheme against victim relevant to show defendant was perpetrator of offense on particular date); *State v. Sills*, 311 N.C. 370, 378, 317 S.E. 2d 379, 384 (1984) (courts have held admissible, in particular, evidence showing prior similar sex crimes committed by defendant on same victim). We find nothing in the facts of this case to distinguish it from those cases in which our courts have held evidence of prior similar sex acts to be admissible. In this case, the testimony was in line with the type of evidence our courts have permitted in the past under the common-scheme-or-plan exception.

The admission of evidence of similar sex crimes under the plan exception of Rule 404(b) is subject to a determination that the probative value of that evidence outweighs any risk or undue prejudice to the defendant. *See* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 403 (1988); *Frazier*, 319 N.C. at 390, 354 S.E. 2d at 477. Determining whether or not to exclude the evidence under Rule 403 rests within the sound discretion of the trial judge. *Id.* We cannot say, in the light of previous cases involving this issue, that the trial judge abused his discretion by allowing the evidence of prior sexual crimes allegedly committed by defendant upon his children.

This assignment of error is overruled.

III

Defendant argues that the trial judge erred by denying his motion, made at the close of all the evidence, to dismiss the charges against him. Defendant contends that, in particular, the State failed to present evidence to support the jury's findings that defendant committed a first degree sexual offense on A. H. and that he took indecent liberties with the children. In two additional assignments of error, defendant has contended that the weight of the evidence did not support the jury's verdict and that the judge's imposition of consecutive life sentences was excessive given the evidence. We shall consider these three assignments of error together.

A

[3] 1. A person commits the crime of first degree sexual offense when he engages in a "sexual act" with a child who is under the age of 13 and the defendant is at least 12 years old and at least four years older than the victim. N.C. Gen. Stat. Sec. 14-27.4(a) (1986). Fellatio is a "sexual act." N.C. Gen. Stat. Sec. 14-27.1(4) (1986).

The bill of particulars listed fellatio as the act that occurred between defendant and A. H. on 14 February. In accordance with that bill, the judge charged the jury that to convict defendant of a first degree sex offense, it had to find, among other things, that defendant and A. H. engaged in fellatio. The judge correctly instructed the jury that fellatio "is any touching by the lips or tongue of one person of the male sex organ of another." *See State v. Bailey*, 80 N.C. App. 678, 682, 343 S.E. 2d 434, 437 (1986), *rev. dismissed*, 318 N.C. 652, 350 S.E. 2d 94 (1986).

At trial, A. H. testified that defendant penetrated her vagina with his finger on 14 February, but she responded "I don't think so" when the assistant district attorney asked if defendant had done anything else to her. T. H., however, testified that she and A. H. "touched" defendant's penis "with [their] lips" when the three were in the car. From T. H.'s testimony, and by following the judge's instruction, the jury could have found that fellatio was performed on defendant by A. H. on 14 February. We find untenable defendant's contention that there is no evidence in the record to support the jury's finding as to this charge.

[4] 2. The judge charged the jury that to convict defendant of taking indecent liberties with A. H. and T. H. on 29 March it had to find that defendant took an "indecent liberty"—which the judge defined as "an immoral, improper, or indecent touching by the defendant upon the child[ren]"—for the purpose of arousing or gratifying defendant's sexual desire, that the children were under the age of 16, and that defendant was at least five years older than the children and was at least 16 years old himself. *See* N.C. Gen. Stat. Sec. 14-202.1 (1986). The testimony of the children more than adequately demonstrated that defendant took indecent liberties with them on 29 March. For example, our Supreme Court has held that a person may be convicted of both rape and indecent liberties without being placed in double jeopardy since vaginal intercourse is not an element of indecent liberties, and committing the act for sexual gratification is not an element of rape. *State v. Rhodes*, 321 N.C. 102, 106-07, 361 S.E. 2d 578, 581 (1987). The children's testimony showed that defendant raped each of them on 29 March, and this same evidence, therefore, supported a finding that he had taken indecent liberties with them. Furthermore, a jury may infer that the defendant engaged in the conduct for the purpose of gratifying his sexual desire, and the jury in this case

could very properly have drawn such an inference from the State's evidence. *See id.* at 105, 361 S.E. 2d at 580.

In addition, we note that the judge's instruction benefited defendant in that the State need not prove a touching of the child to prove the elements of indecent liberties. *State v. Hicks*, 79 N.C. App. 599, 603, 339 S.E. 2d 806, 809 (1986). We have upheld convictions for taking indecent liberties with a child in cases in which a defendant masturbated in the presence of a child, *State v. Turman*, 52 N.C. App. 376, 278 S.E. 2d 574 (1981), and when a defendant exposed his penis and placed his hand on it. *Hicks*, 79 N.C. App. at 604, 339 S.E. 2d at 809. In this case, the evidence was that defendant disrobed in the children's presence, and that he engaged in intercourse with each child in the presence of the other. Even if this charge had been based solely on defendant's causing the children to *witness* the sexual conduct, the State, in our view, would have adequately proven the elements of the indecent liberties offenses.

B

We summarily reject defendant's contention that the sentences were excessive given the evidence.

In summary, we overrule defendant's assignment of error as to the judge's refusal to dismiss the charges. At the same time, we overrule those assignments of error addressed to the jury's verdict and the judge's sentences. The State's evidence clearly supported the jury's verdict and belies defendant's contention that the sentences imposed upon him were disproportionate.

IV

[5] Defendant assigns error to the trial judge's refusal to grant a continuance before conducting the sentencing phase of the trial. After the judge had excused the jury, defendant moved for a continuance and requested a presentencing diagnostic examination. The judge denied the motion, saying, "I'm inclined to go on with the [the hearing], particularly since I don't have any [leeway] in at least four of the sentences." Defendant proceeded to present his evidence.

A defendant may obtain a continuance of his sentencing hearing upon a showing of good cause to the trial court. N.C. Gen. Stat. Sec. 15A-1334(a) (1988). A determination of good cause is within the trial judge's discretion. *See, e.g., State v. Bush*, 78 N.C. App.

686, 692, 338 S.E. 2d 590, 593 (1986). This court will not disturb a judgment because of sentencing procedures unless the defendant shows an abuse of discretion or "circumstances which manifest inherent unfairness and injustice." *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962). Defendant contends that the judge demonstrated such "unfairness and injustice" by remarking that four of the sentences were non-discretionary. He argues that the judge misapprehended the law and believed he had to sentence defendant to consecutive life terms for the rape and sex offense convictions. Defendant contends that a continuance would have enabled him to present evidence that might have resulted in concurrent, rather than consecutive, life terms.

We have reviewed the sentencing proceeding, and we do not believe that the judge labored under a mistaken notion that our statutes mandated consecutive life sentences for four of defendant's convictions. At the hearing, the State explicitly asked for consecutive terms, and defendant explicitly asked that the sentences run concurrently. Likewise, we do not believe defendant demonstrated good cause to continue the hearing. This assignment of error is overruled.

V

[6] Defendant contends the trial judge committed reversible error when he permitted A. H. to interrupt her testimony and leave the courtroom accompanied by a rape crisis counselor, the assistant district attorney prosecuting the case, and the district attorney. Defendant has challenged, once more, the trial judge's exercise of his discretion.

In *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985), a four-year-old victim of a sex offense became emotionally upset when she was asked to testify about what the defendant had done to her. The court ordered a recess, during which time the victim went to the district attorney's office. Our Supreme Court noted that a trial judge has "large discretionary power" as to the conduct of a trial and held that the judge did not abuse his discretion by ordering the recess. *Id.* at 769-70, 324 S.E. 2d at 841.

We, also, do not see an abuse of discretion by the trial judge in this case. A nine-year-old child was testifying about sexual abuse committed upon her by her father. The judge acted properly by calling a recess to afford A. H. an opportunity to regain her composure. We overrule this assignment of error.

VI

A

[7] Defendant assigns error to the trial judge's allowing A. H. to testify as to her truthfulness. He argues that A. H.'s statements constituted improper character evidence in contravention of N.C. Gen. Stat. Sec. 8C-1, R. Evid. 608(a) (1988).

Defendant first excepts to an exchange that took place between the assistant district attorney and A. H. on direct examination. During this exchange, the State asked A. H., "Do you recall indicating earlier that you understood what it meant to tell the truth?" We have read this question in its context, and do not believe it was improper. The question occurred at a point in the testimony when the State was attempting to have A. H. describe what defendant had done to her. The child was not responding to the State's questions. We view the question simply as an attempt by the assistant district attorney to prompt A. H. to speak. We do not find that it constituted evidence of A. H.'s character.

Following cross-examination, during which defense counsel asked A. H. if she had ever told a lie, the State asked A. H. if she had testified truthfully. While such a question is, perhaps, inartful, we do not find that the judge erred by allowing the question. We agree with the State that a witness' statement that she had testified truthfully is not character evidence. Rather, the question is analogous to situations in which a witness makes an in-court identification, and the State then asks, "Are you sure that person is the one you saw?" We think, given the context, that the question was a proper one to ask on re-direct examination.

Even if error had resulted from the asking of either or both of the questions, we would find the error to be harmless. Defendant has not shown, and we think could not show, that his conviction in any way derived from A. H.'s answers to the questions defendant complains of here. *See State v. Fletcher*, 279 N.C. 85, 92, 181 S.E. 2d 405, 410 (1971). This assignment of error is overruled.

B

[8] In a related assignment of error, defendant claims the trial judge erred when he did not permit a defense witness to testify as to specific instances of untruthfulness by the children. On direct examination, defendant's lawyer asked defendant's girlfriend if she had an opinion as to the children's "character for truthfulness."

She answered, "They're not very truthful children." The lawyer then asked, "Can you give us a specific instance of their untruthfulness?" The State objected, and the judge sustained the objection. Defendant then made an offer of proof in which defendant's girlfriend testified the children would blame one another to avoid being punished for misbehavior, that they "[would say] whatever would benefit them." The judge again sustained the objection following the offer of proof.

Counsel may not question a witness on direct examination concerning specific acts indicative of character. *See, e.g., State v. Denny*, 294 N.C. 294, 298, 240 S.E. 2d 437, 439 (1978). The trial court, therefore, properly disallowed defendant's line of questioning, and this assignment of error is overruled.

VII

[9] Defendant addresses two assignments of error to the use of exhibits at trial. He contends the judge erred by permitting the children to use anatomical dolls during their testimony and that the judge erred by allowing A. H. to testify about a drawing she had made and by allowing that drawing to be admitted in evidence.

A

In *State v. Fletcher*, our Supreme Court noted it had "never disapproved of the practice" of allowing children in sexual abuse cases to illustrate their testimony with anatomical dolls. 322 N.C. 415, 421, 368 S.E. 2d 633, 636-37 (1988). The Court elaborated that the use of dolls "is wholly consistent with rules governing the use of photographs and other items to illustrate testimony." *Id.* This assignment of error is overruled.

B

Drawings are admissible in evidence. *E.g.*, 1 *Brandis*, at Sec. 34. The judge did not err by admitting A. H.'s drawing. He did not err, moreover, by allowing A. H. to use the drawing to illustrate her testimony and to testify about how she made the drawing. *See id.* We overrule this assignment of error.

VIII

[10] Defendant addresses three assignments of error to corroborative testimony offered by the State. Dr. Forestner and Iris Derrick,

a social worker with the Brunswick County Department of Social Services, each testified about statements made to them concerning the abuse of A. H. and T. H. The judge gave the jury two limiting instructions, telling the jury they could consider the statements only for corroborative purposes. A third witness for the State, Detective Nancy Simpson, also testified about statements made to her; although defendant did not request a limiting instruction, the judge gave one after Detective Simpson testified.

Corroborative evidence is admissible if the prior statements tend to add weight or credibility to the witness' testimony. *See State v. Ramey*, 318 N.C. 457, 469, 349 S.E. 2d 566, 573 (1986). The judge did not err, therefore, by allowing the corroboration testimony of the three witnesses. This assignment of error is overruled.

IX

A

Defendant alleges that the trial judge allowed the assistant district attorney to pursue a highly prejudicial line of questioning during her cross-examination of defendant. The trial judge sustained several of defense counsel's objections to the questions defendant contends were improper. We hold that those questions the judge did allow were relevant to the issue of defendant's guilt, and thus there was no error when he overruled defendant's objections to them.

B

[11] Defendant also bases an assignment of error on the State's closing argument. During her closing argument, the assistant district attorney attempted to read a passage from *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981). Defendant objected, and the trial judge sustained the objection. We, therefore, see no basis for defendant's complaint on appeal that the State attempted to read from *Galloway*.

Defendant further complains that the trial judge erred by allowing the assistant district attorney to quote from the Bible during her argument to the jury. Defendant cites no authority forbidding Biblical quotation. He cannot do so since our Supreme Court has refused to hold that it is inherently improper to quote from or refer to the Bible. *See State v. Brown*, 320 N.C. 179, 206, 358 S.E. 2d 1, 19 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406

(1987) (reference to Bible); *State v. Hunt*, 323 N.C. 407, 427, 373 S.E. 2d 400, 413 (1988) (quoting from Bible).

At a third point in the State's closing argument, defendant objected and claimed the assistant district attorney was implying that defendant had charged the State with fabricating its case against him. The judge sustained the objection. Defendant now contends he suffered prejudice as a result of the State's assertion. Once again, defendant's reason for claiming prejudice escapes us. We overrule this assignment of error.

X

[12] Defendant assigns error to the trial judge's refusal to give defendant's requested jury instructions. Defendant contends the judge should have given defendant's proffered instructions on alibi, on the credibility of child witnesses, and on expert witnesses. First, defendant's request for the instruction on expert testimony came after the judge had instructed the jury, and defendant made his request orally. The judge, therefore, properly refused to give defendant's instruction. *See* N.C. Gen. Stat. Sec. 15A-1231(a) (1988); *State v. Harris*, 47 N.C. App. 121, 123, 266 S.E. 2d 735, 737 (1980), *cert. denied*, 305 N.C. 762, 292 S.E. 2d 577 (1982) (requests for special instructions must be written and submitted before beginning of charge by judge).

Second, defendant's requested instruction as to alibi was, as he points out, a variation of a pattern jury instruction, N.C.P.I. Crim. 301.10. That instruction explicitly defines the word "alibi" as meaning "somewhere else." Defendant acknowledges that a trial judge is not required to give a requested instruction unless the instruction is a correct statement of the law and is supported by the evidence. *State v. Corn*, 307 N.C. 79, 86, 296 S.E. 2d 261, 266 (1982). The judge pointed out that defendant had not contended he was somewhere else at the time of the offenses; rather, he denied the offenses had occurred. Defendant conceded to the judge that his defense was not "straight alibi." We do not think the judge erred by refusing to give defendant's requested instruction on alibi.

Finally, defendant's requested instruction about child witnesses was "an addition" to N.C.P.I. Crim. 101.15. Defendant's instruction would have added that the jury could consider the age and maturity of the witnesses, their ability to appreciate the significance of testifying under oath, and "young children's . . . tendency to pretend

and fantasize and inability to recall specific factual details; also their susceptibility or exposure to adult influences . . . ."

A trial judge is not required to give a special instruction on the credibility of child witnesses. *State v. Bolton*, 28 N.C. App. 497, 499, 221 S.E. 2d 747, 748 (1976), *appeal dismissed*, 289 N.C. 616, 223 S.E. 2d 390 (1976). The decision whether to instruct the jury respecting a child's credibility is, again, a matter of the judge's discretion since the "trial judge can more accurately determine those instances when the instruction would be appropriate." *Id.* We see no abuse of discretion in the judge's refusal to give a special instruction as to the credibility of A. H. and T. H. This assignment of error is overruled.

XI

[13] Defendant contends the trial judge erred by excusing a juror after the juror told the court he might be related to the defendant. At the time the judge reopened the examination of the juror, the State had one peremptory challenge left to it. Since the State could have exercised this challenge had the judge not removed the juror, defendant cannot claim that the trial judge's action prejudiced him. *See State v. Barts*, 316 N.C. 666, 680-81, 343 S.E. 2d 828, 838 (1986). We overrule this assignment of error.

XII

Defendant contends the trial judge erred by finding A. H. and T. H. competent to testify. We believe the record clearly indicates that the judge ruled correctly on this question, and we overrule this assignment of error.

XIII

We find no error in the trial of this case.

No error.

Judges WELLS and JOHNSON concur.

WILLIAM A. DAVIDSON v. KNAUFF INSURANCE AGENCY, INC., INDIVIDUALLY AND AS AGENT OF UNITED STATES FIDELITY AND GUARANTY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY

No. 8726SC1234

(Filed 21 February 1989)

1. **Appeal and Error § 6.8— no appeal from summary judgment**

Since the trial court failed to certify in its judgment that there was no just reason to delay the appeal, there could be no appeal under N.C.G.S. § 1A-1, Rule 54(b) of the court's judgment finally disposing of at least one but fewer than all the claims.

2. **Appeal and Error § 6.2— claim finally determined—appeal delayed—when substantial right is affected**

So long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined.

3. **Appeal and Error § 6.8; Insurance § 69— allegations of false representations made by defendants—common factual issue in all claims—substantial right affected by dismissal of some claims**

The trial court's dismissal of plaintiff's negligence, fraud, and unfair trade practice claims against defendant insurer and unfair trade practice claim against defendant agent affected a substantial right since common to all those claims and plaintiff's negligence claim against defendant agent which was not dismissed was the factual issue of whether defendant insurer, its agent, or both caused plaintiff's injuries by making any false representation which induced plaintiff to rely on them to his detriment.

4. **Fraud § 12— representations that insurance coverage had value—fraud alleged—summary judgment improper**

The trial court erred in granting summary judgment for defendant insurer on plaintiff's claim that defendant fraudulently induced plaintiff to pay additional insurance premiums for worthless underinsurance coverage where plaintiff offered evidence that defendant collected premiums for policies which stated that they provided "underinsured motorist coverage"

in the amount of $25,000, while the stated coverage did no more than duplicate the uninsured motorist coverage already offered and was thus illusory; the issuance of underinsurance coverage by defendant in return for an additional premium was thus a tacit (albeit false) representation to plaintiff that the coverage issued had some value; the issue whether defendant knew the falsity of its representation or otherwise had the requisite fraudulent intent was not an appropriate subject for summary judgment; there was no merit to defendant's contention that it could not possibly have known that the coverage was worthless until the N. C. Supreme Court decision of *Davidson v. U. S. Fidelity and Guar. Co.*, 316 N.C. 551 (1986), because defendant denied underinsurance coverage under the policy in 1983; and there was no merit to defendant's contention that it could not be held liable for fraud, since it simply offered underinsurance coverage in the minimum amount permitted under the relevant version of N.C.G.S. § 20-279.21(b)(4), because the Legislature did not authorize defendant to offer its underinsurance coverage in a false or misleading manner.

5. Unfair Competition § 1— unfair trade practice—fraud in sale of underinsured motorist coverage

Since proof of fraud in the sale of underinsured motorist coverage would necessarily constitute proof of statutorily prohibited unfair and deceptive acts, and plaintiff was entitled to proceed on his claim of fraud, he was likewise entitled to proceed against defendant insurer on his claim for unfair and deceptive trade practices.

6. Negligence § 29— breach of fiduciary duty—sufficiency of evidence

The trial court erred in entering summary judgment on plaintiff's negligence claim against defendant insurer where there was a factual issue as to whether defendant agent was acting within the course and scope of its agency with defendant insurer when it allegedly committed the negligent act of breaching its fiduciary duty to inform plaintiff that the underinsurance coverage he was purchasing was worthless.

7. Unfair Competition § 1— insurance agent's failure to disclose value of underinsurance coverage—evidence of unfair trade practice—summary judgment improper

The trial court erred in entering summary judgment for defendant insurance agent on plaintiff's claim for unfair and

deceptive trade practices where defendant's renewal of plaintiff's minimum limits underinsurance, without disclosing its true value, was evidence of an unfair trade practice which would at the least tend to deceive the average consumer about the extent of his coverage. N.C.G.S. § 75-1.1; N.C.G.S. § 58-54.4(1).

APPEAL by plaintiff and cross-appeal by defendant Knauff Insurance Agency, Inc. from *Snepp (Frank W.), Judge.* Judgment entered 15 September 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 May 1988.

Hamel, Hamel & Pearce, P.A., by Hugo A. Pearce III, and Lewis, Babcock, Pleicones & Hawkins, by A. Camden Lewis and Daryl G. Hawkins, for plaintiff.

Jones, Hewson & Woolard, by Harry C. Hewson and Hunter M. Jones, for defendants.

GREENE, Judge.

This appeal arises from plaintiff's purchase of an automobile liability policy issued by defendant United States Fidelity and Guaranty Company ("USFG"). The policy was originally procured for plaintiff by Knauff Insurance Agency, Inc. ("Knauff") on or about 11 July 1973 and renewed on each anniversary thereafter through July 1984. Pursuant to the Legislature's enactment of underinsured motorist coverage effective 1 January 1980, the USFG policy issued 11 July 1980 began providing underinsured motorist coverage limits of $25,000 for each person and $50,000 for each accident; these limits remained the same during the 1981, 1982 and 1983 renewal periods. Plaintiff paid an additional annual premium of $1.00 for this underinsured motorist coverage. In March 1983, plaintiff was involved in an automobile accident which caused him serious injuries resulting in medical expenses exceeding $100,000. After plaintiff settled with the driver of the other automobile for $25,000, USFG denied liability for any additional expenses under its policy's underinsurance coverage.

An earlier declaratory judgment action by plaintiff resulted in the determination by this court that both the USFG policy as written as well as the relevant version of Section 20-279.21(b)(4) unambiguously provided that USFG's responsibility under its $25,000 underinsurance coverage would be reduced by plaintiff's $25,000 settlement with the other driver, leaving nothing due from USFG;

this holding was affirmed *per curiam* by our Supreme Court. *Davidson v. U.S. Fidelity and Guar. Co.*, 78 N.C. App. 140, 336 S.E. 2d 709 (1985), *aff'd per curiam*, 316 N.C. 551, 342 S.E. 2d 523 (1986); N.C.G.S. Sec. 20-279.21(b)(4) (1983). As plaintiff's *uninsured* motorist coverage already insured against motorists with less than the statutorily required minimum liability coverage of $25,000, we noted plaintiff's contention that "there are no circumstances under which he can collect on his *underinsured* coverage [of $25,000] and he has paid his premium for this coverage in exchange for nothing. It appears that the plaintiff is correct in this argument but it does not justify our rewriting the policy." 78 N.C. App. at 143, 336 S.E. 2d at 711 (emphasis added); *cf.* N.C.G.S. Sec. 20-279.21(3) (1983) (defining "uninsured motor vehicle" as one without at least minimum liability coverage).

As a result of our judicial determination that plaintiff could not collect under his underinsurance policy with USFG, plaintiff instituted several claims against Knauff and USFG in which he alleged: (1) that Knauff breached its alleged fiduciary duty to disclose the underinsurance coverage was "worthless" and otherwise negligently procured or renewed the USFG policy; and (2) that USFG committed negligence as well as fraud in issuing the policy as subsequently renewed. Plaintiff also alleged that both defendants' actions constituted unfair and deceptive trade practices. Plaintiff conducted discovery which included serving interrogatories on USFG; plaintiff was unsatisfied with its answers and moved that USFG be compelled to answer. Upon the trial court's denial of that motion, both defendants moved for summary judgment on all claims. The trial court subsequently dismissed all claims against USFG. While the trial court also dismissed the claim against Knauff for unfair and deceptive trade practices, the court declined to dismiss plaintiff's negligence claim against Knauff. Plaintiff and defendant Knauff both appeal from the court's summary judgment.

These facts present the following issues: I) as the trial court's summary judgment determined fewer than all the claims between the parties, whether plaintiff and/or Knauff may maintain interlocutory appeals from the court's judgment; and II) whether the trial court properly granted summary judgment (A) dismissing plaintiff's claims against USFG for negligence, fraud and unfair trade practices and (B) dismissing plaintiff's unfair trade practice claim against Knauff.

I

[1] The trial court's summary judgment dismissed all claims against USFG, and all but the claim against Knauff that it breached alleged fiduciary duties in negligently procuring underinsurance coverage of plaintiff's automobile. Thus, the court's summary judgment is an interlocutory judgment since it "does not dispose of the case, but leaves it for further action for the trial court in order to settle and determine the entire controversy." *Veazy v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 377, 381 (1950). However, there are two avenues for appealing judgments which are interlocutory under *Veazy*. First, if there has been a final disposition of at least one but fewer than all claims, the final disposition of those claims may be appealed if the trial judge in addition certifies that there is no just reason to delay the appeal. N.C.G.S. Sec. 1A-1, Rule 54(b) (1988); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 129, 225 S.E. 2d 797, 804 (1976) (Rule 54(b) "expedites review of each separable portion of a multiple claim or multiple party action that has been finally adjudicated"); *see id.* at 144, 225 S.E. 2d at 813 (Sharp, concurring in part) (Rule 54(b) simply focuses on individual claims as "unit to which finality concept would be applied"). However, since the court in this case failed to certify in its judgment that there was no just reason to delay the appeal, there can be no appeal of the court's summary judgment under Rule 54(b).

Second, even if no appeal is permitted under Rule 54(b), an interlocutory adjudication may nevertheless be appealed if it qualifies under the pertinent provisions of Section 1-277 and Section 7A-27(d). N.C.G.S. Sec. 1-277 (1983); N.C.G.S. Sec. 7A-27(d) (1986); *Oestreicher*, 290 N.C. at 131, 225 S.E. 2d at 805 (reference in Rule 54(b) to appeal under "other statutes" permits appeal under Sections 1-277 and 7A-27(d)). Interlocutory appeals are most commonly allowed under Sections 1-277 and 7A-27(d) if delaying the appeal will prejudice any substantial rights. Sec. 1-277(a); Sec. 7A-27(d)(1). In determining whether a substantial right will be prejudiced by delaying an interlocutory appeal, our Supreme Court has emphasized that "it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which the appeal is sought is entered." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E. 2d 405, 408 (1982) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978)).

However, certain guidelines have emerged. Our Supreme Court has agreed with the general proposition that, "The right to avoid one trial on . . . disputed [fact] issues is not normally a substantial right that would allow an interlocutory appeal while the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E. 2d 593, 595 (1982). This general proposition is based on the following rationale: when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green*, 305 N.C. at 608, 290 S.E. 2d at 596; *accord Bernick*, 306 N.C. at 439, 293 S.E. 2d at 408-09. Under Section 1-294, perfecting an appeal stays further proceedings upon the judgment appealed from "and upon the matters embraced therein." N.C.G.S. Sec. 1-294 (1983). As the trial of any remaining factually related claims is presumably stayed under Section 1-294, the possibility of two trials of the same factual issues is thereby averted. *See Survey of Developments in North Carolina*, 57 N.C.L. Rev. 827, 909 n.113 (1979); *see also Survey of Developments in North Carolina Law*, 61 N.C.L. Rev. 957, 1008 (1982) (stating *Green*-type cases subordinate judicial efficiency to jury's need for simple issues by allowing interlocutory appeals of different claims arising from same facts).

The *Green* proposition concerning the trial of common fact "issues" refines the Court's earlier holding in *Oestreicher* concerning the trial of related "causes": where plaintiff raised related claims for breach of contract, fraud, and punitive damages arising from performance of the same lease contract, the *Oestreicher* Court held "plaintiff had a substantial right to have all three causes tried at the same time by the same judge and jury." 290 N.C. at 130, 225 S.E. 2d at 805. It has been suggested that a loose application of the *Oestreicher* Court's reference to the substantial right to try all "causes" at once may produce results inconsistent with the *Green* Court's reference to the more limited right to try only common fact "issues" at once. *J & B Slurry Seal Co. v. Mid-South Aviation Inc.*, 88 N.C. App. 1, 7-9, 362 S.E. 2d 812, 817 (1987).

However, given the related fact issues underlying the "causes" in *Oestreicher*, it is clear under either *Oestreicher* or *Green* that

if the final disposition of multiple claims depends upon the determination of any common fact issues, then the parties ordinarily have a substantial right that those issues be determined by the same jury. *Green*, 305 N.C. at 606-08, 290 S.E. 2d at 596 (since resolution of remaining contribution claim *as pled* did not depend upon factual issues overlapping primary liability claim, appeal from summary judgment on liability claim dismissed); *Bernick*, 306 N.C. at 439, 293 S.E. 2d at 408-09 (plaintiff had substantial right to have one jury decide whether one, some, all or none of joint defendants caused plaintiff's injuries); *see also Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 375 S.E. 2d 161 (1989) (per curiam) (dismissal of compensatory damage claim under insurance contract affected substantial right under *Oestreicher* where remaining unfair trade claim arose from same contract).

Conversely, orders which do not determine even one claim, but simply require subsequent trial of the fact issues underlying that claim, are generally not appealable since "the avoidance of one trial is not ordinarily a substantial right." *Green*, 305 N.C. at 608, 290 S.E. 2d at 596; *see, e.g., Tridyn Inds., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 491-92, 251 S.E. 2d 443, 447 (1979) (partial summary judgment on liability is non-appealable interlocutory order); *Waters*, 294 N.C. at 208-09, 240 S.E. 2d at 344 (denial of motions to dismiss is not appealable).

[2] As it protects the substantial right to avoid inconsistent verdicts, the "one trial/two trial" proposition does not purport to determine those cases where other substantial rights are at stake. *E.g., In re McCarroll*, 313 N.C. 315, 316, 327 S.E. 2d 880, 881 (1985) (per curiam) (order denying motion for jury trial affects substantial right and is appealable); *Faircloth v. Beard*, 320 N.C. 505, 506, 358 S.E. 2d 512, 514 (1988) (order granting motion for jury trial is likewise appealable). However, insofar as interlocutory appeals may arise from multiple claim cases similar to *Oestreicher*, *Green* and *Bernick*, we may generally state that so long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined.

[3] In light of this general proposition, the trial court's dismissal of plaintiff's negligence, fraud and unfair trade practice claims against USFG and unfair trade claim against Knauff affects a substantial right since there are factual issues common to the claims dismissed

by the trial court and the negligence claim it did not dismiss. Common to all claims is the factual issue whether USFG, its agent Knauff or both caused plaintiff's injuries by making any false representation which induced plaintiff to rely to his detriment: given Knauff's purported agency for USFG, a jury considering Knauff's actions on one hand and a separate jury considering the imputation of those actions to USFG on the other could reach inconsistent verdicts on whether Knauff's actions caused plaintiff's injuries. *See Bernick*, 306 N.C. at 438-39, 293 S.E. 2d at 409 (in action including imputed negligence claim, substantial right to have one jury determine whether one, some, all or none of joint defendants caused plaintiff's injuries); *see also Fox v. Wilson*, 85 N.C. App. 292, 298, 354 S.E. 2d 737, 741 (1987) (interlocutory determination of claims including *respondeat superior* claim held appealable since all claims arose from same transaction). Accordingly, we hold under Sections 1-277(a) and 7A-27(d)(1) that plaintiff may appeal as a matter of right the dismissal of its claims against both defendants.

However, the trial court's denial of Knauff's motion to dismiss plaintiff's remaining negligence claim does not entitle Knauff to an immediate appeal under substantial right analysis since there has been no final disposition whatsoever of that claim. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 424, 302 S.E. 2d 868, 871 (1983) (error to grant certiorari to hear appeal from denial of summary judgment motion). Therefore, we dismiss Knauff's cross-appeal.

Plaintiff also appeals the trial court's denial of his motion to compel discovery. This also is an attempt to appeal from a non-appealable interlocutory order. *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 76, 80, 347 S.E. 2d 824, 827 (1986) (denial of motion to compel discovery is non-appealable). However, neither the trial court's order nor this opinion prevent plaintiff from filing additional or amended interrogatories or requests for documents in light of defendants' answers and objections to discovery.

II

At the outset, we note that plaintiff responded to defendants' motion for summary judgment with his own affidavit which, among other things, verified the contents of his amended complaint. As neither defendant made any motion to strike any provision of plaintiff's verified complaint, we will treat the complaint as an additional responsive affidavit under Rule 56(e) of our Rules of Civil Procedure. N.C.G.S. Sec. 1A-1, Rule 56(e) (1983); *see Schoolfield v. Collins*,

281 N.C. 604, 612, 189 S.E. 2d 208, 213 (1972) (to extent verified pleadings meet requirements of Rule 56(e), pleadings treated as affidavits); *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 192, 247 S.E. 2d 720, 722, *disc. rev. denied*, 296 N.C. 410, 251 S.E. 2d 468 (1979) (failure to object to form or sufficiency of verified pleading waived objection on summary judgment).

The summary judgment materials may be briefly summarized as follows: defendants answered plaintiff's claims by admitting Knauff had an agency contract with USFG and that Knauff was acting within the course and scope of its agency when it co-signed the July 1982 renewal of the USFG policy. USFG further admitted that USFG had denied underinsurance liability under the policy and that that denial had been judicially upheld. Defendants contended that they could not be liable on these claims since they were required by Section 20-279.21 to offer plaintiff at least the minimum $25,000 underinsured motorist coverage issued in 1983. James W. Knauff, the president of Knauff Insurance Agency, Inc., stated in his affidavit that the policy itself had been issued in compliance with relevant portions of the North Carolina "Personal Auto Manual" approved by the Insurance Commissioner. In support of their motion for summary judgment, defendants offered Mr. Knauff's affidavit and copies of relevant portions of certain insurance statutes, the North Carolina Personal Auto Manual, and certain written communications with the North Carolina Rate Bureau and the Insurance Commissioner occurring between 1979 and 1985. We note that, in July 1982, Section 20-279.21(b)(4) provided that the limit of payment of underinsurance coverage "is only the difference between the limits of the liability insurance that is applicable and the limits of the underinsured motorist coverage as specified in the owner's policy." N.C.G.S. Sec. 20-279.21(b)(4) (1983).

Plaintiff stated in his own affidavit that he purchased automobile liability insurance in July 1982 through defendant Knauff and at that time requested "underinsurance coverage." He stated that "the agent at Knauff Insurance represented to me that I was in fact purchasing underinsurance coverage. It was my understanding at the time based upon my discussions with the agent that underinsurance coverage provided coverage for damages in excess of at-fault [sic] driver's insurance coverage up to the amount that I purchased [,] *provided my . . . injuries were in excess of the at-fault driver's coverage*." (Emphasis added.) Plaintiff further stated that "the declaration page of my policy indicates that I was re-

ceiving underinsurance coverage and that I paid a premium for underinsurance coverage . . . . I relied upon Knauff Insurance Agency and USF&G to provide me the underinsurance coverage which I requested. I had no knowledge at the time of purchase that I was not in fact receiving underinsurance coverage." Plaintiff stated that had he been informed he was purchasing worthless underinsurance coverage, he would have purchased increased coverage in order to assure protection. Plaintiff stated that he relied upon Knauff and USFG in deciding what type and amount of insurance to purchase. Plaintiff offered copies of his past insurance policies with USFG which, commencing in July 1980, included a declaration page which shows additional "underinsured motorist coverage" with liability limits of $25,000 for an additional premium of $1.00. The endorsement attached to each policy after July 1980 was titled "Underinsured Motorist Coverage—North Carolina."

We also note the record contains Mr. Knauff's deposition in which he asserts, among other things, that the minimum limits underinsurance coverage of $25,000 *did* provide some underinsurance protection when the limits were enacted in January 1980; although the minimum liability coverage for all motorists was raised in January 1980 from $15,000 to $25,000, policies issued before January 1980 with the lower limits would remain in effect for twelve months after their issuance. Thus, it appears plaintiff's $25,000 underinsurance coverage would have provided some protection against those motorists with the lower liability limits from the time he renewed his policy in July 1980 until the expiration of the older policies on or before 31 December 1980.

A

Claims Against USFG

[4] *Fraud.* Plaintiff first claims that USFG fraudulently induced plaintiff to pay additional insurance premiums for worthless underinsurance coverage by representing that the additional premiums would provide underinsurance benefits if plaintiff were injured by an underinsured motorist—although USFG allegedly knew plaintiff could never recover. The elements of fraud are (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, and (5) which results in damage to the injured party. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981); *see also Payne v. N.C. Farm Bureau Mut. Ins. Co.*, 67 N.C. App.

692, 696, 313 S.E. 2d 912, 914-15 (1984) (approving statement of fraud claim where plaintiff failed to secure other insurance coverage based on insurer's misrepresentation). To overcome summary judgment, a plaintiff alleging fraud must forecast evidence that (1) defendant made a definite and specific representation to him that was materially false; (2) that defendant knew the representation was false; and (3) plaintiff reasonably relied on the representation to his detriment. *Kent v. Humphries*, 50 N.C. App. 580, 588, 275 S.E. 2d 176, 182, *modified on other grounds and aff'd*, 303 N.C. 675, 281 S.E. 2d 43 (1981).

Based on the summary judgment materials noted above, we conclude plaintiff has raised material issues of fact which entitle him to proceed with his fraud claim against USFG. First, plaintiff has offered evidence that USFG made a false representation or concealed a material fact in issuing its policy. Specifically, USFG collected premiums for policies which stated they provided "underinsured motorist coverage" in the amount of $25,000. However, as we noted earlier, the purported additional underinsurance coverage offered by USFG after 31 December 1980 did no more than duplicate the uninsured motorist coverage already offered and was thus illusory. Neither defendant offered any summary judgment evidence that the underinsurance coverage offered in July 1982 was anything but worthless. The issuance of underinsurance coverage by USFG in return for an additional premium was thus a tacit (albeit false) representation to plaintiff that the coverage issued had some value.

Based on nearly identical facts, the Illinois Supreme Court held a claim for fraud was stated where the insurer had collected additional premiums for underinsurance coverage which only duplicated the policy's uninsured coverage:

> Because the minimum limits for underinsured-motorist coverage would not exceed the minimum insurance carried by an Illinois resident, the plaintiffs argue that they could never collect on [minimum limits] underinsured-motorist coverage following an accident in Illinois with an Illinois resident. They also contend that the insurance will not pay in any other circumstance. . . . Here, the plaintiffs alleged that the defendants, by their conduct, represented that the coverage had value. The plaintiffs also alleged that the defendants knew that the representations were false, that the representations were made for the purpose of inducing the plaintiffs to purchase insurance, and that in reasonable reliance on the representations, the plain-

> tiffs purchased the coverage in question. We conclude that these allegations are sufficient to state a cause of action for fraud. . . . [T]he plaintiffs allege not that they were overcharged for something that had some value, but rather that they were charged premiums for coverage that had no value. *We are of the opinion that the issuance of coverage by an insurance company in return for a premium is a tacit representation to the consumer that the coverage has value. Assuming . . . that the coverage has no value . . ., we find that the insurance company defendants have made a false representation of the value of the coverage by issuing it without disclosing that it had no value. . . . The defendants contend that they cannot be held liable for fraud because the Legislature required them to offer the coverage in question. That did not authorize them to sell it in a false and misleading manner, however.*

Glazewski v. Coronet Ins. Co., 108 Ill. 2d 243, 483 N.E. 2d 1263, 1265-66 (1985) (emphasis added).

The issue whether USFG knew the falsity of its representation or otherwise had the requisite fraudulent intent is not an appropriate subject for summary judgment under these facts. The affidavit and deposition of USFG's agent, Mr. Knauff, do not necessarily shed light on USFG's intent: contradictory inferences on this issue could reasonably be drawn from these summary judgment materials in any event. *See generally Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410-11 (1976). Since USFG apparently denied underinsurance coverage under the policy in 1983, we reject USFG's argument that it could not *possibly* have known in July 1982 that the coverage was worthless until our Supreme Court affirmed our first decision in this case in 1986.

Like the Illinois Supreme Court in *Glazewski*, we furthermore reject USFG's contention that it cannot be held liable for fraud since it simply offered underinsurance coverage in the minimum amount permitted under the relevant version of Section 20-279.21(b)(4). Irrespective of the minimum limits approved, the Legislature did not authorize USFG to offer its underinsurance coverage in a false or misleading manner. USFG relies on certain transmittal letters by the Insurance Commissioner and provisions of the North Carolina Personal Auto Manual to support its assertion that the Commissioner authorized its offering of these policies. However, both the Manual and the Commissioner's correspondence simply authorize the actual wording of the policies and endorsements:

nothing in the record evidences any authorization of the particular manner by which USFG offered this policy. Furthermore, we note the correspondence with the Commissioner in the record is dated *before* USFG sold plaintiff underinsurance coverage in July 1980: again, minimum limits underinsurance coverage of $25,000 did provide some underinsurance coverage against those motorists who continued through December 1980 to be insured at the prior minimum liability limits of $15,000.

Thus, the materials in the record do not demonstrate that either the Legislature or the Insurance Commissioner approved USFG's practice of offering minimum limits underinsurance coverage without disclosing its true value. Accordingly, under these circumstances we hold the trial court erred in granting summary judgment in favor of USFG on plaintiff's fraud claim.

[5] *Unfair and Deceptive Trade Practices.* As we have held plaintiff has raised material fact issues in support of its fraud claim against USFG, we likewise hold plaintiff is entitled to proceed against USFG with his claim for unfair or deceptive trade practices since proof of fraud in this case would necessarily constitute proof of statutorily prohibited unfair and deceptive acts. *See Winston Realty Co. v. G.H.G. Inc.*, 314 N.C. 90, 97, 331 S.E. 2d 677, 681 (1985); N.C.G.S. Sec. 75-1.1 (1983); N.C.G.S. Sec. 58-54.4(1) (1982). Even if USFG's representations concerning underinsurance were technically true, the representations clearly had the tendency to deceive the average consumer as to the coverage and value of underinsurance in the minimum amount. *Cf. Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 265-66, 266 S.E. 2d 610, 622 (1980).

[6] *Negligence.* Plaintiff has also asserted that USFG had a fiduciary obligation to inform him that the underinsurance coverage he was purchasing was worthless. A fiduciary relationship exists "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 interest of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). We have often held that an insurance agent is the insured's fiduciary with respect to procuring insurance and advising him as to the scope of his coverage. *E.g., R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 659, 303 S.E. 2d 573, 577 (1983) (insurance agent has fiduciary duty to keep insured informed about coverage); *see also Gaston-Lincoln Transit v. Maryland Cas. Co.*,

285 N.C. 541, 551, 206 S.E. 2d 155, 161 (1974) (plaintiff may rely upon assumption that policy renewed upon same terms and conditions as earlier policy).

However, there has as yet been no determination whether USFG's agent Knauff was negligent in renewing the USFG policy in July 1982 without disclosing or ascertaining the true value of the underinsurance coverage. We note USFG's admission that Knauff was acting in the course and scope of its agency when it renewed the USFG policy in July 1982. With respect to the imputation of any negligence from Knauff to USFG, the summary judgment materials accordingly raise the factual issue whether Knauff was acting within the course and scope of its agency with USFG when it allegedly committed negligent acts. The trial court thus erred in entering summary judgment on plaintiff's negligence claim against USFG. *See Harrell v. Davenport*, 60 N.C. App. 474, 478-79, 299 S.E. 2d 308, 311 (1983).

B

Unfair and Deceptive Trade Claim Against Knauff

[7] We note plaintiff's amended complaint deleted his fraud claim against Knauff; however, plaintiff's summary judgment materials nevertheless raise material issues of fact precluding summary dismissal of his remaining unfair trade practice claim against Knauff. Plaintiff's affidavit and exhibits set forth Knauff's representations about the insurance protection afforded by minimum limits underinsurance coverage. As discussed above, offering underinsurance coverage to an insured is a tacit representation that the coverage offered has some value. As we have held with respect to USFG, Knauff's renewal of plaintiff's minimum limits underinsurance—without disclosing its true value—is evidence of an unfair trade practice which would at the least tend to deceive the average consumer about the extent of his coverage. Sec. 75-1.1; Sec. 58-54.4(1); *see generally Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468-72, 343 S.E. 2d 174, 179-80 (1986); *see also Gaston*, 285 N.C. at 551, 206 S.E. 2d at 161 (insured may assume that policy will be renewed upon same terms as earlier policy). Accordingly, the trial court erroneously entered summary judgment against plaintiff on this claim.

Our disposition may thus be summarized as follows: 1) we dismiss the cross-appeal of defendant Knauff from the denial of

its motion for summary judgment; 2) we dismiss plaintiff's appeal from the trial court's order denying his motion to compel discovery; 3) we reverse and remand the trial court's entry of summary judgment dismissing plaintiff's claims against USFG for negligence, fraud and unfair and deceptive trade practices; and 4) we reverse and remand the trial court's judgment dismissing plaintiff's claim against Knauff for unfair and deceptive trade practices.

Appeal by Knauff—dismissed.

Appeal by plaintiff from order denying motion to compel discovery—dismissed.

Appeal by plaintiff from dismissal of claims against defendants—reversed and remanded.

Judges ARNOLD and ORR concur.

IN THE MATTER OF: RANDY RAY GROVES

No. 8827DC534

(Filed 21 February 1989)

Infants § 20— juvenile delinquent—dispositional alternatives not explored or tried—commitment to training school improper

In a juvenile delinquency dispositional hearing where the judge was made aware that the child had a substance abuse problem, evidence did not support the judge's finding that alternatives to commitment were tried unsuccessfully or were inappropriate, since there was an inadequate exploration of what alternatives to commitment existed; the only statutory alternative actually attempted was probation; and the judge did not request any medical or psychological evaluations to assist him in assessing the extent of, or fashioning an appropriate response to, the child's asserted drug problem. Moreover, the judge was required by statute to select the least restrictive dispositional alternative in light of the circumstances, and this he did not do when he placed the child in a training school. N.C.G.S. §§ 7A-646, 7A-647, 7A-648, 7A-649, 7A-652(a).

IN RE GROVES

[93 N.C. App. 34 (1989)]

APPEAL by respondent from *Berlin H. Carpenter, Jr., Judge.* Order entered 31 December 1987 in District Court, GASTON County. Heard in the Court of Appeals 29 November 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David Gordon, for the State.

Office of the Public Defender, by Assistant Public Defender Gay R. Atkins, for respondent-appellant.

BECTON, Judge.

This is an appeal from a juvenile delinquency dispositional hearing. The question presented is whether community-based alternatives to commitment were sufficiently explored before the juvenile was committed to training school. We conclude they were not, vacate the order, and remand the cause.

I

Juvenile petitions were filed 6 November 1987 alleging that Randy Ray Groves, age 15, was a delinquent juvenile. Randy, who was on probation for one charge of shoplifting, conspiracy to commit shoplifting, and receiving stolen goods, failed to appear at the first scheduled hearing. At a second hearing on 31 December 1987, Randy admitted the allegations of the petitions, namely, that he was intoxicated and disruptive in public, and that he stole five cartons of cigarettes. Randy also admitted that he had a substance abuse problem with Dilaudid (a highly addictive narcotic pain reliever) and cocaine. The court counselor assigned to Randy's case informed the judge that Randy had become ill from drug withdrawal while in detention.

At the dispositional phase of the hearing, Randy's attorney asked that the court counselor look into programs appropriate to Randy's situation. The counselor responded, "[W]e don't have a Drug Rehabilitation Program. His mother has tried to get him into treatment. She does not have any insurance." The judge then suggested training school as a dispositional alternative, since Randy could receive treatment for drug abuse there. The judge explained: "Unfortunately, the State doesn't have any [f]acility short of [t]raining [s]chool that I can put you in right now."

Randy's attorney argued that Randy's offenses were not so serious as to warrant commitment to training school, that training school was not designed to be a drug treatment facility, and that

less restrictive dispositional alternatives existed and should be tried before resorting to commitment to training school. The attorney offered several suggestions, including Barium Springs (a group home), Cedar Springs (a private substance abuse facility), placing Randy in custody of the Department of Social Services through which drug treatment could be arranged, or hospitalization.

The judge responded to these suggestions by stating in part:

> [I]t would be dangerous . . . to let him walk out that door . . . in withdrawals[.] . . . [A]ll that [shoplifting] was to get stuff to sell to get dope, wasn't it? . . . You see [Randy], you've got a real big problem and I can't let you out, for your own good. . . . I can't let you walk out that door and go steal something or what have you to get some money to buy some more "coke." It's for your own protection.

The judge then made several findings of fact, including the following:

> . . . [T]he *alternatives to commitment have been attempted unsuccessfully or are inappropriate and . . . the juvenile's behavior constitutes a threat* to property of the citizens of this community and particularly *to his own well being.*

(Emphasis added.) The judge ordered Randy to be committed to training school "for an indeterminate period of time not to exceed two (2) years," and further ordered the training school to give Randy a "complete mental and physical examination and . . . [to] provide the necessary treatment for any condition they may find, including but not limited to controlled substance abuse."

II

We first summarize the law applicable to juvenile adjudications.

A. *Disposition Based on Juvenile's Needs*

The focus of the juvenile justice system is not on punishing the juvenile offender but on achieving an *individualized* disposition that meets the juvenile's needs and promotes his best interests. *See In re Brownlee*, 301 N.C. 532, 553, 272 S.E. 2d 861, 873 (1981); N.C. Gen. Stat. Secs. 7A-516(3), 7A-646 (1986) (Supp. 1988). *See also In re Burrus*, 275 N.C. 517, 529, 169 S.E. 2d 879, 889 (1969), *aff'd sub nom. McKiever v. Pennsylvania*, 403 U.S. 528, 551, 29 L.Ed. 2d 647, 664 (1971) (juvenile delinquency proceeding not equivalent to criminal prosecution). The best interest of the State and

safety of the public are also factors to be weighed in arriving at an appropriate disposition. *See generally In re Bullabough*, 89 N.C. App. 171, 186, 365 S.E. 2d 642, 650 (1988); N.C. Gen. Stat. Secs. 7A-516, 7A-649, 7A-652 (1986) (Supp. 1988). A wide variety of dispositional alternatives is presented in the Juvenile Code, and a trial judge is free to fashion others in harmony with the individual child's needs. *See, e.g.*, N.C. Gen. Stat. Secs. 7A-647, 7A-648, 7A-649 (1986).

B. *Dispositional Alternatives*

Section 7A-649 lists ten dispositional alternatives for delinquent juveniles, the most severe of which is commitment to training school; the other nine are various "community-level" alternatives. *See Brownlee*, 301 N.C. at 552, 554-55, 272 S.E. 2d at 873, 874-75 (term "community" is interpreted broadly but does not include out-of-state services). Among these alternatives are: suspension of a more severe penalty subject to specified conditions; supervised probation with conditions; ordering participation in a supervised day program, sometimes subject to conditions; intermittent confinement in a detention facility; placement in a community-based educational program; and placement in a professional residential or nonresidential treatment program. N.C. Gen. Stat. Sec. 7A-649 (1986).

Section 7A-647, which is to be read in tandem with Section 7A-649, presents several other community-based dispositional alternatives for delinquent juveniles. One of these is placing custody of the juvenile in the Department of Social Services, through which medical, psychiatric, psychological or other care may be arranged. N.C. Gen. Stat. Sec. 7A-647(2) (1986). The judge may also allow the parent to arrange for necessary care or treatment, and if the parent is unwilling or unable to do so, the judge may order it himself. N.C. Gen. Stat. Sec. 7A-647(3). In that case, "the judge may order the parent to pay the cost of such care . . . [or] [i]f the judge finds the parent is unable to pay the cost of care, the judge may charge the cost to the county." *Id.* Finally, if the juvenile is mentally ill or mentally retarded, the director of the Area Mental Health, Mental Retardation, and Substance Abuse Services may be charged with "mobilizing resources to meet [the child's] needs." *Id.*

Like the other sections cited, Section 7A-648 vests broad discretion in the trial judge to design a plan to meet the delinquent juvenile's needs. Some of the dispositional alternatives listed in that Section allow the child to remain at home with family and

friends. For example, the judge may place the juvenile under the supervision of a court counselor who will secure social, educational, or medical services for the child, or the judge may continue the case for up to six months to permit the family to try to meet the child's needs through placement in a specialized program. N.C. Gen. Stat. Sec. 7A-648 (1986).

C. *Commitment to Training School Most Restrictive Alternative*

The legislative preference for a community-based solution to the juvenile offender problem is reflected throughout the Juvenile Code. *See generally Brownlee*, 301 N.C. at 551, 272 S.E. 2d at 872. The stated purpose of the Code is "[t]o divert juvenile offenders from the juvenile system . . . *so that juveniles may remain in their own homes and may be treated through community-based services. . . .*" N.C. Gen. Stat. Sec. 7A-516(1) (Supp. 1988) (emphasis added). Section 7A-646 mandates that "appropriate community resources" be considered, and if possible, employed, before resorting to the most drastic of dispositional alternatives, commitment to training school. N.C. Gen. Stat. Sec. 7A-646 (1986).

Section 7A-646 further provides:

> In choosing among statutorily permissible dispositions for a delinquent juvenile, *the judge shall select the least restrictive disposition* both in terms of kind and duration, that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile. *A juvenile should not be committed to training school . . . if he can be helped through community-level resources.*

Id. (Emphasis added.) Thus, commitment to training school is an option to be reserved only for those extraordinary situations when "there is no reasonable [community-level] alternative open to the court. . . ." *Brownlee*, 301 N.C. at 552, 272 S.E. 2d at 873.

Before a delinquent juvenile may be committed to training school, the judge must find that two tests have been met: first, "that *alternatives to commitment . . . have been attempted unsuccessfully or are inappropriate*," and second, "that the juvenile's behavior constitutes a threat to persons or property in the community." N.C. Gen. Stat. Sec. 7A-652(a) (1986) (emphasis added). The judge's findings supporting both of these tests must be sufficiently detailed and must be based on "some evidence" appearing

in the record. *In re Khork*, 71 N.C. App. 151, 155, 321 S.E. 2d 487, 490 (1984). Randy assigns error to the judge's finding regarding the first test.

III

Randy contends that the evidence in the record does not support the finding that alternatives to commitment (1) were tried unsuccessfully or (2) were inappropriate. We agree.

A. *Alternatives to Commitment Attempted Unsuccessfully*

We find persuasive Randy's contention that there was no basis for the finding that alternatives to commitment were "attempted unsuccessfully."

First, there was an inadequate exploration of what alternatives to commitment existed. The court counselor failed to inform the judge of any programs that might be appropriate for Randy. Thus, it appears that the judge did not consider any of the broad range of community-level alternatives (except probation) listed in Sections 7A-647, 7A-648, and 7A-649 of the Juvenile Code. Moreover, although Randy's attorney offered several examples of appropriate alternative programs, the judge apparently failed to entertain these, simply accepting as dispositive the court counselor's statement, "[W]e don't have a Drug Rehabilitation Program." Without further inquiry, the judge concluded that training school was the only available program offering Randy the drug treatment he needed. We hold that the judge had an affirmative obligation to inquire into and to seriously consider the merits of alternative dispositions, and that his failure to do so was error.

Second, the only statutory alternative actually *attempted* was probation. None of the remaining alternatives listed in Sections 7A-647, 7A-648, or 7A-649 were attempted prior to ordering commitment. The inability of Randy's mother to pay for drug treatment does not amount to an "attempt," let alone an "unsuccessful attempt" at drug rehabilitation. In our view, the determination of what disposition is appropriate for a given juvenile cannot be predicated on the parent's ability—or inability—to pay. *Accord In re Register*, 84 N.C. App. 336, 346, 352 S.E. 2d 889, 894 (1987); *In re Lambert*, 46 N.C. App. 103, 106, 264 S.E. 2d 379, 381 (1980). Thus, there is no evidence in the record to support the finding that alternatives to commitment were attempted unsuccessfully.

B. *Appropriateness of Alternatives*

Randy also challenges the finding that alternatives to commitment "were inappropriate." Our Supreme Court stated in *In re Vinson* that

> . . . while the final commitment order need not formally state all the alternatives considered by a trial judge in committing a child, *a finding that alternatives are inappropriate must be supported by some showing in the record that the [judge] at least heard or considered evidence as to what those alternative methods of rehabilitating were.*

298 N.C. 640, 672, 260 S.E. 2d 591, 610 (1979) (emphasis added). Here, no alternatives to training school were presented by the court counselor, and therefore none were considered by the trial judge. There is thus no basis in the evidence for the judge's finding that the alternatives were inappropriate.

Furthermore, of necessity, the judge must "first determine the needs of the juvenile [before he can] . . . determine the appropriate community resources required to meet those needs. . . ." *See Bullabough*, 89 N.C. App. at 185, 365 S.E. 2d at 650. Although it is clear from the record that the judge believed Randy's primary problem to be drug-related, we find no evidence that medical or psychological evaluations were performed to assist the judge in assessing the extent of, or fashioning an appropriate response to, Randy's asserted drug problem. *See* N.C. Gen. Stat. Sec. 7A-647(3) ("[i]n any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile"); N.C. Gen. Stat. Sec. 7A-639 (1986) ("[t]he judge shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information").

While it may not be necessary to seek medical or psychiatric input in every juvenile case in which drug use is implicated, the case before us provides a compelling example of when such an inquiry is merited. The emphasis throughout the hearing was on Randy's drug use; its role in the offenses he committed; Randy's withdrawal reaction while in custody; his mother's unsuccessful attempt to have him admitted to a treatment program; and the judge's firm belief that Randy needed to overcome his drug dependency.

The superficial inquiry into the nature of Randy's needs and the range of programs that might meet those needs leads us to conclude that there is no support in the record for the finding that the remaining alternatives to training school were "inappropriate" in Randy's case.

C. *Appropriateness of Incarceration*

Moreover, even apart from the necessity of obtaining treatment for Randy's drug problem, the evidence and findings did not support the appropriateness of incarceration in this case. *See Khork*, 71 N.C. App. at 156, 321 S.E. 2d at 490. The judge was required by statute to select the *least restrictive* dispositional alternative in light of the circumstances. N.C. Gen. Stat. Sec. 7A-646. This he failed to do.

The trial judge found that Randy was a threat to *himself*, not to others. Two shoplifting incidents comprised the only "threat [Randy posed] to property of the citizens of [the] community." Arguably, Randy's current and previous offenses were not so serious as to justify commitment to training school. However, since no community-based alternatives, short of probation, were first attempted, or for that matter, even considered, we hold that imposing the harshest alternative, commitment to training school, was inappropriate in the circumstances.

IV

In summary, we hold that it was error to commit Randy Groves to training school without first examining the appropriateness of community-based dispositional alternatives. We conclude that the judge's finding that alternatives to commitment had been attempted unsuccessfully or were inappropriate was not supported by the evidence. Accordingly, we vacate the commitment order and remand the cause for a new dispositional hearing.

On remand, the judge should carefully assess Randy's needs. The judge should also instruct the court counselor to inform him of alternative programs that might meet these needs. We offer some examples of dispositional alternatives the court might consider in designing a plan for Randy: admission to a State, charitable, or for-profit residential or out-patient drug treatment program; enrollment in a substance abuse program offered through Area Mental Health Services; placement in a group home, supervised day care, or specialized foster care where the opportunity for drug

use is curtailed and drug treatment can be arranged; or placing custody in the Department of Social Services through which appropriate drug treatment will be secured.

Vacated and remanded.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. RICHARD V. BARBER

No. 8826SC539

(Filed 21 February 1989)

1. **Automobiles § 127.1— driving while impaired—sufficiency of evidence**

In a prosecution for driving while impaired, evidence was sufficient to be submitted to the jury where it tended to show that, as defendant exited an interstate highway, his car went into a skid and hit a motorcycle; at the accident scene defendant's breath smelled of alcohol and his speech was slurred; defendant's eyes were red, glassy, and watery, and he was unsteady on his feet; defendant believed that the motorcycle had pulled out in front of him when, in fact, it had been stationary for some time; defendant passed out on the way to the police station and passed out again while waiting to be tested at the police station; and defendant's car contained three empty cool beer cans, one partially full beer can, puddles of beer on the driver's side floorboard, and four unopened cans of beer. N.C.G.S. § 20-138.1(a).

2. **Automobiles § 126— driving while impaired—accident victim's medical treatment and expenses—erroneous evidence not prejudicial**

Though the trial court in a prosecution for driving while impaired erred in admitting evidence of the accident victim's medical treatment and expenses, such error was not prejudicial in light of the overwhelming evidence of defendant's impaired condition.

3. Automobiles § 126.2— driving while impaired—defendant's refusal to give breath sample—evidence admissible

The trial court did not err in admitting evidence concerning defendant's refusal to give a breath sample for a breathalyzer test.

4. Criminal Law § 102.12— prosecutor's argument about sentence improper—defendant not prejudiced

The prosecutor's argument that defendant, if given a two-year prison sentence, would serve no more than two months and ten days for his crime was improper because it was tantamount to a discourse on parole; however, defendant was not prejudiced where the court sustained his objection but he asked for no precautionary instruction, and the overwhelming evidence of defendant's guilt made it unlikely that the prosecutor's statement affected the outcome of the case.

5. Automobiles § 130— driving while impaired—sufficiency of evidence to support sentence

In a prosecution for driving while impaired defendant could properly be sentenced as a level two offender where the evidence was sufficient to show that the victim sustained serious injury in that he received treatment for a cut on the inside of his right heel and for a broken leg, was hospitalized for blood clots in his lungs and for a compressed vertebra, had over $8,000 in medical expenses, and had been out of work from the time of the accident because of his injuries. N.C.G.S. §§ 20-179(a) and (o).

APPEAL by defendant from *Burroughs (Robert M.), Judge.* Judgment entered 26 January 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1989.

Defendant was charged with and found guilty in District Court of driving while impaired. On appeal to the Superior Court for trial *de novo*, defendant was again found guilty and sentenced as a level two offender. Defendant was given a suspended twelve month sentence, placed on three years supervised probation, and ordered to serve 45 days in the Mecklenburg County satellite jail with work release recommended. From this judgment defendant appeals.

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

Public Defender Isabel Scott Day, by Assistant Public Defender Grady Jessup, for defendant appellant.

PARKER, Judge.

Defendant assigns error to (i) the denial of his motion to dismiss, (ii) the admission of certain evidence, (iii) the denial of his motion for mistrial arising out of the prosecutor's improper jury argument and (iv) the finding of a grossly aggravating factor which elevated the level of punishment.

[1] As to defendant's first assignment of error, before denying a defendant's motion to dismiss, the trial court must ascertain that there is substantial evidence of each essential element of the offense charged. *State v. Hutchins*, 303 N.C. 321, 344, 279 S.E. 2d 788, 803 (1981). In making this determination, all evidence admitted must be considered in the light most favorable to the State and any discrepancies must be resolved in favor of the State. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E. 2d 718, 720 (1983). By statute, the elements of the offense of impaired driving are as follows:

> [driving] any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that [the driver] has, at any relevant time after the driving, an alcohol concentration of 0.10 or more.

G.S. 20-138.1(a).

At trial the State's evidence tended to show the following:

On 10 October 1987 defendant was involved in an automobile accident in Charlotte, N.C. As defendant exited northbound Interstate 85 onto Beatties Ford Road his car went into a sideways skid and the right rear of his vehicle collided with the rear of a motorcycle, knocking the driver of the motorcycle into the car

in front of him. When the investigating officers arrived, defendant was arrested for driving while impaired. At the accident scene defendant's breath smelled of alcohol and his speech was slurred. Defendant's eyes were red, glassy, and watery. Defendant was swaying and staggering and was generally so unsteady on his feet that he had to use the police car to steady himself. Defendant believed that the motorcycle pulled out in front of him when, in fact, it had been stationary for some time. Defendant passed out on the way to the police station and passed out again while waiting to be tested at the police station. Finally, when defendant's car was searched incident to his arrest, the officers found three empty, cool beer cans; one partially full beer can, with puddles of beer on the driver's side floorboard; and four unopened cans of beer. Defendant admitted drinking at least one beer. We hold that this evidence was sufficient to go to the jury; therefore, defendant's first assignment of error is overruled. *See State v. Mills*, 268 N.C. 142, 150 S.E. 2d 13 (1966); *State v. Flannery*, 31 N.C. App. 617, 230 S.E. 2d 603 (1976).

[2] By his next assignment of error, defendant contends that the admission of evidence of the accident victim's medical treatment and expenses was error because such evidence was irrelevant in that it was not probative of any fact regarding whether defendant was driving while impaired. Defendant argues that admitting this evidence confused the issues in this case and unfairly prejudiced him in the eyes of the jury.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." G.S. 8C-1, Rule 401. "Evidence which is not relevant is not admissible." G.S. 8C-1, Rule 402. The admission of technically inadmissible evidence, however, is harmless unless the party contesting admission can show prejudice such that a different result would have been likely had the evidence been excluded. *State v. Gappins*, 320 N.C. 64, 68, 357 S.E. 2d 654, 657 (1987).

We conclude that the evidence in question was not relevant to the State's burden of proving that defendant was guilty of driving while impaired. At most, evidence of injury to the motorcycle driver would be relevant on the issue of whether defendant's act of driving while impaired caused serious injury to another person

an issue properly raised at the sentencing hearing after conviction. See G.S. 20-138.1 and G.S. 20-179(c)(3).

Although the medical evidence was irrelevant to the issue of defendant's guilt, defendant has failed to show prejudice requiring a new trial. In light of the overwhelming evidence of defendant's impaired condition, it is unlikely that admission of evidence of the victim's injuries affected the result of the trial. We, therefore, deem this error harmless.

[3] Defendant next asserts that the court erred when it admitted evidence regarding defendant's breathalyzer analysis. Specifically, defendant argues that the State failed to show that the test was administered in compliance with the methods approved by the Commission for Health Services. Defendant contends that the chemical analyst failed to mark number seven on the checklist provided by the Commission and thereby failed to indicate that he performed all of the steps necessary to take a breath sample. Operational Procedure Number Seven (7) has three parts: (i) the analyst must set the machine to "take"; (ii) the analyst must collect a breath sample; and (iii) the analyst must set the machine to "analyze." N.C. Admin. Code tit. 10, r. 7B.0336 (Feb. 1988). Defendant argues that because the analyst did not follow the proper procedure, regardless of how much breath defendant provided as a sample, the breathalyzer would never provide a reading.

Before the results of a breathalyzer test can be considered valid the State must show: (i) that the person administering the test possesses a valid permit issued by the Department of Human Resources for this purpose and (ii) that the test was performed according to the methods approved by the Commission for Health Services. *State v. Martin*, 46 N.C. App. 514, 520, 265 S.E. 2d 456, 459, *disc. rev. denied*, 301 N.C. 102 (1980); G.S. 20-139.1(b). Deputy Sheriff Deyton, who administered the breathalyzer test to defendant, testified that he was licensed to operate a breathalyzer by the North Carolina Department of Health and Human Services. Officer Deyton's permit was introduced into evidence without objection.

As to properly performing the test, Officer Deyton testified that the breathalyzer instrument was in working order on the date in question; that he calibrated the instrument according to

the checklist provided by the Division of Health Services; and that he attempted to take a breath sample from defendant, but that defendant, by puffing his cheeks, merely pretended to blow into the instrument. The fact that no air entered the instrument was evidenced by the analyst's observation that the piston in the collection chamber did not rise.

The officer further testified that he repeatedly instructed defendant as to how to give a breath sample so that the instrument could make a reading; that defendant was given three opportunities to give a breath sample; that he confirmed defendant's physical ability to give a breath sample by having defendant blow toward one of the walls in the analysis room; and that each time defendant was asked to blow into the breathalyzer he merely puffed his cheeks and did not blow into the machine. After giving defendant a third opportunity to provide a breath sample, the officer concluded that defendant wilfully refused to take the breathalyzer.

We hold that this evidence was sufficient to lay the foundation for introduction of the "result" of the breathalyzer analysis—that defendant refused to submit to such analysis. *See State v. Eubanks*, 283 N.C. 556, 563, 196 S.E. 2d 706, 710-11 (1973); *State v. Powell*, 279 N.C. 608, 610-11, 184 S.E. 2d 243, 245-46 (1971); *State v. Martin*, 46 N.C. App. at 520, 265 S.E. 2d at 459-60. Obviously, the analyst could not indicate on the checklist that he had taken a sample where defendant refused to give a sample.

[4] In his fourth assignment of error defendant asserts that he is entitled to a new trial because of the prosecutor's improper argument to the jury. Defendant's objection to the prosecutor's closing argument centers on the following remarks:

> Mr. Whitesides: The only evidence that is consistent with common sense and with what you've heard today is the verdict of guilty. He's not going to go to jail for two years, ladies and gentlemen. You're not going to . . .
>
> Mr. Jessup: Objection, your Honor.
>
> The Court: Overruled.
>
> Mr. Whitesides: Do you know how much two years means in the Department of Corrections? Two months and ten days. That's how much drunk drivers, impaired drivers, however

you want to call them, spend in jail after a—after the maximum they're given in Court.

Mr. Jessup: Objection.

The Court: Sustained.

The State contends: (i) that the prosecutor's argument was not improper because it was made in response to defendant's argument that defendant, if convicted, was subject to imprisonment for a period of two years; and (ii) that even if the argument was improper defendant was not prejudiced because the trial judge sustained defendant's second objection.

The State erroneously contends that the prosecutor's remarks were a proper response to defendant's statement that if convicted he would be subject to two years in prison. At the outset we note that a remark to the jury inviting response does not give opposing counsel an unbridled right to travel outside the record. *Crutcher v. Noel*, 284 N.C. 568, 572, 201 S.E. 2d 855, 857 (1974). By statute, defense counsel is granted the right to inform the jury of the punishment prescribed for the offense for which defendant is being tried. *See* G.S. 84-14. *See also State v. Walters*, 294 N.C. 311, 240 S.E. 2d 628 (1978). In contrast, however, the North Carolina Supreme Court has said that neither party in a criminal action is allowed "to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons." *State v. Jones*, 296 N.C. 495, 502, 251 S.E. 2d 425, 429 (1979) (citing *State v. McMorris*, 290 N.C. 286, 288, 225 S.E. 2d 553, 555 (1976)). In our view, the prosecutor's argument was improper in that his statement that defendant would serve no more than two months and ten days for his crime was tantamount to a discourse on parole.

The State also contends that since the trial court sustained defendant's second objection to the argument, defendant was not prejudiced by the court's overruling his first objection to the argument. Defendant, however, argues that he was prejudiced because the trial judge overruled defendant's first objection and because the judge, after sustaining the second objection, did not instruct the jury to ignore the prosecutor's improper argument.

As a general rule, when objection is made to an improper argument of counsel, it is not sufficient for the court merely to stop the argument without instructing the jury, either at the time or in the jury charge, to ignore the improper argument. *See*

Wilcox v. Motors Co. and Wilson v. Motors Co., 269 N.C. 473, 478, 153 S.E. 2d 76, 81 (1967). Where the court has sustained the objection, however, and the defendant does not request a precautionary instruction, there is no error if the court fails to give such an instruction. *State v. Sanderson*, 62 N.C. App. 520, 523, 302 S.E. 2d 899, 901-02 (1983). *See also State v. Correll*, 229 N.C. 640, 644, 50 S.E. 2d 717, 720 (1948), *cert. denied*, 336 U.S. 969, 69 S.Ct. 941, 93 L.Ed. 1120 (1949); *State v. Hammonds*, 45 N.C. App. 495, 499-500, 263 S.E. 2d 326, 329 (1980). Moreover, in light of the overwhelming evidence against defendant, it is unlikely that the prosecutor's statement affected the outcome of this case. *See State v. Sauls*, 291 N.C. 253, 260, 230 S.E. 2d 390, 394, *cert. denied*, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed. 2d 226 (1976); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). This assignment of error, therefore, is overruled.

[5] In his final assignment of error defendant asserts that he was improperly sentenced as a level two offender. Specifically, defendant contends that the State failed to prove by the greater weight of the evidence (i) that the victim sustained serious injury and (ii) that the victim's injuries were caused by defendant's alleged impaired driving. Additionally, defendant asserts that G.S. 20-179 deprives him of his due process rights because the statute does not require the trial judge to make specific findings. We address separately each of defendant's contentions.

We hold that the evidence in this case is sufficient to prove that the accident victim sustained serious injury. At trial, the victim testified that after the accident he received treatment for a cut on the inside of his right heel and for a broken right leg, and was hospitalized for blood clots in his lungs and for a compressed vertebra. The victim also testified that he had over $8,000.00 in medical expenses and that he had been out of work since the accident on account of his injuries. Although the State did not put on evidence to corroborate the victim's testimony, none of defendant's evidence suggests that the victim was not seriously injured.

As to the cause of the victim's injuries, it is uncontested that defendant's car struck the motorcycle which the victim was riding. Defendant contends, however, that the accident was not caused by his driving in an impaired condition, but was the result of his hitting a pothole, which caused his tire to blow out, propelling him into the motorcycle. The evidence presented at trial regarding

the pothole was conflicting. Defendant's primary argument is that the jury, rather than the judge, should have determined the issue of proximate causation. As noted earlier, infliction of serious injury is not an element of the crime of driving while impaired but is merely a factor to be considered in aggravation once defendant has been convicted of the crime. For this reason defendant had no right to have the jury make this determination. The judge could properly rule on this issue. *State v. Denning*, 316 N.C. 523, 342 S.E. 2d 855 (1986); *State v. Field*, 75 N.C. App. 647, 331 S.E. 2d 221 (1985).

Finally, defendant asserts that G.S. 20-179(a) and (o) deny him his due process rights because the judge is not required to make findings. This contention is without merit. As in the Fair Sentencing Act, under G.S. 20-179 the judge makes findings whenever he determines that aggravating, grossly aggravating, and mitigating factors exist. *See State v. Ahearn*, 307 N.C. 584, 593-98, 300 S.E. 2d 689, 695-98 (1983). Defendant's final assignment of error is overruled.

No error.

Judges EAGLES and LEWIS concur.

JAMES A. CANADY AND DAVID ETTA CANADY CARTER v. LLOYD C. CLIFF AND WIFE, GLADYS B. CLIFF; GEORGE W. MEEKS, JR. AND WIFE, LANIE DELL MEEKS AND ALEX MEEKS

No. 885DC508

(Filed 21 February 1989)

1. **Appeal and Error § 6.8— denial of summary judgment or judgment on pleadings—no review on appeal from final judgment in trial on merits**

Neither the denial of a motion for summary judgment nor the denial of a motion for judgment on the pleadings is reviewable on appeal from a final judgment rendered in a trial on the merits.

2. **Boundaries §§ 3, 15.1— calls reversed—sufficiency of evidence**

The trial court properly determined the boundary of plaintiffs' land by relying on testimony of a surveyor who located

an unknown corner by starting at a subsequent, known corner and reversing the direction called for in the description set out in the deed.

3. **Boundaries § 11— general reputation as to location—evidence properly disregarded**

The trial court properly disregarded plaintiffs' testimony showing that others in the community believed that the boundary of their land was as they contended rather than as defendants contended, since the boundaries of the tract could be determined by reference to the description in the deed, and the testimony offered by plaintiffs did not comport with the description in their deed.

4. **Adverse Possession § 25.2— insufficiency of evidence**

Plaintiffs' evidence was insufficient to support a claim of title by adverse possession where it was limited to the reputation in the community that they owned the land and their granting of permission to others to use the land, but plaintiffs were required to present evidence of actual and continuous possession within known and visible boundaries for the statutory period.

5. **Quieting Title § 2.2— 30-year chain of title established by defendants—ownership sufficiently shown**

The trial court properly concluded that land covered by an old road was owned by defendants rather than plaintiffs where defendants established a chain of title going back more than thirty years. N.C.G.S. § 47B-2.

APPEAL by plaintiffs from *Tucker (Elton G.), Judge*. Judgment entered 11 December 1987 in District Court, PENDER County. Heard in the Court of Appeals 10 January 1989.

The parties to this appeal are involved in a dispute concerning the ownership of real property. Plaintiffs own a tract of land located in Pender County. The eastern boundary of plaintiffs' land is located near Secondary Road No. 1520 and also runs approximately parallel to the road. Secondary Road No. 1520 replaced the Old Holly Shelter Road (hereinafter "old road"), which lies to the east of Road No. 1520 and also runs approximately parallel to plaintiffs' boundary. The old road is no longer used as a road, having been abandoned for that purpose when Road No. 1520 was completed.

On 12 March 1987, plaintiffs filed a verified complaint in which they alleged that they were the owners of the land covered by the path of the old road and that defendants had committed several trespasses on that property. Plaintiffs also alleged that defendants had wrongfully obtained court orders directing the Pender County Sheriff to remove personal property belonging to plaintiffs from the land at issue. The complaint prayed for damages, injunctive relief, and "[t]hat the Defendants and every person claiming under them be barred from all claim to an estate or interest in the property . . . ."

Defendants George W. Meeks, Jr. and wife Lanie Dell Meeks filed an answer and counterclaim alleging that they owned the land covered by the old road, they used the land to gain access to other lands owned by defendants, and plaintiffs had wrongfully attempted to block defendants' use of the land. Defendants prayed for injunctive relief and punitive damages. Defendant Alex Meeks filed an answer denying the allegations in plaintiffs' complaint. Defendants Cliff filed an answer denying plaintiffs' allegations, alleging that any claim plaintiffs may have against them is barred by G.S. 1-40, and alleging an easement by necessity over the disputed land.

Plaintiffs filed a motion for judgment on the pleadings or, alternatively, for summary judgment. On 14 May 1987, the trial court entered an order consolidating plaintiffs' action with a prior action filed by defendants against plaintiffs for damages and injunctive relief with regard to plaintiffs blocking defendants' use of the land. The case came on for trial on 7 December 1987. The trial court denied plaintiffs' motion for judgment on the pleadings or summary judgment in open court. The case was then tried without a jury by consent of the parties. At the close of plaintiffs' evidence, the trial court granted defendants' motion to dismiss plaintiffs' claim. After hearing evidence on defendants' counterclaims, the trial court entered judgment decreeing that defendants George W. Meeks, Jr. and wife Lanie Dell Meeks are the owners of the land covered by the old road and enjoining plaintiffs from erecting any barricades upon that land. Plaintiffs appeal.

James H. Locus, Jr., P.A., by James H. Locus, Jr., for plaintiff-appellants.

Robert U. Johnsen for defendant-appellees.

PARKER, Judge.

Plaintiffs bring forward fifteen assignments of error which are consolidated under two questions presented in plaintiffs' brief. Plaintiffs' arguments, exceptions, and assignments of error raise three essential issues: (i) whether the trial court erred in denying plaintiffs' motion for judgment on the pleadings or summary judgment; (ii) whether the trial court erred in concluding that plaintiffs failed to produce sufficient evidence in support of their claim of ownership of the land in question; and (iii) whether the trial court erred in concluding that defendants George W. Meeks, Jr. and Lanie Dell Meeks are the owners of the land in question.

[1] Plaintiffs first contend that the trial court erred in denying their motion for judgment on the pleadings or summary judgment. Neither the denial of a motion for summary judgment nor the denial of a motion for judgment on the pleadings is reviewable on appeal from a final judgment rendered in a trial on the merits. *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E. 2d 254, 256 (1985) (summary judgment); *Duke University v. Stainback*, 84 N.C. App. 75, 77, 351 S.E. 2d 806, 807-08, *aff'd*, 320 N.C. 337, 357 S.E. 2d 690 (1987) (judgment on the pleadings). Therefore, the trial court's denial of plaintiffs' motion in this case is not reviewable.

We next consider whether the trial court erred in dismissing plaintiffs' claim of ownership of the land in question. Plaintiffs base their claim of title upon a deed dated 31 January 1935 which conveyed to G. W. Canady a tract of land described as Block No. 2 of the G. W. Meeks tract. G. W. Canady, who is now deceased, was the father of plaintiff James A. Canady and the grandfather of plaintiff David Etta Canady Carter. Plaintiffs' ownership of Block No. 2 is not disputed. The dispute in this case is whether or not the eastern boundary of plaintiffs' land is located to the east of the old road so as to encompass the land in question.

[2] Plaintiffs offered the testimony of D. Horace Thompson, a surveyor who prepared a map of the disputed area. The surveyor testified that he was unable to precisely locate the eastern boundary of plaintiffs' land. Specifically, he testified that he was unable to locate the beginning point of the description in the deed. The deed provides in pertinent part:

> BEGINNING At a stake in the edge of Holly Shelter Public Road runs thence North 78 degrees 5 minutes West 987 feet to a stake in the run of Man Branch . . . .

The surveyor could not locate the stake in the edge of the old road, which would be the northeast corner of the tract. The surveyor was, however, able to locate the line of the northern boundary, and he testified that the northeast corner could be located by running the course and distance of the northern boundary back from its termination point in the Man Branch. He explained his inability to precisely locate the northeast corner as follows:

> You run your course and distance on the first call of the deed, the first call of the map, on the North line. The distance to this Man Branch. If you start your distance at the Eastern edge of the branch, it will fall in the center of the Old Holly Shelter Road. If you went to the center of that Man Branch, the distance will put you on the Western edge of that road.

The surveyor subsequently testified:

> The exact location of the Eastern boundary lines, the reason I cannot say exactly where they are is because it is unclear to me, unclear on this division map whether the boundary line was the center of the Old Holly Shelter Road or on the Western edge of the Old Holly Shelter Road.

The trial court found as a fact that the eastern boundary of plaintiffs' land was the western edge of the old road. Plaintiffs did not except to this finding of fact; failure to except normally precludes a party from challenging findings of fact on appeal. *See Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E. 2d 159, 161 (1982). The trial transcript clearly shows, however, that the trial court determined that, as a matter of law, the northern boundary must run from the center of the Man Branch rather than the edge and, therefore, plaintiffs' eastern boundary is the western edge of the old road. While the location of boundaries on the ground is a question of fact, the determination of what the boundaries are is a question of law. *Cutts v. Casey*, 271 N.C. 165, 167-68, 155 S.E. 2d 519, 521 (1967). Thus, the trial court's determination of the boundary includes a reviewable question of law. Nevertheless, we find no error in the trial court's ruling.

When determining the boundaries of a parcel of land, it is permissible to locate an unknown corner by starting at a subsequent, known corner and reversing the direction called for in the description set out in the deed. *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E. 2d 562, 563 (1959). The surveyor in this case used this

procedure to locate the beginning point of the description—the northeast corner of plaintiffs' parcel. The subsequent corner is described as "a stake in the run of Man Branch." The "run" of a branch or stream is its center; it is not the bank or edge. *See Rowe v. Lumber Co.*, 128 N.C. 301, 38 S.E. 896 (1901). The surveyor testified that, if the subsequent corner were located in the center of the branch, the northeast corner and plaintiffs' eastern boundary would be located on the western edge of the old road. Furthermore, the northeast corner is described as "a stake in the edge" of the old road. Therefore, the northeast corner could not be located in the center of the road—the alternate boundary suggested by the surveyor. *See Goss v. Stidhams*, 68 N.C. App. 773, 315 S.E. 2d 777 (1984).

[3] In addition to their deed, plaintiffs offered testimony to show that others in the community believed that the eastern boundary of plaintiffs' land was located to the east of the old road. The reputation in a community as to a boundary is admissible evidence. Rule 803(20), N.C. Rules Evid.; H. Brandis, Brandis on North Carolina Evidence § 150 (3d ed. 1988). When the boundaries of a tract can be determined by reference to the description in a deed, however, parol evidence is not admissible to enlarge the scope of the description. *Overton v. Boyce*, 289 N.C. 291, 293-94, 221 S.E. 2d 347, 349 (1976). Similarly, the statements and acts of adjoining landowners are not competent evidence of the location of a boundary when the boundary can be located by the calls in a deed. *Wadsworth v. Georgia-Pacific Corp.*, 38 N.C. App. 1, 5, 247 S.E. 2d 25, 27 (1978), *vacated on other grounds*, 297 N.C. 172, 253 S.E. 2d 925 (1979). The testimony offered by plaintiffs did not comport with the description in their deed. One claiming title to disputed land must fit the description in his deed to the land claimed. *Cutts v. Casey*, 271 N.C. at 167, 155 S.E. 2d at 521. Therefore, the trial court properly disregarded plaintiffs' parol evidence.

[4] Plaintiffs also contend that they obtained ownership of the old road by adverse possession for over twenty years. The record shows, however, that plaintiffs' evidence is limited to the reputation in the community that they owned the land and their granting of permission to others to use the land. This evidence is insufficient to support a claim of title by adverse possession. Plaintiffs were required to present evidence of actual and continuous possession within known and visible boundaries for the statutory period. *Mizzell v. Ewell*, 27 N.C. App. 507, 219 S.E. 2d 513 (1975). Accordingly,

the trial court did not err in dismissing plaintiffs' claims and ruling that the eastern boundary of their land is the western edge of the old road.

[5] We next consider whether the trial court erred in concluding that the land covered by the old road is owned by defendants George W. Meeks, Jr. and wife Lanie Dell Meeks (hereinafter "defendants"). Defendants base their claim of title upon a deed to G. W. Meeks, the father of defendant George Meeks, Jr., dated 22 March 1904. The disputed portion of the old road is within the description contained in the deed. It was established at trial that the old road was not included in the tract lying to the east of plaintiffs' land. Thus, there was no evidence that the strip of land covered by the old road had been conveyed since 1904.

Defendant George Meeks testified that his father had two other children named Richard and Carl, his father died without a will, the other children had survived their father, and the other children were now deceased and had been survived by children of their own. By deed dated 6 April 1987, the heirs of Richard Meeks and Carl Meeks conveyed to defendants "any lands situated in Holly Township, Pender County, North Carolina . . . specifically including the area encompassed by the Old Holly Shelter Road, of which G. W. Meeks was seised at his death." By establishing a chain of title going back more than thirty years, defendants made out a prima facie case of their title to the property. G.S. 47B-2; *Heath v. Turner*, 309 N.C. 483, 488-89, 308 S.E. 2d 244, 247 (1983). Since plaintiffs failed to establish title in themselves, the trial court correctly ruled that defendants are the owners of the disputed land.

For the foregoing reasons, the judgment entered by the trial court is affirmed in all respects.

Affirmed.

Judges EAGLES and LEWIS concur.

LYNCH v. N.C. DEPT. OF JUSTICE

[93 N.C. App. 57 (1989)]

THOMAS J. LYNCH, ADMINISTRATOR OF THE ESTATE OF JAMES THOMAS LYNCH; THOMAS J. LYNCH, ADMINISTRATOR OF THE ESTATE OF JOHN WESLEY LYNCH, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF JUSTICE; NORTH CAROLINA STATE BUREAU OF INVESTIGATION; FORSYTH COUNTY; FORSYTH COUNTY SHERIFF'S DEPARTMENT; CITY OF GREENSBORO; CITY OF GREENSBORO POLICE DEPARTMENT; ROBERT MORGAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION; ED HUNT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE STATE BUREAU OF INVESTIGATION; J. W. BRYANT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE STATE BUREAU OF INVESTIGATION; TOM STURGILL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE STATE BUREAU OF INVESTIGATION; WALT HOUSE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE STATE BUREAU OF INVESTIGATION; A. G. TRAVIS, INDIVIDUALLY AND AS AN OFFICER OF THE CITY OF GREENSBORO POLICE DEPARTMENT; ALLEN GENTRY, INDIVIDUALLY AND AS AN OFFICER OF THE FORSYTH COUNTY SHERIFF'S DEPARTMENT; MARC FETTER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE FORSYTH COUNTY SHERIFF'S DEPARTMENT; JOHN BONER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE FORSYTH COUNTY SHERIFF'S DEPARTMENT; TERRY SPAINHOUR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE FORSYTH COUNTY SHERIFF'S DEPARTMENT; STEPHEN CARDEN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE FORSYTH COUNTY SHERIFF'S DEPARTMENT; RON BARKER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN OFFICER OF THE FORSYTH COUNTY SHERIFF'S DEPARTMENT; AND OTHER UNKNOWN PERSONS IN THEIR INDIVIDUAL CAPACITIES AND IN THEIR OFFICIAL CAPACITIES AS AGENTS AND OFFICERS OF THE NORTH CAROLINA DEPARTMENT OF JUSTICE, STATE BUREAU OF INVESTIGATION, FORSYTH COUNTY SHERIFF'S DEPARTMENT, AND THE CITY OF GREENSBORO POLICE DEPARTMENT, DEFENDANTS

No. 8818SC120

(Filed 21 February 1989)

Death § 3.1— officers' attempt to arrest children's custodian— children killed by custodian— no causes of action against officers

In an action arising out of plaintiff's children's deaths at the hands of their custodians because defendants tried to arrest one custodian for murder, plaintiff's cause of action for wrongful death could not be maintained because the children could not have recovered for their injuries if they had lived; his cause of action based on 42 U.S.C. § 1983 could not be maintained because the complaint did not allege that any right the children had under the Constitution or laws of the U. S. was violated, the children not having a constitutional right to be protected by the State against being murdered by criminals or madmen; and his cause of action based on §§ 18 and 19 of Art. I of the N. C. Constitution could not be maintained because § 18

only guarantees a remedy for legally cognizable claims, and plaintiff's claim was not legally cognizable, while no right of the children was violated under the "law of the land" provision of § 19.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 9 September 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 June 1988.

Plaintiff's suit for the wrongfully caused deaths of his nine and ten year old sons was dismissed on the pleadings. Each defendant is either a law enforcement agency or officer and the gist of the case against them is that their negligence and recklessness in undertaking to arrest the late Frederick R. Klenner, Jr. when the children were with him provoked Klenner or his companion and the children's mother, Susie Newsom Lynch, into killing them. Though the complaint states six causes of action—one for compensatory damages and one for punitive damages under the North Carolina Wrongful Death Act, 42 U.S.C. Sec. 1983, and Sections 18 and 19 of Article I of the Constitution of North Carolina—all are based upon the following facts:

On 3 June 1985 the defendants knew or should have known that (a) the children, who had been living with their mother and her cousin-boyfriend, Frederick R. Klenner, Jr., in the Friendly Hills Apartments in Greensboro, were the subject of a bitter, long-standing custody dispute between their divorced parents; (b) Klenner, either alone or in collusion with Susie Newsom Lynch and others, had murdered five people—plaintiff's mother and sister in Kentucky the year before, and Susie Newsom Lynch's parents and grandmother in Forsyth County a month earlier—because they had testified or planned to testify against Susie Newsom Lynch in the custody case; (c) Klenner and Susie Newsom Lynch possessed many guns and explosives and would use them to prevent his arrest or the children being taken from them. Nevertheless, on the afternoon of that day defendants planned and tried to arrest Klenner at the Friendly Hills Apartments for the three Forsyth County murders. Before trying to arrest Klenner, various defendants and their agents, stationed near the Friendly Hills Apartments' parking lot, saw Klenner and Ms. Lynch load Klenner's Chevrolet Blazer with automatic weapons and other items, get in the Blazer with the two children, and start to drive out of the lot. Defendants then attempted to block Klenner's way, but

he drove around the road block onto Friendly Avenue and various of the defendants gave chase in their vehicles. During the chase, which covered many miles, Klenner shot at those chasing him several times with a submachine gun and the officers fired back; Klenner or Lynch gave the children lethal doses of cyanide and shot them in the head with a pistol; Klenner detonated a bomb that blew up the Blazer and killed himself and Susie Newsom Lynch.

Donaldson, Horsley & Greene, by Arthur J. Donaldson and Richard M. Greene, for plaintiff appellant.

Attorney General Thornburg, by Special Deputy Attorney General David Roy Blackwell, for defendant appellees North Carolina Department of Justice; North Carolina State Bureau of Investigation; Robert Morgan, Individually and in his official capacity as Director of the North Carolina State Bureau of Investigation; and Ed Hunt, J. W. Bryant, Tom Sturgill and Walt House, Individually and in their official capacities as agents of the North Carolina State Bureau of Investigation.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and J. Daniel McNatt, for defendant appellees Forsyth County; Forsyth County Sheriff's Department; and Allen Gentry, Marc Fetter, John Boner, Terry Spainhour, Stephen Carden and Ron Barker, Individually and in their official capacities as officers of the Forsyth County Sheriff's Department.

Nichols, Caffrey, Hill, Evans & Murrelle, by Charles E. Nichols and Fred T. Hamlet, for defendant appellees City of Greensboro; City of Greensboro Police Department; and A. G. Travis, Individually and in his official capacity as an officer of the City of Greensboro Police Department.

PHILLIPS, Judge.

One ground for dismissing a civil action on the pleadings is that it is of a sort that the law does not support. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690 (1970). Plaintiff's action is clearly of that sort; for its validity under all the causes of action alleged depends upon the defendant law enforcement agencies and officers being legally liable for plaintiff's children being murdered by their custodians because defendants tried to arrest one custodian for murder, and the law does not support their liability under the facts alleged. Three of the purported six causes of action stated in the complaint are not causes of action at all, but mere claims

for punitive damages; and punitive damages are a matter not of right, but grace, as the jury sees fit, *Ford v. McAnally*, 182 N.C. 419, 109 S.E. 91 (1921), and cannot be awarded in the absence of compensatory damages. *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936). Under the circumstances we will discuss only the unenforceability of the three causes of action for compensatory damages, the failure of which necessarily leaves the adjunct claims for punitive damages unsupported, and will not determine whether the action is dismissible on any of the other grounds raised by the pleadings.

The cause of action for the children's wrongful death cannot be maintained because the children could not have recovered for their injuries if they had lived, and the first requisite of a wrongful death action in this State is that the decedent could have recovered for his injuries if he had lived. G.S. 28A-18-2(a). The children could not have recovered of the defendants if they had lived because under the circumstances alleged the defendant law enforcement agencies and officers did not owe them any legal duty of care, the breach of which caused their injury and death; and in tort law there can be no liability for resulting injury or damage in the absence of a legal duty and its breach. W. Prosser, Law of Torts Sec. 30, p. 146 (3rd ed. 1964); *Mattingly v. North Carolina Railroad Co.*, 253 N.C. 746, 117 S.E. 2d 844 (1961). Our law is that in the absence of a special relationship, such as exists when a victim is in custody or the police have promised to protect a particular person, law enforcement agencies and personnel have no duty to protect individuals from the criminal acts of others; instead their duty is to preserve the peace and arrest lawbreakers for the protection of the general public. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E. 2d 2, *disc. rev. denied*, 322 N.C. 834, 371 S.E. 2d 275 (1988); 70 Am. Jur. 2d *Sheriffs, Police, and Constables* Sec. 94 (1987). In this instance a special relationship of the type stated did not exist, and the only basis for any kind of special relationship was that the children were in the car when defendants tried to arrest and capture Klenner, and the attempt was not delayed. Plaintiff's argument that the children's presence required defendants to delay Klenner's arrest until the children were elsewhere is incompatible with the duty that the law has long placed on law enforcement personnel to make the safety of the public their first concern; for permitting dangerous criminals to go unapprehended lest particular individuals be injured or killed would inevitably

and necessarily endanger the public at large, a policy that the law cannot tolerate, much less foster.

The cause of action based on 42 U.S.C. Sec. 1983 is not maintainable because the complaint does not allege that any right the children had under the Constitution or laws of the United States was violated. For pertinent to this case, 42 U.S.C. Sec. 1983 subjects to liability in damages only those who, under color of state law, deprive a citizen of the United States of "rights, privileges, or immunities secured by the Constitution and laws"; it does not create any new substantive right, *Baker v. McCollan*, 443 U.S. 137, 61 L.Ed. 2d 433, 99 S.Ct. 2689 (1979); and in the absence of a special relationship between the law enforcement personnel and the victim, such as that heretofore discussed, *Jensen v. Conrad*, 747 F. 2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052, 84 L.Ed. 2d 818, 105 S.Ct. 1754 (1985), no one has a "constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito*, 686 F. 2d 616, 618 (7th Cir. 1982).

And the cause of action based on Sections 18 and 19 of Article I of the North Carolina Constitution is not maintainable because Section 18, the "open courts" provision, only guarantees a remedy for legally cognizable claims, *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983), and plaintiff's claim is not legally cognizable; and Section 19, the "law of the land" provision, is synonymous with the due process clause of the Fourteenth Amendment to the United States Constitution, *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E. 2d 764 (1962), and no right of the children thereunder was violated.

Affirmed.

Judges WELLS and BECTON concur.

J. D. DAWSON COMPANY, PLAINTIFF v. ROBERTSON MARKETING, INC., DEFENDANT

No. 883SC738

(Filed 21 February 1989)

1. **Rules of Civil Procedure § 37— sanctions available—sufficiency of notice**

While the better practice would have been to specify the section of N.C.G.S. § 1A-1, Rule 37 under which plaintiff was proceeding, defendant nevertheless had sufficient notice that it might have any or all of the sanctions available under Rule 37(d) imposed against it, and the trial court therefore did not err in striking parts of defendant's "Answer, Crossclaim and Counteraction, and Amendment to Crossclaim" for failure to respond to plaintiff's discovery request.

2. **Rules of Civil Procedure § 6— shortened notice period—defendant present at hearing—no prejudice shown**

Defendant failed to show that it was prejudiced by the trial court's order of a shortened notice period and by a last minute change in the hearing location where defendant attended the hearing and participated in it, suggested no additional testimony which would have been available to it at a later hearing, did not show how it would have benefited from a later hearing, and did not object at the hearing to the change in its location. N.C.G.S. § 1A-1, Rule 6(d).

3. **Rules of Civil Procedure § 60.3— Rule 60(b) motion no substitute for appeal**

Defendant could not use a motion under N.C.G.S. § 1A-1, Rule 60(b) as a substitute for appellate review.

APPEAL by defendant from *Phillips, Judge.* Orders entered 4 March 1988 and 11 March 1988 in Superior Court, PITT County. Heard in the Court of Appeals 15 February 1989.

This is a civil action wherein plaintiff seeks to recover damages arising out of a contract with defendant to install a computer system for plaintiff. Plaintiff also seeks punitive damages and attorney's fees. Defendant answered and counterclaimed for specific performance of the contract. On 26 February 1988, plaintiff filed a motion to compel discovery and a motion for sanctions pursuant to Rule

37 of the North Carolina Rules of Civil Procedure. Plaintiff also filed an *ex parte* motion, pursuant to Rule 6(d) of the North Carolina Rules of Civil Procedure, seeking to shorten the regular notice period required for motions. The trial court granted plaintiff's motion for a shortened notice period and set the hearing on plaintiff's motions for 4 March 1988. At the 4 March 1988 hearing, the trial court ruled for plaintiff and sanctioned defendant by striking portions of defendant's pleadings and awarding attorney's fees to plaintiff.

On 9 March 1988, defendant filed a motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure for relief from the 4 March 1988 order. Defendant also filed a motion pursuant to Rule 6(d) for a shortened notice period on its pending Rule 60(b) motion for relief. The motion pursuant to Rule 6(d) was granted, and the hearing was set for 11 March 1988. After the hearing, the trial court made the following conclusions:

> 1. That a Rule 60(b) Motion does not lie in this cause. Rule 60(b) has no application to interlocutory orders. By its express terms, it applies only to final judgments or orders. The Court's Order of March 4, 1988 is not a final Order because all claims made in the action have not been adjudicated by that Order. Further, the Rule cannot be used as a substitute for an appeal. (Citations omitted.)
>
> 2. In the alternative, assuming *arguendo* that a Rule 60(b) Motion does lie, the Court concludes that the Order of March 4, 1988 is proper in all respects and the Court concludes that said Order should stand. (Citations omitted.)

On 14 March 1988, defendant appealed from both the order entered on 4 March 1988 and the order entered on 11 March 1988.

Ward and Smith, P.A., by Kenneth R. Wooten, for plaintiff, appellee.

Darden, Coyne, Bruce & Harris, P.A., by H. Buckmaster Coyne, Jr., and Robert A. Bruce, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the "trial court committed reversible error as a matter of law in imposing sanctions in the form of striking defendant's answer, crossclaim and counteraction [sic] and

amendment to crossclaim [sic] in response to plaintiff's motion to compel discovery and motion for sanctions." Essentially, defendant argues plaintiff's motion to compel and motion for sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure were insufficient to support the trial court's order striking defendant's pleadings because the motions did not specifically ask for all of the particular sanctions imposed.

Rule 37(d) states in pertinent part:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Under Rule 37(b)(2)(C), a court may sanction a party by "striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . . ." "The choice of sanctions under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E. 2d 793, 795 (1984).

Here, plaintiff, in its motion, requested an order imposing sanctions upon defendant pursuant to Rule 37. Although plaintiff did not specify the section of Rule 37 it wished to proceed under, it did state in the motion that plaintiff had served "Plaintiff's First Interrogatories and Requests for Production of Documents" on defendant and that "Defendant has failed to timely respond to the aforesaid discovery requests and has refused, and continues to refuse, to provide responses to said requests." Plaintiff prayed in its motion for "full recovery of expenses, including attorneys' fees, occasioned by Defendant's failure to make timely discovery,

and for such other and further relief as the Court may deem appropriate." While the better practice would be to specify the section of the rule under which the moving party wishes to proceed, we hold that under these circumstances defendant had sufficient notice that it may have any or all of the sanctions available under Rule 37(d) imposed against it. We hold the trial court did not err in striking parts of defendant's "Answer, Crossclaim and Counteraction, and Amendment to Crossclaim" pursuant to Rule 37 and further find no evidence of abuse of discretion. Defendant gave no legitimate reason for its failure to respond to plaintiff's discovery request and concedes in its brief that "these factors may not constitute good cause excusing defendant's failure to properly respond. . . ." The trial court imposed the sanctions under Rule 37 that it deemed appropriate. Since we can find no abuse of judicial discretion, we must uphold the sanctions imposed.

[2] Defendant next contends the "trial court abused its discretion in ordering a shortened notice period and ordering relief in the form of striking defendant's pleadings on plaintiff's motion to compel and motion for sanctions." As we have previously found no abuse of discretion as to the sanctions imposed by the trial court, we will only address defendant's "shortened notice period" argument.

It is defendant's contention that it was "extremely prejudiced [in its] ability to adequately prepare for the hearing" because it received actual notice of the 4 March 1988 hearing on 2 March 1988, and the hearing location was changed at the last minute.

Rule 6(d) of the North Carolina Rules of Civil Procedure, in pertinent part, provides:

> A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

Plaintiff filed an *ex parte* application with the trial judge which was granted. Defendant was afforded notice by telephone as well as written notice. The record reflects that defendant appeared at the hearing. The trial court's order states that "[t]he Court, hearing no objection to the nature and form of the hearing and the notice thereof given to the Defendant and upon Defendant

being present and announcing that it was ready to proceed with the hearing, the Court proceeded to consider the matters presented." Defendant did in fact participate in the hearing.

It is well-settled that "a party entitled to notice of a motion may waive such notice." *Brandon v. Brandon*, 10 N.C. App. 457, 460, 179 S.E. 2d 177, 179 (1971). Defendant, like the defendant in *Brandon*, has suggested no additional testimony that would have been available to it at a later hearing and does not show how it would have benefited from a later hearing. Assuming, *arguendo*, that notice was improperly given, defendant has waived the notice requirement by attending the hearing of the motions and participating in it. *See Story v. Story*, 27 N.C. App. 349, 219 S.E. 2d 245 (1975).

Likewise, the record reflects that defendant did not object at the hearing to the change in the hearing location. Defendant has failed to show any possible resulting prejudice and cannot now be heard to complain about the location of the hearing. These assignments of error have no merit.

[3] Lastly, defendant argues the "trial court committed reversible error in entering its March 11, 1988 order on the grounds that defendant's motion for relief from order of March 4, 1988 was a proper use of N.C.R. Civ.P. 60(b) as a matter of law, and that based on the facts of this case, the entry of such order was an abuse of discretion." Defendant concedes in its brief that the 4 March 1988 order is not a final order as to the portions which strike defendant's answer and affirmative defenses. Defendant's sole contention set forth by these assignments of error is that the 4 March 1988 order striking defendant's counterclaim in its entirety effectively dismisses the action and therefore is a final judgment or order as required by Rule 60(b).

Even assuming that the 4 March 1988 order was a final judgment or order, defendant has failed to set forth any valid grounds for relief in his Rule 60(b) motion. It is clear by the wording of defendant's motion that it is attempting to assert errors in law in the 4 March 1988 order as a basis for relief. In substance, defendant sought only to raise additional arguments in its Rule 60(b) motion in an effort to show that the trial court acted contrary to law in the 4 March 1988 order. It is well-settled in this jurisdiction that erroneous judgments may only be corrected by appeal "and that a motion under G.S. 1A-1, Rule 60(b) of the Rules of

Civil Procedure cannot be used as a substitute for appellate review." *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E. 2d 115, 117, *disc. rev. denied and appeal dismissed*, 303 N.C. 319, 281 S.E. 2d 659 (1981). Furthermore, even if the Rule 60(b) motion is considered a proper motion under the circumstances, defendant has shown no abuse of discretion. This assignment of error is meritless.

Affirmed.

Judges WELLS and LEWIS concur.

SHIRLEY W. HARRIS v. JOSEPH M. HARRIS

No. 8826DC545

(Filed 21 February 1989)

1. **Divorce and Alimony § 30— lump sum distribution—deduction of previous $15,000 payment proper**

The trial court properly determined that an earlier consent order concerning the division of an IRS refund barred plaintiff's suit where the order provided that plaintiff would receive $15,000 from the refund and that such amount would "be applied toward any subsequent equitable distribution which she may receive by agreement or court order"; the parties later entered into a property settlement agreement whereby plaintiff received a lump sum distributive award; defendant deducted the $15,000 before paying plaintiff the balance of the award; and plaintiff then brought this action for the $15,000.

2. **Attorneys at Law § 7— complaint not frivolous—award of attorney's fees improper**

Plaintiff's complaint which raised the existence of a justiciable issue as to her entitlement to $15,000 which she sought from defendant was not frivolous, was filed in good faith, and did not violate either N.C.G.S. § 6-21.5 or N.C.G.S. § 1A-1, Rule 11; therefore the trial court erred in awarding attorney's fees to defendant.

APPEAL by plaintiff from *Johnston, Robert P., Judge.* Judgment entered 16 December 1987 in MECKLENBURG County District Court. Heard in the Court of Appeals 11 January 1989.

Plaintiff and defendant were married on 31 December 1962. The parties had two children during the course of the marriage: Sheridan Anne Harris, born 31 July 1966, and Mark St. Clair Harris, born 14 July 1973. Plaintiff and defendant separated on or about 8 February 1985. On 11 February 1986, the parties entered into a consent order, which provided *inter alia* for Mark, the minor child, to live with the plaintiff and for defendant to pay plaintiff alimony *pendente lite* in the amount of $1,400 per month and child support in the amount of $1,000 per month. Also included in the consent order was a provision dealing with two Internal Revenue Service (IRS) refunds totaling $43,127.83. This provision indicated that plaintiff and defendant were in dispute over the disposition of these funds and provided as a "temporary resolution of the dispute" that plaintiff receive $15,000 of the total refund. The remainder of the refund was given to defendant. The provision stated that "the parties acknowledge that the $15,000 received by Plaintiff shall be applied toward any subsequent equitable distribution which she may receive by agreement or court order."

Plaintiff and defendant were divorced on 12 May 1986. On 24 December 1986 the parties entered into a property settlement and support agreement. This agreement provided *inter alia* for a distributive award of $400,000 to be paid by defendant to plaintiff. Defendant was to pay $100,000 at the closing of the agreement and the balance of $300,000 on or before 19 January 1987. Defendant paid the $100,000 amount at closing but only paid $285,000 to plaintiff on or before 19 January 1987.

On 15 July 1987, plaintiff filed a complaint seeking $15,000 she claimed was due her under the distributive award provision of the settlement agreement. Defendant answered, alleging that he was entitled to a credit of $15,000 as a result of the division of the IRS refund in the 11 February 1986 court order and therefore was not obligated to make a further payment to plaintiff. Defendant also alleged that the complaint filed by plaintiff was without merit, was filed for the purpose of harassment and was in violation of Rule 11 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 6-21.5. Defendant contended that as a result plaintiff and her attorney, either individually or jointly, should be sanctioned and required to pay all reasonable expenses, costs, and all counsel fees for defendant's attorney.

The matter came on for hearing on 10 December 1987 on a motion by defendant for summary judgment. By judgment entered

16 December 1987 the trial court granted defendant's motion and deferred defendant's request for an award of counsel fees. On 17 December 1987, the trial court entered an order in which it found that there was no ambiguity with respect to the provisions of the 11 February 1986 consent order; that there was a complete absence of a justiciable issue, and that the complaint was not well-grounded in fact and not warranted by existing law or good faith argument. The trial court also found that the complaint appeared to be filed for the purposes of harassment and needless increase in the cost of litigation, was frivolous and improper, and was in violation of G.S. § 6-21.5 and Rule 11. Plaintiff was ordered by the trial court to pay $6,000 in attorney's fees to defendant's attorneys.

Plaintiff appealed from the judgment of 16 December 1987 and the order of 17 December 1987.

Hamel, Helms, Cannon and Hamel, P.A., by Thomas R. Cannon, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., and Barbara Hellenschmidt, for defendant-appellee.

WELLS, Judge.

Plaintiff assigns error to the trial court's grant of summary judgment in favor of defendant. Plaintiff argues that there were "genuine issues of material fact . . . regarding the interpretation of the Property Settlement and Support Agreement," making a grant of summary judgment to defendant improper.

Plaintiff also argues that summary judgment based on a defense of accord and satisfaction is improper because plaintiff's actions indicate she did not accept defendant's $285,000 payment as full payment of the debt and that therefore accord and satisfaction cannot be used as a defense. Summary judgment is appropriate where the pleadings, affidavits and other evidentiary materials before the court disclose that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure (1983); *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). "A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative

defense which would bar the claim." *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 340 S.E. 2d 510 (1986). When a moving party establishes that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, ". . . the burden is then on the opposing party to show that a genuine issue of material fact exists." *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E. 2d 203 (1988). "If the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper." *Id.* at 383, 363 S.E. 2d at 204.

[1] Defendant asserts in his answer and affidavit that the provisions of the consent order of 11 February 1986 concerning the division of the IRS refund bars plaintiff's suit. The consent order and the 24 December 1986 settlement agreement, when construed together, are unambiguous and give effect to the consent order thereby showing conclusively that defendant was entitled to the $15,000 credit. Defendant's forecast of evidence shows that the plaintiff cannot prove the existence of an essential element of her case; namely, that she is entitled to the $15,000 at issue. The burden then shifts to the plaintiff to show that a genuine issue of material fact exists. Plaintiff has failed to do this. The trial court's entry of summary judgment in favor of defendant was proper. There is no error.

As a result of our decision above, it is unnecessary to reach defendant's argument concerning accord and satisfaction.

[2] Plaintiff's remaining assignments of error deal with the order of 17 December 1987, awarding attorney's fees to defendant's attorneys pursuant to N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 1A-1, Rule 11 of the North Carolina Rules of Civil Procedure. Plaintiff argues that the evidence in the record does not support the trial court's findings of fact, that these findings do not support the conclusions of law, *i.e.*, that plaintiff's complaint violated Rule 11 and G.S. § 6-21.5, or the award of attorney's fees. Plaintiff contends the trial court erred in its award of attorney's fees because her claim was not frivolous, was filed in good faith and raised a justiciable issue; therefore, it did not violate G.S. § 6-21.5 and Rule 11. We agree.

G.S. § 6-21.5 states in part:

> In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable at-

torney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.

Rule 11 deals with the signing and verification of pleadings and states in part:

> . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion . . . shall impose upon the person who signed it, . . . an appropriate sanction, which may include an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

G.S. § 1A-1, Rule 11 of the North Carolina Rules of Civil Procedure (1988).

In construing G.S. § 6-21.5 this Court has stated, "The only basis for the award of attorney's fees under Section 6-21.5 is the complete absence of a justiciable issue." *Bryant v. Short*, 84 N.C. App. 285, 352 S.E. 2d 245, *disc. rev. denied*, 319 N.C. 458, 356 S.E. 2d 2 (1987). " 'Complete absence of a justiciable issue' suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss." *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E. 2d 555, *disc. rev. denied*, 318 N.C. 284, 348 S.E. 2d 344 (1986).

In the present case it is clear that plaintiff's complaint contained allegations which raised the existence of a justiciable issue as to her entitlement to the $15,000 she sought from defendant. Therefore, plaintiff's complaint was not frivolous, was filed in good faith, and did not violate either G.S. § 6-21.5 or Rule 11.

The entry of summary judgment in favor of defendant by the trial court is affirmed. The order of 17 December 1987 awarding attorney's fees to defendant is vacated.

Affirmed in part and vacated in part.

Judges BECTON and JOHNSON concur.

KAREN RENEE GASSER v. ERIK JAMES SPERRY

No. 8828DC513

(Filed 21 February 1989)

Divorce and Alimony § 26.1— child custody—full faith and credit given to Florida order—order overturned on appeal

Plaintiff's appeal from the trial court's order giving full faith and credit to a Florida child custody modification order is dismissed where plaintiff appealed the modification order in Florida, and the Florida appellate court determined that the Florida trial court had no jurisdiction over the children and vacated the order.

Judge EAGLES concurs in the result.

APPEAL by plaintiff from *Roda (Peter C.), Judge.* Judgment entered 5 January 1988 in District Court, BUNCOMBE County. Heard in the Court of Appeals 27 October 1988.

Scott E. Jarvis for plaintiff-appellant.

John E. Shackelford for defendant-appellee.

GREENE, Judge.

This appeal arises from plaintiff's attempt to enforce a Florida order granting her custody of three minor children born during her marriage to defendant. Upon the parties' Florida divorce in November 1984, a Florida court granted plaintiff custody of all four children born during the marriage. However, it appears the Florida court modified the original custody order in March 1987 to transfer custody of the daughter Erin Rebekah Sperry to defendant while leaving custody of the three other children with plaintiff. After this order (the "First Modification Order") was entered, plaintiff and the three remaining minor children moved to North Carolina. However, in June 1987, the Florida court entered another order (the "Second Modification Order") which transferred custody of the remaining three minor children to defendant.

In September 1987, plaintiff filed suit in North Carolina to enforce her right to custody of the minor children. Plaintiff alleged the Florida court did not have jurisdiction to enter the Second Modification Order. Conversely, defendant asserted the Second Modification Order was a valid judgment entitled to full faith and credit in the courts of North Carolina and requested the North Carolina court order plaintiff to deliver the remaining minor children in accord with the Second Modification Order. Pending plaintiff's Florida appeal of the Second Modification Order, the North Carolina trial court determined the Second Modification Order was entitled to full faith and credit and ordered custody of the minor children transferred to defendant.

However, the North Carolina trial court's order stated that, "this Order [is] being entered subject to being modified if the Florida Court shall hereafter sustain the appeal of [plaintiff], and if said Order is sustained, the courts of North Carolina and Florida shall have further proceedings to determine jurisdiction." After the North Carolina court's order was appealed to this court and the case argued, the Florida District Court of Appeals held, among other things, that the Florida trial court had no jurisdiction to enter the Second Modification Order and vacated that order. The Florida Supreme Court has declined to review that decision of the Florida District Court of Appeals. As the North Carolina trial court's order was entered subject to the Florida determination which has now occurred, we dismiss this appeal and remand the case for further proceedings.

If either party on remand desires our own courts to enforce or modify any remaining Florida orders concerning custody of these children, such efforts shall be governed by the federal Parental Kidnapping Prevention Act of 1980[1] ("PKPA") and our own

---

1. 28 U.S.C.A. 1738A:

Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term—

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

Uniform Child Custody Jurisdiction Act ("UCCJA"). 28 U.S.C.A. Sec. 1738A (West Supp. 1988); N.C.G.S. Sec. 50A (1984). The PKPA establishes national policy in the area of custody jurisdiction. To

---

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

the extent any state custody statutes conflict with its provisions, the PKPA controls. *See Thompson v. Thompson*, 484 U.S. ---, 108 S.Ct. 513, 517, 98 L.Ed. 2d 512, 521 (1988) (PKPA imposes uniform national standards for allocating and enforcing custody determinations).

Appeal dismissed.

Judge BECTON concurs.

Judge EAGLES concurs in the result.

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

CECIL F. JARMAN v. VELMA I. WASHINGTON AND ADDIE WASHINGTON KITTLE

No. 884SC610

(Filed 21 February 1989)

1. **Rules of Civil Procedure § 41— involuntary dismissal—statute of limitations not extended**

The trial court's dismissal of plaintiff's action under N.C.G.S. § 1A-1, Rule 41(b) which did not specify additional time within which a second action could be commenced did not extend the applicable statute of limitations; however, because defendants did not plead or otherwise raise the defense of the statute of limitations in the court below or raise it on appeal, the defense is waived.

2. **Rules of Civil Procedure § 41.1— first dismissal involuntary—second dismissal voluntary—second dismissal no adjudication on merits**

Where plaintiff's first action was dismissed by court order for failure to comply with the Rules of Civil Procedure, such dismissal was authorized by Rule 41(b) and was involuntary; therefore, plaintiff's second dismissal, which was made pursuant to Rule 41(a) and was voluntary, did not operate as an adjudication on the merits, since the provision of that rule that a notice of dismissal operates as an adjudication on the merits "when filed by a plaintiff who has once dismissed" an action based upon the same claim means that a plaintiff may not bring an action which twice has been dismissed *voluntarily*.

APPEAL by plaintiff from *Tillery (Bradford), Judge*. Order entered 15 February 1988 in Superior Court, ONSLOW County. Heard in the Court of Appeals 11 January 1989.

Plaintiff instituted this personal injury action by filing a complaint on 27 November 1985. The complaint alleged that, on 1 December 1982, plaintiff was struck by an automobile owned by defendant Kittle and being driven by defendant Washington. At the 6 October 1986 civil session of Onslow County Superior Court, the trial judge ordered plaintiff's action dismissed without prejudice for plaintiff's counsel's failure to file a pre-trial order in accordance with the Rules of Civil Procedure. (This order was signed 30 October 1986 and filed 4 November 1986.)

Plaintiff reinstituted the action by filing a second complaint on 7 October 1986. On 1 September 1987, plaintiff voluntarily dismissed the second action by filing a notice of dismissal. Plaintiff then filed a third complaint on 3 September 1987. Defendants failed to answer the third complaint, and judgment of default was entered against defendants on 20 October 1987. The trial court entered an order setting aside the entry of default on 19 January 1988.

Defendants moved to dismiss the third action on the grounds that, pursuant to Rule 41 of the N.C. Rules of Civil Procedure, plaintiff's dismissal of the second action operated as an adjudication on the merits. The trial court granted defendants' motion in an order entered 15 February 1988. From the order dismissing his complaint, plaintiff appeals.

Popkin and Associates, by Samuel S. Popkin, for plaintiff-appellant.

Hamilton, Bailey, Way & Brothers, by Harvey Hamilton, Jr. and Catherine E. Brothers, for defendant-appellees.

PARKER, Judge.

The sole issue presented by this appeal is whether the trial court erred in dismissing plaintiff's action under Rule 41. For the reasons stated below, we hold that the action was not properly dismissed, and we reverse the trial court's order of 15 February 1988.

Plaintiff's first action was dismissed by court order for failure to comply with the Rules of Civil Procedure. Dismissal on these grounds is authorized by Rule 41(b) of the N.C. Rules of Civil Procedure. Rule 41(b) provides in pertinent part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule . . . operates as an adjudication on the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

In this case, the trial court specified in the first order of dismissal that the dismissal was without prejudice. Thus, plaintiff was not precluded from prosecuting the second action. We must determine

whether plaintiff's subsequent dismissal of the second action operated as an adjudication on the merits so as to preclude plaintiff from prosecuting the third action.

[1] Before addressing the dispositive issue of this appeal, we note that the first dismissal order did not specify additional time within which a second action could be commenced. In the absence of such a specification, a dismissal under Rule 41(b) does not extend any applicable statute of limitation. *See Evans v. Chipps*, 56 N.C. App. 232, 236, 287 S.E. 2d 426, 428-29 (1982). Defendants, however, did not plead or otherwise raise the defense of the statute of limitations in the court below, nor do they argue the issue on appeal. Defendants' failure to assert the defense in the trial court precludes review of the issue on appeal. *See Baer v. Davis*, 47 N.C. App. 581, 267 S.E. 2d 581, *disc. rev. denied*, 301 N.C. 85, 273 S.E. 2d 296 (1980). Therefore, our decision here is limited solely to the operation of Rule 41 without regard to whether plaintiff's action is barred by any statute of limitation.

[2] Plaintiff voluntarily dismissed the second action by filing a notice of dismissal without prejudice pursuant to Rule 41(a). The relevant portion of Rule 41(a) provides:

> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. . . .

Defendants contend that the trial court correctly ruled that, under the above provision, plaintiff's second dismissal operated as an adjudication on the merits. We disagree.

It is not disputed that all three of plaintiff's actions are based on the same claim. The dismissal of the first action, however, was not a voluntary dismissal under Rule 41(a) but an involuntary dismissal pursuant to Rule 41(b). Rule 41(a) provides that a notice of dismissal operates as an adjudication on the merits "when filed by a plaintiff who has once dismissed" an action based upon the same claim. The clear meaning of this provision is that a plaintiff may not bring an action which twice has been dismissed voluntarily. Because the dismissal of plaintiff's first action was involuntary, the provision does not apply in this case.

We are not unmindful of defendants' arguments based on the policy behind the "second dismissal" rule, which is to prevent a plaintiff's abuse of the right to voluntarily dismiss and reinstitute an action. *See* Comment to Rule 41, N.C. Rules App. Proc.; *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F. 2d 1012, 1017 (2d Cir. 1976) (construing Federal Rule 41(a)). Policy must yield, however, to the clear terms of Rule 41(a). In a somewhat analogous case, this Court held that the "second dismissal" rule did not apply where the second voluntary dismissal was accomplished by court order because Rule 41(a) provides that only a second dismissal by notice shall operate as an adjudication on the merits. *Parrish v. Uzzell*, 41 N.C. App. 479, 255 S.E. 2d 219 (1979). In addition, the policy behind the "second dismissal" rule is not as compelling where the first dismissal was not a unilateral act on the part of the plaintiff. *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F. 2d at 1017-18 (rule not applicable where first dismissal was by stipulation of the parties). Finally, we note that courts in other jurisdictions with rules similar to North Carolina Rule 41(a) have refused to apply the "second dismissal" rule where the first dismissal was involuntary. *Hughes Supply, Inc. v. Friendly City Elec. Fixture Co.*, 338 F. 2d 329 (5th Cir. 1964); *Keesling v. State*, 295 Md. 722, 458 A. 2d 435 (1983); *Norris v. Johnson*, 599 S.W. 2d 90 (Mo. Ct. App. 1980).

Accordingly, the trial court's order dismissing plaintiff's third action is reversed and the case is remanded for further proceedings.

Reversed and remanded.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. MICHAEL GARRETT

No. 8823SC658

(Filed 21 February 1989)

1. Homicide § 30.2— shooting of brother—sufficiency of evidence of voluntary manslaughter

Evidence was sufficient to go to the jury and to support a verdict of voluntary manslaughter where it tended to show

that defendant and his brother argued; defendant had a gun; another brother heard a shot go off; minutes later defendant was observed shutting his car trunk and driving away; seven months later the brother's body was found over a cliff about five miles from the place where the argument occurred; defendant confessed to another brother that he shot the victim; and defendant's sister and mother testified that defendant stated that he didn't mean to shoot his brother.

2. Homicide § 28.8— failure to instruct on accident—error

The trial court erred in failing to instruct the jury on the defense of accident where the State offered no eyewitness to the shooting and killing of defendant's brother; evidence against defendant was largely circumstantial; the only evidence as to exactly how the shooting occurred came from defendant himself through the testimony of his sister and mother; and both of them as witnesses for the State testified that defendant stated that the shooting was accidental.

APPEAL by defendant from *Mills, Judge*. Judgment entered 16 October 1987 in Superior Court, ASHE County. Heard in the Court of Appeals 13 February 1989.

This is a criminal action wherein defendant was charged in a proper bill of indictment with the murder of Danny K. Garrett, his brother, in violation of G.S. 14-17. Evidence presented at trial tends to show the following:

On 18 October 1985, defendant and his brothers, Junior and Danny, had been drinking when they began to argue about beer cans. The argument began because the brothers often sold the used cans for recycling. Valarie, the sister of defendant, called the sheriff because of the argument. Deputies arrived, but they soon left because the disturbance had died down.

Junior then went to bed, but the dispute again broke out between defendant and Danny in Junior's bedroom. After the brothers' mother chased defendant and Danny out of the house, Junior got out of bed and went back outside where his brothers were arguing. Meanwhile, defendant had gone to his trailer to get his car keys, and a witness heard him say, "let me get my gun. I'll show that 'nigger.'"

When Junior reached his brothers, they were still arguing. As he walked between them, Junior saw defendant pointing a gun

toward the ground. He then heard a shot go off and felt gravel hit his hand. Junior decided he should leave, and after getting about one hundred yards away, he heard another shot. No one witnessed the second shot, but minutes later defendant was seen hastily shutting his car trunk and driving away. Junior later told police he had seen defendant putting Danny into defendant's car trunk, but Junior denied this at trial. Junior and another witness told police they had seen defendant washing out his car trunk the next day, but both denied this at trial.

The victim, Danny Garrett, was never seen alive again. About seven months later, Danny's body was found over a cliff about five miles from the place where the argument occurred.

The record discloses that some time after defendant's argument with Danny, defendant was riding in a car with his brother Eric. He made Eric pull over to the side of the road in front of a church, and according to Eric, "he was drunk and he kept muttering out and then he said he shot Danny Kay."

Defendant's sister testified as a witness for the State that defendant "just said that he didn't mean to shoot his brother." Defendant's mother also testified as a witness for the State that defendant "just said that it was an accident. . . ."

The court submitted to the jury the possible verdicts of guilty of second degree murder, guilty of voluntary manslaughter, and not guilty. The jury found defendant guilty of voluntary manslaughter, and he was sentenced to 15 years in prison. Defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Harold M. White, Jr., for the State.

John P. Siskind and John Johnston for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred in not allowing his motions to dismiss at the close of the State's evidence and at the close of all evidence "because there was insufficient evidence to go to the jury to prove the crimes as charged." Although the evidence is largely circumstantial, it is clearly sufficient to require submission of the case to the jury and to support a verdict of voluntary manslaughter. This assignment of error is meritless.

[2] Defendant next contends the trial court erred in denying his motions to instruct the jury "on accident because the evidence presented such instructions." This assignment of error has merit.

The trial court has a duty to instruct the jury on all substantial features of the case arising on the evidence. *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974). All defenses arising from the evidence presented during trial, including the defense of accident, are substantial features of a case and therefore warrant instructions. *State v. Loftin*, 322 N.C. 375, 362 S.E. 2d 613 (1988).

The death of a human being as a result of accident attaches no criminal responsibility to the act of the slayer. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961). Where the killing was unintentional and the perpetrator acted without wrongful purpose in the course of a lawful enterprise and without criminal negligence, a homicide will be excused as an accident. *Id.*

In the present case, the State offered no eyewitness to the shooting and killing of defendant's brother. As stated before, the evidence against defendant is largely circumstantial. The only evidence as to exactly how the shooting occurred came from defendant himself through the testimony of his sister and mother. Both his sister and mother as witnesses for the State testified that defendant stated that the shooting was accidental. These statements were elicited by the State apparently in an effort to show defendant actually shot his brother, but the State seems to have gotten more than it bargained for. While the testimony of defendant's sister and mother as to what defendant told them was surely sufficient to raise an inference that defendant shot his brother, it also gives rise to an inference from which the jury could find defendant *accidentally* shot and killed his brother. Therefore we hold that the trial judge erred in not instructing the jury on the defense of accident.

We do not discuss the remaining assignments of error since they are not likely to reoccur at the next trial.

For the reasons stated, defendant is entitled to a new trial.

New trial.

Judges WELLS and LEWIS concur.

STATE OF NORTH CAROLINA v. RANDY EARL ROBERSON

No. 882SC629

(Filed 21 February 1989)

Criminal Law § 34.7; Rape and Allied Offenses § 19— taking indecent liberties with minor—evidence of prior offenses—admissibility

In a prosecution of defendant for first degree burglary and taking indecent liberties with a minor where the evidence tended to show that defendant entered the home of the victim at night while she was sleeping, placed his hand under her skirt, rubbed her vaginal area, and left when she awoke, the trial court did not err in admitting testimony that defendant had touched another young girl in a similar manner five years before and had touched his own daughter in a similar manner during the year prior to trial. N.C.G.S. § 8C-1, Rules 403 and 404(b).

APPEAL by defendant from *Griffin (William C., Jr.), Judge.* Judgment entered 26 February 1988 in Superior Court, MARTIN County. Heard in the Court of Appeals 24 January 1989.

Defendant was found guilty by a jury of first degree burglary and of taking indecent liberties with a minor. He was sentenced to consecutive prison terms of twenty-five years and ten years. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James C. Gulick, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant.

LEWIS, Judge.

Defendant assigns error to the admission of testimony of two witnesses that they were touched by defendant in ways similar to the victim in this case. He also assigns error to the admission of testimony tending to corroborate the testimony of these witnesses. We have reviewed the challenged testimony and find no error in the trial court admitting the evidence.

The 12-year-old female victim testified for the State that on 9 September 1987 after 11 p.m. she was asleep on the couch in

her living room and was awakened by defendant standing beside her with his hand underneath her skirt, rubbing her vaginal area. When she woke up, defendant removed his hand, put his finger to his lips and said "shh," and went out the door. Defendant testified in his own behalf and admitted knocking on the front door of the victim's house because he wanted to use the telephone. Defendant denied entering the house or touching the victim. At that time, defendant was 28 years of age.

The State presented the testimony of Melissa Brinson that in December 1982 when she was 11 years old she was at defendant's house playing with his wife's daughter, Susie. Melissa entered a screened-in porch and defendant started tickling her and then "grabbed between [her] legs." William Thomas came onto the porch and told defendant to leave her alone. A few days later, Melissa spent the night with Susie. While she was asleep, defendant got on the bed, held Melissa's arms and tried to kiss her. At trial, William Thomas testified to the events on the porch and Melissa's mother testified that Melissa told her of both incidents a few months later.

Defendant's daughter, Crystal Roberson, also testified for the State. Her testimony indicated that defendant touched her vaginal area when she was six years old. She turned seven in the two weeks before the trial. A deputy sheriff testified that Crystal told him that defendant had put his hand between her legs and kissed her with his tongue in her mouth.

Defendant objected to the testimony of Melissa Brinson. He did not object to the testimony of William Thomas, Melissa's mother, Crystal Roberson or the deputy sheriff. App. R. 10(b) requires that an exception be preserved at trial by objection. However, we choose to address defendant's contentions in exercise of our discretion as the same issues are raised by Melissa Brinson's testimony. App. R. 2. Defendant assigns error to all the testimony contending the court erroneously allowed the State to introduce evidence of alleged prior acts of misconduct.

Defendant contends the challenged testimony is inadmissible under both G.S. 8C-1, Rule 404(b) and G.S. 8C-1, Rule 403. G.S. 8C-1, Rule 404(b) provides that evidence of other wrongs or acts is not admissible to prove a person's character but may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." Rule 403 allows the trial court to exclude relevant evidence

"if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Defendant contends the evidence of prior acts was inadmissible under Rule 404(b) because the prior acts were both remote in time and dissimilar to the act charged in the indictment. Defendant further contends that even if this court finds the evidence admissible under Rule 404(b) it should have been excluded under the balancing test of Rule 403 as it caused confusion and was prejudicial.

Our Supreme Court has held "that evidence of prior sex acts may have some relevance to the question of defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E. 2d 118, 119 (1988). However, "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403." *Id.* at 577, 364 S.E. 2d at 119. The period of time between the prior sexual acts and the acts charged is an important part of the balancing process. *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982). "[T]he passage of time between the commission of the . . . acts slowly erodes the commonality between them." *State v. Jones*, 322 N.C. 585, 590, 369 S.E. 2d 822, 824 (1988).

In this case, the lapse of nearly five years between the events involving Melissa and those involving the victim does not diminish the similarities between the acts. Melissa testified that defendant "grabbed between [her] legs" and the victim testified that defendant rubbed her vaginal area. Both Melissa and the victim, young girls at the time of the incidents, knew defendant before the incidents. The intervening years do not dilute the similarities especially when considered in light of Crystal's testimony that defendant had touched her in the same way during the year before the trial. "This Court has been quite 'liberal in admitting evidence of similar sex crimes' under the common plan or scheme exception." *State v. Gordon*, 316 N.C. 497, 504, 342 S.E. 2d 509, 513 (1986). Therefore, we hold that the testimony of Melissa and Crystal and the corroborating evidence was admissible under Rule 404(b) and Rule 403.

Even if the trial court had erred in admitting the challenged testimony, defendant was not prejudiced by its admission. The evidence showed that defendant was in the area and his footprints were found in the yard. Moreover, the evidence showed the victim initially identified defendant by name as the intruder before law

enforcement officers apprehended him or asked the victim to identify him. At trial, the victim testified without hesitation that defendant committed the acts charged. The jury had before it strong and sufficient evidence to find defendant guilty of the crimes charged even without the evidence of prior acts.

No error.

Judges EAGLES and PARKER concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY J. B. BROOKS AND WIFE, GEARENE B. BROOKS, DEED OF TRUST BOOK 321, AT PAGE 948

No. 8829SC533

(Filed 21 February 1989)

Judgments § 2.1— order signed out of term and out of county —order void

The trial judge had no jurisdiction to sign an order entered once her term and the period of consent between the parties to allow her to sign the order out of term had expired.

APPEAL by petitioner from *Hyatt (J. Marlene), Judge*, and *Owens (Hollis M., Jr.), Judge*. Order entered 5 November 1987 by Hyatt and Order entered 28 March 1988 by Owens in Superior Court, MCDOWELL County. Heard in the Court of Appeals 7 December 1988.

This is an action to determine if a non-resident Superior Court judge had jurisdiction to sign an order entered once her term and the period of consent between the parties to allow her to sign the order out of term had expired.

This case began as a foreclosure action on a deed of trust pursuant to G.S. 45-21.16. The action was duly instituted 26 June 1986 by a Notice for Hearing filed before the Clerk of Superior Court in McDowell County. The Clerk had the proper jurisdiction and the hearing was held 30 July 1986. After the hearing, the Clerk entered an order refusing to allow the foreclosure to take place. Petitioner appealed to Superior Court in McDowell County.

The case was heard in the 29th District during the 7 September 1986 term of Superior Court, the Honorable J. Marlene Hyatt of the 30th District presiding. Judge Hyatt entered an order denying foreclosure. The petitioner appealed to this Court. In an unpublished opinion (File No. 8629SC1102) this Court stated, "[W]e remand the case to the trial court to make appropriate findings of fact on the evidence which was presented to it."

On remand, the Chief District Court Judge used his authority pursuant to G.S. 7A-146 to reassign the case to Judge Hyatt when she returned to the 29th District. Judge Hyatt was assigned to hold court in McDowell County for the week of 7 September 1987. The case was reheard on 11 September 1987, the last day of Judge Hyatt's term in that county. According to a letter in the record from the petitioner's counsel to Judge Hyatt dated 23 September 1987, although the judge's term ended that day, the parties consented to allow the judge to enter a judgment out of term within ten days. The judgment was to be prepared by respondent's attorney.

Judge Hyatt did not sign the Order until 5 November 1987, and the Order was not filed until 19 November 1987. There is no evidence in the record revealing when the Order was submitted to the judge.

Petitioner filed a motion pursuant to G.S. 1A-1, Rules 60, 59 and 52(b) and requested the Order signed by Judge Hyatt be voided because it was signed out of term and out of county, and he requested a new trial. In the alternative, petitioner requested the Order be amended as he suggested in Exhibit B which would allow the foreclosure. Petitioner's motion was denied and petitioner appeals.

Jones and Davis Attorneys, by J. Thomas Davis, for appellant-petitioner Cliffside Hosiery Mill, Inc.

No brief filed for respondent-appellees.

ORR, Judge.

Petitioner argues on appeal that Judge Hyatt lacked jurisdiction to sign the order in question. We agree.

As we have stated above, the Chief District Court Judge has the statutory authority to assign cases to Superior Court judges. *See* G.S. 7A-146. A decision to reassign a case to the original trial judge is clearly judicially expedient. Yet, the Chief District

Judge has no obligation to do so. Therefore, the original judge does not have authority over a particular case on remand unless the judge is in session in the proper county, and the case is reassigned to that judge. Judge Hyatt, therefore, did not maintain jurisdiction over the case on remand simply because she was the original trial court judge.

The period of consent is critical because Judge Hyatt's term ended on 11 September 1987. A judgment or order entered after that time could only be valid if there was consent between the parties to that effect. *State v. Boone*, 310 N.C. 284, 287, 311 S.E. 2d 552, 555 (1984). G.S. 7A-47 makes clear that a non-resident superior court judge has the "same powers in the district in open court and in chambers as the resident judge . . . and his jurisdiction in chambers shall extend until the session is adjourned . . . ."

Boone clearly states the necessity of consent by the parties if an order is to be signed by a judge whose term has expired. *State v. Boone*, 310 N.C. at 287, 311 S.E. 2d at 555. In the case *sub judice*, consent was given for ten days. However, that period had long expired by the time the Order was entered. For that reason, we find the Order was void, and the case must be remanded for the necessary findings of fact and the signing of an order during a duly designated term of court.

Based on this holding, we do not reach the petitioner's remaining assignments of error which refer to the trial court's findings and the sufficiency of the evidence to support those findings.

Remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

GEORGE KING, PETITIONER/APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES—DIVISION OF SOCIAL SERVICES, RESPONDENT/APPELLEE

No. 8820SC718

(Filed 21 February 1989)

Social Security and Public Welfare § 1— termination of benefits—inadequate notice

Petitioner's "chore services" benefits were improperly terminated where his termination letter did not contain any information regarding the petitioner's right to representation, and the reason given for termination, "continuing refusal to cooperate," was not sufficiently specific. N.C.G.S. § 108A-79(c).

APPEAL by petitioner from *Albright (W. Douglas), Judge.* Judgment entered 28 March 1988 in Superior Court, RICHMOND County. Heard in the Court of Appeals 13 December 1988.

Petitioner, George King, is a paraplegic who requires assistance to perform his daily tasks in order to stay in a residential setting rather than an institutional home. Mr. King became a Chore Services Client of the Richmond County Department of Social Services on 12 February 1985. On 17 June 1987, he received a written notice stating that his chore services would be terminated on 1 July 1987. A local hearing was held on 24 June 1987, and the agency decision was affirmed. Mr. King appealed the decision to the North Carolina Department of Human Resources as provided in G.S. 108A-79(g) and (i).

The State Hearing Officer conducted a hearing on 6 October 1987. The agency decision was affirmed. Mr. King next appealed to the Chief Hearing Officer. This decision was rendered on 22 December 1987. Again, the agency decision was affirmed. The case was heard in Superior Court on 28 March 1988. The agency decision was affirmed. Petitioner appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Martha K. Walston, for the State.

North State Legal Services, Inc., by Candace Carraway, for petitioner-appellant.

ORR, Judge

Petitioner claims he received improper notice of the termination of his chore worker services under G.S. 108A-79(c). The statute reads in part:

> The notice of action and the right to appeal shall comply with all applicable federal and State law and regulations; provided, such notice shall, at a minimum contain a clear statement of:
>
> (1) The action which was or is to be taken;
>
> (2) The reasons for which this action was or is to be taken;
>
> (3) The regulations supporting this action;
>
> (4) The applicant's or recipient's right to both a local and State level hearing, or to a State level hearing in the case of the food stamp program, on the decision to take this action and the method for obtaining these hearings;
>
> (5) The right to be represented at the hearings by a personal representative, including an attorney obtained at the applicant's or recipient's expense;
>
> (6) In cases involving termination or modification of assistance, the recipient's right upon timely request to continue receiving assistance at the present level pending an appeal hearing and decision on that hearing.

. . .

In the case *sub judice*, petitioner's letter which served as his notice of termination, read:

> Dear Mr. King:
>
> As per our conversation during my visit to your home on June 10, 1987, your Chore services will be terminated July 1, 1987. This decision was made due to your continuing refusal to cooperate with agency assigned Chore workers in their delivery of Chore services to you. Such actions on your part constitute reason for termination of Chore services as set forth in Volume VI, Chapter II, Section 8070 (V.D. 10:) of the North Carolina Division of Social Services Family Services Manual.
>
> You have the right to appeal this decision within sixty (60) days after this letter was received. An appeal request may be either verbal or written. You also have the right to

continue receiving services pending the outcome of any appeals process, provided a request for continuation of services is made prior to the effective date of termination of services. However, should a hearing result in the agency's division [sic] being upheld, you may be required to repay the cost of services received during this period.

If you have any questions, please feel free to contact me at 997-7312, extension 35.

Sincerely,
DEPARTMENT OF SOCIAL SERVICES
J. F. McKeithan, Director

s/(Mrs.) Norma Ramey
Social Worker I
Adult Services

NR:bm
VIA HAND DELIVERY

The letter did not contain any information regarding the petitioner's right to representation. This is a *minimum* requirement under the statute as quoted above. The omission of information concerning the right to counsel is a serious error. Petitioner was not represented by an attorney and the assistance of counsel could have a major impact on the proceedings. In addition, the notice falls short of the necessary specificity regarding the reasons for termination. The general "continuing refusal to cooperate" does not sufficiently apprise the petitioner of the basis for the decision and seriously impairs his ability to rebut those grounds at the subsequent hearing.

Petitioner's benefits were therefore improperly terminated by the failure to follow prescribed statutory requirements for notice. We therefore remand the case so that petitioner may receive proper notice and a new hearing.

Based on the above finding, we do not reach any subsequent assignments of error.

Remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

JASPER WARREN, JR., ADMINISTRATOR OF THE ESTATE OF ROBERT WARREN, PLAINTIFF-APPELLANT v. MICHAEL COLOMBO, ADMINISTRATOR OF THE ESTATE OF KARSON LEE CONGER, DECEASED; MILITARY DISTRIBUTORS OF VIRGINIA, INC. AND THOMAS BUILT BUSES, INC., DEFENDANTS-APPELLEES

No. 878SC1258

(Filed 7 March 1989)

1. **Sales § 22; Negligence § 22— enhanced injury liability—negligent design and manufacture of school bus—sufficiency of complaint**

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for negligent design and manufacture of a school bus which enhanced injuries received by plaintiff's intestate when a truck crossed the center line and collided with the school bus.

2. **Sales § 22— product liability—strict liability inapplicable**

North Carolina expressly rejects strict liability in product liability actions.

3. **Damages § 12.1— punitive damages—insufficiency of complaint**

Plaintiff's complaint failed to allege sufficient facts to support a claim against the manufacturer of a school bus for punitive damages in an enhanced injury liability action.

Judge GREENE concurring in the result.

Judge ARNOLD dissenting.

APPEAL by plaintiff from *Llewellyn (James D.), Judge*. Order entered 29 September 1987 in Superior Court, GREENE County. Heard in the Court of Appeals 11 May 1988.

This appeal arises out of the 31 May 1985 school bus accident near Snow Hill, North Carolina, in which six children were killed and numerous others injured. The accident occurred when a tractor-trailer truck driven by Karson Lee Conger (deceased) crossed the center line of the highway and collided with a school bus. Plaintiff is the administrator of the estate of Robert Warren, one of the young children killed. Defendants are Colombo, administrator of the estate of Karson Lee Conger; Military Distributors of Virginia,

Inc., owners of the truck Conger was driving; and Thomas Built Buses, Inc., manufacturers of the school bus.

On 26 August 1985, plaintiff filed an amended complaint alleging seven causes of action. The first and second claims allege negligence by Conger and Military Distributors of Virginia, Inc.; the third claim seeks punitive damages against the administrator of Conger's estate and Military Distributors of Virginia, Inc.; the fourth claim alleges negligence by defendant Thomas Built Buses, Inc. (Thomas Built) proximately caused pain, suffering and wrongful death; the fifth claim alleges that defendant Thomas Built negligently designed and manufactured the bus which proximately caused or enhanced the injuries; the sixth claim alleges strict liability of defendant Thomas Built; and the seventh claim alleges breach of implied warranty by defendant Thomas Built.

Two defendants petitioned for removal of the case to the United States District Court for the Eastern District of North Carolina. On 8 November 1985, defendant Thomas Built filed its answer and moved to dismiss the amended complaint under the Federal Rules of Civil Procedure, Rule 12(b)(6), for failure to state a claim upon which relief could be granted. The case was remanded to Greene County Superior Court on 20 February 1986.

On 29 September 1987, Judge Llewellyn entered an order dismissing three of plaintiff's claims under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The three claims dismissed are those against defendant Thomas Built for negligent design and manufacture of the bus which enhanced plaintiff's injuries; for strict liability of defendant Thomas Built; and for punitive damages against defendant Thomas Built. The remaining claims including plaintiff's claim against Thomas Built for negligence and implied warranty proximately causing the accident were denied and are not before us on appeal.

From this order, plaintiff appeals.

Taft, Taft & Haigler, by Thomas F. Taft, Kenneth E. Haigler, Robert H. Hochuli, Jr. and James M. Stanley, Jr., for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellee Thomas Built Buses, Inc.

ORR, Judge.

The trial court dismissed plaintiff's claims under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The test on a motion under this rule is whether the pleading is legally sufficient, and the trial court must treat the allegations of the challenged pleading as true. *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E. 2d 567 (1984), *aff'd in part, rev'd in part*, 315 N.C. 103, 337 S.E. 2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986). The legal insufficiency of a complaint may be due to the absence of law to support a claim, absence of fact to support a good claim, or the disclosure of some fact which will defeat the claim. *State of Tennessee v. Environmental Management Comm.*, 78 N.C. App. 763, 338 S.E. 2d 781 (1986).

I.

[1] Plaintiff first contends that the trial court erred in dismissing the claim against defendant Thomas Built for negligent design and manufacture of the school bus, thereby proximately causing or enhancing the injuries in question.

The concept of enhanced injury is set forth in an article by Thomas V. Harris entitled Enhanced Injury Theory: An Analytic Framework, 62 N.C.L. Rev. 643 (1984):

> *Enhanced injury liability is based on the premise that some objects, while they are not made for the purpose of undergoing impact, should be reasonably designed to minimize the injury-producing effect of such contact.* In *Larsen v. General Motors Corp.* the court discussed the nature of this type of liability:
>
> 'Automobiles are made for use on the roads and highways in transporting persons and cargo to and from various points. This intended use cannot be carried out without encountering in varying degrees the statistically proved hazard of injury-producing impacts of various types.
>
> . . . .
>
> No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and the resultant injury . . . all are foreseeable.
>
> . . . .

> We perceive of no sound reason, either in logic or experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents.'
>
> The proper terminology for characterizing the theory is 'enhanced injury' liability. In addition to that term, courts and commentators have described such accidents as involving 'crashworthiness' or a 'second collision.' In many cases, courts have used the three terms interchangeably.

Id. at 646. (Footnotes omitted.) (Emphasis added.)

While the case *sub judice* arises from a crash between a tractor-trailer and a school bus, the issue presented is couched in the terms of "enhanced injury." Therefore, we shall specifically address the issue as "enhanced injury" and not "crashworthiness" or a "second collision."

This cause of action has not yet been addressed by this Court or our Supreme Court. Under this negligence theory, recovery may be allowed when defects in a vehicle enhance or increase plaintiff's injuries in an accident, although the defect did not cause the accident. *Larsen v. General Motors Corporation*, 391 F. 2d 495 (8th Cir. 1968). The defect must result from some negligence of the manufacturer in the design or construction of the vehicle. *Id.* Since *Larsen*, a majority of states have adopted some form of this doctrine. *Sealey v. Ford Motor Co.*, 499 F. Supp. 475 (E.D.N.C. 1980) (citations omitted). *See generally* Harris, Enhanced Injury Theory: An Analytic Framework, 62 N.C.L. Rev. 643 (1984).

The federal district courts in North Carolina that have considered this issue are divided in their forecast of what North Carolina courts would do on this issue. Those cases which predict that we would not allow recovery based upon an enhanced injury claim are *Simpson v. Hurst Performance, Inc.*, 437 F. Supp. 445 (M.D.N.C. 1977), *aff'd*, 588 F. 2d 1351 (4th Cir. 1978); *Bulliner v. General Motors Corp.*, 54 F.R.D. 479 (E.D.N.C. 1971); and *Alexander v. Seaboard Air Line Railroad Company*, 346 F. Supp. 320 (W.D.N.C. 1971). Those predicting that we would allow recovery are *Isaacson v. Toyota Motor Sales*, 438 F. Supp. 1 (E.D.N.C. 1976) and *Sealey v. Ford Motor Co.*, 499 F. Supp. 475 (E.D.N.C. 1980).

The United States Fourth Circuit Court of Appeals also has considered this question. In the *per curiam* opinion of *Wilson v. Ford Motor Company*, 656 F. 2d 960 (4th Cir. 1981), the Fourth Circuit upheld the district court ruling based upon the prediction that the Supreme Court of North Carolina would not allow a claim for injuries "which neither caused nor contributed to the accident." The Court stated in a footnote that because North Carolina rejects strict liability, then we would also reject an enhanced injury claim. *Id. See Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). The *Wilson* Court did not address the likelihood of a successful enhanced injury claim under negligence or product liability theories. Relying upon *Wilson*, the Fourth Circuit again rejected enhanced injury claims in *Martin v. Volkswagen of America, Inc.*, 707 F. 2d 823 (4th Cir. 1983) and *Erwin v. Jeep Corp.*, 812 F. 2d 172 (4th Cir. 1987).

While the decisions of federal district and appellate courts are instructive on these issues, we are not bound by their decisions. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E. 2d 25 (1986). Instead, this Court must determine whether a cause of action for enhanced injuries is permissible under North Carolina law. We conclude that it is for the reasons set forth below.

The enhanced injury concept has been grounded in other jurisdictions in both general negligence law and product liability.

> As in any action for negligence, the essential elements of a suit for products liability sounding in tort must include
>
> (1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances;
>
> (2) breach of that standard of care;
>
> (3) injury caused directly or proximately by the breach, and;
>
> (4) loss because of the injury.

W. Prosser, Hornbork of the Law of Torts sec. 30 (4th ed. 1971); *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E. 2d 190, 194 (1980).

A.

We first address the question of duty of a manufacturer under North Carolina law.

A manufacturer's standard of care in products liability is found in the leading case of *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967).

> Since the liability is to be based on negligence, the defendant is required to exercise the care of a reasonable man under the circumstances. His negligence may be found over an area quite as broad as his whole activity in preparing and selling the product. He may be negligent first of all in designing it, so that it becomes unsafe for the intended use. He may be negligent in failing to inspect or test his materials, or the work itself, to discover possible defects, or dangerous propensities.

Id. at 491, 157 S.E. 2d at 102-03, *quoting* W. Prosser, Law of Torts sec. 665 (3d ed. 1964).

None of the courts addressing the issue of enhanced injury under a negligence theory have imposed a duty on the defendant to build a vehicle that would withstand all crashes. All manufacturers owe a duty to their purchasers to design and build a vehicle reasonably safe to minimize its injury producing effects. *See Seese v. Volkswagen-werk A.G.*, 648 F. 2d 833 (3d Cir. 1981), *cert. denied*, 454 U.S. 867 (1981). We believe that defendant was under the same duty. The pleadings adequately set forth allegations of defendant's duty, and the law as set forth in *Corprew* controls on this question.

B.

Plaintiff must next establish that defendant breached the duty. W. Prosser, Law of Torts sec. 30 (4th ed. 1971). Plaintiff alleged the following breaches of defendant's duty:

> 45. That the injuries herein and subsequent death suffered by plaintiff's intestate were proximately caused by or enhanced by the negligent conduct of defendant Thomas in that it:
>
> a. Failed to adequately pad the seats in said bus.
>
> b. Failed to adequately secure the seats to the floor of the bus.
>
> c. Constructed seats of materials of insufficient quality and strength so as to withstand reasonably foreseeable forces acting upon them.
>
> d. Constructed seats of metal tubing which breaks easily and becomes sharp and dangerous when broken.

e. Constructed the exterior siding of the bus of materials that are not sufficient to withstand reasonably foreseeable forces acting upon them.

f. Constructed the exterior siding of the bus of a material inadequate to withstand impacts reasonably expected to be encountered in the normal useage [sic] of a school bus.

g. Designed the bus using materials which would not withstand collisions normally encountered during the normal life of a school bus.

h. Failed to provide seat belts for the passengers of the bus.

i. Failed to use reasonable care in the design of its vehicle to avoid subjecting the passengers to an unreasonable risk of collision injury.

46. That the negligence, carelessness and wilful and wanton conduct of the defendant Thomas was a proximate cause of the collision, injuries and subsequent death of the plaintiff's intestate and was a proximate cause of the enhancement of injuries and subsequent death of plaintiff's intestate.

Taking plaintiff's allegations to be true as required by G.S. 1A-1, Rule 12(b)(6), plaintiff sufficiently alleged that defendant breached its duty of reasonable care in the design and manufacture of the school bus.

C.

The third element of any negligence test, proximate cause, is the most troublesome aspect in enhanced injury cases.

In his special concurring opinion in *Martin v. Volkswagen of America, Inc.*, 707 F. 2d 823 (4th Cir. 1983), Judge Phillips sets out the conceptual problem based on proximate cause arising in enhanced injury cases.

> The underlying conceptual problem in substantive crashworthiness doctrine precisely concerns identification of the accident-occurrence upon which the proximate causation inquiry is to be focused. Is it the initial impact of vehicle with some external object—another vehicle, a tree, a ditchbank—that sets in train a series of traumatic 'crashes'? Or is it the specific physical trauma traceable to second (and third, etc.) 'crashes' that are in turn arguably traceable in causal terms

> to design defects that concededly have no causal relation to the 'first crash'? Courts that reject crashworthiness doctrine are likely to do so by a purely conceptual analysis that identifies the first impact as the sole accident-occurrence upon which proximate causation injury is rightly focused, with liability for all direct and consequential damages flowing from that impact (including all ensuing 'crashes') then being imposed solely upon the actor whose negligence proximately caused that impact.

Id. at 827. Judge Phillips next contends that the decision in *Miller v. Miller*, 273 N.C. 228, 160 S.E. 2d 65 (1968) is a "strong indication" that the North Carolina Supreme Court identifies the "first impact" as the critical and sole one for proximate causation. Based upon his interpretation of *Miller*, Judge Phillips states "[*Miller's*] conceptual analysis of the critical causation issue must be the starting point for any honest reappraisal leading to adoption by North Carolina courts of the crashworthiness doctrine."

While we agree that *Miller* must be the starting point, this Court concludes that *Miller* does not indicate that the "first impact" is the critical and sole one for proximate causation and thus precludes a cause of action for enhanced injuries. *Miller* was not a "crashworthiness" or enhanced injury case. The only question presented for consideration was set out specifically by Justice Sharp at page 230: "Does the occupant of an automobile have a duty to use an available seat belt *whenever* it is operated on a public highway?" In *Miller*, a passenger had sued the driver of the automobile for negligence, and defendant contended plaintiff was contributorily negligent for failure to wear a seat belt. The portion relied upon by Judge Phillips taken in the full context of the entire paragraph states:

> *When the occupant of an automobile is injured in a collision, upset, or deviation of the vehicle from the highway, it goes without saying that his failure to have his seat belt fastened did not contribute to the occurrence of the accident. Brown v. Kendrick*, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966); *Kavanagh v. Butorac*, --- Ind. App. ---, 221 N.E. 2d 824 (1966). Obviously, however, in some accidents, an *after-the-fact appraisal would reveal that his injuries would probably have been minimized had he been using a seat belt.* But whether the occupant of an automobile was contributorily negligent in failing to fasten his seat belt must, of course, be determined in view of his

> knowledge of conditions prevailing prior to the accident, and not in the light of hindsight.

Miller, at 231, 160 S.E. 2d at 68. (Emphasis added.)

Thus, we see that the offhand reference to "occurrence" is not in the context of proximate causation, but simply is part of a sentence concluding that failure to wear a seat belt could not be a contributing factor in the "occurrence of the accident." We therefore conclude that *Miller* does not provide controlling guidance on this question and turn our attention elsewhere.

An examination of North Carolina law pertaining to joint tortfeasors provides a foundation for analyzing the proximate causation question in enhanced injury cases.

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968); *Green v. Tile Co.*, 263 N.C. 503, 139 S.E. 2d 538 (1965). *See generally* Byrd, *Proximate Cause in North Carolina Tort Law*, 51 N.C.L. Rev. 951 (1973). Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence. *Nance v. Parks*, 266 N.C. 206, 146 S.E. 2d 24 (1966); *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796 (1935).

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E. 2d 559, 565 (1984).

"There may be more than one proximate cause of an injury. When two or more proximate causes join and concur in producing the result complained of, the author of each cause may be held for the injuries inflicted. The defendants are jointly and severally liable." *Hairston*, at 234, 311 S.E. 2d at 565-66.

"Negligence, in order to be actionable, must be shown to have been the proximate cause or *one of the proximate causes of the plaintiff's injuries*. There must be some causal relationship between the breach of duty and the injury." *Reason v. Sewing Machine Co.*, 259 N.C. 264, 267, 130 S.E. 2d 397, 399 (1963). (Emphasis added.)

The theory advanced by plaintiff alleging enhanced injuries does not, however, focus on *one* injury caused by concurring sources. Instead, the focus is allegedly on an injury caused by the negligence of the tractor-trailer driver and the enhancement of that injury proximately caused by the negligence of the manufacturer of the bus.

Relying on the logic and law of joint and concurrent negligence that more than one proximate cause can result in one injury, it follows that there is nothing in our law that would preclude more than one proximate cause that results in an original injury and the enhancement of that injury. Thus, as in the case *sub judice*, the allegation that the injuries sustained in this accident were proximately caused by both the impact with the truck and enhanced by the alleged negligence of the manufacturer is sufficient to withstand a 12(b)(6) motion.

D.

The final element to be considered is damages. We decline to address defendant's contention that enhanced injury claims are not appropriate in severe collision cases. We also acknowledge the potential difficulty in enhanced injury cases dealing with the apportionment of damages should a jury find that the manufacturer's negligence was the proximate cause of the enhanced injuries. For the purpose of a 12(b)(6) motion, plaintiff has adequately alleged damages arising out of enhanced injuries. Therefore, we decline to speculate on the other aspects of damages noted above. The adequacy of plaintiff's evidence will no doubt be tested upon motions for summary judgment and directed verdict if the case is tried. At this stage of the litigation, this Court simply finds that plaintiff's complaint survives a motion to dismiss for failure to state a claim.

To hold that the allegations in plaintiff's complaint do not state a claim would be, as previously pointed out, not supported by North Carolina law. Likewise, such a determination would result in the possible insulation of negligent parties from responsibility in a situation where the initial event would have caused only minor injuries absent the event causing enhanced injuries. This Court declines to pronounce that as the law in North Carolina.

II.

Plaintiff's final assignments of error that the trial court erred in dismissing his claims for strict liability and punitive damages are without merit.

[2] North Carolina expressly rejects strict liability in products liability actions. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980); *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 736, 742, 330 S.E. 2d 228, 232 (1985), *aff'd*, 318 N.C. 352, 348 S.E. 2d 772 (1986).

Plaintiff specifically sought punitive damages against defendants Military Distributors of Virginia and Colombo in its amended complaint and prayer for relief. The issue of punitive damages against defendant Thomas Built was briefed by both sides, and the trial court dismissed the claim against Thomas Built.

Plaintiff's sixth cause of action alleges that the negligence, carelessness and willful and wanton conduct of Thomas Built was a proximate cause of the collision, injuries and subsequent death of the plaintiff's intestate.

In the absence of any intentional, malicious, or willful act, punitive damages may not be recovered in a case involving an ordinary motor vehicle collision caused by negligence. The injury must result from defendant's wanton negligence. Conduct is wanton when it is in conscious and intentional disregard of and indifference to the rights and safety of others. Hightower, *North Carolina Law of Damages* sec. 30-13 (1981).

[3] Plaintiff is correct that under the "notice theory" of pleading he need not allege circumstances justifying recovery of punitive damages. *Shugar v. Guill*, 304 N.C. 332, 337-38, 283 S.E. 2d 507, 510 (1981). However, plaintiff's amended complaint does not meet the minimum requirements for "notice theory" of pleading for punitive damages against Thomas Built. Plaintiff's allegation of willful and wanton conduct against Thomas Built is buried among negligence allegations. Plaintiff does not request punitive damages against Thomas Built in any claim nor in his prayer for relief. Although both parties admit they briefed this issue in the court below, we do not have those briefs before us and can only determine the sufficiency of the amended complaint before us. Under G.S. 1A-1, Rule 12(b)(6), plaintiff's complaint fails to allege sufficient facts to support a claim for punitive damages against defendant.

For the reasons set forth above, we hold that plaintiff's complaint sufficiently states a cause of action against defendant for enhanced injuries due to negligent design and manufacture of the school bus. Further, the trial court did not err in dismissing the

complaint for failure to state a claim for which relief can be granted for strict liability and punitive damages. Accordingly, we reverse and remand solely on the issue of enhanced injuries.

Reversed in part, affirmed in part.

Judge GREENE concurs in the result.

Judge ARNOLD dissents.

Judge GREENE concurring in the result.

I join with the majority in holding the trial court erred in dismissing the plaintiff's fifth cause of action against Thomas for the negligent design and construction of the school bus. The plaintiff has sufficiently alleged a duty by defendant Thomas, a breach of that duty and that the breach resulted in injuries proximately caused by the breach.

I do not find it necessary or helpful, however, to recognize a new cause of action for enhanced injuries. In fact, the term "enhanced injury," along with the terms "crashworthiness," "second collision" and "second accident," is merely an expression for "the notion that, within limits, automobile manufacturers may be held liable for injuries caused by their failure to take the possibility of automobile accidents into consideration in designing their products." 5 S. Speiser, C. Krause & A. Gans, *The American Law of Torts*, Sec. 18:89, P. 932 (1988) [hereinafter Speiser, Krause, & Gans]. These concepts do not have a "life of [their] own as separate and distinct cause[s] of action." *Id.* Instead, they are but a part of the necessary proofs of any traditional negligence action. *See Olsen v. United States*, 521 F. Supp. 59, 63 (E.D. Pa. 1981), *aff'd without op.*, 688 F. 2d 820 (3d Cir. 1982), *cert. denied*, 459 U.S. 1107, 74 L.Ed. 2d 956, 103 S.Ct. 732 (1983) ("second collision" doctrine does not have a life of its own but is applicable in cases tried on negligence theory); *Fox v. Ford Motor Co.*, 575 F. 2d 774, 787 (10th Cir. 1978) (orthodox tort principles can be routinely applied to enhanced injury litigation); *but see Huddell v. Levin*, 537 F. 2d 726, 742 (3d Cir. 1976) (the concept of second collision liability is *sui generis* and common law doctrines of negligence are of no useful purpose); *Caizzo v. Volkswagenwerk A.G.*, 647 F. 2d 241, 250 (2d Cir. 1981) (proximate cause issue should be addressed as two separate issues involving the occurrence and

the extent of the enhancement); Harris, *Enhanced Injury Theory: An Analytic Framework*, 62 N.C.L. Rev. 642, 657 (1984) ("enhanced injury theory is neither *sui generis* nor the subject for a mechanical application of other tort formulas").

Plaintiff's attempt to establish joint and several liability for injuries allegedly caused by several tort-feasors is a common practice and is governed by traditional principles of negligence, such as:

(1) The plaintiff's *injuries* must have been caused directly or proximately by the negligent acts of the defendants. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts* Sec. 30 (5th ed. 1984) [hereinafter *Prosser and Keeton*]; Speiser, Krause & Gans, Sec. 9:1, p. 994; *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E. 2d 190, 194 (1980) (question in a products liability case is whether the injuries were caused "directly or proximately by the breach"); *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E. 2d 898, 900 (1988) (an element of actionable negligence is whether the breach of a duty was "the proximate cause of the injury"); *Holley v. Burroughs Wellcome*, 318 N.C. 352, 355, 348 S.E. 2d 772, 774 (1986) (in products liability action a party must show "injury caused directly or proximately by the breach"); *Adams v. Mills*, 312 N.C. 181, 187, 322 S.E. 2d 164, 168 (1984) (the elements of proof of contributory negligence include proving that the "breach of duty was a proximate cause of the injury suffered"); *but see Miller v. Miller*, 273 N.C. 228, 237, 160 S.E. 2d 65, 73 (1968) (plaintiff's failure to buckle his seat belt, generally, does not impair his right to recover from an active tort-feasor because the failure to buckle the seat belt "in no way contributed to the accident").

(2) Two or more tort-feasors may be responsible for the same injuries. *Adams*, 312 N.C. at 194, 322 S.E. 2d at 172 (there may be more than one proximate cause of an injury).

(3) Tort-feasors are jointly and severally liable if they either act together in committing the wrong or commit separate negligent acts which concur as to time and place and unite in proximately causing a single indivisible injury. *Phillips v. Hassett Mining Co.*, 244 N.C. 17, 22, 92 S.E. 2d 429, 433 (1956); *see Yandell v. Fireproofing Corp.*, 239 N.C. 1, 9-10, 79 S.E. 2d 223, 229 (1953) (concurrent negligence occurs when two or more persons concur "in point of consequence in producing a

single indivisible injury"); *Bost v. Metcalfe*, 219 N.C. 607, 611, 14 S.E. 2d 648, 652 (1941) (where no concert of action or no single indivisible injury, physician who negligently treats injury negligently inflicted by another is not a joint tort-feasor); *Mitchell v. Volkswagenwerk A.G.*, 669 F. 2d 1199, 1206 (8th Cir. 1982) (if manufacturer's negligence "is found to be a substantial factor in causing an indivisible injury . . . then absent a reasonable basis to determine which wrongdoer actually caused the harm, the defendants should be treated as joint and several tort-feasors"); *see also* Restatement (Second) of Torts Sec. 433A(1) (1965) ("damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm"); *Fox*, 575 F. 2d at 787 (adopting Restatement (Second) of Torts Sec. 433A (1965)); *see generally Prosser and Keeton*, Sec. 30, p. 346-47 (two or more persons may be liable for the entire wrong if they act in concert or if the actions of both persons produce a single indivisible result).

(4) A single indivisible injury exists if apportionment among the tort-feasors is impossible. *See Ipock v. Gilmore*, 73 N.C. App. 182, 186, 326 S.E. 2d 271, 275, *disc. rev. denied*, 314 N.C. 116, 332 S.E. 2d 481 (1985); *Prosser and Keeton*, Sec. 30, p. 347.

(5) Negligent conduct of first tort-feasor may be insulated by independent negligent acts of second tort-feasor. *Adams*, 312 N.C. at 194, 322 S.E. 2d at 172-73. The test is whether the independent negligent act of the second actor is reasonably foreseeable on the part of the original actor. *Id.; see* 5 Speiser, Krause & Gans, Sec. 18:92, p. 940 (1988) (". . . an accident or collision is considered a foreseeable result of the normal use of a motor vehicle . . ."); *Riddle v. Artis*, 243 N.C. 668, 671, 91 S.E. 2d 894, 896 (1956) (where intervening cause "becomes itself solely responsible for the injuries" original wrongdoer is relieved of liability); Restatement (Second) of Torts Sec. 442A (1965) ("Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.").

(6) Whether injuries are capable of apportionment among the tort-feasors is an issue of law for the trial court to decide. *See Casado v. Melas Corp.*, 69 N.C. App. 630, 635, 318 S.E.

2d 247, 250 (1984) (court determined damage complained of was the indivisible result of several causes); Restatement (Second) of Torts Sec. 434(1)(b) (1965) (trial court to determine "whether the harm to the plaintiff is capable of apportionment among two or more causes"). If the trial court determines the damages are capable of apportionment, the actual apportionment is a question of fact for the jury. Restatement (Second) of Torts Sec. 434(2)(b) (1965); *see* Restatement (Second) of Torts Sec. 433B(2) (1965) ("where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor"); *see also* 1 Speiser, Krause & Gans, Sec. 3:7, p. 398 ("the burden of proof is on defendant once the plaintiff has made a prima facie showing that the defendant's conduct contributed as a proximate cause to the harm suffered by plaintiff").

I likewise join with the majority in holding, for the reasons stated in that opinion, that the trial court committed no error in dismissing the plaintiff's cause of action based on strict liability or in dismissing the third cause of action for punitive damages.

Judge ARNOLD dissenting.

I dissent from the majority's conclusion that plaintiff's allegations of enhanced injury against Thomas Built are sufficient to withstand a 12(b)(6) motion.

It is my opinion that the "first impact" is the critical and sole event of proximate causation in vehicular collision cases, and therefore actions for enhanced injuries are precluded. The initial impact of the truck with the bus was the cause, which in natural and continuous sequence, unbroken by any new and independent cause, that produced plaintiff's harm. *See Hairston v. Alexander*, 310 N.C. 227, 311 S.E. 2d 559 (1984).

I vote no error.

MUMFORD v. COLOMBO

[93 N.C. App. 107 (1989)]

ALICE MUMFORD, GUARDIAN AD LITEM FOR SHARANDA MUMFORD, A MINOR CHILD, PLAINTIFF-APPELLANT v. MICHAEL COLOMBO, ADMINISTRATOR OF THE ESTATE OF KARSON LEE CONGER, DECEASED; MILITARY DISTRIBUTORS OF VIRGINIA, INC. AND THOMAS BUILT BUSES, INC., DEFENDANTS-APPELLEES

No. 878SC1259

(Filed 7 March 1989)

Sales § 22; Negligence § 22— enhanced injury liability—negligent design and manufacture of school bus—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for enhanced injuries due to negligent design and manufacture of a school bus.

APPEAL by plaintiff from *Llewellyn (James D.), Judge*. Order entered 29 September 1987 in Superior Court, GREENE County. Heard in the Court of Appeals 11 May 1988.

This appeal arises out of the 31 May 1985 school bus accident near Snow Hill, North Carolina, in which six children were killed and numerous others injured. The accident occurred when a tractor-trailer truck driven by Karson Lee Conger (deceased) crossed the center line of the highway and collided with a school bus. Plaintiff is the Guardian Ad Litem for Sharanda Mumford, one of the young children injured. Defendants are Colombo, administrator of the estate of Karson Lee Conger; Military Distributors of Virginia, Inc., owners of the truck Conger was driving; and Thomas Built Buses, Inc., manufacturers of the school bus.

On 26 August 1985, plaintiff filed an amended complaint alleging six causes of action. The first claim alleges negligence by Conger and Military Distributors of Virginia, Inc.; the second claim seeks punitive damages against the administrator of Conger's estate and Military Distributors of Virginia, Inc.; the third claim alleges that defendant Thomas Built Buses, Inc. (Thomas Built) negligently designed and manufactured the bus which proximately caused the injuries; the fourth claim alleges defendant Thomas Built negligently designed and manufactured the bus which proximately caused or enhanced the injuries; the fifth claim alleges strict liability of defendant Thomas Built; and the sixth claim alleges breach of implied warranty by defendant Thomas Built.

Two defendants petitioned for removal of the case to the United States District Court for the Eastern District of North Carolina. On 8 November 1985, defendant Thomas Built filed its answer and moved to dismiss the amended complaint under the Federal Rules of Civil Procedure, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The case was remanded to Greene County Superior Court on 20 February 1986.

On 29 September 1987, Judge Llewellyn entered an order dismissing three of plaintiff's claims under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The three claims dismissed are those against defendant Thomas Built for negligent design and manufacture of the bus which enhanced plaintiff's injuries; for strict liability of defendant Thomas Built; and for punitive damages against defendant Thomas Built. The remaining claims including plaintiff's claim against Thomas Built for negligence and implied warranty proximately causing the accident were denied and are not before us on appeal.

From this order, plaintiff appeals.

Taft, Taft & Haigler, by Thomas F. Taft, Kenneth E. Haigler, Robert H. Hochuli, Jr. and James M. Stanley, Jr., for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellee Thomas Built Buses, Inc.

ORR, Judge.

For the reasons set forth in *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E. 2d 249 (1989), we hold that plaintiff's complaint sufficiently states a cause of action against defendant for enhanced injuries due to negligent design and manufacture of the school bus. Further, the trial court did not err in dismissing the complaint for failure to state a claim for which relief can be granted for strict liability and punitive damages. Accordingly, we reverse and remand solely on the issue of enhanced injuries.

Reversed in part, affirmed in part.

Judge GREENE concurs in the result.

Judge ARNOLD dissents.

ALICE MUMFORD, ADMINISTRATRIX OF THE ESTATE OF MITTIE MUMFORD, PLAINTIFF-APPELLANT v. MICHAEL COLOMBO, ADMINISTRATOR OF THE ESTATE OF KARSON LEE CONGER, DECEASED; MILITARY DISTRIBUTORS OF VIRGINIA, INC. AND THOMAS BUILT BUSES, INC., DEFENDANTS-APPELLEES

No. 878SC1264

(Filed 7 March 1989)

Sales § 22; Negligence § 22— enhanced injury liability—negligent design and manufacture of school bus—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for enhanced injuries due to negligent design and manufacture of a school bus.

APPEAL by plaintiff from *Llewellyn (James D.), Judge.* Order entered 29 September 1987 in Superior Court, GREENE County. Heard in the Court of Appeals 11 May 1988.

This appeal arises out of the 31 May 1985 school bus accident near Snow Hill, North Carolina, in which six children were killed and numerous others injured. The accident occurred when a tractor-trailer truck driven by Karson Lee Conger (deceased) crossed the center line of the highway and collided with a school bus. Plaintiff is the administratrix of the estate of Mittie Mumford, one of the young children killed. Defendants are Colombo, administrator of the estate of Karson Lee Conger; Military Distributors of Virginia, Inc., owners of the truck Conger was driving; and Thomas Built Buses, Inc., manufacturers of the school bus.

On 26 August 1985, plaintiff filed an amended complaint alleging seven causes of action. The first and second claims allege negligence by Conger and Military Distributors of Virginia, Inc.; the third claim seeks punitive damages against the administrator of Conger's estate and Military Distributors of Virginia, Inc.; the fourth claim alleges negligence by defendant Thomas Built Buses, Inc. (Thomas Built) proximately caused pain, suffering and wrongful death; the fifth claim alleges that defendant Thomas Built negligently designed and manufactured the bus which proximately caused or enhanced the injuries; the sixth claim alleges strict liability of defendant Thomas Built; and the seventh claim alleges breach of implied warranty by defendant Thomas Built.

Two defendants petitioned for removal of the case to the United States District Court for the Eastern District of North Carolina. On 8 November 1985, defendant Thomas Built filed its answer and moved to dismiss the amended complaint under the Federal Rules of Civil Procedure, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The case was remanded to Greene County Superior Court on 20 February 1986.

On 29 September 1987, Judge Llewellyn entered an order dismissing three of plaintiff's claims under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The three claims dismissed are those against defendant Thomas Built for negligent design and manufacture of the bus which enhanced plaintiff's injuries; for strict liability of defendant Thomas Built; and for punitive damages against defendant Thomas Built. The remaining claims including plaintiff's claim against Thomas Built for negligence and implied warranty proximately causing the accident were denied and are not before us on appeal.

From this order, plaintiff appeals.

Taft, Taft & Haigler, by Thomas F. Taft, Kenneth E. Haigler, Robert H. Hochuli, Jr. and James M. Stanley, Jr., for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellee Thomas Built Buses, Inc.

ORR, Judge.

For the reasons set forth in *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E. 2d 249 (1989), we hold that plaintiff's complaint sufficiently states a cause of action against defendant for enhanced injuries due to negligent design and manufacture of the school bus. Further, the trial court did not err in dismissing the complaint for failure to state a claim for which relief can be granted for strict liability and punitive damages. Accordingly, we reverse and remand solely on the issue of enhanced injuries.

Reversed in part, affirmed in part.

Judge GREENE concurs in the result.

Judge ARNOLD dissents.

LARRY D. CORBITT, GUARDIAN AD LITEM FOR REGINALD DONNELL WARREN, A MINOR CHILD, PLAINTIFF-APPELLANT v. MICHAEL COLOMBO, ADMINISTRATOR OF THE ESTATE OF KARSON LEE CONGER, DECEASED; MILITARY DISTRIBUTORS OF VIRGINIA, INC. AND THOMAS BUILT BUSES, INC., DEFENDANTS-APPELLEES

No. 878SC1260

(Filed 7 March 1989)

Sales § 22; Negligence § 22— enhanced injury liability—negligent design and manufacture of school bus—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for enhanced injuries due to negligent design and manufacture of a school bus.

APPEAL by plaintiff from *Llewellyn (James D.), Judge*. Order entered 29 September 1987 in Superior Court, GREENE County. Heard in the Court of Appeals 11 May 1988.

This appeal arises out of the 31 May 1985 school bus accident near Snow Hill, North Carolina, in which six children were killed and numerous others injured. The accident occurred when a tractor-trailer truck driven by Karson Lee Conger (deceased) crossed the center line of the highway and collided with a school bus. Plaintiff is the Guardian Ad Litem for Reginald Donnell Warren, one of the young children injured. Defendants are Colombo, administrator of the estate of Karson Lee Conger; Military Distributors of Virginia, Inc., owners of the truck Conger was driving; and Thomas Built Buses, Inc., manufacturers of the school bus.

On 26 August 1985, plaintiff filed an amended complaint alleging six causes of action. The first claim alleges negligence by Conger and Military Distributors of Virginia, Inc.; the second claim seeks punitive damages against the administrator of Conger's estate and Military Distributors of Virginia, Inc.; the third claim alleges that defendant Thomas Built Buses, Inc. (Thomas Built) negligently designed and manufactured the bus which proximately caused the injuries; the fourth claim alleges defendant Thomas Built negligently designed and manufactured the bus which proximately caused or enhanced the injuries; the fifth claim alleges strict liability of defendant Thomas Built; and the sixth claim alleges breach of implied warranty by defendant Thomas Built.

Two defendants petitioned for removal of the case to the United States District Court for the Eastern District of North Carolina. On 8 November 1985, defendant Thomas Built filed its answer and moved to dismiss the amended complaint under the Federal Rules of Civil Procedure, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The case was remanded to Greene County Superior Court on 20 February 1986.

On 29 September 1987, Judge Llewellyn entered an order dismissing three of plaintiff's claims under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The three claims dismissed are those against defendant Thomas Built for negligent design and manufacture of the bus which enhanced plaintiff's injuries; for strict liability of defendant Thomas Built; and for punitive damages against defendant Thomas Built. The remaining claims including plaintiff's claim against Thomas Built for negligence and implied warranty proximately causing the accident were denied and are not before us on appeal.

From this order, plaintiff appeals.

Taft, Taft & Haigler, by Thomas F. Taft, Kenneth E. Haigler, Robert H. Hochuli, Jr. and James M. Stanley, Jr., for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellee Thomas Built Buses, Inc.

ORR, Judge.

For the reasons set forth in *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E. 2d 249 (1989), we hold that plaintiff's complaint sufficiently states a cause of action against defendant for enhanced injuries due to negligent design and manufacture of the school bus. Further, the trial court did not err in dismissing the complaint for failure to state a claim for which relief can be granted for strict liability and punitive damages. Accordingly, we reverse and remand solely on the issue of enhanced injuries.

Reversed in part, affirmed in part.

Judge GREENE concurs in the result.

Judge ARNOLD dissents.

JOHNNIE CORBITT, ADMINISTRATOR OF THE ESTATE OF RICKY CORBITT, PLAINTIFF-APPELLANT v. MICHAEL COLOMBO, ADMINISTRATOR OF THE ESTATE OF KARSON LEE CONGER, DECEASED; MILITARY DISTRIBUTORS OF VIRGINIA, INC. AND THOMAS BUILT BUSES, INC., DEFENDANTS-APPELLEES

No. 878SC1262

(Filed 7 March 1989)

Sales § 22; Negligence § 22— enhanced injury liability—negligent design and manufacture of school bus—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for enhanced injuries due to negligent design and manufacture of a school bus.

APPEAL by plaintiff from *Llewellyn (James D.), Judge.* Order entered 29 September 1987 in Superior Court, GREENE County. Heard in the Court of Appeals 11 May 1988.

This appeal arises out of the 31 May 1985 school bus accident near Snow Hill, North Carolina, in which six children were killed and numerous others injured. The accident occurred when a tractor-trailer truck driven by Karson Lee Conger (deceased) crossed the center line of the highway and collided with a school bus. Plaintiff is the administrator of the estate of Ricky Corbitt, one of the young children killed. Defendants are Colombo, administrator of the estate of Karson Lee Conger; Military Distributors of Virginia, Inc., owners of the truck Conger was driving; and Thomas Built Buses, Inc., manufacturers of the school bus.

On 26 August 1985, plaintiff filed an amended complaint alleging seven causes of action. The first and second claims allege negligence by Conger and Military Distributors of Virginia, Inc.; the third claim seeks punitive damages against the administrator of Conger's estate and Military Distributors of Virginia, Inc.; the fourth claim alleges negligence by defendant Thomas Built Buses, Inc. (Thomas Built) proximately caused pain, suffering and wrongful death; the fifth claim alleges that defendant Thomas Built negligently designed and manufactured the bus which proximately caused or enhanced the injuries; the sixth claim alleges strict liability of defendant Thomas Built; and the seventh claim alleges breach of implied warranty by defendant Thomas Built.

Two defendants petitioned for removal of the case to the United States District Court for the Eastern District of North Carolina. On 8 November 1985, defendant Thomas Built filed its answer and moved to dismiss the amended complaint under the Federal Rules of Civil Procedure, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The case was remanded to Greene County Superior Court on 20 February 1986.

On 29 September 1987, Judge Llewellyn entered an order dismissing three of plaintiff's claims under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The three claims dismissed are those against defendant Thomas Built for negligent design and manufacture of the bus which enhanced plaintiff's injuries; for strict liability of defendant Thomas Built; and for punitive damages against defendant Thomas Built. The remaining claims including plaintiff's claim against Thomas Built for negligence and implied warranty proximately causing the accident were denied and are not before us on appeal.

From this order, plaintiff appeals.

Taft, Taft & Haigler, by Thomas F. Taft, Kenneth E. Haigler, Robert H. Hochuli, Jr. and James M. Stanley, Jr., for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellee Thomas Built Buses, Inc.

ORR, Judge.

For the reasons set forth in *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E. 2d 249 (1989), we hold that plaintiff's complaint sufficiently states a cause of action against defendant for enhanced injuries due to negligent design and manufacture of the school bus. Further, the trial court did not err in dismissing the complaint for failure to state a claim for which relief can be granted for strict liability and punitive damages. Accordingly, we reverse and remand solely on the issue of enhanced injuries.

Reversed in part, affirmed in part.

Judge GREENE concurs in the result.

Judge ARNOLD dissents.

JOHNNIE ALBRITTON, ADMINISTRATOR OF THE ESTATE OF SHAWAN ALBRITTON, PLAINTIFF-APPELLANT v. MICHAEL COLOMBO, ADMINISTRATOR OF THE ESTATE OF KARSON LEE CONGER, DECEASED; MILITARY DISTRIBUTORS OF VIRGINIA, INC. AND THOMAS BUILT BUSES, INC., DEFENDANTS-APPELLEES

No. 878SC1263

(Filed 7 March 1989)

Sales § 22; Negligence § 22— enhanced injury liability—negligent design and manufacture of school bus—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for enhanced injuries due to negligent design and manufacture of a school bus.

APPEAL by plaintiff from *Llewellyn (James D.), Judge*. Order entered 29 September 1987 in Superior Court, GREENE County. Heard in the Court of Appeals 11 May 1988.

This appeal arises out of the 31 May 1985 school bus accident near Snow Hill, North Carolina, in which six children were killed and numerous others injured. The accident occurred when a tractor-trailer truck driven by Karson Lee Conger (deceased) crossed the center line of the highway and collided with a school bus. Plaintiff is the administrator of the estate of Shawan Albritton, one of the young children killed. Defendants are Colombo, administrator of the estate of Karson Lee Conger; Military Distributors of Virginia, Inc., owners of the truck Conger was driving; and Thomas Built Buses, Inc., manufacturers of the school bus.

On 26 August 1985, plaintiff filed an amended complaint alleging seven causes of action. The first and second claims allege negligence by Conger and Military Distributors of Virginia, Inc.; the third claim seeks punitive damages against the administrator of Conger's estate and Military Distributors of Virginia, Inc.; the fourth claim alleges negligence by defendant Thomas Built Buses, Inc. (Thomas Built) proximately caused pain, suffering and wrongful death; the fifth claim alleges defendant Thomas Built negligently designed and manufactured the bus which proximately caused or enhanced the injuries; the sixth claim alleges strict liability of defendant Thomas Built; and the seventh claim alleges breach of implied warranty by defendant Thomas Built.

Two defendants petitioned for removal of the case to the United States District Court for the Eastern District of North Carolina. On 8 November 1985, defendant Thomas Built filed its answer and moved to dismiss the amended complaint under the Federal Rules of Civil Procedure, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The case was remanded to Greene County Superior Court on 20 February 1986.

On 29 September 1987, Judge Llewellyn entered an order dismissing three of plaintiff's claims under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The three claims dismissed are those against defendant Thomas Built for negligent design and manufacture of the bus which enhanced plaintiff's injuries; for strict liability of defendant Thomas Built; and for punitive damages against defendant Thomas Built. The remaining claims including plaintiff's claim against Thomas Built for negligence and implied warranty proximately causing the accident were denied and are not before us on appeal.

From this order, plaintiff appeals.

Taft, Taft & Haigler, by Thomas F. Taft, Kenneth E. Haigler, Robert H. Hochuli, Jr. and James M. Stanley, Jr., for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellee Thomas Built Buses, Inc.

ORR, Judge.

For the reasons set forth in *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E. 2d 249 (1989), we hold that plaintiff's complaint sufficiently states a cause of action against defendant for enhanced injuries due to negligent design and manufacture of the school bus. Further, the trial court did not err in dismissing the complaint for failure to state a claim for which relief can be granted for strict liability and punitive damages. Accordingly, we reverse and remand solely on the issue of enhanced injuries.

Reversed in part, affirmed in part.

Judge GREENE concurs in the result.

Judge ARNOLD dissents.

HARRY HOLMES, GUARDIAN AD LITEM FOR JOHN HOLMES, A MINOR CHILD, PLAINTIFF-APPELLANT v. MICHAEL COLOMBO, ADMINISTRATOR OF THE ESTATE OF KARSON LEE CONGER, DECEASED; MILITARY DISTRIBUTORS OF VIRGINIA, INC. AND THOMAS BUILT BUSES, INC., DEFENDANTS-APPELLEES

No. 878SC1261

(Filed 7 March 1989)

Sales § 22; Negligence § 22— enhanced injury liability—negligent design and manufacture of school bus—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for enhanced injuries due to negligent design and manufacture of a school bus.

APPEAL by plaintiff from *Llewellyn (James D.), Judge.* Order entered 29 September 1987 in Superior Court, GREENE County. Heard in the Court of Appeals 11 May 1988.

This appeal arises out of the 31 May 1985 school bus accident near Snow Hill, North Carolina, in which six children were killed and numerous others injured. The accident occurred when a tractor-trailer truck driven by Karson Lee Conger (deceased) crossed the center line of the highway and collided with a school bus. Plaintiff is the Guardian Ad Litem for John Holmes, one of the young children injured. Defendants are Colombo, administrator of the estate of Karson Lee Conger; Military Distributors of Virginia, Inc., owners of the truck Conger was driving; and Thomas Built Buses, Inc., manufacturers of the school bus.

On 26 August 1985, plaintiff filed an amended complaint alleging six causes of action. The first claim alleges negligence by Conger and Military Distributors of Virginia, Inc.; the second claim seeks punitive damages against the administrator of Conger's estate and Military Distributors of Virginia, Inc.; the third claim alleges that defendant Thomas Built Buses, Inc. (Thomas Built) negligently designed and manufactured the bus which proximately caused the injuries; the fourth claim alleges defendant Thomas Built negligently designed and manufactured the bus which proximately caused or enhanced the injuries; the fifth claim alleges strict liability of defendant Thomas Built; and the sixth claim alleges breach of implied warranty by defendant Thomas Built.

Two defendants petitioned for removal of the case to the United States District Court for the Eastern District of North Carolina. On 8 November 1985, defendant Thomas Built filed its answer and moved to dismiss the amended complaint under the Federal Rules of Civil Procedure, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The case was remanded to Greene County Superior Court on 20 February 1986.

On 29 September 1987, Judge Llewellyn entered an order dismissing three of plaintiff's claims under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The three claims dismissed are those against defendant Thomas Built for negligent design and manufacture of the bus which enhanced plaintiff's injuries; for strict liability of defendant Thomas Built; and for punitive damages against defendant Thomas Built. The remaining claims including plaintiff's claim against Thomas Built for negligence and implied warranty proximately causing the accident were denied and are not before us on appeal.

From this order, plaintiff appeals.

Taft, Taft & Haigler, by Thomas F. Taft, Kenneth E. Haigler, Robert H. Hochuli, Jr. and James M. Stanley, Jr., for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, by James R. Sugg and Rudolph A. Ashton, III, for defendant-appellee Thomas Built Buses, Inc.

ORR, Judge.

For the reasons set forth in *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E. 2d 249 (1989), we hold that plaintiff's complaint sufficiently states a cause of action against defendant for enhanced injuries due to negligent design and manufacture of the school bus. Further, the trial court did not err in dismissing the complaint for failure to state a claim for which relief can be granted for strict liability and punitive damages. Accordingly, we reverse and remand solely on the issue of enhanced injuries.

Reversed in part, affirmed in part.

Judge GREENE concurs in the result.

Judge ARNOLD dissents.

STATE OF NORTH CAROLINA v. WILLIAM PAUL REED

No. 8819SC387

(Filed 7 March 1989)

1. **Criminal Law § 138.21— two counts of assault—especially heinous, atrocious or cruel—properly found**

The trial court did not err in a prosecution for two counts of assault with a deadly weapon with intent to kill inflicting serious injury by finding as an aggravating factor in both cases that the offense was especially heinous, atrocious or cruel where the court stated that it was considering only the situation as it existed during the course of the offense and the overall situation during the course of the offense. The judge had explicitly acknowledged during argument by counsel that he recognized that it was improper for the court to use conviction of a joined offense as the basis for finding another offense especially heinous, atrocious or cruel, and the type of assault in this case was excessively brutal beyond that normally present in any assault with a deadly weapon with intent to kill inflicting serious injury.

2. **Criminal Law § 138.29— assault—nonstatutory aggravating factor—premeditated and deliberated assault—no error**

The trial court did not err when sentencing defendant for two counts of assault with a deadly weapon with intent to kill inflicting serious injury by finding as a nonstatutory aggravating factor that the assault on his wife was premeditated and deliberated where there was ample evidence of defendant's intent to kill on the night in question and the evidence of premeditation and deliberation from two days earlier was not necessary to prove the intent to kill element of the offense.

3. **Criminal Law § 138.7— assault—sentencing—limited use of statements made by defendant to psychologist**

There was no error when sentencing defendant for two counts of assault with a deadly weapon with intent to kill inflicting serious injury from admitting testimony concerning statements made by defendant to his psychologist about his consumption of alcohol prior to the offenses for the limited purpose of proving what he had told his psychologist and not to prove that he had used alcohol. Although the formal rules of evidence do not apply in sentencing hearings, and the court

may base its sentencing decision on reliable hearsay, defendant is not entitled to consideration of hearsay evidence if it is of doubtful credibility and defendant had the burden of persuasion on mitigating circumstances. The defendant here failed to show that the statements in question were manifestly credible.

Judge BECTON concurs in the result.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered 21 October 1987 in Superior Court, ROWAN County. Heard in the Court of Appeals 1 November 1988.

The defendant was tried and convicted of two counts of assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence at trial tended to show that defendant was separated from his wife (Carol Reed) at the time of the incident, and Mrs. Reed was living with another man (Mr. Wells). Defendant knew of the relationship and knew where the two were residing.

On 5 August 1987 at approximately 10:30 or 11:00 p.m., a car pulled into Mr. Wells' driveway and a shot was fired from the vicinity of the car through a glass storm door to the home. The victims, Mrs. Reed and Mr. Wells, had been sitting on the living room couch when the first shot was fired. Mr. Wells testified that the bullet from the first shot went right by his head. An investigating officer testified that a shell casing was found in the wall behind the couch, about 6-8 inches above the back of the couch. Both Mr. Wells and Mrs. Reed testified they got up from the couch and ran out of the living room, away from the attack. As Mr. Wells was moving toward the kitchen he was struck by a bullet in the right arm, just above the elbow. The bullet shattered the bone so that he was unable to use his right arm after that initial wound. Mr. Wells testified that he was trying to protect himself with a kitchen chair but when he reached for the chair, he was wounded in his left arm by two bullets. The second wound to his left arm severed the main artery in the arm. Mr. Wells testified that he clearly saw the defendant standing in the living room of the house holding a .22 caliber rifle. Mr. Wells also testified that he pleaded with the defendant to stop shooting.

Mrs. Reed testified that she had run to a back bedroom after the initial shot had been fired. When she heard something fall in another room, she went to stand near a doorway and looked

around a corner to see what was happening in the kitchen. Mrs. Reed testified that she saw Mr. Wells on the floor, and that she saw the defendant holding a rifle. Mrs. Reed testified that the defendant shot her in the left arm as she stood in the doorway. After being wounded Mrs. Reed ran back into the bedroom. Mrs. Reed also testified that after she heard no more shots for awhile and thought the defendant had left, she returned to the kitchen to help Mr. Wells. Mrs. Reed was then shot in the back by defendant. Mrs. Reed fell on the floor in front of the refrigerator. The defendant then fired two more shots in her direction, both of which hit the refrigerator. Mrs. Reed testified she then pulled herself up off the floor and ran back into the bedroom, screaming to the defendant to please stop shooting. After some time Mrs. Reed returned to the kitchen and found the defendant had left. She then ran to a neighbor's house to get help. Both victims testified they were certain the defendant was their assailant.

The State also presented testimony from a police officer and a detective who were called to the scene the night of the shootings. The policemen testified that eight .22 caliber spent shells were found in various locations in the living room. Furthermore, one bullet was found in the wall behind the couch, two in the wall next to a door, one in the refrigerator, and one in the wall behind the refrigerator (the bullet had passed through the refrigerator). The State also presented testimony from the surgeon who treated the victims the night of the shooting. His testimony corroborated the victims' testimony as to the nature of their wounds.

A friend of the defendant, a Mr. Lefler, also testified for the State. Mr. Lefler recalled a conversation with the defendant that allegedly occurred on 3 August 1987 in which the defendant asked Mr. Lefler if Mrs. Reed "knew" Mr. Lefler's car and if Mr. Lefler had a gun the defendant could borrow. Mr. Lefler testified that the defendant said he was "going to go shoot the hell out of Carol" (Mrs. Reed).

The defendant presented no evidence. Upon guilty verdicts on both charges the court sentenced defendant to two consecutive 15 year terms. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Staples Hughes, for the defendant-appellant.

EAGLES, Judge.

Defendant does not argue in his brief any of the eight assignments of error that relate to the guilt determination phase of his trial. They are therefore deemed abandoned. Rule 28(b)(5), N.C. Rules of App. Proc. He also fails to argue three of the assignments of error listed in the record that relate to the sentencing phase. They too are deemed abandoned. *Id.* The four assignments of error defendant did argue in his brief relate to the sentencing phase. Two assignments question the propriety of finding as an aggravating factor that each offense was especially heinous, atrocious or cruel. Defendant also argues that the trial court erred in finding that the offense against Mrs. Reed was premeditated and deliberated. Finally, the defendant argues that the trial court's failure to admit statements allegedly made by defendant to a psychologist regarding defendant's use of alcohol prior to the commission of the offenses was error. The defendant asserts in his brief that the error resulted in the "tepid finding of a mitigating mental condition." After careful review of the record, we find no error in the sentencing phase.

I.

[1] Defendant asserts that it was error for the trial court to have found as an aggravating factor in both cases that the offense was especially heinous, atrocious or cruel. Defendant's argument is that the trial court used the conviction of each offense as an aggravating factor in the other. We find no merit to defendant's argument and therefore overrule these two assignments of error.

In *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d 223 (1985), the Court held that use of a joined offense as evidence that the offense for which defendant is being sentenced was especially heinous, atrocious or cruel violates the Fair Sentencing Act. In *Westmoreland*, the defendant had been convicted of one count of first degree murder, two counts of second degree murder, and one count of assault with a deadly weapon with intent to kill inflicting serious injury. In sentencing for the non-capital offenses the trial court stated that "these four offenses were committed within a short time of one another, and that the course of conduct in which defendant committed the first degree murder . . . was a part of other crimes involving violence against the persons." *Id.* at 448, 334 S.E. 2d at 227. The trial court found that all three non-capital offenses were especially heinous, atrocious or cruel. The Supreme Court

found that although the trial court did not explicitly use defendant's convictions as aggravating factors, in relying on defendant's "murderous course of conduct" the trial court had in effect used the contemporaneous convictions as aggravating factors. *Id.* at 449, 334 S.E. 2d at 228.

In support of his argument here, the defendant points to the statements made by the court at the sentencing hearing. The trial court stated that, in finding each offense especially heinous, atrocious or cruel, the court was "considering only the situation as it existed during the course of the offense . . . the overall situation during the course of the offense." The court went on to state that

> [t]he victims cared for each other and were exposed to the infliction of wounds over a period of time, and other gunshots in the house, by a person—by the defendant—who was violent throughout it all, who gave no indication when it was over, other than leaving, violently leaving both victims in fear.

Contrary to defendant's assertion, looking at the context in which the statement was made by the trial court, in light of arguments of counsel and responses by the court, we find that the quoted statement does not indicate the trial court improperly used a joined offense as an aggravating factor in either of these cases. The judge had explicitly acknowledged during argument by counsel that he recognized that it was improper for the court to use conviction of a joined offense as the basis for finding another offense especially heinous, atrocious or cruel. The trial court's reference to the "overall situation" does not necessarily indicate he was improperly considering a "course of conduct" that included the commission of a joined offense. The "overall situation" was that the victims were attacked late at night in the home they shared, without warning or provocation on their part. Furthermore, as the defendant stealthily moved to various places in the living room, he shot at the victims at least nine times, wounding one twice and the other three times, over an extended period of eight to ten minutes. Both victims testified that even after each had been wounded by defendant, they pleaded with defendant to stop shooting. This type of assault is excessively brutal beyond that normally present in any assault with a deadly weapon with intent to kill inflicting serious injury. *See State v. Vaught*, 318 N.C. 480, 349 S.E. 2d 583 (1986).

II.

[2] Defendant's next assignment of error is based on the court's finding as a non-statutory aggravating factor that the assault on Mrs. Reed was premeditated and deliberated. Defendant argues that the trial court used evidence of an element of an offense to aggravate that same offense. Defendant's argument is without merit.

The defendant argues that since the trial court found that defendant had premeditated and deliberated the shooting of Mrs. Reed "over a period of approximately two days" he must have relied on the State's evidence of defendant's 3 August 1987 conversation with a friend. Since this evidence was introduced at trial, defendant asserts it could have been used by the jury as the basis of the "intent to kill" element of the offense for which he was convicted. "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." G.S. § 15A-1340.4(a)(1). 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 formed the intent to kill while in a "cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E. 2d 791, 795 (1981). To show premeditation, the State must prove the timing of the defendant's intent. To show deliberation, the State must prove defendant's emotional state at the time the intent to kill was formed. An intent to kill may be shown by evidence of the deadly weapon used, the number of shots fired, the nature of the wounds inflicted and other circumstances at the time of the assault. Therefore, proof of premeditation and deliberation requires presentation of additional evidence beyond evidence necessary to prove defendant's intent to kill. *See State v. Smith*, 92 N.C. App. 500, 374 S.E. 2d 617 (1988). In this case, evidence of defendant's conversation two days before the shooting was sufficient to show premeditation and deliberation. Evidence of defendant's conduct on the night of the assaults was sufficient to prove the intent to kill element.

Since there was ample evidence of defendant's intent to kill on the night in question, i.e., the number of shots, the multiple shootings of already wounded victims, etc., the evidence of premeditation and deliberation from two days earlier "was not necessary to prove an element of the offense," i.e., the intent to kill. According-

ly, the State is not precluded from using the premeditation and deliberation evidence to prove an aggravating factor for sentencing purposes.

III.

[3] Defendant's final argument is that the trial court erred in limiting the use of certain testimony offered at the sentencing hearing concerning statements made by defendant to his psychologist about his consumption of alcohol prior to the offenses. The State objected to the psychologist's testimony on hearsay grounds. The trial court ruled the evidence would not be admitted to prove defendant had used alcohol but would be admitted for a limited purpose, as evidence of what defendant told his psychologist. Defendant asserts that the statements made by defendant were shown to be trustworthy and, though clearly hearsay, they should have been admitted to prove the truth of the matter asserted. Defendant further argues that had the statements been admitted to prove that defendant had consumed alcohol prior to the shootings, the court would have been compelled to find as a mitigating factor that "defendant was suffering from a . . . physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." G.S. § 15A-1340(a)(2)(d). Defendant's argument is without merit.

Although the formal rules of evidence do not apply in sentencing hearings, evidence offered at sentencing must be both pertinent and dependable. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). While the court may base its sentencing decision on "reliable hearsay," *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980), defendant is not entitled to consideration of hearsay evidence that is of doubtful credibility.

In the sentencing phase, the burden of persuasion on mitigating circumstances is on the defendant. *State v. Braswell*, 78 N.C. App. 498, 337 S.E. 2d 637 (1985). Defendant must convince the court that evidence of the mitigating factor is "uncontradicted, substantial and manifestly credible." *State v. Cameron*, 314 N.C. 516, 520, 335 S.E. 2d 9, 11 (1985). "The failure of a court to find a factor in mitigation urged by the defendant will not be overturned on appeal unless the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility. *State v. Lane*, 77 N.C. App. 741, 745, 336 S.E. 2d 410, 412 (1985). The

refusal of the trial court to admit the doctor's testimony to prove that defendant had consumed alcohol prior to the offenses was not error. The defendant failed to show the statements were manifestly credible.

For the reasons stated, we find no error.

No error.

Judge GREENE concurs.

Judge BECTON concurs in the result.

STATE OF NORTH CAROLINA v. MICHAEL RAY BRITT

No. 8816SC518

(Filed 7 March 1989)

1. **Constitutional Law § 69; Rape and Allied Offenses § 4— sexual abuse of child—right to confrontation—not raised at trial**

In a prosecution arising from the sexual abuse of defendant's daughter by defendant, defendant could not raise for the first time on appeal Sixth Amendment confrontation clause issues regarding his ex-wife's testimony as to what their daughter had told her. Moreover, there was no prejudice even if there was error in the admission of testimony on the two occasions when defendant objected.

2. **Rape and Allied Offenses § 4— child sexual abuse—mother's statements to doctors concerning child's statements—no error**

There was no error in a prosecution for rape, incest, taking indecent liberties with a child, and first degree sexual offense from the admission of testimony from the victim's pediatrician concerning the mother's statements to him and his partner relating what the victim had told her mother. Defendant waived his objection when the mother later testified to the same incidents without objection.

3. Criminal Law § 50.1— sexual abuse of child—pediatricians' testimony that child's statements credible—no plain error

There was no plain error in a prosecution arising from the sexual abuse of a child in allowing the victim's pediatricians to testify that the child's statements were credible.

4. Criminal Law § 100— sexual abuse of child—private counsel—use of mother's counsel in custody suit—no plain error

There was no plain error in a prosecution arising from the sexual abuse of a child from the use of counsel in the mother's custody suit as private prosecutors where the private prosecutors were involved only by the consent of the district attorney, the private prosecutors and the district attorney tried the case together, and there was no underlying judgment the enforcement of which would benefit one party.

5. Rape and Allied Offenses § 6— first degree sexual offense—instructions—unanimity of verdict

There was plain error in a conviction for first degree sexual offense where the court's instruction described six separate sexual acts, the evidence would support a conviction based on at least three of those acts, and the offense or offenses for which defendant was found guilty could not be determined from the jury's general verdict. N.C.G.S. § 15A-1237(b), North Carolina Constitution, Art. I, § 24.

6. Rape and Allied Offenses § 19— indecent liberties—instructions—unanimity of verdict

A conviction for taking indecent liberties with a child was reversed where the court's instruction pointed out three distinct types of acts which would constitute taking indecent liberties, the evidence would support a conviction based on any of the three acts, and the act or acts which the jury found defendant had committed could not be determined.

7. Rape and Allied Offenses § 5— sexual abuse of child—motion to dismiss charges denied—no error

There was no error in a prosecution for rape, taking indecent liberties with a child, incest, and first degree sexual offense from the denial of defendant's motion to dismiss all charges.

APPEAL by defendant from *Currin, Judge*. Judgment entered 9 December 1987 in Superior Court, ROBESON County. Heard in the Court of Appeals 10 January 1989.

A jury convicted Michael Ray Britt (defendant) of first degree rape, incest, taking indecent liberties with a child, and first degree sexual offense. The victim was defendant's young daughter, Michelle. The trial court sentenced defendant to concurrent life sentences for the rape and sexual offense charges and six years each for incest and indecent liberties to run consecutively with the life sentences. Defendant appeals.

Attorney General Thornburg, by Associate Attorney General Martha K. Walston, for the State.

Geoffrey C. Mangum for the defendant-appellant.

EAGLES, Judge.

In this child sexual abuse case defendant presents numerous assignments of error. We hold that the trial court erred in instructing the jury as to the first degree sexual offense and indecent liberties charges. Accordingly, we reverse and remand for a new trial on those charges; otherwise, we find no prejudicial error.

The evidence for the State tended to show the following: Defendant and his wife, Martha, separated on 9 December 1983 with Martha retaining custody of their 13 month old daughter Michelle. Michelle was born on 10 November 1982. In October 1984 Martha took her daughter to see a local pediatrician, Dr. Young, because Michelle was complaining that her "bottom" hurt and because Michelle had used sexually explicit language. Dr. Young's examination found nothing physically wrong. Sometime thereafter Dr. Young's partner, Dr. Adams, became Michelle's pediatrician.

In December 1985 Dr. Adams referred Michelle to another pediatrician, Dr. Frothingham, because Michelle had suffered a number of recurring infections, including vaginitis. Dr. Frothingham testified that he saw Michelle in February 1986 and that "the opening to her vagina was larger than it should be in a child that age." Upon his examination of Michelle and Dr. Young's office notes, Dr. Frothingham concluded that Michelle might be a sexual abuse victim. He told Martha of his concerns and advised her to watch Michelle closely.

Martha testified that on or about 9 April 1986, after returning home from a visit with her father, Michelle was watching television. Shortly after her father left, Michelle told Martha of instances of sexual abuse committed against her by defendant. Defendant did not object to this testimony. The following day Martha went to Dr. Adams' office, without Michelle, and talked with him about what Michelle had told her. Dr. Adams advised Martha to contact a local psychologist, Dr. Dennis O'Brien.

The following day Dr. O'Brien examined Michelle. After talking with Michelle for about thirty minutes Dr. O'Brien concluded that Michelle had been sexually abused. He recommended that Martha not allow defendant to visit with Michelle.

Beginning in May 1987 Michelle began seeing Dr. Susan Deese, a child psychologist. Dr. Deese testified that she examined Michelle and that Michelle showed her what her father had done to her. While using anatomically correct dolls Michelle first identified for Dr. Deese the various parts of the body. She called the male doll's penis a "weewee." She called the vagina and urinary opening on the female doll "peepee" and "weewee." In part, Michelle told Dr. Deese that "[m]y daddy used to touch my peepee" and "Daddy put his tongue on my weewee." In a later interview with Dr. Deese, Michelle told the doctor that defendant put soap and his fingers in her vagina and rectum. She then related to Dr. Deese that "Daddy used to touch me with his weewee and stuck it in my peepee."

After Dr. Deese testified, the State, without examining her, tendered Michelle for defendant's cross-examination. Defendant declined to cross-examine Michelle.

The evidence for the defendant tended to show the following: Dr. Bob Rollins, a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant did not meet the psychological profile of one who sexually abuses children. Defendant's former boss, Billy Howard, testified that defendant's reputation within the community was excellent. Both defendant's mother and sister testified that defendant loved his daughter, took good care of her when they visited, and that he behaved appropriately when he was with her. The defendant testified in his own defense denying each of the charges.

[1] On appeal defendant argues that Martha's testimony as to what Michelle told her was hearsay the admission of which violated his rights under the Sixth Amendment's Confrontation Clause.

He further argues that Martha's testimony is not admissible under any of the arguably applicable hearsay rule exceptions: excited utterance, N.C. R. Evid. 803(2); medical diagnosis or treatment, N.C. R. Evid. 803(4); or the residual exception, N.C. R. Evid. 803(24).

We first note that defendant raised no Confrontation Clause issue or any other constitutional issue at trial. Accordingly, he may not raise constitutional issues for the first time on appeal. *In re Gorski v. N.C. Symphony Society*, 310 N.C. 686, 314 S.E. 2d 539 (1984). Moreover, defendant objected only twice during Martha's testimony. The exceptions brought forward by defendant are not related to Martha's testimony about abuse of Michelle. Defendant has not properly preserved as error Martha's testimony of Michelle's abuse and we may not address it in our review. N.C. R. App. Proc. 10(b); *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976).

Defendant's first exception during Martha's testimony came when Martha testified that she took Michelle to see Dr. Young in October 1984 because Michelle complained that her "bottom" hurt and because Michelle had used a sexually explicit four letter word. Since Dr. Young actually examined Michelle on this visit, Martha's testimony of what she recounted to the doctor is admissible under North Carolina Rule of Evidence 803(4). *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985); 4 Weinstein's Evidence section 803(4)[01] (1985). Even if its admission were error, defendant was not prejudiced by this testimony because the evidence shows that Dr. Young discovered nothing physically wrong with Michelle in October 1984.

Defendant's only other exception came when Martha described an incident in November 1985 between Michelle and defendant which Michelle had told her occurred while they were fishing. Michelle came home upset because she claimed that defendant had threatened to kill her and Martha because Michelle was not playing in the area defendant told her to play. Assuming *arguendo* that the admission of this testimony was error, defendant has failed to demonstrate evidence sufficient to show that a different result would have been reached. G.S. § 15A-1443(a). Given the remaining physical and circumstantial evidence presented by the State we conclude that there was no prejudice. This assignment of error is without merit.

[2] Defendant also assigns as error the trial court's admission of Dr. Adams' testimony concerning Martha's statements made to him and his partner, Dr. Young, relating what Michelle had told her mother. While Dr. Adams' testimony should have been excluded initially, defendant waived his objection to that testimony when Martha later testified to the same incidents without objection. *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (1988), *petition for cert.* filed (1989). Accordingly, we overrule this assignment of error.

[3] In defendant's third assignment of error he argues that the trial court committed plain error in allowing Dr. Adams, Dr. O'Brien, and Dr. Deese to testify that Michelle's statements to them were credible. Defendant correctly argues that Rule 405(a) of the North Carolina Rules of Evidence states, in part, that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." However, we note that defendant failed to object to this testimony at trial thereby waiving his right to object on appeal. Furthermore, in reviewing the entire record, we decline to hold that the admission of this testimony was such a fundamental error as to constitute plain error. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983).

[4] Defendant next assigns as error the State's use of Martha's custody suit counsel as private prosecutors in prosecuting this case. He contends that the private prosecutors' degree of control over the case violated due process under both the state and federal constitutions. Defendant further argues that the Supreme Court's decision in *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 95 L.Ed. 2d 740, 107 S.Ct. 2124 (1987), states that the appointment of a private prosecutor in a criminal matter who also represents an interested party in civil litigation is a fundamental error which can never be deemed harmless. As previously noted, defendant failed to raise any constitutional issues at trial and is, therefore, precluded from raising them for the first time on appeal, *In re Gorski*, at 694, 314 S.E. 2d at 544, unless plain error occurred. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

We hold that *Young* is distinguishable from the instant case. First, *Young* involved the court appointment of a private prosecutor who prepared and tried the case without any involvement or assistance of the U.S. Attorney's office so that the private prosecutor was the sole representative of the people's interest in the case. Additionally, in *Young* the trial court appointed the private prosecutor to pursue criminal contempt charges against the defend-

ants for violating the provisions of an earlier consent judgment. Here private prosecutors were involved only by consent of the district attorney. The private prosecutors and an assistant district attorney tried the case together. *Person v. Miller*, 854 F. 2d 656 (4th Cir. 1988). Further, unlike *Young*, in this case there was no underlying judgment whose enforcement would benefit one party. We hold, therefore, that *Young* does not control here and that the use of private prosecutors, on this record, does not constitute plain error.

By defendant's fifth assignment of error he contends that the trial court committed plain error in instructing the jury on the first degree sexual offense and indecent liberties charges. We agree and, accordingly, we reverse those two convictions.

[5] Defendant contends that even though he failed to object to the trial court's instructions, when the instructions violate his right to a unanimous verdict he may argue plain error on appeal. N.C. Const. Art. 1 section 24; G.S. § 15A-1237(b). We agree. In *State v. Callahan*, 86 N.C. App. 88, 356 S.E. 2d 403 (1987), this court held that the trial court erred in instructing the jury that if the defendant forced his victim to perform fellatio or anal intercourse, he would be guilty of first degree sexual offense. We said that "there is no way for this Court to tell whether defendant was convicted of second degree sexual offense because the jury unanimously agreed that defendant engaged in fellatio, anal intercourse, both fellatio and anal intercourse, or whether some members of the jury found that he engaged in fellatio but not anal intercourse and some found that he engaged in anal intercouse but not fellatio." *Id.* at 90-91, 356 S.E. 2d at 405. Here, the trial court's instructions on the first degree sexual offense and indecent liberties charges are similarly defective.

The trial court instructed the jury that in order to convict defendant on the first degree sexual offense charge the State must show

> First, that the Defendant engaged in a sexual act with the victim. A sexual act means any touching, however slight, by the lips or the tongue of one person to any part of the female sex organ of another. Any touching by the lips or tongue of one person of the male sex organ of another. Any touching by the lips or tongue of one person in the anus of another. Any penetration, however slight, of the anus of any person

> by the male sex organ of another. Any penetration, however slight, by an object into the genital or anal opening of a person's body.

Defendant points out that this instruction describes six separate sexual acts. The evidence presented in this case could support a conviction based on at least three of these acts. As in *Callahan*, we cannot ascertain from the jury's general verdict for which offense or offenses they found defendant guilty. Accordingly, we reverse defendant's conviction for first degree sexual offense.

[6] The trial court instructed the jury that in order for the State to prove the indecent liberties charge it must demonstrate

> First, that the Defendant willfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an immoral, improper or indecent touching or act by the Defendant upon the child or an inducement by the Defendant of an immoral or an indecent touching by the child.

This instruction points out three distinct types of acts which would constitute taking indecent liberties. The evidence presented by the State could support a conviction based on any of the three acts. Since we cannot determine which act or acts the jury found that defendant committed, we must reverse this conviction as well.

[7] Defendant argues that the trial court erred in failing to grant his motion to dismiss all charges made at the close of the State's evidence and at the close of all of the evidence. We disagree. By his introduction of evidence defendant waived his right to object to the trial court's denial of his motion made at the close of the State's evidence. *State v. Powell*, 74 N.C. App. 584, 328 S.E. 2d 613 (1985); G.S. § 15-173. Therefore, we address only defendant's motion made at the close of all of the evidence.

Considering the evidence in the light most favorable to the State, we hold that there was substantial evidence of both the first degree rape and incest charges. Dr. Deese testified that Michelle told her that "Daddy used to touch me with his weewee and stuck it in my peepee." This evidence is sufficient to support a verdict of guilty of incest, carnal intercourse with defendant's daughter. G.S. § 14-178. Further, the State's evidence showed that Michelle was between three and four years old at the time of the offense and that defendant was more than four years older than Michelle,

supporting the charge of first degree rape. G.S. § 14-27.2. This assignment of error is without merit.

In his brief defendant argues four additional issues. He contends that the trial court erred in instructing the jury upon its reporting that it was deadlocked and that the trial court erred in finding certain aggravating factors during sentencing. In each of these instances defendant failed to object to the trial court's action. Accordingly, we may not address any of these issues on appeal. N.C. R. App. Proc. 10(b).

In summary, we find no prejudicial error in the first degree rape and incest convictions. However, we find that the trial court committed plain error in instructing the jury on the first degree sexual offense and indecent liberties charges. Accordingly, as to those two charges we reverse and remand.

Affirmed in part; reversed and remanded in part.

Judges PARKER and LEWIS concur.

SAMPSON COUNTY CHILD SUPPORT ENFORCEMENT AGENCY, *EX REL.* MARY HESTER BOLTON, PLAINTIFF-APPELLEE v. ALBERT BOLTON, JR., DEFENDANT-APPELLANT

No. 884DC609

(Filed 7 March 1989)

1. Garnishment § 2— garnishment for child support—rate set in order—necessity for motion for higher rate

Due process requires that a child support enforcement agency may automatically garnish wages for enforcement of child support in IV-D cases only at the rate set out in the controlling child support order. Once the underlying order sets out the amount of the ongoing support obligation and the amount to be applied toward liquidation of a support arrearage, the agency may not garnish at a higher rate without first pursuing a motion to show cause why the debtor should not be garnished at a higher rate than that set by the underlying order. N.C.G.S. § 110-136.

2. Garnishment § 2— garnishment for child support—hearing —equal protection

The hearing provided by N.C.G.S. § 110-136.4 in IV-D garnishment proceedings does not violate a debtor's rights to equal protection when compared to the hearing granted private litigants under N.C.G.S. § 110-136.5.

APPEAL by defendant from *Thagard, Judge*. Orders entered 18 April 1988 in District Court, SAMPSON County. Heard in the Court of Appeals 12 December 1988.

In 1978 defendant, a non-custodial parent, became subject to a child support order requiring him to pay $15.00 per week to the clerk of court for the support of his five minor children. As the children received public assistance the order specified that defendant's payments be delivered to the North Carolina Department of Human Resources to reimburse the State for benefits provided to defendant's children under the Aid for Families with Dependent Children program. Statutory reimbursement to the State was created in response to a federal scheme for child support enforcement.

In 1980, Sampson County Child Support Enforcement Agency acquired an order to show cause alleging that defendant was in contempt for failing to make his payments. Defendant filed a motion contending that no debt had accrued to the State during the periods he had been unemployed. On appeal to this Court defendant's position was upheld. *Lockamy v. Bolton*, No. 814DC1153 (N.C. Court of Appeals, filed 7 September 1982 (unpublished opinion)). As a result of that opinion the defendant's arrearage was adjusted on remand to include only periods during which he was financially able to furnish support.

In February 1985, plaintiff again acquired an order to show cause, alleging that defendant was in arrears in the amount of $4,190.00. Defendant filed a motion challenging the amount of arrears and requesting a modification of the original order. The court did not relieve defendant of the portion of the debt attributable to the months he had been unemployed. But, as all but one of defendant's children had reached the age of eighteen, the court reduced defendant's future support obligations to $5.00 per week, and set the rate for payment on arrearages at $10.00 per week.

On appeal this Court restated that defendant was not liable for support during months he was financially unable, that is, when he was unemployed. On remand, the District Court deleted all arrearages for the months of November through March, 1981 through 1985.

On 2 December 1987, plaintiff served defendant with a "Notice of Intent to Require Income Withholding" pursuant to N.C.G.S. § 110-136.4. Until 1986, defendant's employment had consisted of warm weather seasonal farm work. When plaintiff served the defendant with a "Notice of Garnishment" defendant was working full time at a tobacco company. However, during the ninety-five weeks from March 1985 through December 1986, defendant had been unemployed a total of 44 weeks.

The Notice stated arrearages at $3,565.78 and that defendant's wages would be garnished at the rate of $60.00 per week. Garnishment was to begin automatically. The notice stated that defendant could contest garnishment only by alleging one of three mistakes of fact as set out in N.C.G.S. § 110-129(10).

> "Mistake of fact" means that the obligor:
>
> (a) is not in arrears in an amount equal to the support payable for one month; or
>
> (b) did not request that withholding begin . . . or
>
> (c) is not the person subject to the court order of support for the chid [sic] named in the advance notice of withholding.

Instead, defendant wished to contest the amount of arrearage and the amount to be garnished.

Defendant by motion requested a hearing. In addition to challenging the amount of arrearage and the amount to be withheld the motion challenged the constitutionality of the State's wage garnishment procedures for the enforcement of child support in IV-D cases.

In its order dated 18 April 1988, the district court adjusted the amount of defendant's arrearage in consideration of the 44 weeks he was not employed, set defendant's weekly garnishment at $40.00, and denied defendant's due process and equal protection challenges to the statute. From this order defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith, for the State appellee.

East Central Community Legal Services, by Leonard G. Green and James P. Green, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant contends that the hearing provided under N.C.G.S. § 110-136.4 for contesting wage garnishment fails to comport with due process requirements under the federal and North Carolina Constitutions. We disagree. Rather, we find that plaintiff Sampson County Child Support Enforcement Agency proceeded wrongly under North Carolina's statutory scheme for income withholding in IV-D cases by attempting to use the garnishment proceeding outlined in N.C.G.S. § 110-136.4 as a means to modify the underlying order which established the rate at which the defendant could be assessed for arrearages.

Defendant also contends that the notice provisions of N.C.G.S. § 110-136.4 are contrary to the federal statute which is the basis for wage garnishment proceedings and therefore invalid under the Supremacy clause. We take up this argument first, and then proceed to defendant's due process argument.

Federal law requires states to implement procedures for income withholding as a method of enforcing child support orders. 42 U.S.C. 666(a)(b). "In cases in which the custodial parent seeks support enforcement through the state's IV-D agency, commonly termed IV-D cases, the procedure for income withholding must be triggered whenever the absent parent fails to make payments amounting to one month's support. . . ." Note, *Legislating Responsibility: North Carolina's New Child Support Enforcement Acts*, 65 N.C.L. Rev. 1354, 1357-58 (1987).

The federal scheme mandates advance notice of garnishment to non-custodial parents. The notice must include procedures the absent parent should follow to contest the withholding, including the amount to be withheld and the total amount of arrearage. 42 U.S.C. 666(4)(A); 45 C.F.R. 303.100(a)(5). A state is exempt from these advance notice requirements if there was "a system of income withholding for child support purposes in effect on August 16, 1984" which meets procedural due process requirements of state law. 42 U.S.C. 666(4)(B).

In 1975 Congress enacted the Title IV-D program to improve enforcement of child support payments. Note, *Remedies-Domestic Relations: Garnishment for Child Support*, 56 N.C.L. Rev. 169 (1978). June 25, 1975 North Carolina amended Chapter 110 of the General Statutes providing a system for child support enforcement to conform to the 1975 Federal enactment. *Id.* at 169, n.5. North Carolina's scheme for enforcement was in place before 16 August 1984 and is exempt from federal advance notice requirements so long as North Carolina's scheme complies with state due process requirements.

In *Henry v. Edmisten*, 315 N.C. 474, 340 S.E. 2d 720 (1986), the Court formulated this statement of due process requirements under the North Carolina Constitution's Law of the Land clause:

> When the furtherance of a legitimate state interest requires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state interest, the law of the land ordinarily requires no more than that before such action is undertaken, a judicial officer determine there is probable cause to believe that the conditions which would justify the action exist.

Henry, at 494, 340 S.E. 2d at 733. The State concedes that the defendant has a property interest in his wages. The State interest in child support enforcement is established by statute. N.C.G.S. § 110-128 *et seq.; see Note*, 65 N.C.L. Rev. 1354 (1987). As long as before garnishment occurs "a judicial officer has determined that there is probable cause to believe that the conditions which would justify" garnishment have occurred, state due process requirements are met.

Garnishment is defined as "not an independent action but a proceeding ancillary to attachment." N.C.G.S. § 1-440.21. Attachment is a proceeding ancillary to a pending action. N.C.G.S. § 1-440.1. "Attachment may be had in any action for . . . the support of a minor child. . . ." N.C.G.S. § 1-440.2. Like attachment, garnishment is merely a remedy to enforce an underlying order. *See* Dobbs, *Remedies* § 1.3 (1973).

Two conditions justify enforcement by garnishment of child support obligations:

> [I]n any case in which a responsible parent is under a court order . . . to provide child support, a judge of the district court . . . may enter an order of garnishment whereby no more than forty percent (40%) of the responsible parent's monthly disposable earnings shall be garnished for the support of his minor child.

N.C.G.S. § 110-136(a), and

> An obligor shall become subject to income withholding on the earliest of:
>
> (1) The date on which the obligor fails to make legally obligated child support payments in an amount equal to the support payable for one month . . . .

N.C.G.S. § 110-136.3(b)(1).

On 30 October 1987, when defendant received plaintiff's "Notice of Garnishment," defendant was subject to a valid support order entered 8 March 1985 and modified 7 April 1986. That order was entered following a hearing which accorded defendant substantial due process. As directed by this Court, the order as modified set defendant's arrearage at $2,655.00 by considering only the periods when the defendant was employed and financially able to comply. *Lockamy v. Bolton*, No. 854DC513 (N.C. Court of Appeals, filed 21 January 1986 (unpublished opinion)).

> The March 1985 order established the following rate of payment:
>
> (a.) Defendant shall pay $15.00 per week during the months of April through October. Said payments shall be allocated such that $5.00 is applied to fulfill defendant's continuing support obligation for the remaining one minor child; *and $10.00 is applied toward payment of the present child support arrearage*. (Emphasis added.)
>
> (b.) Defendant shall pay $5.00 per week during the months of November through March, all of which payments shall be allocated to fulfill defendant's continuing support obligation for the remaining one minor child.

[1] Defendant argues that due process requires that plaintiff may only garnish automatically at the rate set out in the controlling support order. We agree. As cited already, N.C.G.S. § 110-136 only allows garnishment when the parent is under a court order. Once

the underlying order sets out the amount of the ongoing obligation and the amount to be applied toward liquidation of overdue support, IV-D agencies may not garnish at a higher rate without first applying by motion for a modification in the rate at which defendant is to pay arrearage. The motion would be in the nature of a motion to show cause why the defendant should not be garnished at a rate higher than that set out in the underlying order. *Cf.* N.C.G.S. § 1-352 ("requiring such debtor to appear and answer concerning his property before such court or judge . . ."). The motion would allow for proper notice and would give the debtor an opportunity to respond to plaintiff's application for a change in the rate of payment on the debt as well as an opportunity to dispute the amount of arrearage. If, as in this case, the underlying order does not set the amount payable as high as the maximum rate of forty percent permitted by N.C.G.S. § 110-136(a), the agency's motion can address that question.

The requirement of a motion to garnish at a rate different than the underlying order complements the federal scheme which requires:

> [S]uch withholding must occur without the need for any amendment to the support order involved or for any further action . . . by the court or other entity which issued such order.

42 U.S.C. 666(b)(2).

> The State must ensure that in the case of each absent parent against whom a support order is or has been issued or modified in the State, and is being enforced under the State plan, so much of his or her wages must be withheld, in accordance with this section, as is necessary to comply with the order.

45 C.F.R. 300.100(a). Plaintiffs in this action could have garnished at the rate of $10.00 per week in compliance with the underlying order. However, N.C.G.S. § 110-136 does not permit plaintiffs to make a unilateral change in the underlying order. Our ruling does not require amendment to the underlying support order, it merely recognizes that due process would require that defendant has a right to be heard on any change in the terms of that order.

In this case defendant's motion requesting a hearing to contest the amount of arrearage and amount to be garnished was granted. The court corrected the amount of arrearage and reduced the amount of weekly garnishment to $40.00 of defendant's $179.78 weekly

wage. Prior to the hearing on 9 March 1988, plaintiff garnished $120.00 of defendant's wages at the rate of $60.00 per week. After the hearing, the plaintiff continued garnishing defendant's wages at the rate of $40.00 per week pursuant to the district court's order. Defendant was laid off in April 1988.

The record shows that the defendant had an opportunity to be heard on the amount of arrearage and the rate of garnishment. However, for the future, the burden is upon the enforcement agency to make a motion to alter the rate of payment on arrearage, not the defendant. The defendant is entitled to reimbursement of $100.00 for the two weeks he was garnished above the $10.00 per week allowed in the court's 1985 order.

It is true that if the statutory definition of "Mistakes of Fact" in N.C.G.S. § 110-129(10) were expanded to include as reasons to contest garnishment, the amount of arrearage, and, the rate of garnishment, it would eliminate the need for a separate motion to show cause why the debtor should not be garnished at a higher rate than that set in the underlying order. Additionally it would comport with federal advance notice requirements. 42 U.S.C. 666(4)(A), 45 C.F.R. § 303.100(a)(5). *See also* Kan. Stat. Ann. § 23-4,107(f)(4) (1987) (the only basis for contesting the withholding is a mistake of fact concerning the amount of support order, the amount of the arrearage, the amount of income to be withheld or the proper identity of the obligor); *see* Note, *Kansas Enacts New Provisions for Child Support Enforcement*, 25 Washburn L.J. 91, 112-15 (1985).

[2] Defendant also contends that the hearing provided by § 110-136.4 in IV-D garnishment proceedings when compared to the hearing granted private litigants under N.C.G.S. § 110-136.5, violates the defendant's rights to equal protection. Given our interpretation of N.C.G.S. § 110-136.4 we find defendant's argument without merit.

Though we disagree with the reasoning of the trial court, for the reasons stated above we affirm its judgment that North Carolina's income withholding scheme, N.C.G.S. § 110-128 *et seq.* does not violate defendant's due process and equal protection rights. This matter is remanded for reimbursement to the defendant of $100.00, the amount he was garnished at above the rate set in the March 1985 order, before the court heard defendant on the question of the amount to be withheld.

Affirmed in part and reversed in part.

Chief Judge HEDRICK and Judge ORR concur.

SUSAN BUCK (FORMERLY HEAVNER), PLAINTIFF v. JOHN L. HEAVNER, DEFENDANT

No. 8811DC454

(Filed 7 March 1989)

Process § 9.1— enforcement of note—nonresident defendant—insufficient minimum contacts

A nonresident defendant who executed a promissory note to his former wife, who resided in North Carolina, did not do some act or consummate some transaction so that it could be fairly said that he purposefully availed himself of the privilege of conducting activities in this state and defendant's motion to dismiss should have been granted. The fact that payment was to be made to plaintiff at her North Carolina address was the result of plaintiff's decision to move to North Carolina when the parties separated; defendant's general appearance in a child custody and support action in North Carolina does not satisfy the requirement that there be a relationship between the defendant, the forum, and the litigation because defendant's general appearance was a submission to jurisdiction in that action only and does not waive his right to object to jurisdiction in separate causes of action; a subsequent Wake County District Court order requiring the parties to abide by all the terms of the Colorado order, which included the provisions pertaining to the promissory note, resulted from plaintiff's motion to hold defendant in contempt for failing to make child support payments and cannot serve as the basis for asserting jurisdiction over defendant in an action to enforce the promissory note; and the fact that defendant makes trips to North Carolina to exercise his visitation rights cannot supply the necessary minimum contacts.

APPEAL by defendant from Order of *Christian (William A.), Judge*, entered 8 December 1987 in LEE County District Court. Heard in the Court of Appeals 2 November 1988.

Moretz & Silverman, by Jonathan Silverman, for plaintiff appellee.

Johnson, Gamble, Hearn & Vinegar, by Richard J. Vinegar and Kathleen M. Waylett, for defendant appellant.

COZORT, Judge.

The sole question presented in this appeal is whether the trial court erred in denying defendant's motion to dismiss plaintiff's claim for lack of personal jurisdiction. We hold that the trial court did not have personal jurisdiction over defendant and, therefore, improperly denied the motion to dismiss.

Plaintiff is a resident of North Carolina. Defendant is a resident of Ohio. The parties were married on 12 September 1978 and thereafter resided in the State of Louisiana. In 1980, they moved to Colorado, where they resided together until their separation in early 1982. One child was born during the marriage. In March of 1982, plaintiff and the minor child moved to North Carolina, where they resided at the time the present action was filed.

After moving to North Carolina, plaintiff brought an action in this State for child custody and child support. Counsel for defendant apparently made a general appearance on defendant's behalf in that action, and orders for custody and support were entered on 25 June 1982 and 8 October 1982. An additional order was entered on 11 February 1983 upon plaintiff's motion for arrearages in child support payments.

On or about 9 December 1982, defendant petitioned the District Court of Arapahoe County, Colorado, for a decree dissolving the marriage and dividing the parties' marital property. On 20 December 1982 the Colorado court entered a Decree of Dissolution *nunc pro tunc* 9 December 1982 and awarded the marital home to defendant. The court further ordered plaintiff to quitclaim her interest in that property to defendant, who was, in turn, ordered to execute and deliver to plaintiff a promissory note in the face amount of $7,500.00, with ten percent simple interest, payable within two years from the date of the court's order, and secured by a deed of trust for the benefit of plaintiff. It is this promissory note which forms the basis of the present action.

On 17 September 1987 plaintiff filed the instant action alleging that payment was due under the terms of the promissory note

and that payment had not been made. Plaintiff prayed for a money judgment in the amount of the note, plus interest and attorney's fees. Through his counsel, defendant made a limited appearance and moved the court to dismiss under Rule 12(b)(2) of the N.C. Rules of Civil Procedure on the ground that the courts of the State of North Carolina lacked jurisdiction over the person of defendant in the matter. The trial court denied the motion. Defendant appealed pursuant to N.C. Gen. Stat. § 1-277(b). We reverse.

A determination of whether a nonresident defendant is subject to the *in personam* jurisdiction of the courts of this State involves a two-pronged analysis: first, whether there is a statutory basis for the exercise of *in personam* jurisdiction by the court; and second, whether the exercise of jurisdiction comports with the requirements of the due process clause of the Fourteenth Amendment. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

Plaintiff argues that the statutory basis for the exercise of personal jurisdiction in this case is found in N.C. Gen. Stat. § 1-75.4(5)(c) (1988). That subsection of the State's "long-arm" statute provides, in pertinent part, that a court of North Carolina may exercise personal jurisdiction over a defendant properly served in an action which

> [a]rises out of a promise, made anywhere to the plaintiff . . . by the defendant to deliver or receive within this State . . . goods, documents of title, or other things of value . . . .

N.C. Gen. Stat. § 1-75.4(5)(c) (1988). This Court has held that "[m]oney payments are clearly a thing of value within the meaning of G.S. 1-75.4(5)(c)," *Pope v. Pope*, 38 N.C. App. 328, 331, 248 S.E. 2d 260, 262 (1978), and that a defendant's promise to make money payments to a holder in North Carolina is within the purview of the long-arm statute. *Wohlfahrt v. Schneider*, 66 N.C. App. 691, 693, 311 S.E. 2d 686, 687 (1984). Defendant argues, however, that, unlike the defendant in *Wohlfahrt*, he executed the promissory note pursuant to a court order and that there was no *voluntary* promise as contemplated in § 5(c) of the statute. While we are not persuaded by defendant's effort to engraft a voluntariness requirement onto the statute, we need not resolve that particular issue here. Assuming *arguendo* that our long-arm statute gives North Carolina courts *in personam* jurisdiction over defendant, we nevertheless believe that the exercise of personal jurisdiction in this case would violate the second prong in the analysis, the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Due process demands that the maintenance of a lawsuit against a nonresident not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102, 66 S.Ct. 154, 158 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283, 61 S.Ct. 339, 343 (1940)). The "constitutional touchstone" of this due process requirement is whether the defendant has purposefully established minimum contacts with the forum state so that he should reasonably anticipate being haled into court in that forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 85 L.Ed. 2d 528, 542, 105 S.Ct. 2174, 2183 (1985). When there are sufficient "continuous and systematic" contacts between the defendant and the forum state, the state may exercise "general jurisdiction" over the defendant in causes of action that are unrelated to defendant's forum state activities. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.9, 415, 80 L.Ed. 2d 404, 411 n.9, 104 S.Ct. 1868, 1872 n.9 (1984). Absent such continuous and systematic contacts, a state may exercise "specific jurisdiction" over a defendant in lawsuits that arise out of or are related to defendant's contacts with the forum state. *Id.* at n.8. *See also Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 348 S.E. 2d 782 (1986). The case before us involves a question of specific jurisdiction.

In cases involving specific jurisdiction, the focus of the minimum contacts inquiry is on the relationship among the defendant, the forum state, and the litigation. *See Shaffer v. Heitner*, 433 U.S. 186, 204, 53 L.Ed. 2d 683, 698, 97 S.Ct. 2569, 2580 (1977). The resolution of the inquiry necessarily turns on the facts of each case, *Parris v. Garner Commercial Disposal, Inc.*, 40 N.C. App. 282, 253 S.E. 2d 29, *disc. review denied*, 297 N.C. 455, 256 S.E. 2d 808 (1979), but it is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the forum state's laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958).

In an affidavit filed with his motion to dismiss, defendant alleged that he had never been a resident of North Carolina nor stayed within this State for "an appreciable period of time" since before he married plaintiff in 1979, and that he did not own, nor had he owned since prior to his marriage in 1979, any real or personal property in North Carolina. Plaintiff did not challenge those assertions. Rather, plaintiff alleged in her affidavit that she

was living in North Carolina at the time defendant executed the promissory note and deed of trust and that payment was to be made to her at her North Carolina address, that defendant's attorney made general appearances on behalf of defendant in the child custody and support action, and that defendant makes trips to North Carolina in exercising his visitation rights. Plaintiff contends that these facts provide a constitutional basis for asserting jurisdiction over defendant in her action to enforce the promissory note. We must disagree.

A contractual relationship between a North Carolina resident and a nonresident party does not automatically establish the necessary minimum contacts with this State. *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E. 2d at 786. However, a single contract may provide a sufficient basis for the exercise of personal jurisdiction if it has a substantial connection with this forum. *Id.* In the case before us, defendant executed a promissory note to plaintiff, in return for a quitclaim deed to their Colorado property, pursuant to a dissolution and distribution order of the Colorado court. The promissory note is secured by the real property located in Colorado.

Without more, we must conclude that the contract does not provide a substantial connection with this State. The fact that payment was to be made to plaintiff at her North Carolina address was the result of plaintiff's decision to move to North Carolina when the parties separated. Her unilateral act of moving to North Carolina cannot satisfy the requirement that defendant have minimum contacts with this forum. *See Miller v. Kite*, 313 N.C. 474, 479, 329 S.E. 2d 663, 666 (1985) (citing *Hanson v. Denckla*, 357 U.S. at 253, 2 L.Ed. 2d at 1298, 78 S.Ct. at 1239).

Nor do we believe that defendant's general appearance in the child custody and support action satisfies the requirement that there be a relationship among the defendant, the forum, and the litigation. While the support action necessarily has a connection with the parties' former marital relationship, it is not, for the purposes of a minimum contacts analysis, related to the breach of contract action which arises from obligations imposed by the Colorado distribution order. Defendant's general appearance in the custody and support action was a submission to jurisdiction in that action only and does not waive his right to object to jurisdiction in separate causes of action.

Plaintiff's contention that the 11 February 1983 order of the Wake County District Court ordered the parties to abide by all of the terms of the Colorado order—including the provisions pertaining to the promissory note—is not supported by the record. The 11 February 1983 order resulted from plaintiff's motion to hold defendant in contempt for failing to make child support payments. The issues before the district court pertained only to child support and custody. Although the court ordered the parties "to abide by all of the terms and conditions" of the Colorado order, its conclusion of law in support of that order was that "[i]t would be in the best interest of the parties' minor child that the *custody, support and visitation privileges* determined by the Colorado court . . . should be adopted by this Court . . . ." (Emphasis added.) Therefore, the order of the North Carolina court in the support action cannot serve as the basis for asserting jurisdiction over defendant in an action to enforce a promissory note executed in accordance with the order of the Colorado court.

Finally, this Court has held that the fact that a defendant makes trips to North Carolina in order to exercise his visitation rights cannot supply the necessary minimum contacts for the purposes of a child support action. *See Miller v. Kite.* We believe that rule applies with at least equal force in the instant case.

We therefore hold that, by executing the promissory note to his former wife who resided in North Carolina, defendant did not do some act or consummate some transaction so that it could be fairly said that he purposefully availed himself of the privilege of conducting activities in this State.

The order of the District Court denying defendant's motion to dismiss is reversed, and the case is remanded to the District Court of Lee County for the purpose of entering an order granting the defendant's motion to dismiss.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

MARGARET WHITE AND LEONA BLOUNT HELMS, APPELLANTS v. UNION COUNTY AND UNION COUNTY ZONING BOARD OF ADJUSTMENT, APPELLEES

No. 8820SC671

(Filed 7 March 1989)

1. **Municipal Corporations § 31; Counties § 5.4— denial of special use permit—complaint filed in superior court—direct attack on zoning ordinance**

Plaintiff's complaint, filed in the superior court after a county board of adjustment denied her application for a special use permit for her mobile home and alleging that a county ordinance requiring a pre-1976 mobile home to be valued at $5,000 or more in order to be used as a residence exceeds the power granted the county by statute to enact zoning ordinances, constituted a direct attack on the ordinance permitted by N.C.G.S. § 15A-348, and the trial court erred in dismissing the complaint for failure to state a claim for relief. N.C.G.S. §§ 153A-340, 160A-383.1.

2. **Municipal Corporations § 31— denial of special use permit —review by certiorari—sufficiency of complaint**

Plaintiff's complaint filed in the superior court was sufficient to obtain review in the nature of certiorari of a decision of a county board of adjustment denying her a special use permit for a mobile home, and the trial court erred in denying plaintiff's motion to amend her complaint pursuant to Rule 15(a) to caption it a "Petition for Writ of Certiorari," notwithstanding the complaint failed to request the court to issue a writ of certiorari or to review the board's action, where the complaint invoked the court's jurisdiction under the correct statute, N.C.G.S. § 153A-345(e), and where the complaint set forth facts sufficient to establish the right to review by certiorari.

APPEAL by plaintiffs from *Helms (William H.), Judge*. Judgment entered 29 March 1988 in Superior Court, UNION County. Heard in the Court of Appeals 13 December 1988.

The following is a summary of the facts set out in plaintiff's complaint:

Since 1983 plaintiff White has lived in her pre-1976 mobile home which sits on a twenty-two acre lot in Union County. The

lot is owned by her elderly mother, plaintiff Helms, who lives in a cabin on the same property. Neither the cabin nor the mobile home have electricity.

Plaintiff White is disabled, and for health, safety and reasons of convenience she wishes to have electricity in her mobile home. In order for electrical service to be installed Union County ordinance requires that she first get a special use permit for the mobile home from the Union County Board of Adjustment.

In October of 1987, plaintiff applied to the Union County Zoning Board of Adjustment for a special use permit for her mobile home so that she could have electrical service installed. A recently adopted land use ordinance which took effect in September 1987 states that only mobile homes built after 1976 or valued at or more than $5,000.00 may be used for a residence in Union County. The ordinance allows three methods to prove valuation: a current tax evaluation, a purchase receipt or a commercial appraisal.

At the 2 November 1987 meeting of the Union County Zoning Board of Adjustment, plaintiff attempted to prove the $5,000.00 valuation through testimony and documentary evidence. The Board refused to hear this evidence as it was not one of the three prescribed methods of proof. Instead plaintiff was advised to return in December with a tax-appraised valuation. At the 7 December 1987 meeting plaintiff was unable to meet any of the three tests for valuation. Her application for a special use permit was denied.

On 4 January 1988 plaintiff appealed her denial to the Superior Court for Union County, basing the court's jurisdiction upon N.C.G.S. § 153A-345(e). Defendant timely responded with a motion to dismiss for failure to state a claim. Defendant argued that plaintiff proceeded wrongly by filing an original complaint because the Union County ordinance provides that every decision of the Board of Adjustment is subject to review by the court in proceedings in the nature of certiorari and that plaintiff's complaint amounted to a collateral attack on the ordinance. Plaintiffs timely moved to amend their complaint to caption it "Petition for Writ of Certiorari."

In its orders dated 29 March 1988 the trial court granted defendant's motion to dismiss and denied plaintiff's motion to amend. From these orders plaintiffs appeal.

Legal Services of Southern Piedmont, Inc., by Thomas W. Brudney and Theodore O. Fillette, for petitioner appellants.

Griffin, Caldwell, Helder & Steelman, by Thomas J. Caldwell; and Love & Milliken, by John R. Milliken, for respondent appellees.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in allowing defendant's motion to dismiss for failure to state a claim pursuant to N.C.R. Civ. P. 12(b)(6) and in failing to allow plaintiff's motion to amend her complaint pursuant to N.C.R. Civ. P. 15(a). We agree.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). For purposes of the motion to dismiss, the allegations of the complaint are taken as true. *Smith v. Ford Motor Co*, 289 N.C. 71, 221 S.E. 2d 282, 79 A.L.R. 3d 651 (1976). The complaint is to be liberally construed to determine if a claim has been stated upon which relief can be granted on any theory. *Brewer v. Hatcher*, 52 N.C. App. 601, 279 S.E. 2d 69 (1981).

[1] On appeal plaintiffs contend that the trial court should have allowed their amendment to recaption the complaint "Petition for Writ of Certiorari" or treated the complaint as a direct attack. A direct attack is allowed as prescribed under N.C.G.S. § 153A-348:

> A cause of action as to the validity of any zoning ordinance, or amendment thereto . . . shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within nine months as provided in G.S. 1-54.1.

Plaintiffs' first claim for relief contends that the Union County land use ordinance requiring:

> a resident prove his/her mobile home to be worth at least $5,000.00 in order for that resident to reside in such a mobile home within Union County, is not a legal regulation of land use, and is therefore an *ultra vires* ordinance, in violation of N.C.G.S. § 153A-340.

N.C.G.S. § 153A-340 is the enabling statute which grants power to the county to draft zoning regulations. In pertinent part that statute states:

> For the purpose of promoting health, safety, morals, or the general welfare, a county may regulate and restrict the *height*,

> *number of stories and size of buildings and other structures*, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence. . . .
>
> . . . The regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. The regulations may also provide that the board of adjustment or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits.
>
> . . . [E]very such decision of the board of commissioners shall be subject to review by the superior court by proceedings in the nature of certiorari. (Emphasis added.)

The well-settled rule in North Carolina, commonly called Dillon's Rule, states that:

> '[A] municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . .'

Greene v. City of Winston-Salem, 287 N.C. 66, 72, 213 S.E. 2d 231, 235 (1975) [citations omitted]. On appeal plaintiffs point to N.C.G.S. § 160A-383.1 for additional authority for their argument that the $5,000.00 valuation requirement exceeds the power granted by N.C.G.S. § 153A-340 to draft ordinances:

> § 160A-383.1. ZONING REGULATIONS FOR MANUFACTURED HOMES.
>
> (a) The General Assembly finds and declares that manufactured housing offers affordable housing opportunities for low and moderate income residents of this State who could not otherwise afford to own their own home. The General Assembly

> further finds that some local governments have adopted zoning regulations which severely restrict the placement of manufactured homes. It is the intent of the General Assembly in enacting this section that cities reexamine their land use practices to assure compliance with applicable statutes and case law, and consider allocating more residential land area for manufactured homes based upon local housing needs.
>
> * * * *
>
> (d) A city may adopt and enforce *appearance and dimensional* criterial for manufactured homes. Such criteria shall be designed to protect property values, to preserve the character and integrity of the community or individual neighborhoods within the community, and to promote the health, safety and welfare of area residents. The criteria shall be adopted by ordinance. (Emphasis added.)

N.C.G.S. § 106A-383.1 is equally applicable to counties. N.C.G.S. § 153A-341.1.

The nub of plaintiffs' argument is that the legislature has granted the county authority to draft ordinances limiting structures, and mobile homes specifically, only in qualitative terms and not by way of an arbitrary money value. Given the requirements of Dillon's Rule, plaintiffs have stated a direct attack on the ordinance so long as they can show that the attack is timely under N.C.G.S. § 153A-348. For purposes of N.C.G.S. § 153A-348, the timing of plaintiff's complaint should be considered as it would have been on 4 January 1988, the date it was originally brought in superior court. Though not fatal to this appeal, plaintiffs neglected to state the date of adoption of the ordinance and include a copy of the ordinance in the record. Such proof will be necessary on remand.

[2] Plaintiffs also contend that the trial court erred in denying their motion to amend, so that, in the alternative, they could proceed with their appeal under N.C.G.S. § 153A-345(e). N.C.G.S. § 153A-345(e) requires that "[e]ach decision of the board [of adjustment] is subject to review by the superior court by proceedings in the nature of certiorari." Defendant argues that plaintiffs' pleading is fatally flawed because it failed to request the court to issue a writ of certiorari or to review the board's action. Defendant's argument is without merit.

After a responsive pleading has been served, as in this case, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C.R. Civ. P. 15(a). The denial of a motion to amend is not reviewable absent a clear showing of abuse of discretion. *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 298 S.E. 2d 409 (1982), *disc. rev. denied*, 308 N.C. 194, 302 S.E. 2d 248 (1983). However, abuse of discretion can be shown when there is no justifying reason for denying the amendment such as undue delay, bad faith, undue prejudice or futility. *Id.* at 43, 298 S.E. 2d at 411.

In this case no reason for the denial of the amendment was given, nor can one be deduced from the record. Plaintiffs' original complaint invoked jurisdiction under the very statute that defendants claim plaintiffs should have proceeded under. Further, when a verified pleading alleges facts sufficient to establish the right to review by certiorari, and "contains a general prayer for such remedy as the court shall deem meet and proper. . . . its validity as a pleading is not impaired by the fact that the petitioner does not specifically pray that the court issue a writ of certiorari. . . ." *Russ v. Board of Education*, 232 N.C. 128, 131, 59 S.E. 2d 589, 592 (1950). The amendment should have been allowed.

Should plaintiffs proceed "in the nature of certiorari" pursuant to N.C.G.S. § 153A-345(e) the requirements for that hearing are set out in *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379 (1980). *See Humble Oil and Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). However, judging from the record, it appears that plaintiffs' cause fits more squarely within the parameters of N.C.G.S. § 153A-348.

We find it unnecessary to reach plaintiffs' arguments concerning a regulatory taking and equal protection.

For the reasons stated above the orders of the trial court are

Reversed and remanded.

Chief Judge HEDRICK and Judge ORR concur.

JOHN EDWARDS v. ADVO SYSTEMS, INC., AND TIM SCHEVERS

No. 8826SC487

(Filed 7 March 1989)

1. **Malicious Prosecution §§ 12, 13.2— insufficient showing of special damages and probable cause**

Defendants were entitled to summary judgment on plaintiff's claim for malicious prosecution based on counterclaims against him in a prior civil action because plaintiff failed to raise a genuine issue of fact concerning special damages or absence of probable cause. Plaintiff's evidence relating to mental anguish, loss of income, injury to reputation and legal expenses did not show a substantial interference with either plaintiff's property or person as contemplated by the special damage requirement, and termination of the counterclaims in plaintiff's favor did not show an absence of probable cause.

2. **Process § 19— abuse of process—insufficient evidence**

Summary judgment was properly entered for defendants in an action for abuse of process based on counterclaims in a civil action where all of plaintiff's evidence concerned the alleged motives of defendants in filing the counterclaims but plaintiff raised no issue of fact concerning an abuse of the judicial system after the counterclaims were filed.

3. **Trespass § 2— filing of counterclaims—no intentional infliction of emotional distress**

Defendants' filing of counterclaims against plaintiff in a civil action did not constitute extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress.

4. **Damages § 3.4— negligent infliction of mental distress—insufficient showing of physical impact or physical injury**

Plaintiff failed to raise a genuine issue of material fact as to physical impact or physical injury sufficient to support a claim for the negligent infliction of mental distress based on counterclaims filed against plaintiff in a prior civil action where plaintiff's deposition testimony related only vague statements about loss of sleep, worry and some uncertain amount of weight loss that may have occurred during the previous litigation.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 18 December 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 November 1988.

Plaintiff sued defendants for malicious prosecution, abuse of process, intentional infliction of emotional distress, negligent infliction of mental distress and punitive damages. Plaintiff's suit here is based on the filing of counterclaims by defendants against plaintiff in prior litigation. Plaintiff had sued defendant Advo Systems, Inc. to recover sales commissions. Advo counterclaimed for damages that the company allegedly incurred because of plaintiff's negligence in handling his advertising accounts. Two of the counterclaims were disposed of by summary judgment and the remaining two were dismissed at the close of defendant's evidence.

Plaintiff alleged that the counterclaims were brought with no foundation in law or fact, exclusively for the purpose of intimidating plaintiff and other salespeople who may have been owed sales commissions by Advo. Plaintiff alleged that these actions by the corporate defendant were at the direction of the individual defendant, Tim Schevers. Plaintiff also alleged that defendants' action caused mental anguish, loss of income, injury to his reputation and legal expenses. Plaintiff claims that the actions by defendants constitute malicious prosecution and abuse of process. On his emotional distress claims plaintiff alleged that defendants knew or should have known that institution of the counterclaims would inflict upon the plaintiff severe emotional and mental distress. In addition, plaintiff alleged that defendants' actions were willful and intentional and were designed to intimidate and discourage plaintiff from pursuing his claim for sales commissions due. Plaintiff further alleged that filing the counterclaims caused emotional distress which produced physical injury, loss of income, and "resulting damages." Plaintiff also asked for punitive damages based on defendants' malicious actions which plaintiff alleged were prosecuted "under circumstances of insult, rudeness or oppression, and in a manner which showed a reckless and wanton disregard of the rights of the plaintiff." After discovery, the trial court granted defendants' motion for summary judgment. Plaintiff appeals.

W. James Chandler and Brian deBrun for plaintiff-appellant.

Horack, Talley, Pharr and Lowndes, by Neil C. Williams and Christopher J. Culp, for defendant-appellees.

EAGLES, Judge.

Where a motion for summary judgment is granted the question on appeal is whether, on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E. 2d 399 (1980). After careful review of the record on appeal, we find there is no genuine issue of material fact as to any of plaintiff's claims and that the defendants are entitled to judgment as a matter of law. Therefore, we affirm.

I. Malicious Prosecution

[1] In an action for malicious prosecution the plaintiff must show that the defendant had initiated an earlier proceeding, maliciously and without probable cause, and that the earlier proceeding terminated in plaintiff's favor. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). When plaintiff's claim for malicious prosecution is based on a prior civil proceeding against him, plaintiff must also show "that there was some arrest of his person, seizure of his property, or some other element of special damage resulting from the action such as would not necessarily result in all similar cases." *Id.* at 203, 254 S.E. 2d at 625. As our Supreme Court has stated

> [t]he gist of such special damage is a substantial interference either with the plaintiff's person or his property such as causing execution to be issued against the plaintiff's person, causing an injunction to issue prohibiting plaintiff's use of his property in a certain way, causing a receiver to be appointed to take control of plaintiff's assets, causing plaintiff's property to be attached, or causing plaintiff to be wrongfully committed to a mental institution. [Citations omitted.]

Id.

Plaintiff has failed to assert any basis on which special damages could possibly be found. Plaintiff's evidence relates that defendants' actions have caused "mental anguish, loss of income, injury to reputation, and legal expenses." These types of injury do not constitute a substantial interference with either the plaintiff's property or person as contemplated by the special damage requirement. *See Id.* at 204, 254 S.E. 2d at 626. "Embarrassment, expense, inconvenience, lost time from work or pleasure, stress, strain and worry

are experienced by all litigants, to one degree or another, and by themselves do not justify additional litigation" in the form of a malicious prosecution claim. *Brown v. Averette*, 68 N.C. App. 67, 70, 313 S.E. 2d 865, 867 (1984). Furthermore, "[t]he mere termination of a lawsuit in favor of an adverse party does not mean that there was a want of probable cause to believe on a set of stated facts that a cause of action did exist." *Petrou v. Hale*, 43 N.C. App. 655, 658, 260 S.E. 2d 130, 133 (1979), *cert. denied*, 299 N.C. 332, 265 S.E. 2d 397 (1980). Because plaintiff has failed to raise a genuine issue of fact concerning special damages or absence of probable cause, defendant is entitled to judgment on the malicious prosecution claim as a matter of law.

II. Abuse of Process

[2] "There are two essential elements for an action for abuse of process, (1) the existence of an ulterior motive, and (2) an act in the use of the process not proper in the regular prosecution of the proceeding." *Ellis v. Wellons*, 224 N.C. 269, 271, 29 S.E. 2d 884, 885 (1944). "[T]he gravamen of a cause of action for abuse of process is the improper use of the process after it has been issued." *Petrou v. Hale*, 43 N.C. App. at 659, 260 S.E. 2d at 133. Plaintiff has raised no issue of fact concerning an abuse of the judicial system after the institution of the prior counterclaims. All of plaintiff's evidence concerns the alleged motives of the defendants in filing the counterclaims. As we have stated before, "[a]n ulterior motive alone is not sufficient" to sustain an abuse of process claim. *Id.* Therefore, plaintiff has raised no genuine issue of material fact and summary judgment was proper on the abuse of process claim.

III. Intentional Infliction of Emotional Distress

[3] Intentional infliction of emotional distress consists of: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E. 2d 325, 335 (1981). The "extreme and outrageous conduct" necessary for recovery has been characterized as conduct which "exceeds all bounds usually tolerated by decent society." *Stanback v. Stanback*, 297 N.C. at 196, 254 S.E. 2d at 622. Whether or not the conduct complained of may reasonably be regarded as "extreme and outrageous" is

initially a question of law for the court. *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E. 2d 308, *cert. denied*, 314 N.C. 114, 332 S.E. 2d 479 (1985). We conclude that the defendants' act of filing counterclaims against plaintiff may not be reasonably regarded as extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress. Summary judgment for defendant was proper on this claim.

IV. Negligent Infliction of Mental Distress

[4] For a plaintiff to recover for emotional or mental distress in an ordinary negligence case, he must prove that the mental distress was the proximate result of some physical impact or physical injury to himself which also resulted from the defendants' negligence. *Williamson v. Bennett*, 251 N.C. 498, 112 S.E. 2d 48 (1960). Plaintiff has failed to raise any genuine issue as to a physical impact or physical injury resulting from defendants' actions. His deposition testimony included in the record relates only vague statements about loss of sleep, worry and some uncertain amount of weight loss that may have occurred during the previous litigation. Plaintiff himself characterized his emotional distress in general terms, not requiring medical care and no more severe than that endured by litigants generally. These vague statements do not evince the type of emotional distress on which claims for negligent infliction of emotional distress have been successful in the past. On these facts, we decline to expand the tort to include this type of general distress. Therefore, summary judgment on plaintiff's negligent infliction of mental distress claim was proper.

Plaintiff has failed to argue in his brief the trial court's summary judgment in favor of defendants on the punitive damages claim. That assignment of error is therefore deemed abandoned. Rule 28(b), Rules of App. Proc.

For the reasons stated the order of the trial court is affirmed.

Affirmed.

Judges BECTON and GREENE concur.

UNITED STATES FIDELITY & GUARANTY COMPANY, A MARYLAND CORPORATION v. CITY OF RALEIGH, A MUNICIPAL CORPORATION

No. 8810SC649

(Filed 7 March 1989)

Principal and Surety § 9.1— construction dispute—performance bond—settlement with city—subsequent arbitrator's award —city's refusal to pay—rejection of subsequent bid bonds

The trial court erred in granting defendant's motion for summary judgment and should have granted summary judgment for plaintiff in an action in which plaintiff sought a declaratory judgment and injunctive relief from defendant's refusal to accept plaintiff's bonds where plaintiff had been the surety for a construction company under a performance bond with defendant; plaintiff negotiated a settlement with defendant after defendant declared the construction company to be in default; the agreement required plaintiff to advance $104,543 to defendant, with those funds to be repaid to plaintiff if an arbitrator determined that defendant had wrongfully terminated its contract with the construction company; the arbitrator awarded the construction company $54,700 with no specific finding that defendant had wrongfully terminated the contract; defendant refused to repay the money advanced by plaintiff; plaintiff filed an action to recover the advanced monies; and defendant issued a statement that bid bonds or performance bonds from plaintiff would not be acceptable. N.C.G.S. § 143-129, which authorizes a municipality to reject a licensed surety company's bid if it fails to settle a pending claim against it within 180 days, is punitive in nature, must be strictly construed, contains no provision for reviving claims after settlement, and no language suggesting that a surety company's subsequent action against a municipality arising from their settlement constitutes a claim against the surety.

APPEAL by plaintiff from *Stephens (Donald W.), Judge*. Judgment entered 11 April 1988 in WAKE County Superior Court. Heard in the Court of Appeals 23 January 1989.

Plaintiff is a Maryland corporation authorized to do business in North Carolina. Defendant entered a contract with NewKor Construction, Inc. for construction work on a public project known as Glen Eden Pilot Park. Plaintiff, as surety for the construction

company under a performance bond, negotiated a settlement agreement with defendant, after the latter declared NewKor to be in default of the construction contract. The agreement required plaintiff to advance $104,543 to defendant in full satisfaction of the latter's claims involving completion of the project. These funds would be repaid to plaintiff in full if the arbitrator resolving the dispute between defendant and NewKor "determined from the evidence in the arbitration proceeding [upon the arbitrator's findings of fact and conclusions of law and in any final judgment based thereon, . . .]" that defendant had wrongfully terminated its contract with NewKor.

The arbitrator awarded NewKor $54,700, but made no specific finding that defendant had wrongfully terminated the construction contract. Defendant refused to repay the money advanced by plaintiff, and plaintiff filed an action in Wake County Superior Court on 31 March 1987 to recover it. Defendant issued a statement on 16 November 1987 that "bid bonds and/or performance bonds written by the United States Fidelity and Guarantee [sic] Co., will *not* be acceptable to the City of Raleigh."

Plaintiff filed this action for a declaratory judgment and injunctive relief on 10 December 1987. Judge Farmer entered a temporary restraining order preventing defendant from barring plaintiff from participating in the bidding process or from entering any public contracts from which plaintiff had been excluded on 10 December 1987. Both parties agreed that there were no outstanding issues of material fact, and Judge Stephens granted defendant's motion for summary judgment on 11 April 1988.

Bailey & Dixon, by J. Ruffin Bailey, David M. Britt and Alan J. Miles, for plaintiff-appellant.

Poyner & Spruill, by John L. Shaw and Donna Sisson Richter, for defendant-appellee.

WELLS, Judge.

Plaintiff appeals the entry of summary judgment against it, contending that it was entitled to judgment as a matter of law. Defendant asserts that its action was fully justified by that provision of the open bidding procedure statute, N.C. Gen. Stat. § 143-129 (Cum. Supp. 1988), which authorizes rejecting bonds issued by surety companies in certain situations.

> The . . . governing board, in contracts involving a political subdivision of the State, may reject the bonds of any surety company against which there is pending any unsettled claim or complaint made by a . . . governing board of any political subdivision of the State arising out of any contract under which State funds, in contracts with the State, or funds of political subdivisions of the State, in contracts with such political subdivision, were expended, provided such claim or complaint has been pending more than 180 days.

Id.

This provision allows a municipality to reject a licensed surety company's bid if it fails to settle a pending claim against it within 180 days. It operates to prevent a licensed surety company from engaging in the business it is otherwise authorized to participate in under the laws of this State, N.C. Gen. Stat. §§ 55-17, 55-140 (1982), and therefore is punitive in nature. Punitive statutes must be strictly construed. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E. 2d 422 (1972).

Strict construction requires that "[e]verything not clearly within the scope of the language . . . be excluded from the operation of the [statute], taking the words in their natural and ordinary meaning." *City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 303 S.E. 2d 228 (1983) (*citing Harrison v. Guilford County*, 218 N.C. 718, 12 S.E. 2d 269 (1940)). Applying these principles, defendant's authorization to reject a surety company's bonds exists only if it has made a claim against that company which is currently pending, and which has been pending more than 180 days.

Defendant contends that its claim against plaintiff for NewKor's alleged breach of contract qualifies as a "claim" under the statute. Although the dispute was settled, defendant argues that plaintiff reactivated its initial claim by repudiating the settlement agreement. A narrow construction of the statute does not support this interpretation. The statute contains no provision for reviving claims after settlement, and no language suggests that a surety company's subsequent action against a municipality arising from their settlement constitutes a claim against the surety. Defendant cannot invoke this provision to justify its blanket refusal to accept plaintiff's bonds.

We hold that the trial court erred in granting defendant's motion for summary judgment and remand for the entry of an

order granting summary judgment for plaintiff to the effect that defendant cannot use the NewKor contract dispute as a basis under the statute to reject plaintiff's bid bonds.

Reversed and remanded.

Judges BECTON and JOHNSON concur.

LENA KILLETTE v. RAEMELL'S SEWING APPAREL, INCORPORATED; RAEMELL HINES; TAMMY H. CORBIN; AND LINWOOD EARL HINES

No. 8811SC568

(Filed 7 March 1989)

Receivers § 5.1— bank balance—note owed to the bank—action by receiver to recover account

The trial court erred by concluding as a matter of law that a garnishee bank had waived its right of setoff against an insolvent corporation and ordering the bank to turn a balance over to the receiver where the insolvent corporate defendant had a balance of $2,568.55 in its account with the bank when plaintiff's action was filed; the corporate defendant at that time owed the bank $5,000 plus interest; and twenty-one payroll checks, totaling $2,496.16 had been submitted to the bank but not honored. Banks are debtors of their general depositors and have the right to offset against deposits any matured debts the depositors owe them; nothing else appearing, the right may be exercised at any time after the debt comes due, including when a bank is served with notice of levy or attachment. The bank here did not waive its setoff by honoring some checks after the company's note became due because the mere honoring of a depositor's checks after its note is due manifests only an intention to accommodate the depositor at that time, not an intent to continue doing so in the future. Moreover, the twenty-one employees with outstanding payroll checks have a lien, if at all, against the assets of their employer, not the assets of others, and the balance became an asset of the bank when the offset was asserted.

APPEAL by garnishee Bank of Pine Level from *Johnson (E. Lynn), Judge.* Order entered 26 February 1988 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 9 December 1988.

Narron, O'Hale, Whittington and Woodruff, by James W. Narron and E. Craig Jones, Jr., for garnishee appellant Bank of Pine Level.

Thomas S. Berkau, pro se, receiver appellee.

PHILLIPS, Judge.

This controversy, ancillary to the main action, is between the receiver for the insolvent corporate defendant and Bank of Pine Level, and it concerns a $2,568.55 balance that the company had in its checking account with the bank when plaintiff's action was filed on 13 March 1987. At that time the corporate defendant owed the bank $5,000, plus interest, on a note that had been past due for several months, and twenty-one of its payroll checks, amounting altogether to $2,496.16, had been submitted to the bank but not honored. The same day suit was filed the bank was attached as a debtor of the corporate defendant and served with a summons and notice of levy. The bank disputed the attachment on the ground that it had an offset against the company. Based upon these facts and that the bank had honored a number of the corporation's checks after the note became due and did not assert its setoff until the account was attached, the court concluded as a matter of law that the bank had waived its right of setoff against the corporation and ordered the bank to turn the $2,568.55 balance over to the receiver.

The court's conclusion is erroneous. Because of the company's checking account with the bank it was the bank's creditor and the bank its debtor. 9 C.J.S. *Banks and Banking* Sec. 267, p. 546 (1938). As debtors of their general depositors banks have long had the right to setoff against the deposits any matured debts the depositors owe them. *Continental Trust Co. v. Spencer*, 193 N.C. 745, 138 S.E. 124 (1927). Nothing else appearing, and nothing else does appear here, the right may be exercised "at any time after the debt becomes due," *Coburn v. Carstarphen*, 194 N.C. 368, 370, 139 S.E. 596, 597 (1927); and "any time," so it was held in *In the Matter of the Taxes of Bob Dance Chevrolet*, 67 N.C. App. 509, 512, 313 S.E. 2d 207, 209 (1984), includes when a bank is served with a notice of levy or attachment. Furthermore, the right

to assert the setoff "[i]n answer to a summons to garnishee" is expressly recognized by subsection (f) of the statute under which the levy was issued, G.S. 1-440.28, and that it was not asserted sooner is without legal significance.

Nor did the bank waive its setoff right by honoring some of the company's checks after the note became due. A waiver is an intentional and permanent relinquishment of a known right, *Green v. Patriotic Order Sons of America, Inc.*, 242 N.C. 78, 87 S.E. 2d 14 (1955), that usually must be manifested in a clear and unequivocal manner. *Klein v. Avemco Insurance Co.*, 289 N.C. 63, 220 S.E. 2d 595 (1975). The law does not discourage leniency to one's debtors, and in our opinion the mere honoring of a depositor's checks after its note is due manifests only an intention by the bank to accommodate the depositor at that time; it does not indicate an intent to continue doing so in the future. If such indulgences were held to be a permanent waiver of the right of setoff it could only encourage banks to immediately offset their matured notes against the checking account balances of their depositor-debtors, a practice bound to embarrass if not ruin many hard pressed debtors.

Though the order was not entered on that basis the receiver also argues that it can be sustained because the twenty-one employees of the depositor whose checks are outstanding have a lien upon the company's assets superior to all other liens, under the following provisions of G.S. 44-5.1:

> In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets . . .

The argument is without foundation. The lien, if any, that the employees have is against *the assets of their employer*, it does not attach to the assets of others; and the checking account balance became an asset of the bank upon the right of offset being asserted. 10 Am. Jur. *Banks* Sec. 666 (1963); 9 C.J.S. *Banks and Banking* Sec. 296 (1938). The receiver and the employees have no independent rights against the garnishee bank; they stand in the company's

shoes and can enforce only those rights it could if it was doing the attaching, *Ward v. Kolman Manufacturing Co.*, 267 N.C. 131, 148 S.E. 2d 27 (1966); *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904); and the company has no right to enforce since it owes the garnishee more than the garnishee owes it.

The order appealed from is therefore vacated and the matter remanded to the Superior Court for the entry of an order releasing the checking account involved from the garnishment levy.

Vacated and remanded.

Judges COZORT and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 FEBRUARY 1989

BOWEN v. WEATHINGTON No. 883SC324	Pitt (86CVS1529)	Affirmed in part, reversed in part
IN RE HARRISON No. 8825DC538	Burke (87J65) (87J66)	Affirmed
IN RE HILL v. PERDUE No. 882SC399	Martin (87CVS121)	Reversed & Remanded
IN RE WILSON No. 8825DC581	Burke (87J26) (87J27)	Affirmed
OWENS v. CUMBERLAND COUNTY MENTAL HEALTH No. 8812SC391	Cumberland (87CVS695)	Dismissed
STATE v. FAULK No. 8813SC637	Columbus (87CRS5198) (87CRS5199) (87CRS5200)	Affirmed
STATE EX REL. COMR. OF INS. v. N.C. RATE BUREAU No. 8810INS372 No. 8810INS373	Ins. Comm. (474) (475)	Appeal Dismissed
STILLEY & ASSOC. v. EASTERN ENGINEERING No. 883SC612	Craven (85CVS86)	Affirmed
STONE v. MANUFACTURED HOMES No. 8818DC543	Guilford (85CVD7285)	Affirmed

FILED 7 MARCH 1989

BARCLAYS BANK OF N.C. v. H.O.G.S., INC. No. 886SC670	Bertie (86CVS284)	Affirmed
BROWN v. BROWN No. 8814DC500	Durham (82CVD607)	Affirmed in part and vacated in part

GARRISON v. NATIONWIDE MUT. FIRE INS. CO. No. 887SC153	Wilson (87CVS560)	Reversed & Remanded
IN RE BRYSON No. 8830SC591	Macon (87CVS134)	Vacated & Remanded
IN RE RAXTER No. 8829SC984	Transylvania (88CVS063)	Affirmed
LYNCH v. DAVIS No. 886SC553	Halifax (86CVS1045)	Affirmed
REEVES v. WILLIAMS No. 8818SC744	Guilford (87CVS5833)	Reversed and remanded in part; vacated and remanded in part
STATE v. FARRIS No. 8815SC741	Chatham (87CRS2707)	No Error
STATE v. PEARSON No. 884SC660	Onslow (87CRS13627)	No Error
THOMPSON v. THOMPSON No. 884DC423	Onslow (86CVD1122)	Affirmed in part; vacated and remanded in part
WALSH v. WILLIAMS No. 8818SC743	Guilford (87CVS5832)	Reversed and remanded in part; vacated and remanded in part
WINDING CREEK HOMEOWNERS ASSN. v. LEWTER No. 88820DC425	Moore (87CVD500)	Reversed

EDDIE RAY CRUMP v. BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT, WILLIAM PITTS, LOIS YOUNG, BARBARA A. GARLITZ, RUEBELLE A. NEWTON, C. JOHN WATTS, III, AND LARRY O. ISENHOUR

No. 8825SC401

(Filed 21 March 1989)

1. **Judgments § 37— dismissed schoolteacher—prior judicial review of dismissal hearing—bias claim not barred by res judicata**

A dismissed schoolteacher was not estopped by reason of *res judicata* to assert his bias claim against defendant school board where plaintiff filed his bias claim against defendants at the same time he petitioned for judicial review of his dismissal hearing; defendants caused the two actions to be separated; as a consequence, the only question considered by the superior court and by the Court of Appeals was whether the hearing transcript, together with the exhibits introduced into evidence at the hearing, disclosed "substantial evidence" to support defendant board's findings against plaintiff; none of the evidence which plaintiff presented at trial to support his charge of bias existed in the record reviewed by the courts; the severance obtained by defendants forestalled plaintiff from litigating his bias claim; and defendants therefore could not successfully argue that the due process claim which plaintiff attempted to proceed with had been given preclusive effect by the judicial reviews of the dismissal hearing.

2. **Schools § 13.2— dismissal of teacher—bias in dismissal hearing charged—failure to ask board members to recuse themselves—right to raise bias charge not waived**

Plaintiff teacher did not waive his right to raise a charge of bias on the part of defendant school board in his dismissal because he did not ask board members to recuse themselves from his dismissal hearing, since plaintiff alleged that he brought his claim of bias once he learned of the prehearing actions and statements of the board members, and defendants did not contest this assertion.

3. **Schools § 13.2— dismissal of teacher—right of due process—impartial decision maker required**

A board of education conducting a dismissal hearing must provide the parties with all essential elements of due process,

a fundamental requirement of which is the opportunity to be heard at a meaningful time and in a meaningful manner. To afford a meaningful hearing, due process demands that the decision maker be impartial.

4. Schools § 4— board of education—presumption of correctness of actions

The law affords a presumption of honesty and integrity to policymakers who possess decision-making powers, and the action of any North Carolina board of education is presumed to be correct, the burden of proof being on the complaining party to show the contrary. N.C.G.S. § 115C-44(b).

5. Schools § 4— board of education—test for bias

A school board's prehearing involvement with a matter which it will adjudicate, when coupled with denials at the hearing of any involvement in or familiarity with the case, is sufficient to demonstrate disqualifying personal bias.

6. Schools § 13.2— dismissal of teacher—bias of school board—sufficiency of evidence

Evidence was sufficient to establish a *prima facie* case of disqualifying personal bias on the part of defendant school board in plaintiff teacher's dismissal hearing where the evidence tended to show that the chairman, who said that nothing about the case had been revealed to the board until the day preceding the hearing, allegedly told another teacher at the school months earlier that the board could not "overlook" the "letters about the little girls"; another board member, who said his familiarity did not extend beyond newspaper accounts, allegedly attempted to have another teacher persuade plaintiff to resign because the charges against him "didn't look good"; that same board member told another teacher that the board seemed to have predetermined its decision to dismiss plaintiff; another board member claimed to have "not said one word anywhere" about the case, yet she allegedly told the principal that "[w]e're all together on this Crump thing"; moreover, she reportedly told plaintiff that the principal had promised the board that plaintiff would resign rather than face a dismissal hearing.

7. Schools § 13.2— dismissal of teacher—charge of bias—court's instructions on "bias" proper

Where plaintiff teacher claimed that he was denied due process in a dismissal hearing because of the bias of defendant board, the trial court properly instructed on the ordinary mean-

ing of the word "bias" and properly incorporated holdings from prior cases about the presumption of honesty, the legitimate investigatory functions of administrative bodies, and the nugatory effect of simple prehearing familiarity with the case. The court was not required to instruct on bias on the basis of a Kentucky case which had never been adopted in this State.

8. **Schools § 13.2— dismissal of teacher—bias of only one school board member sufficient to deprive teacher of fair hearing—instruction proper**

The trial judge correctly instructed the jury that the bias of one member of defendant school board was sufficient for the jury to find that plaintiff teacher had been deprived of a fair dismissal hearing, and a correct instruction on bias need not specify that the jury had to find that such bias infected a majority of the board members; moreover, plaintiff produced evidence from which the jury could have found that as many as four of the six board members, a majority, possessed a disqualifying bias.

9. **Schools § 13.2— teacher dismissed—charge of bias—instruction on damages proper**

In plaintiff teacher's action to recover damages for denial of due process in his dismissal hearing, the trial court properly instructed on damages, and plaintiff's evidence was sufficient to demonstrate injury where it tended to show that he experienced insomnia and depression and was unable to find employment as a teacher following his dismissal.

10. **Schools § 13.2— teacher dismissed—charge of bias—evidence tending to show character of teacher properly excluded**

In plaintiff teacher's action to recover damages for denial of due process in his dismissal hearing, the trial court properly excluded evidence concerning the charges against plaintiff as contained in a letter from the school superintendent to plaintiff since the substantiality of the charges which the superintendent brought against plaintiff, or their lack of merit, was not germane to the question of whether any of the board members brought a presettled judgment into the hearing room, and admission of the evidence would have permitted defendant to present plaintiff as an immoral person deserving of dismissal regardless of any predisposition against him by defendant board.

11. Schools § 13.2— teacher dismissal—no standing to complain about exclusion

A party who successfully objects to the admission of evidence about the charges leveled at a teacher's dismissal hearing cannot complain on appeal that he was precluded from introducing the same evidence.

Judge WELLS dissenting in part.

APPEAL by defendants from *Sitton (Claude S.), Judge*. Judgment entered 19 November 1987 in Superior Court, CATAWBA County. Heard in the Court of Appeals 6 December 1988.

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by John W. Gresham for plaintiff-appellee.

Mitchell, Blackwell, Mitchell & Smith, P.A., by Thomas G. Smith; and Sigmon, Clark & Mackie, by E. Fielding Clark, II, for defendant-appellants.

Tharrington, Smith & Hargrove, by George T. Rogister, Jr., for North Carolina School Boards Association, amicus curiae.

BECTON, Judge.

On 7 June 1984, appellants, the Hickory Board of Education and its members, dismissed appellee, Eddie Ray Crump, from his position as coach and teacher at Hickory High School. Following his dismissal, Mr. Crump filed a Complaint alleging that the Board had acted with bias against him, in violation of his due process rights under the state and federal constitutions and of the statutory protections now codified at N.C. Gen. Stat. Sec. 115C-325 (1987) (Supp. 1988). Mr. Crump sought damages under 42 U.S.C. Section 1983, praying for actual damages from the Board and for punitive damages from its individual members; at trial, he abandoned his claim for punitive damages against four of the six Board members. On 19 November 1987, a jury found that the Board had failed to "provide [Mr. Crump with] . . . a fair hearing before an unbiased hearing body" and awarded him actual damages of $78,000. The jury awarded no punitive damages. The trial judge entered judgment in accord with the verdict, and from this judgment the Board appeals. We affirm.

I

Although these parties have been before this court previously, we shall restate and elaborate upon those facts of the case that are pertinent to the issues now on appeal.

A

Eddie Ray Crump served as a coach, trainer and driver education instructor at Hickory High School. As of the 1983-84 academic term, he had been employed by the Hickory Administrative School Unit for nine years and had attained career status, entitling him to the protections of the "Tenure Act," N.C. Gen. Stat. Sec. 115C-325.

On 16 March 1984, Hickory Schools Superintendent Dr. Stuart Thompson notified Mr. Crump in a letter that he (Dr. Thompson) planned to recommend Mr. Crump's dismissal to the School Board. Dr. Thompson wrote that his recommendation would be based on four grounds: immorality, neglect of duty, failure to fulfill the duties and responsibilities of a teacher, and insubordination. Dr. Thompson submitted his dismissal recommendation on 4 June 1984, and the hearing before the Board took place two days later.

The Board received testimony from 13 witnesses, including Mr. Crump, present and former students of his, Dr. Thompson, and Hickory High School Principal Henry Williamson. The evidence presented against Mr. Crump indicated, essentially, that on several occasions between 1981 and 1984 he had improperly touched female students on their breasts, legs, and necks during driver's training classes, had asked personal questions of one of them, and had called two of them "babe" and "honey." In addition, the evidence indicated that, following a complaint by a student in 1981, Principal Williamson ordered Mr. Crump, both orally and by formal letter, to have at least two students in the training vehicle "during the road work phase of the driver education instruction of a female student." The Board found as a fact that Mr. Crump disobeyed this directive on "one or more occasions."

Mr. Crump denied any improper conduct with the students and explained his reasons for making physical contact with them during the training sessions. For example, he told the Board that at times he had "grabbed" students legs off the brake pedal to prevent the brakes from locking. Larry Wittenberg, another driver's education instructor at Hickory High School, testified that he also had found it necessary on occasion to grab students' legs during

road-work instruction. Mr. Crump contended, moreover, that his allegedly improper comments had been misconstrued by the complaining students and that he had made them merely in an effort to help his pupils relax while they drove. Mr. Crump testified that he complied with Principal Williamson's order during the 1981-82 school year but assumed after that year that the directive was no longer in effect. He presented further evidence that suggested Mr. Williamson harbored animosity against him because of his participation in an investigation of the principal by Superintendent Thompson in 1982-83.

After hearing several hours of testimony, the Board members deliberated in closed session. At approximately 3:45 on the morning of 7 June, after two hours of deliberation, the Board voted to dismiss Mr. Crump for insubordination and for immorality.

B

After his dismissal, Mr. Crump filed a Complaint in the superior court of Catawba County, alleging that the Board had denied him a fair and impartial hearing. He asked that this issue be tried before a jury. Along with the Complaint, Mr. Crump submitted a petition for judicial review of the Board's decision to terminate him. Mr. Crump charged that the Board erred in dismissing him in that the evidence on which the Board members based their findings of insubordination and immorality was insufficient to sustain those findings. In their answer, appellants moved, pursuant to Rule 42(b) of the Rules of Civil Procedure, to separate the petition for judicial review from the Complaint. The judge granted the motion and subsequently upheld the Board's decision to dismiss Mr. Crump. Mr. Crump appealed to this court, and we affirmed in *Crump v. Board of Education*, 79 N.C. App. 372, 339 S.E. 2d 483 (1986), *disc. rev. denied*, 317 N.C. 333, 346 S.E. 2d 137 (1986) ("*Crump I*").

Mr. Crump's due process claim was tried before a jury during the 16 November 1987 term of the Catawba County superior court. Mr. Crump based his charge that the Board denied him a fair and impartial hearing on a disparity between alleged prehearing involvement in the case by the Board members and their disavowals of any significant knowledge of the matter when they were asked about it at the hearing.

At the dismissal hearing, following an opening statement by Dr. Thompson's counsel, Mr. Crump's lawyer, Mr. Fuller, questioned the Board members about their ability to be fair and impartial. The specific questions, and the Board members' answers, were as follows:

> Mr. Fuller: . . . I want to be perfectly blunt about it and ask the [B]oard . . . the extent to which any of you have been personally involved, have discussed with people who have knowledge and whether any of you have formed any kind of preconceived notions. I don't mean that in a pejorative sense but just as matter of being brutally candid. Has anybody on the [B]oard either because of the publicity, because of what you have heard from [the] administration, from friends, neighbors, from anyone else, whether you have any problem at all being completely fair to Mr. Crump? And again, I don't mean fair in the sense of you will try to be fair, but can you honestly say the scales are even now . . . .
>
> Mr. Pitts: That's a fair question. I am glad you addressed that right up front because several months ago the [B]oard was aware that some form of hearing was coming down the pike. The administration, the attorney, has not ever revealed anything until we received this letter in the mail yesterday hand delivered of any charges or any statements. Now I can speak for myself. But the attorney has asked all members of the [B]oard not to discuss any aspect of anything that they may hear. If someone calls them on the phone, they are not to respond in any way. I can speak for myself to say that for me at this point in time the slate is clear. . . .
>
> Ms. Newton: The same thing. In fact we have not even been given a name whenever we were told a hearing was coming up. And I have not been approached by anybody. And if mention was made of it, I just said I know nothing. And whatever judgment would be made has to be done on what we hear tonight.
>
> Mr. Isenhour: The same.
>
> Ms. Garlitz: The same. I have had people that made statements to me, and I have not responded in any way. And I did not know until the letter came yesterday what this was about.
>
> Mr. Watts: Frankly, I feel that I can be as objective as anybody on this [B]oard. Obviously when a newspaper that is published

> on a county-wide basis comes out and indicates that a teacher is being brought up for charges, I read the article because I'm on the [S]chool [B]oard and the teacher happens to be in my system. Other than that, there has been no preliminary information except for this notice we got yesterday afternoon late in the afternoon with the charges. I think I have a fairly good grasp of what we're here for and hopefully will be able to give every bit of the evidence full weight.
>
> Ms. Young: I had one call, and I said, "I have no comments." And I have not said one word anywhere. And when I go, I listen and I vote my convictions.

A subsequent comment, however, suggested that all of the Board members had not been candid in their answers. During Principal Williamson's testimony Board member Isenhour asked him, "Are you aware of the fact that we had parents who will not let their daughters take driver's education because of this situation, that they're sending their daughters to the private school?" Later in the hearing, Mr. Crump's lawyer said, ". . . I would like to note that although we began with a statement of neutrality . . . it's getting right hostile. Mr. Isenhour [, you] indicated . . . that you had information about this case that nobody has discussed yet. . . . So we know we're dealing with items that are not even on the agenda." At trial, Mr. Isenhour acknowledged that there had been no testimony at the hearing concerning female students at Hickory High School taking driver's education elsewhere. He explained that "we had some complaints about a number of . . . students taking driver's education from a private school in Hickory. I tried to find out if this had some bearing on that, and I found it didn't have any bearing on Mr. Crump at all. I didn't verbalize the question very well."

Evidence Mr. Crump brought forth at trial included the following. Hal Bolick, a teacher at Hickory High School, testified that, sometime between December 1983 and January 1984, Board chairman Pitts told Mr. Bolick that the Board could not "overlook" the "letters about [Mr. Crump's conduct with] the little girls."

Mr. Bolick further testified to having had conversations with Board member John Watts prior to Mr. Crump's dismissal hearing. He testified he "advised" Mr. Watts of conversations he (Mr. Bolick) had had with Ursula Hope Bolick, his niece and one of the students who testified against Mr. Crump, about Mr. Crump. Mr. Bolick

testified that, after the hearing had ended, "[Mr. Watts] said [to Mr. Bolick] . . . that things that had gone on in the [hearing] room itself didn't seem like the [B]oard members were listening, that they seemed to have made up their minds before they went in." (Mr. Watts testified that he did not recall making such a statement to Mr. Bolick.)

Roger Henry, a former teacher at Hickory High School, testified that, sometime in March 1984, Mr. Watts had come to the high school and had asked Mr. Henry to talk with him. Mr. Henry testified that the two of them "rode around" in Mr. Watts' car and that Mr. Watts told him the charges against Mr. Crump "didn't look good, that they were concerned, and [that Mr. Watts] mentioned [Board member] Garlitz and [Chairman] Pitts and [mentioned that Mr. Crump] . . . needed to resign [and would Mr. Henry] do anything about it. . . ." (When asked at trial whether he denied that the conversation with Mr. Henry had occurred, Mr. Watts answered, "I won't deny it or confirm it, sir.")

Bruce Crump, a former teacher at Hickory High School (and no relation to Mr. Crump), testified that in the spring of 1984 he witnessed Board member Lois Young come into the office area of the high school. He testified that Ms. Young told Principal Williamson, "We're all together on this Crump thing" and that Mr. Williamson then invited Ms. Young into his office. Bruce Crump testified that no matters involving himself were pending with the Board at the time he heard Ms. Young make the statement about the "Crump thing." Neither Ms. Young nor Mr. Williamson testified at trial.

Mr. Crump testified about a conversation he had with Ms. Young after his dismissal. Mr. Crump said that Ms. Young told him Principal Williamson had at some point promised the Board that Mr. Crump would resign rather than endure a dismissal hearing and thus bring embarrassment upon his wife.

With these facts from the record as background, we turn to the issues on appeal.

II

Appellants first assign error to the trial judge's denial of their motions for summary judgment, directed verdict, and judgment notwithstanding the verdict. They contend, first, that Mr. Crump did not establish a *prima facie* case of bias against the Board

and, second, that the issue of bias was *res judicata* at the time of trial. We shall first address the *res judicata* argument.

A

Appellants contend that the superior court and Court of Appeals' reviews of Mr. Crump's dismissal hearing foreclose him from now alleging that the Board acted out of bias. Appellants argue that the superior court judge's statement in his judgment upholding Mr. Crump's dismissal that "the action of the Board to dismiss Crump was not biased, arbitrary or capricious" and this court's affirmation of that judgment amount to a final adjudication of the bias issue. Alternatively, appellants argue that Mr. Crump waived his right to charge bias because he did not ask any Board members to recuse themselves from the hearing.

[1] Under the doctrine of *res judicata*, a valid and final judgment on a claim precludes relitigation of that claim or of any part of it. *See generally* Restatement (Second) of Judgments, Secs. 18, 19 (1982). The term "*res judicata*" typically subsumes a related doctrine, collateral estoppel, which gives conclusive effect to an issue of fact or law, actually litigated and determined by a final judgment, in any subsequent litigation between the same parties or those in privity with them. *See id.* at Sec. 27. In North Carolina, *res judicata* may be invoked against "all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward [initially]. . . ." *Bruton v. Carolina Power & Light Co.*, 217 N.C. 1, 7, 6 S.E. 2d 822, 826 (1940) (citations omitted).

Given the procedural history of this case, we do not believe Mr. Crump is estopped to assert his Section 1983 claim against the Board. Mr. Crump filed his Complaint against appellants at the same time he petitioned for judicial review of his dismissal hearing. Appellants caused the two actions to be separated and, as a consequence of the severance, the only question considered by the superior court and by this court was whether the hearing transcript, together with the exhibits introduced in evidence at the hearing, disclosed "substantial evidence" to support the Board's findings against Mr. Crump. *See Crump I*, 79 N.C. App. at 373-74, 339 S.E. 2d at 484-85 (discussing "whole record test" employed by superior court and Court of Appeals in reviewing Crump's dismissal). None of the evidence Mr. Crump presented at trial to support his charge of bias existed in the record reviewed by the

courts. The severance obtained by appellants forestalled Mr. Crump from litigating his Section 1983 claim, and appellants cannot now be heard to say that the due process claim Mr. Crump attempted to proceed with has been given preclusive effect by the judicial reviews of the dismissal hearing. We hold, therefore, that Mr. Crump is not estopped by reason of *res judicata* to assert his bias claim against the Board.

[2] Our remaining inquiry is whether Mr. Crump waived his right to raise the bias charge because he did not ask Board members to recuse themselves from the hearing. A claimant must assert promptly his claim of bias or partiality against an administrative agency after he acquires knowledge of the alleged disqualification. *See Satterfield v. Board of Education*, 530 F. 2d 567, 574-75 (4th Cir. 1975). Mr. Crump alleges he brought his Section 1983 claim once he learned of the prehearing actions and statements of the Board members. Appellants have not contested this assertion. We hold, therefore, that Mr. Crump has not waived his right to complain of bias on the part of the Board.

B

We now decide whether the trial judge erred by denying appellants' motion for judgment notwithstanding the verdict. We note that appellants also allege that the trial judge erred by denying their motions for summary judgment and directed verdict. However, we consider only the denial of the motion for judgment notwithstanding the verdict. *See Harris v. Walden*, 314 N.C. 284, 286, 333 S.E. 2d 254, 256 (1985) (denial of motion for summary judgment not reversible error when case has been determined on merits by trier of fact); *Rice v. Wood*, 82 N.C. App. 318, 322, 346 S.E. 2d 205, 208 (1986), *disc. rev. denied*, 318 N.C. 417, 349 S.E. 2d 599 (1986) (by introducing evidence, defendants waived directed verdict motion made at close of plaintiff's evidence).

[3] A board of education conducting a dismissal hearing must provide the parties with all essential elements of due process. *Baxter v. Poe*, 42 N.C. App. 404, 409, 257 S.E. 2d 71, 74 (1979), *disc. rev. denied*, 298 N.C. 293, 259 S.E. 2d 298 (1979). Of the essential elements of due process, a fundamental requirement is that the parties have "[a] fair trial in a fair tribunal . . . ." *In re Murchison*, 349 U.S. 133, 136, 99 L.Ed. 942, 946 (1955). The Supreme Court has articulated this same idea as "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Matthews*

v. Eldridge, 424 U.S. 319, 333, 47 L.Ed. 2d 18, 32 (1976) (citation omitted). To afford a meaningful hearing, due process demands that the decision maker be impartial. *Goldberg v. Kelly*, 397 U.S. 254, 271, 25 L.Ed. 2d 287, 301 (1970); *see also Bowens v. North Carolina Dept. of Human Resources*, 710 F. 2d 1015, 1020 (4th Cir. 1983); *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 354, 342 S.E. 2d 914, 924 (1986), *cert. denied*, 318 N.C. 507, 349 S.E. 2d 862 (1986). Impartiality requires that the decision maker have an open mind about the factual issues to be decided. *See Corstvet v. Boger*, 757 F. 2d 223, 229 (10th Cir. 1985).

A party who bases a due process claim on the theory that the decision maker was not impartial must demonstrate that the decision-making board or individual possessed a disqualifying personal bias. *Leiphart*, 80 N.C. App. at 354, 342 S.E. 2d at 924 (citing *Salisbury v. Housing Authority*, 615 F. Supp. 1433, 1439-41 (E.D. Ky. 1985)). To determine what constitutes impermissible bias in a case such as this one, it is necessary to remember that the concept of due process " 'negates any concept of inflexible procedures universally applicable to every imaginable situation.' " *Hortonville Joint School District v. Hortonville Education Ass'n.*, 426 U.S. 482, 494, 49 L.Ed. 2d 1, 10 (1976) (citation omitted). Rather, "[d]etermining what process is due," and, consequently, determining what actions by a decision maker will amount to disqualifying bias, "requires [a court] to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it." *Id.*

[4] Our boards of education are endowed with the "general control and supervision of all matters pertaining to the public schools in their respective administrative units and [the enforcement of] the school law in their respective units." N.C. Gen. Stat. Sec. 115C-36 (1987). The legislature has included within the purview of the boards' powers the authority to employ and to dismiss teachers. N.C. Gen. Stat. Sec. 115C-325. Being the only body so empowered, a school board has a duty to keep itself apprised of events taking place within the school system it supervises. We agree with appellants that because school boards in this State perform "dual roles as . . . administrator and enforcer," school boards cannot be expected to decide cases "in a vacuum of ignorance." Furthermore, the State has a strong interest in ensuring that capable citizens of civic spirit will look to serve on local school boards. Exposure to civil liability for acts connected with this civic function risks chilling

the desire of people to so serve. Out of considerations such as these, the law affords a presumption of honesty and integrity to policymakers who possess decision-making powers. *Hortonville*, 426 U.S. at 497, 49 L.Ed. 2d at 11-12. Additionally, the action of any North Carolina board of education is presumed to be correct, and the burden of proof is on the complaining party to show the contrary. N.C. Gen. Stat. Sec. 115C-44(b) (1987).

At the same time, the Tenure Act exists "to provide teachers of proven ability . . . [with] protecti[on] . . . from dismissal for political, personal, arbitrary, or discriminatory reasons." *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E. 2d 381, 386 (1975). It is equally in the State's interest to attract qualified and dedicated people to the teaching profession, and this requires the state, at a minimum, to treat its teachers professionally. Additionally, our tenured teachers have an important property interest in their continued employment, *see Hortonville*, 426 U.S. at 494, 49 L.Ed. 2d at 10; *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed. 2d 548, 561 (1972) (property interests created and defined by sources such as state law), and a liberty interest in their reputations and standing within the teaching profession. *See Roth*, 408 U.S. at 573, 33 L.Ed. 2d at 558.

Prior cases that have weighed the individual's interest with the State's interest have identified certain conduct by the decision maker, which, standing alone, is not enough to constitute disqualifying personal bias. For example, a mere showing that school board members had involvement in the events giving rise to the dismissal hearing is not sufficient to rebut the presumption of the board's honesty and integrity. *Hortonville*, 426 U.S. at 496-97, 49 L.Ed. 2d at 11-12. Moreover, the fact that a decision maker enters a hearing with preliminary opinions about the matter to be adjudicated does not demonstrate that the decision maker's mind is irrevocably closed about the outcome of the hearing. *F.T.C. v. Cement Institute*, 333 U.S. 683, 701, 92 L.Ed. 1010, 1034 (1948), *reh'g denied*, 334 U.S. 839, 92 L.Ed. 1764 (1948). Our court has held, in addition, that a mere appearance of impropriety, without more, is not sufficient to demonstrate disqualifying personal bias. *Leiphart*, 80 N.C. App. at 354, 342 S.E. 2d at 924.

[5] This case, however, is not consonant with those decisions holding that a claimant did not demonstrate disqualifying bias. The case before us does not simply involve school board members who conducted a prehearing investigation, or who formulated opinions about

the matter they were to decide. The added element in this case which, disturbingly, distinguishes it from cases upholding the fairness of the decision-making process is that, here, the Board members effectively denied any connection with the case beyond their having a cursory knowledge of the nature of the charges against Mr. Crump. The issue here presented, then, is whether a school board's prehearing involvement with the matter it will adjudicate is, when coupled with denials at the hearing of any involvement in or familiarity with the case, sufficient to demonstrate disqualifying personal bias. We answer this question in the affirmative.

[6] These Board members plainly understood that Mr. Crump's lawyer requested them to state the extent of their involvement in the case, their knowledge of the nature of the charges against Mr. Crump, and their ability to be fair and impartial decision makers. Each member echoed Chairman Pitts' assertion that the "slate [was] clear." The evidence presented at trial, however, demonstrated the contrary. Chairman Pitts, who said that nothing about the case had been revealed to the Board until the day preceding the hearing, allegedly told Hal Bolick months earlier that the Board could not "overlook" the "letters about the little girls." Board member Watts, who said his familiarity with the case did not extend beyond newspaper accounts, allegedly attempted to have Roger Henry persuade Mr. Crump to resign because the charges against the latter "didn't look good." In addition, Mr. Watts reportedly told Mr. Bolick that the Board seemed to have predetermined its decision to dismiss Mr. Crump. Board member Young claimed to have "not said one word anywhere" about the case, yet she allegedly told Principal Williamson that "[w]e're all together on this Crump thing." Moreover, she reportedly told Mr. Crump that the principal had promised the Board that Mr. Crump would resign rather than face a dismissal hearing. If the disparity between the Board members' assertions about their neutrality and the evidence of their prehearing conduct is insufficient to have allowed Mr. Crump to survive motions for directed verdict and judgment notwithstanding the verdict, then it is difficult to posit any case wherein a party could prevail on a bias claim.

We do not hold that a claimant may demonstrate bias through every discrepancy between a board member's prehearing conduct and that member's statement during a *voir dire* examination at the hearing. However, we do not endeavor here to articulate when a discrepancy will rise to the level of disqualifying personal bias.

We think such a determination must be left to the courts on a case-by-case basis. We hold only that, in this case, the discrepancy between the statements of some of the board members at the hearing to be so much at odds with the evidence Mr. Crump presented at trial of their prehearing conduct that the evidence was sufficient to establish a *prima facie* case of disqualifying personal bias.

Appellants insist they candidly responded to the questions Mr. Crump's lawyer asked them at the dismissal hearing. They contend the lawyer asked only if they "could be fair" and that they responded truthfully to that inquiry. As we read the transcript of the hearing, it is clear to us that Mr. Crump's lawyer asked the Board members the extent to which they had been personally involved in the case, whether they had formulated any opinions about the case, and whether they had heard about the case. Some of the answers given by the members to these questions, particularly the answers of Mr. Watts and Ms. Young, do not square with the evidence of their conduct prior to the hearing.

In our view, Mr. Crump sufficiently rebutted the presumptions of honesty and correctness to which the Board was initially entitled. With these presumptions overcome, appellants' motion for judgment notwithstanding the verdict was properly decided by the trial judge on the basis of whether Mr. Crump "produced more than a scintilla of evidence, taking the record in the light most favorable to [him] and [giving him the benefit of] every favorable inference [from the evidence he presented]" that the Board deprived him of a fair and impartial hearing. *Mobley v. Hill*, 80 N.C. App. 79, 83, 341 S.E. 2d 46, 49 (1986). Appellants contend that Mr. Crump's evidence never rose above "the realm of speculation" that the prehearing conduct of some of the Board members meant they had decided the case against him before the hearing took place. Again, however, the relevant focus is not that the Board had prior knowledge of the case, or investigated the charges, or engaged in any conduct which, standing alone, would not amount to disqualifying personal bias. The focus here is that the Board members claimed to have had essentially no knowledge about the case when asked about it at the hearing. We agree with Mr. Crump that the jury reasonably could have inferred that these disavowals were made to mask a presettled judgment. We hold that the judge correctly denied appellants' motion for judgment notwithstanding the verdict.

III

Appellants next contend that the judge incorrectly instructed the jury as to disqualifying personal bias and, further, that he incorrectly instructed that the bias of any one member of the Board was sufficient for the jury to find that Mr. Crump had been denied a fair dismissal hearing.

A

[7] The trial judge defined bias as "a predetermined opinion which is fixed and not susceptible to change." The judge instructed the jury as to the presumptions of honesty and legal correctness attending the Board and its actions, he instructed that a showing the Board was merely familiar with "a fact or facts or charge or charges" stemming from the case was not a disqualifying bias, and he instructed that a school board member has a "duty to keep apprised of problem situations in the schools." The judge told the jury that "[t]o find impermissible bias [the jury had to] find by the greater weight of the evidence that the mind of a board member was predetermined and was fixed and not susceptible to change prior to the deliberating process . . . and that the decision [to dismiss Mr. Crump] was not based solely upon evidence elicited during the hearing." Appellants contend the judge's instruction failed to require the jury to balance "the traditional elements of bias" alongside the evidence of prejudgment Mr. Crump presented.

Appellants urge this court to adopt, as the standard for determining disqualifying personal bias in this State, the test articulated in *Salisbury* by the district court of the Eastern District of Kentucky. That test involves a balancing of four factors which, appellants claim, should have been used in the jury instruction here. The factors are these:

1. Whether the decision maker's role in initiating the charges was largely a procedural step, or implies that the decision maker's mind is closed on the issue of guilt.

2. Whether there are important issues of fact such that the decision maker's possible lack of impartiality gives rise to serious risk of an erroneous decision based on tainted findings of fact.

3. Whether the decision maker has a personal interest, either pecuniary or relating to personal prestige, in seeing that the termination is upheld.

4. Whether personal animosity exists between the employee and the decision maker.

615 F. Supp. at 1441. The *Salisbury* court explained in a footnote that it had not held that all four factors need be demonstrated in each case. *Id.* at n.6.

We do not quarrel with any of the factors enumerated in *Salisbury*, and, in our view, the jury in Mr. Crump's case might well have reached the same verdict based on a consideration of these factors. Any one of them, if demonstrated, would indicate that the decision maker is not capable of rendering an impartial judgment. However, just as the term "due process" is not reducible to an inflexible standard, neither can the existence of disqualifying personal bias be determined, in every case, by resort to a set of immutable factors. The *Salisbury* factors are culled from very fact-specific cases in which the courts focused on the conduct of the decision maker that gave rise to the bias charge. In all the cases, the focus of the inquiry was whether that conduct demonstrated that the decision maker harbored a presettled judgment about the matter to be decided.

To protect the due process rights of claimants, the term "disqualifying personal bias" must remain malleable enough to apply to new fact patterns that have not arisen in earlier cases. We believe this case presents a unique situation not heretofore decided upon, and thus we decline to hold that its facts must be subjected to the mechanical application of a test. We note, furthermore, that the first of the *Salisbury* factors speaks of the decision maker's "closed mind." We do not think any court would mean to limit that element of bias to only those cases in which the administrative body itself initiated the charges.

We hold, therefore, that it was not error for the trial judge to fail to instruct the jury on the basis of a Kentucky case that has never been adopted in this State. The judge's definition of bias tracked the ordinary meaning of the word. *See, e.g.*, Black's Law Dictionary 147 (5th ed. 1979). His instruction incorporated the holdings from prior cases about the presumption of honesty, the legitimate investigatory functions of administrative bodies, and the nugatory effect of simple prehearing familiarity with the case. We hold that the instruction was proper, and that it was not error for the trial judge to omit the *Salisbury* factors from that instruction.

B

[8] Appellants contend that a correct instruction on bias would have specified that the jury had to find that such bias infected a majority of the Board members. We disagree.

Appellants concede they know of no case holding that a majority of an administrative body must possess disqualifying personal bias before impermissibly tainting the hearing. We are in accord with the view expressed by the Third Circuit in *Berkshire Employees Association v. NLRB*, wherein the Court of Appeals addressed the same argument appellants make here:

> The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one [person] or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.

121 F. 2d 235, 239 (3d Cir. 1941); *See also Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F. 2d 583, 590-92 (D.C. Cir. 1970); *American Cynamid Co. v. F.T.C.*, 363 F. 2d 757, 767 (6th Cir. 1966). We hold, therefore, that the judge correctly instructed the jury that the bias of one member of the Board was sufficient for the jury to find that Mr. Crump had been deprived of a fair hearing. Moreover, Mr. Crump produced evidence from which the jury could have found that as many as four of the six Board members (a majority) possessed a disqualifying bias.

Though appellants have not raised the issue on appeal, we point out that the trial judge's instruction did not permit the jury to hold the Board members individually liable on the basis of any one member's bias. The judge gave a separate instruction on punitive damages in which he made plain that punitive damages could "only be awarded against an individual defendant" on the basis of that defendant's conduct. The judge's instruction, therefore, while permitting the jury to hold the Board liable in actual damages on the basis of one member's bias, did not allow the bias of one member to be the ground for holding any other member individually liable. The judge instructed the jury that it could consider punitive damages only against Board members Young and Watts, "not against the Board of Education or any other [Board member]." The jury, ultimately, awarded no punitive damages against Ms. Young and Mr. Watts.

IV

[9] Appellants contend that the trial judge erred by not setting aside the damages awarded Mr. Crump by the jury. On the damages question, the judge instructed the jury that it could not award Mr. Crump compensatory damages for lost wages. His instruction on compensatory damages also included the following:

> The plaintiff has the burden of proving by the greater weight of the evidence that he has suffered embarrassment, humiliation, loss of professional reputation or mental anguish as a proximate result of the defendants' denial of his rights. Compensatory damages are not to be denied simply because they may not be easily [quantified]. The plaintiff must prove, however, the existence and magnitude, if any, of such injuries and damages by its greater weight.

Mental and emotional distress caused by a denial of procedural due process is compensable under Section 1983. *Carey v. Piphus*, 435 U.S. 247, 264, 55 L.Ed. 2d 252, 265 (1978). In *Carey*, the United States Supreme Court held that a plaintiff must prove injury to be entitled to compensatory damages under that statute; damages are not presumed. *Id.* The trial judge, therefore, correctly instructed the jury that Mr. Crump bore the burden of proving he had suffered injury.

At trial, Mr. Crump testified to experiencing insomnia, sleeping only "two or three hours a night." He further testified to having been unable to find employment as a teacher since his dismissal from Hickory High School. Marsha Crump, Mr. Crump's wife, testified that, following the hearing, Mr. Crump "was very depressed," that he "[had a feeling] of hopelessness" and that he "tossed and turned in bed a lot." In *Carey*, the Supreme Court said that "[although mental distress injuries are] essentially subjective, genuine injury . . . may be evidenced by one's conduct and observed by others." *Id.* at 264, 55 L.Ed. 2d at 265, n.20. We hold that Mr. Crump's evidence was sufficient to demonstrate injury.

Because we have determined that the judge correctly instructed the jury as to damages and that Mr. Crump's evidence was sufficient to demonstrate injury, our review of the judge's refusal to set aside the damages award is confined to the question of whether the judge abused his discretion. *See Thompson v. Kyles*, 48 N.C. App. 422, 426, 269 S.E. 2d 231, 234 (1980), *disc. rev. denied*, 301

N.C. 239, 283 S.E. 2d 135 (1980); *Klein v. Sears & Roebuck Co.*, 773 F. 2d 1421, 1428 (4th Cir. 1985). From our review of the evidence in this case, we cannot say that it was an abuse of discretion for the trial judge, intimately familiar with the facts of this case, to refuse to disturb the jury's award of damages. *See Klein*, 773 F. 2d at 1428. Thus, we overrule this assignment of error.

V

Appellants next assign error to the trial judge's exclusion of evidence related to the Board's deliberations at the dismissal hearing. Specifically, they complain that the judge did not allow them to put in evidence: 1) the letter from Dr. Thompson to Mr. Crump in which the former announced his intention to seek Mr. Crump's dismissal and detailed the charges against him; 2) testimony about the Board's deliberations; 3) testimony about which portions of the evidence against Mr. Crump allegedly convinced Board members to vote for his dismissal; 4) portions of the Board's findings of fact, conclusions of law, and order; and 5) those portions of this court's opinion in *Crump I* reciting the factual history of the case. Appellants allege that the exclusion of this evidence prevented the jury from determining if the alleged bias of the Board proximately caused it to dismiss Mr. Crump. They contend that the evidence would have demonstrated to the jury that Mr. Crump would have been terminated as a career teacher by any group of people called upon to decide the case.

We note that appellants made no offer of proof of the evidence they allege convinced them to vote for Mr. Crump's dismissal. On this ground alone we may hold that defendants may not now claim error. *See* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 103(a)(2) (1988). Notwithstanding appellants' failure to make an offer of proof, the transcript of the dismissal hearing enables us to review whether prejudicial error resulted from the exclusion of that evidence. *Cf. State v. Miller*, 321 N.C. 445, 452, 364 S.E. 2d 387, 391 (1988) (by failing to preserve evidence for appellate review, defendant deprived Supreme Court of necessary record from which to ascertain if alleged error was prejudicial). Therefore, we will consider all the evidence appellants contend should have been admitted by the trial judge.

[10] The judge properly prevented appellants from introducing the evidence touching upon the details of the charges against Mr. Crump. Such evidence was irrelevant, was unduly prejudicial, and

risked confusing the jury about the material issues in the case. N.C. Gen. Stat. Sec. 8C-1, R. Evid. 401, R. Evid. 403 (1988). Mr. Crump alleged he did not receive a fair and impartial hearing from the Board. The substantiality of the charges Superintendent Thompson brought against him, or their lack of merit, was not germane to the question of whether any of the Board members brought a presettled judgment into the hearing room. At trial, the Board members had every opportunity to answer Mr. Crump's allegations about their prehearing statements and conduct. The judge also allowed them to explain the answers they gave at the hearing about their lack of knowledge and participation in the case. Finally, he allowed them to testify that they had not acted out of bias against Mr. Crump. This line of inquiry kept the jury's focus on the relevant issue of impartiality.

Assuming Mr. Crump was indeed guilty of every allegation brought against him, due process still entitled him to an impartial decision maker. Even the most culpable defendant has a right to an unbiased jury. Admission of the evidence the Board sought to introduce would have permitted appellants to present Mr. Crump as an immoral person deserving of dismissal regardless of any predisposition against him by the Board. Such evidence would have improperly confused the issues before the jury.

We hold, therefore, that the trial judge correctly disallowed the jury from receiving this evidence.

Mr. Crump attempted, in his case-in-chief, to offer his own evidence concerning the charges that led to his dismissal. Significantly, and as an alternative basis of our holding, counsel for appellants objected that Mr. Crump was attempting to "retry[ ] the case that was tried before the [B]oard, and [that the case against Mr. Crump was] not the issue." The judge consistently prevented either side from addressing the allegations that had been heard by the Board.

[11] Even assuming the judge erred by excluding appellants' evidence, we conclude that appellants are estopped to complain on appeal. We analogize to the doctrine of invited error and to the "opening the door" metaphor, whereby a party may not assert error based on a course he himself pursued at trial. *See, e.g., Johnson v. Massengill*, 280 N.C. 376, 383, 186 S.E. 2d 168, 174 (1972) (party who, on cross-examination, opened door to damaging testimony cannot win new trial based on admission of testimony); *All American Life and Casualty Co. v. Oceanic Trade Alliance*

Council International, Inc., 756 F. 2d 474, 479-80 (6th Cir. 1985), *cert. denied*, 474 U.S. 819, 88 L.Ed. 2d 55 (1985) (under invited error doctrine, when injection of allegedly inadmissible evidence is attributable to action of party seeking to exclude evidence, admission is not reversible error). If the reasoning in such cases is correct, it must likewise be the case that a party who successfully objects to the admission of evidence about the charges leveled at a dismissal hearing cannot complain on appeal that he was precluded from introducing the same evidence.

We overrule this assignment of error.

VI

Appellants next object to the trial judge's ordering that the testimony of Douglas Punger be sealed. Mr. Punger sat as lawyer for the School Board during Mr. Crump's hearing and observed the Board's deliberations. At trial, the judge told defense counsel, when they sought to introduce Mr. Punger's testimony, that because all other evidence of the Board's deliberations had been excluded, Mr. Punger's evidence was to be reduced to writing and sealed for appellate purposes. One of the defense lawyers responded, "Fine. One copy left with the court."

Alleged errors based on rulings made during the trial must be called to the attention of the trial judge by an objection taken at the time the rulings are made. *See* N.C. R. Evid. 103(a)(1). Because appellants did not object to the judge's ruling on Mr. Punger's testimony, we overrule this assignment of error.

VII

Appellants' last assignment of error is to the trial judge's admission of testimony concerning Principal Williamson's alleged animosity toward Mr. Crump. Appellants argue this evidence was irrelevant. We disagree.

Mr. Crump's theory of his case was that Mr. Williamson used the charges as a pretext to dismiss him because of his cooperation in an investigation of Mr. Williamson by Superintendent Thompson. Mr. Crump's theory alleged that Mr. Williamson, through *ex parte* meetings, convinced some members of the Board to terminate Mr. Crump. His evidence about Mr. Williamson, therefore, was relevant to explain the reasons for the Board's alleged bias.

We overrule this assignment of error.

VIII

We find no error in the trial of this case. Therefore, the judgment is

Affirmed.

Judge JOHNSON concurs.

Judge WELLS dissents in part.

Judge WELLS dissenting in part.

One aspect of the majority opinion disturbs me. In the context of the Sec. 1983 claim for monetary damages, based on denial of due process, the trial court charged the jury that the bias of *one* member of the Board was sufficient to establish that plaintiff had been denied due process. The majority opinion approves that instruction, and in doing so expresses its accord with the view expressed by the Third Circuit Court of Appeals in *Berkshire Employees Association v. NLRB* as follows:

> 'The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one [person] or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.'

The Third Circuit Court in that case remanded the matter for a determination of whether a member of the Board was disqualified because of bias, and, if so, to grant plaintiff a new hearing by Board members not so disqualified.

I regard the implication of that case as vastly different from the case now before us, where the result of the trial court's instruction allowed the jury to hold the entire Board answerable in damages because of the bias of a single member. In a due process context, this result appears to be somewhat incongruous, if not bizarre.

I agree with defendant that a correct instruction on bias would specify that the jury had to find that such (impermissible) bias infected a majority of the Board members. I disagree with the statement of the Third Circuit Court that "there is no way which

. . . the influence of one upon the others can be quantitatively measured. . . ." I know no reason why a jury could not as satisfactorily sort out this kind of evidentiary challenge as well as they are regularly called upon to do in complex or difficult cases.

I perceive that the balancing process at stake here is fraught with difficulty: the entitlement of plaintiff to a fair hearing on his discharge versus the entitlement of defendant to a fair trial in this case. It appears unfair to me to hold the whole Board responsible in damages for the bias of a sole member. I therefore respectfully dissent on this issue, and I vote to award defendant a new trial.

IN THE MATTER OF: THE APPEAL OF CHARLES E. WORLEY FROM THE DECISION OF THE ALAMANCE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1986 CONCERNING THE EXEMPTION FROM PROPERTY TAX OF CERTAIN PROPERTY OF BEACON BAPTIST CHURCH

No. 8810PTC549

(Filed 21 March 1989)

1. **Taxation § 22.1— property held for future religious use— no exemption from taxation**

Because no public purpose is served by permitting land to lie unused and untaxed, *present* use, not *intended* use, controls; thus, property merely held for planned future religious purposes is not exempt. Art. V, § 2(3) of the N. C. Constitution; N.C.G.S. § 105-278.3(a) and (d).

2. **Taxation § 22.1— undeveloped property—use for recreation and spiritual retreat—present use sufficient for tax exemption**

Recreational church-related activities which occurred on church-owned property and use of the property as a spiritual retreat together constituted sufficient "present use wholly and exclusively for religious purposes" to warrant exemption from *ad valorem* taxation.

3. **Taxation § 22.1— use of lot as buffer zone for church—tax exempt use**

Use of a lot as a buffer zone to screen a church from industrial exposure was a tax exempt use, since use of the adjacent undeveloped land as a buffer zone was reasonably

necessary for the convenient use of church buildings, and use of the lot as a buffer zone to protect the sanctity and serenity of the church from encroaching industrial development was a permissible "religious purpose" and "present use" entitling the property to exemption.

APPEAL by the County of Alamance and Beacon Baptist Church from the North Carolina Property Tax Commission. Final Decision entered 10 March 1988. Heard in the Court of Appeals 11 January 1989.

County Attorney S. C. Kitchen for Alamance County, appellant.

Tuggle, Duggins, Meschan & Elrod, P.A., by Carolyn J. Woodruff, for Beacon Baptist Church, appellant.

Charles E. Worley, pro se appellee.

BECTON, Judge.

Beacon Baptist Church and Alamance County appeal from a Property Tax Commission decision denying tax exemption for a 5.29-acre parcel of land owned by the church. (Appellants do not challenge that part of the decision granting an exemption for the church's remaining property.) Appellants contend that the parcel in dispute was tax exempt because it was "wholly and exclusively used for religious purposes," as required by statute. We agree, and reverse the challenged portion of the Commission decision.

I

In 1986, Beacon Baptist Church sought a "religious purposes" exemption from *ad valorem* taxation for all of the real property it owned. The exemption was granted by the Alamance County Board of Equalization and Review. Charles E. Worley, a citizen of Alamance County, appealed the decision to the North Carolina Property Tax Commission, contending that the property was not entitled to exemption because, in his view, the land was merely being held for expansion by the church and was not wholly and exclusively used for religious purposes.

The following evidence was presented at the Commission hearing.

Beacon has experienced tremendous growth since the church was founded, expanding from 29 people meeting in a rented hall

in 1973 to as many as 475 people attending services at the church complex in 1986. Over the years, Beacon acquired three adjacent lots as its need for expansion increased and as the land became available.

As of 1 January 1986, the assessment date, Beacon owned 19.18 contiguous acres of land, designated as Lots 33, 34, and 37 on the Alamance County tax map. Lot 34 (8.62 acres) was purchased in 1973, and Lot 33 (5.27 acres) was purchased in 1977. Improvements made to Lots 33 and 34 consisted of a sanctuary building, an education building, parking lots, playground areas, and storage facilities. The 5.29-acre parcel in dispute, Lot 37, was purchased in 1985. Although an architect had performed a space study plan regarding existing and proposed facilities for the Beacon property, no improvements had been made to Lot 37 by the assessment date. The lot remained in a natural, largely wooded state.

Beacon's property and the surrounding land had been zoned for industrial use. Beacon's leaders decided to purchase Lot 37 in 1985 after they learned that the property was on the market and that a potential buyer intended to build a textile plant there. The church was already bounded by a molded plastics plant and a textile plant, and construction of an industrial park to the rear of the church had been proposed. According to Beacon's minister, Lot 37 was acquired both to serve as a buffer zone between the church grounds and the burgeoning industrial area surrounding it, and to hold the land for projected future expansion of church facilities.

Although Lots 33 and 34 were used extensively for church-related activities, comparatively less activity took place on Lot 37. The following activities occurred there between the date of purchase and the date of assessment. First, Lot 37 was regularly used as a spiritual retreat by men from the Alamance Rescue Mission, a church-affiliated organization benefiting substance abusers and the homeless. Beacon members picked up the men at the Mission in downtown Burlington and transported them to the church to attend services. Before and after services, a number of the men walked through the wooded sections of Lot 37, enjoying the area's solitude, peacefulness and natural beauty. Second, Beacon's youth groups ("Awanas" and "Pro-Teens"), part of the church's active youth ministry, used Lot 37 for recreational activities: a snowball fight was held there, and the Pro-Teens group selected

campsites in wooded sections of the lot to be used to satisfy certain group requirements. Third, the property was made available for community recreation, including hunting. Lot 37 was never used for a commercial purpose.

After hearing the evidence, the Commission found that the use of Lot 37 by men from the Rescue Mission "contribute[d] to the success of the church's programs for these men. . . ." The Commission likewise concluded that "the organized activities of the Awan[a]s and Pro-Teens groups [were] activities that demonstrate[d] and further[ed] the beliefs and objectives of Beacon Baptist Church." The Commission made no findings regarding the use of the property as a buffer zone.

The Commission concluded that "Lot 37 . . . [was] purchased, not because the church needed the land immediately, but in order to prevent the purchase of the lot by an industrial user and to preserve the lot for *future* use by the church. . . ." (Emphasis supplied.) The Commission further concluded that the use made of Lot 37 was insufficient to support exemption. It denied the exemption, holding that "[t]he church did not *use* this lot wholly and exclusively for religious purposes. . . ." (Emphasis supplied.)

Appellants contend on appeal that the Commission decision was unsupported by the evidence and that the Commission erred as a matter of law in denying the church an exemption for Lot 37. Appellants assert that the activities occurring on the property, as well as the lot's function as a buffer, constituted sufficient "present use" for "religious purposes" to warrant exemption.

II

We first address principles governing review of this case.

A. *Standard of Review*

Appellate review of Property Tax Commission decisions is governed by N.C. Gen. Stat. Sec. 105-345.2 (1985). That section permits us to grant relief if, based on our review of the whole record, it appears that the taxpayer's substantial rights have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are, among other things, "[a]ffected by . . . errors of law" or are "[u]nsupported by competent, material and substantial evidence in view of the entire record as submitted." *Id.* We must consider all of the evidence in the record, including "evidence contradictory to the evidence on which the [Commission] decision relies," to determine whether the decision "has a rational

basis in the evidence." *In re Southview Presbyterian Church*, 62 N.C. App. 45, 47, 302 S.E. 2d 298, 299 (1983), *disc. rev. denied*, 309 N.C. 820, 310 S.E. 2d 354 (1983).

B. *"Religious Purposes" Exemption*

Article V, Section 2 of the North Carolina Constitution authorizes the General Assembly to "exempt . . . property held for . . . religious purposes" from *ad valorem* taxation. N.C. Const., Art. V, Sec. 2(3) (1984). Under Section 105-278.3 of the General Statutes, property consisting of "[b]uildings, the land they actually occupy, and *additional adjacent land reasonably necessary for the convenient use of any building[s]*" is exempt from taxation if the property is *"[w]holly and exclusively used by its owners for religious purposes."* N.C. Gen. Stat. Sec. 105-278.3(a) (1985) (emphasis added). A religious purpose "pertains to the practicing, teaching, and setting forth of a religion. Although worship is the most common religious purpose, the term encompasses other *activities that demonstrate and further the beliefs and objectives* of a given church or religious body." N.C. Gen. Stat. Sec. 105-278.3(d)(1) (emphasis added).

The theory behind the "religious purposes" property tax exemption is that by relieving religious organizations of the burden of taxation, these groups can devote funds to other beneficial programs, thereby better serving the public interest. However, a competing consideration is that granting exemptions to some increases the tax burden borne by others. Accordingly, "[s]tatutes exempting specific property from taxation because of the purposes for which [the] property is held and used . . . should be construed strictly . . . against exemption and in favor of taxation." *Harrison v. Guilford County*, 218 N.C. 718, 721, 12 S.E. 2d 269, 272 (1940). This does not mean that the statute should be construed narrowly or stintingly. *Id.* at 722, 12 S.E. 2d at 272. It simply means that "everything [should] be excluded from [the statute's] operation which does not clearly come within the scope of the language used. . . ." *Id.* (citation omitted).

C. *"Present Use" of Property Controls*

[1] The rule in North Carolina is that unless property is "presently used" for tax exempt purposes, it is not tax exempt. *See Southview*, 62 N.C. App. at 50-51, 302 S.E. 2d at 300-01. Because no public purpose is served by permitting land to lie unused and untaxed, *present* use, not *intended* use, controls. *See id.* Thus,

property merely held for planned future religious purposes is not exempt. *Id.*

We now turn to the appellants' contentions.

III

[2] We conclude that the Commission erred in holding that the activities taking place on Lot 37 did not constitute present use wholly and exclusively for religious purposes.

First, following the lead of *Southview*, we conclude that the recreational use of Lot 37 was present use for religious purposes. In *Southview*, as here, a church owned about 20 acres of land, only a portion of which contained improvements. The remaining vacant land, as here, was used for recreational activities, and had never been used for commercial purposes. *Cf. In re Forestry Foundation*, 296 N.C. 330, 250 S.E. 2d 236 (1979) (use of property primarily for commercial purposes precluded exemption). The *Southview* Court held that the property in dispute was exempt because the community recreational activities taking place there constituted a present use wholly and exclusively for religious purposes. 62 N.C. App. at 51, 302 S.E. 2d at 301. Although it is not clear from the record in this case what *community* recreational use of the property was made, beyond hunting, it is undisputed that the *church youth groups* used Lot 37 for recreational church-related activities.

Second, we conclude that natural areas reserved—and *used*—as a spiritual retreat should be exempt from *ad valorem* taxation on "religious purposes" grounds. *Accord Order Minor Conventuals v. Lee*, 64 A.D. 2d 227, 409 N.Y.S. 2d 667 (1978) (property preserved in its natural state "to allow communication with God in solitude" was exempt); *Christward Ministry v. San Diego County*, 271 Cal. App. 2d 805, 76 Cal. Rptr. 854 (1969) (keeping land in its wild state reasonably necessary for use as religious retreat).

Finally, Lot 37 was not removed from the operation of the exemption statute simply because it was also being held for future use. *Cf. Harrison*, 218 N.C. 718, 12 S.E. 2d 269 (property purchased and held for particular future use nonetheless exempt since it was presently devoted to some other religious purpose).

Although we decline to hold that permitting hunting on Lot 37 was an exempt "religious purpose," we conclude that the other recreational activities that occurred there and the use of the prop-

erty as a spiritual retreat together constituted sufficient "present use wholly and exclusively for religious purposes" to warrant exemption. The Commission erred as a matter of law by concluding otherwise.

IV

[3] As an alternative basis for our holding, we conclude that the use of Lot 37 as a buffer zone to screen the church from industrial exposure was an exempt use.

First, in our view, use of the adjacent undeveloped land as a buffer zone was "reasonably necessary for the convenient use of [church] buildings." *See generally* N.C. Gen. Stat. Sec. 105-278.3(a); *Harrison*, 218 N.C. at 721, 12 S.E. 2d at 272; *Southview*, 62 N.C. App. at 51, 302 S.E. 2d at 301. Our view is supported by this court's decision in *In re Wake Forest University*, 51 N.C. App. 516, 277 S.E. 2d 91 (1981), *disc. rev. denied*, 303 N.C. 544, 281 S.E. 2d 391, *pet. for reh'g denied*, 304 N.C. 195, 285 S.E. 2d 98 (1981). In *Wake Forest*, this court implicitly recognized that land used as a buffer was "reasonably necessary for the convenient use" of the University's stadium. There, a 38-acre parking lot was shared by the University and a corporation that donated the land. The remaining 10 acres of the donated plot were covered with trees and gullies, and separated the University stadium from the parking lot and the adjoining corporation. After reciting the rule that "additional land reasonably necessary for the convenient use of . . . improvements shall be exempted from taxation," and noting that "it is the use to which the property is dedicated [that] controls," the court held that the entire portion of the donated land not used by the corporation—*including the 10-acre buffer zone*—was "wholly and exclusively used for [exempt] purposes." *Id.* at 520, 277 S.E. 2d at 94.

Second, we conclude that the use of Lot 37 as a buffer zone to protect the sanctity and serenity of the church from encroaching industrial development was a permissible "religious purpose" and "present use" entitling the property to exemption. *Accord Grady v. Hausman*, 509 So. 2d 1316 (Fla. Dist. Ct. App. 1987) (property adjoining church left in its natural state provided a tranquil, private setting contributing to the spirituality of the parish); *Order Minor Conventuals*, 409 N.Y.S. 2d at 669 (retaining wooded land as buffer from surrounding development was exempt religious purpose); *Christward Ministry*, 76 Cal. Rptr. at 856 (buffer reasonably

necessary to protect religious use of remaining property); *City of Houston v. Cohen*, 204 S.W. 2d 671 (Tex. Civ. App. 1947) (vacant lot adjacent to church served as a barrier to noise and confusion incident to downtown traffic); *People ex rel. Outer Court, Inc. v. Miller*, 161 Misc. 603, 292 N.Y.S. 674 (1936) (additional property acquired to protect boundaries from encroaching development was exempt). *Cf. In re Major Deegan Boulevard*, 131 N.Y.S. 2d 330 (1954) (preventing historical structure from becoming hemmed in by unsuitable buildings on nearby land was exempt purpose); *Board of Assessors v. Cunningham Foundation*, 305 Mass. 411, 26 N.E. 2d 335 (1940) (tract screening hospital and park from surrounding development was exempt). *But see Kerrville Indep. School Dist. v. Southwest Texas Encampment Ass'n*, 673 S.W. 2d 256 (Tex. Ct. App. 1984) (23 lots across street from exempt 63-acre religious campground used solely to further the atmosphere of rustic hill country were not used for religious purpose).

Although the uncontradicted evidence presented at the hearing demonstrated the church's need for a buffer zone to protect it from encroaching industrial development, the Commission failed to consider that evidence. Accordingly, we hold that the decision was unsupported by competent, material, and substantial evidence appearing in the record. However, we emphasize the narrowness of our holding. We do not attempt here to draw bright lines or to quantify the amount of acreage a church reasonably may purchase for the purpose of establishing a buffer zone. Each case turns upon its unique facts, and appellate courts will view with a careful eye any acquisition of extensive acreage under less compelling facts.

V

The Commission erred in holding that Beacon Baptist Church did not use Lot 37 wholly and exclusively for religious purposes. Accordingly, we reverse that portion of the Commission decision which denies Lot 37 exemption from *ad valorem* taxation.

Reversed.

Judges WELLS and JOHNSON concur.

LINDA S. LEAKE, DONALD C. KORDICH, RALPH A. CARLEN, CLAIRE R. CARLEN, JOAN FRASER, BRIAN HAILES, MONICA JANET SINCLAIR, LINDA MILLER, BETH ANNE BARBUTI, FREDERICK L. CROOM, JOY CROOM, MARY MARGARET SAWYER, BRUCE WILLIAMSON, CATHERINE R. WILLIAMSON, JOY WEISS, K. RAY ALLEN, AND GEORGE BEDNARZ v. SUNBELT LIMITED OF RALEIGH, HOLLAND GAINES AND S. ALAN GAINES

No. 8810SC473

(Filed 21 March 1989)

1. **Fraud § 12— sale of townhouses—misrepresentation about buffer zone—sufficiency of evidence**

Plaintiffs who bought townhouses allegedly on the basis of false answers given to them by defendants' agents concerning a proposed road and trees behind the property in question were entitled to have their fraudulent misrepresentation claim heard by a jury, and their recovery was not precluded as a matter of law by a plat within their respective chains of title which showed that a proposed thoroughfare was to be built on the adjoining property.

2. **Fraud § 9— housing development—failure to build promised recreational facilities—pleadings insufficient**

The trial court properly granted summary judgment for defendants on plaintiffs' claim of fraudulent misrepresentation by defendants concerning the building of recreational facilities in the housing development where plaintiffs purchased townhouses, since plaintiffs failed to allege that defendants knew when the representations were made that no recreational facilities would be built, and N.C.G.S. § 1A-1, Rule 9(b) requires that fraud be pleaded with particularity.

3. **Unfair Competition § 1— unfair or deceptive trade practice —allegation of intent not required**

Plaintiffs did not need to allege intent in their Chapter 75 claim based on defendants' representations that they would build certain recreational facilities, since intent is irrelevant in a Chapter 75 claim; plaintiffs needed only to show that defendants' actions were unfair or deceptive; defendants' sales representative testified that he told prospective clients that defendants would build the facilities, but he did not explain to every prospective buyer that the building of the facilities

was dependent upon an affirmative vote of the homeowners' association and a concomitant raise in homeowners' association dues; whether the sales representative explained this to plaintiffs was a question of fact for the jury; and the trial court thus erred in granting summary judgment for defendants on the issue of unfair and deceptive trade practices relating to the recreational facilities.

4. Trespass § 2— intentional infliction of emotional distress— insufficiency of evidence

The trial court properly entered summary judgment for defendants on plaintiffs' claim for intentional infliction of emotional distress where plaintiffs presented no evidence which showed that defendants *intended* to cause emotional distress in making representations concerning a proposed road and trees behind the property which they sold to plaintiffs.

APPEAL by plaintiffs Barbuti and Fraser and defendants from *Brannon, Judge*. Order entered 10 March 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 3 November 1988.

Plaintiffs allege that agents of the corporation Sunbelt Limited of Raleigh (Sunbelt), through fraudulent misrepresentations, induced them to buy townhouses in a "planned solar townhome community" named Sunscape. Defendants Holland Gaines and S. Alan Gaines are president and secretary respectively of corporate defendant Sunbelt. Each of the plaintiffs bought a townhouse on Sunscape Lane in the Sunscape community. When the plaintiffs each bought their townhomes, a large stand of trees was located about fifty feet behind their homes. The trees were on adjoining land just south of plaintiffs' lots. According to plaintiffs the trees were a major reason for buying because they afforded their individual lots more privacy than other lots within the development. In fact, defendant Holland Gaines told one of his sales representatives that the trees would make those particular townhouses easier to market.

Shortly after the plaintiffs bought their homes they learned that a five lane highway was being built within fifty feet of their homes. As a result of the highway construction, virtually all of the trees behind their homes were bulldozed. Plaintiffs then brought this action for fraud, unfair and deceptive trade practices, and intentional infliction of emotional distress.

After discovery defendants moved for summary judgment. The trial court granted summary judgment against plaintiffs Catherine Williamson and Monica Janet Sinclair because neither of them were grantees of any property at Sunscape. Neither Williamson nor Sinclair appealed. The trial court's order noted that there was no dispute as to material facts and granted summary judgment in favor of defendants against plaintiffs Beth Anne Barbuti (Barbuti) and Joan Fraser (Fraser). Both Barbuti and Fraser appeal. The trial court denied defendants' summary judgment motion as to the remaining thirteen plaintiffs. From this portion of the trial court's order, defendants appeal.

Thorp, Fuller & Slifkin, by James C. Fuller, Anne R. Slifkin, and Margaret E. Karr, for plaintiff-appellants/appellees.

McMillan, Kimzey & Smith, by James M. Kimzey and Katherine E. Jean, for defendant-appellees/appellants.

EAGLES, Judge.

Plaintiffs Barbuti and Fraser appeal the trial court's order of summary judgment against them. The defendants appeal the trial court's failure to grant their motion for summary judgment against thirteen other plaintiffs. As to plaintiffs Barbuti and Fraser, we affirm in part and reverse in part. Defendants' appeal from denial of their summary judgment motion is interlocutory and, accordingly, is dismissed.

Summary judgment is a drastic remedy. The purpose is to save time and money for litigants in those instances where there is no dispute as to any material fact. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975). Upon appeal, the standard of review is whether there is a 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). The movant has the burden of showing that summary judgment is appropriate. *Development Corp. v. James*, 300 N.C. 631, 268 S.E. 2d 205 (1980). Furthermore, in considering summary judgment motions, we review the record in the light most favorable to the nonmovant. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). Summary judgment is also appropriate when the movant proves the nonexistence of an essential element of his opponent's claim. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974).

[1] Plaintiffs Barbuti and Fraser allege fraudulent misrepresentation, intentional infliction of emotional distress, and unfair and deceptive trade practices on the part of the defendants. More specifically, Barbuti and Fraser claim that defendants' agent Tim Blackson (Blackson), a sales representative at Sunscape, lied to them about how close to their property a proposed road was to be built and how a stand of trees would be used to buffer their properties from any future road. They also allege that Blackson misrepresented that certain recreational facilities were to be built by Sunbelt for the homeowners' use. Finally, they argue that these acts constitute unfair and deceptive trade practices as well as an intentional infliction of emotional distress.

Viewed in the light most favorable to plaintiffs Barbuti and Fraser, the evidence shows the following. At his deposition Blackson stated that he had been told by defendant Holland Gaines that Gaines owned the land behind Sunscape on which the trees stand. Gaines further told Blackson that the trees would remain as a buffer from any road that might be built and that the buffer would make those homes easier to market. Sometime later Blackson asked Terry Pope, the sales manager at Sunscape, for more information about the trees. Pope indicated that the buffer of trees would be about one hundred fifty feet deep. Because Blackson was still unsure what to tell prospective clients about the trees, Pope sent him to another development to see how the trees there looked. Pope said that the buffer at Sunscape would be like the other development. The stand of trees between the road and the homes at that development was about one hundred fifty feet deep. After he had seen the other development Blackson told prospective purchasers that if a road was developed behind their properties, it would be a two lane road and there would be trees one hundred fifty feet deep acting as a buffer between the homes and the road.

Blackson also testified that he was to "talk up" the recreational facilities planned for the development. These planned facilities included a tennis court, swimming pool, and clubhouse. Blackson, however, admitted that he did not explain to all his clients that the facilities would be built only with the approval of the homeowners' association or that, in effect, the homeowners would have to raise their association dues to pay for the facilities.

Shirley Collins, another sales agent at Sunscape, stated by affidavit that Holland Gaines instructed her "not to tell prospective

buyers of the proposed thoroughfare unless asked. Further, if asked, [I was] to represent that the road, if ever built, would be quite a distance from the townhomes and that a buffer of trees and landscaping would always remain."

Plaintiff Barbuti stated that she first asked Blackson about the trees behind the property when she was viewing a home different from the one she bought. Blackson told her that the property she bought would extend about fifty feet behind the townhouse. He also said that the Sunscape community owned another one hundred fifty feet beyond that as common property. Blackson pointed out the possibility of a two lane road being built on that adjoining property, but that any road would be about two hundred feet behind the townhomes.

Barbuti later had a second conversation with Blackson in which he confirmed the information he had previously told her. This second conversation with Blackson took place in the Sunscape model home. Blackson used a map hanging on the wall to illustrate his comments. At this time Blackson and Barbuti again discussed the trees behind the lots.

Plaintiff Fraser claimed that she talked to Blackson about the wooded area behind her townhome as being a privacy factor. She thought that the trees might mean that there would be reduced traffic and noise around her home. At her deposition Fraser testified that she was never told that there would be a major road behind her house. She further stated that she also relied on the map in the model which showed that there were trees behind her house with no indication of a road to be built there.

Defendants' sole argument as to the fraudulent misrepresentation claim about the road and trees is that a plat within Barbuti's and Fraser's respective chains of title showed a proposed thoroughfare was to be built on the adjoining property. Defendants contend that this constitutes record notice of the proposed roadway and precludes their recovery as a matter of law. We disagree.

Defendants claim that our decision in *Highway Comm. v. Wortman*, 4 N.C. App. 546, 167 S.E. 2d 462 (1969), directly controls here. We find *Wortman* distinguishable. *Wortman* involved a condemnation proceeding over defendant's property to enable the state to convert a two lane highway to a four lane highway. The issues

there involved the extent of the State's right of way over defendants' property and the amount of compensation due defendants.

The instant case is not a condemnation proceeding concerned with rights of way and compensation. Here the questions are considerably different. The issue before us is whether the false answers given by defendants' agents to Barbuti's and Fraser's questions concerning the proposed road and the trees induced Barbuti and Fraser to purchase the townhouses located at Sunscape Lane. The answers to these questions are not easily found in even a diligent title examination. Accordingly, we hold that whether or not plaintiffs Barbuti's and Fraser's reliance on defendants' statements was reasonable is a jury question.

Moreover, our Supreme Court has stated that where a seller makes a representation to a prospective purchaser to induce the purchaser to buy and the purchaser relies upon the representation in making his purchase, it is for the jury to determine whether the purchaser's reliance was reasonable if he could have discovered the representation to be false through a diligent title search. *Fox v. Southern Appliances*, 264 N.C. 267, 141 S.E. 2d 522 (1965). This rule is an attempt by the courts to suppress fraud and also to discourage negligence on the part of purchasers. *Id.* at 272, 141 S.E. 2d at 526; *see also Kleinfelter v. Developers, Inc.*, 44 N.C. App. 561, 261 S.E. 2d 498 (1980).

Plaintiffs Barbuti and Fraser next allege that defendants' acts constitute unfair and deceptive trade practices in violation of G.S. 75-1.1. Our Supreme Court has stated that "[p]roof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts." *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E. 2d 342, 346 (1975). Because of our ruling on the previous fraud issue, summary judgment may not be granted on plaintiffs' claim that defendants' representations concerning the trees constitute a Chapter 75 violation.

[2] Plaintiffs Barbuti and Fraser further allege a fraudulent misrepresentation by defendants concerning the building of recreational facilities at Sunscape. This representation did not concern a past or existing fact. Normally, a promissory misrepresentation will not support an allegation of fraud. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). However, when a promissory misrepresentation is made with an intent to deceive the purchaser

and at the time of making the misrepresentation the defendant has no intention of performing his promise, fraud may be found. *Id.*

Defendants contend that plaintiffs Barbuti and Fraser failed to properly plead each of the essential elements of fraud in their fraud claim concerning the building of recreational facilities. Specifically, defendants argue that Barbuti and Fraser failed to allege that defendants knew when the representations were made that no recreational facilities would be built. We agree. Rule 9(b) of the North Carolina Rules of Civil Procedure requires that fraud be pleaded with particularity. Since plaintiffs Barbuti and Fraser failed to allege defendants' intent at the time the representations were made, we affirm that portion of the trial court's order granting summary judgment for defendants on the fraudulent misrepresentation of recreational facilities claim.

[3] On the other hand, plaintiffs Barbuti and Fraser need not allege intent in their Chapter 75 claim based on defendants' representations that they would build certain recreational facilities. Intent is irrelevant in a Chapter 75 claim. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981). Plaintiffs need only show that defendants' actions were "unfair or deceptive acts or practices in or affecting commerce." G.S. 75-1.1.

The *Marshall* Court explained that whether a practice is unfair or deceptive depends upon the particular facts of each case. Here Blackson testified that he told prospective clients that defendants would build a swimming pool, tennis court, and clubhouse. He did not, however, explain to every prospective buyer that the building of these facilities was dependent upon an affirmative vote of the homeowners' association and a concomitant raise in homeowners' association dues. Whether Blackson explained this to plaintiffs Barbuti and Fraser is a question of fact for the jury. Accordingly, we reverse that portion of the trial court's order granting summary judgment for defendants on the issue of unfair and deceptive trade practices relating to the recreational facilities.

[4] Plaintiffs Barbuti's and Fraser's final claim is that defendants' conduct amounts to an intentional infliction of emotional distress. We disagree.

The Supreme Court in *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981), noted that through a motion for summary judgment a defendant may force plaintiff to produce a forecast

of evidence showing that plaintiff can make a *prima facie* case at trial. For a claim of intentional infliction of emotional distress a *prima facie* case consists of "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Id.* at 452, 276 S.E. 2d at 335.

Defendants contend that their evidence in support of its summary judgment motion shows that plaintiffs Barbuti and Fraser cannot demonstrate that defendants intended to cause them emotional distress. Even when viewing the record in the light most favorable to plaintiffs Barbuti and Fraser, we hold that they have presented no evidence which shows that defendants *intended* to cause emotional distress. Accordingly, we affirm this portion of the trial court's order.

Defendants appeal the trial court's denial of their summary judgment motion as to the other thirteen plaintiffs. We dismiss this appeal as interlocutory. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). We further note that the trial court's order does not affect a substantial right because avoiding trial on the merits is not a substantial right. *Horne v. Nobility Homes, Inc.*, 88 N.C. App. 476, 363 S.E. 2d 642 (1988).

In summary, we affirm the trial court's order of summary judgment against plaintiffs Barbuti and Fraser on their claims of intentional infliction of emotional distress and fraudulent misrepresentations concerning the construction of recreational facilities at Sunscape. We reverse and remand that portion of the trial court's order granting summary judgment against plaintiffs Barbuti and Fraser on their remaining claim of fraudulent misrepresentation and both claims for unfair and deceptive trade practices in violation of Chapter 75. We dismiss defendants' appeal as interlocutory.

As to plaintiffs' appeal—affirmed in part; reversed and remanded in part.

As to defendants' appeal—dismissed.

Judges BECTON and GREENE concur.

STATE OF NORTH CAROLINA v. JAMES ANDREW BLACKMAN

No. 8810SC603

(Filed 21 March 1989)

1. **Criminal Law § 75.7— no custodial interrogation—Miranda warnings not required**

The trial court properly concluded that police detectives did not subject defendant to custodial interrogations, and the court consequently did not err by refusing to suppress defendant's statements on the ground that he did not receive *Miranda* warnings where defendant was free to come and go as he pleased during all interviews; he asked for and received breaks to get coffee or go to the bathroom unescorted; the detectives took pains to ask defendant on tape if anybody was forcing him to stay, and he typically responded that he had come to the station and was talking to police of his own free will; defendant, on several occasions, telephoned the detectives and, on his own, went to the police station to talk to them; none of the interview sessions were of long duration; the detectives dressed in civilian clothing; and they did not expose their weapons to defendant.

2. **Criminal Law § 75— detectives' use of psychiatric history—detectives ingratiating themselves with defendant—no coercion of confession**

Detectives' use of defendant's psychiatric history to guide their interrogative tactics and their ingratiating themselves with defendant did not constitute coercion of his confession.

3. **Criminal Law § 75.14— mental capacity to confess**

Though there was conflicting medical evidence as to defendant's mental state, his statements to detectives were not rendered involuntary by his mental condition, and defendant was legally competent to make those statements to the detectives.

APPEAL by defendant from *Barnette (Henry V.), Judge*. Judgment entered 14 January 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 23 January 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William P. Hart, for the State.

Thomas C. Manning for defendant-appellant.

BECTON, Judge.

On 12 December 1983, a grand jury indicted defendant, James Andrew Blackman, for the murder of Helena Peyton. At the 6 August 1987 Criminal Term of the Wake County Superior Court, defendant made a motion *in limine* to suppress statements he had made to two Raleigh police detectives. In an order entered 31 August 1987, the Honorable Wiley F. Bowen, Judge, denied defendant's motion to suppress. Defendant entered a plea of guilty to second degree murder before the Honorable Henry V. Barnette, Jr., Judge, at the 14 January 1988 Criminal Term of the Wake County Superior Court. Judge Barnette sentenced defendant to life imprisonment. The State agreed that, as a condition of the plea, defendant would appeal the denial of his motion *in limine* along with his appeal of the judgment and sentence. We affirm.

I

On 28 September 1979, Helena Peyton, a student at St. Augustine's College, was stabbed to death in a sixth-floor bathroom of the women's dormitory, Latham Hall. Police investigators made a composite sketch of a man witnesses had seen leaving the building. They also recovered a blood-stained garment from woods nearby. The police, however, did not initially apprehend any suspect in the killing.

In the spring and summer of 1983, Detectives J. C. Holder and A. C. Munday of the Raleigh Police Department Major Crimes Task Force received information that defendant, James Andrew Blackman, had been making inculpatory statements about the Peyton murder. At the time they received these reports, defendant was a patient at Dorothea Dix Hospital. Holder and Munday began to investigate defendant; their inquiry included obtaining and reading defendant's voluminous psychiatric records.

When defendant left the hospital on 23 September 1983, Holder and Munday made contact with him in downtown Raleigh and told him they wanted to speak with him. On 25 October, a police officer brought defendant to the investigative division offices to meet with Holder and Munday. With defendant's permission, the detectives

tape recorded the conversation. After the interview, defendant and the detectives went to St. Augustine's College. Defendant pointed to Latham Hall and said, "That's the girls' [or girl's] dorm." In addition, defendant walked down a path into the woods where the bloodied garment had been found following the Peyton murder.

The next day, defendant came back to the police station, spoke once more with Holder and Munday, and returned with them to the college campus. Defendant took the detectives to the sixth-floor bathroom in Latham Hall, showed them the last toilet stall, and told them, "This is where it happened." He then walked to the sink, washed his hands, and said, "This is what I did."

Between 28 October and 7 December, defendant participated in eight tape-recorded conversations; seven included Holder and Munday, and one included Holder and an assistant district attorney. During these sessions, defendant, in essence, admitted killing Helena Peyton. On 7 December, Holder and Munday arrested defendant for the murder.

Concomitant with his dealings with the police, defendant received extensive psychiatric treatment. Between 21 January 1983 and 7 December 1983, defendant was hospitalized at Dorothea Dix four times. The first hospitalization ran from 21 January until 23 September, the second from 2 October until 18 October, the third from 28 October until 18 November, and the fourth from 28 November until 7 December. Defendant's psychiatric reports from this period indicate that he was twice diagnosed as suffering from atypical psychosis.

After his arrest, defendant filed a motion *in limine* to suppress the statements he had made to the detectives. Following a *voir dire* hearing, the judge denied defendant's motion. Defendant subsequently pleaded guilty to second degree murder, preserving his right to appeal the denial of his motion *in limine* as a condition of the plea. The only issue for our consideration is whether the judge should have granted defendant's motion to suppress.

II

Defendant contends his statements were inadmissible on two grounds. First, he contends he did not make the statements knowingly and voluntarily. Stated another way, defendant alleges he was not mentally competent when he made his admissions. Second, defendant claims that he made the statements during custodial

interrogations without the benefit of *Miranda* warnings. We shall first address the question of custody.

A

The State urges us to reject defendant's *Miranda* challenge on the grounds that defendant has not excepted to the judge's finding that no custodial interrogations took place prior to defendant's arrest. N.C. R. App. P. 10(a) (1988). We choose to dispose of this issue on its merits, however, because the question of custody is relevant to whether defendant made his statements knowingly and voluntarily.

A person must be fully advised of his constitutional rights before any custodial interrogation may take place. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966); *State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E. 2d 857, 859 (1985). " '[T]he only relevant inquiry' " to make in determining whether a person was in the custody of the police during interrogation " 'is [to ask] how a reasonable man in the suspect's position would have understood his situation.' " *Harvey*, 78 N.C. App. at 238, 336 S.E. 2d at 860 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L.Ed. 2d 317, 336 (1984)). In short, "custody" depends upon whether a reasonable person would have believed he was free to leave the company of the police. *See State v. Davis*, 305 N.C. 400, 410, 290 S.E. 2d 574, 580-81 (1982) (citing *U.S. v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed. 2d 497, 509 (1980)). *Miranda* warnings are not required simply because questioning takes place at the police station, or because the questioned person is a suspect. *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L.Ed. 2d 714, 719 (1977); *see also State v. Perry*, 298 N.C. 502, 509, 259 S.E. 2d 496, 500-01 (1979).

[1] The judge concluded as a matter of law that Holder and Munday never subjected defendant to a custodial interrogation prior to his arrest. The judge based this conclusion on his finding of fact that "[d]uring all interviews [d]efendant was free to come and go as he pleased and asked for and received breaks to get coffee or go to the bathroom unescorted." The detectives took pains, moreover, to ask defendant, on tape, such questions as "Nobody is forcing you to stay here, [are] they?" Defendant typically answered that he had come to the station and was talking to the police "on [his] own will." Defendant, on several occasions, telephoned Holder and Munday and, on his own, came to the station to talk with them. Moreover, the judge found that none of the interview

sessions was of long duration, that Holder and Munday dressed in civilian clothing, and that they did not expose their weapons to defendant. In our view, a reasonable person in defendant's position would not have believed he was in police custody. The judge correctly concluded, therefore, that the detectives did not subject defendant to custodial interrogations. Consequently, the judge did not err by refusing to suppress the statements on the ground that defendant did not receive *Miranda* warnings. We overrule this assignment of error.

B

Defendant also contends that he was not mentally competent on the occasions he spoke to Holder and Munday and that his incriminating statements, therefore, should have been suppressed. *See Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed. 2d 242 (1960); *State v. Ross*, 297 N.C. 137, 141, 254 S.E. 2d 10, 12 (1979). Defendant argues that his lack of competence rendered his admissions "involuntary" under the due process clause of the fourteenth amendment. We begin by noting that, absent police coercion, there is no federal due process ground for finding that a confession is involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167, 93 L.Ed. 2d 473, 484 (1986); *State v. Adams*, 85 N.C. App. 200, 203, 354 S.E. 2d 338, 340 (1987). Rather, the admissibility of an uncoerced statement must be determined by state rules of evidence. *Connelly*, 479 U.S. at 159, 93 L.Ed. 2d at 479; *Adams*, 85 N.C. App. at 203, 354 S.E. 2d at 340.

[2] Defendant asserts that Holder and Munday's use of his psychiatric history to guide their interrogative tactics constituted coercion. We reject this contention. Holder and Munday clearly ingratiated themselves with defendant and presented themselves as his friends. We are not prepared to hold, however, that simply because the police adopt a strategy for their dealings with a suspect that that strategy is therefore coercive. At no time did these detectives force defendant to submit to any of the ordeals traditionally associated with coercive interrogations. *See, e.g., Blackburn*, 361 U.S. at 207-08, 4 L.Ed. 2d at 249 (suspect interrogated for eight to nine hours in a tiny room). We hold, therefore, that the interviews in which defendant participated with Holder and Munday were not coercive, and thus, we look to our state rules to decide whether the judge should have suppressed defendant's statements

on the ground that defendant was incompetent. *Adams*, 85 N.C. App. at 203, 354 S.E. 2d at 340.

[3] To determine whether a defendant was or was not competent at the time he incriminated himself, this court must look at the totality of the circumstances surrounding the defendant and his admissions. *Ross*, 297 N.C. at 141, 254 S.E. 2d at 12. A critical stricture on our inquiry is that the findings of fact made by the trial judge at the *voir dire* hearing are conclusive and binding upon us if those findings are supported by competent evidence in the record. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E. 2d 53, 59 (1985).

We have already determined that defendant was not in police custody at the time he made his admissions, and that Holder and Munday did not coerce defendant into making the statements he did. We now turn our examination to the medical evidence in this case. That evidence indicated that defendant has never had a sound mental state. The evidence conflicted, however, as to the severity of defendant's disorder. Indeed, the evidence conflicted as to the nature of the illness, or illnesses, from which defendant has suffered.

Dr. Walter Scarborough, Jr., a psychiatrist, reviewed defendant's medical records, read the transcript of defendant's conversations with Holder and Munday, and interviewed defendant prior to the suppression hearing. Dr. Scarborough testified that defendant was "at least psychotic during [the period of time in which defendant associated with the detectives], if not psychotic all the time." Dr. Scarborough's opinion is buttressed, in part, by the two diagnoses of atypical psychosis made in late 1983.

Dr. Bob Rollins, a forensic psychiatrist and Clinical Director of the Forensic Unit at Dorothea Dix, testified for the State. His diagnosis was that defendant had a mixed personality disorder with primitive, antisocial and aggressive characteristics. Dr. Rollins also believed that other psychiatrists had misdiagnosed defendant as being psychotic and/or schizophrenic because defendant was a skilled malingerer. He offered the following opinion of defendant's condition during the period in which defendant dealt with Holder and Munday:

> I don't believe Mr. Blackman had a mental disorder at that time that would keep him from being competent to execute other functions. It is fair to say that Mr. Blackman is

> a very limited individual and he could be easily influenced, suggestible, respond to offers of help. But all that aside, it's still my assessment that he would be competent to know what he was doing at that time.

Dr. Rollins' opinion is also supported by evidence in the record. The judge found Dr. Rollins' opinion to be "the better reasoned, [and] more consistent with the behavior and history of the [d]efendant than any opinion that [defendant] is psychotic."

In our view, some of the medical and other evidence in this case would support a conclusion that this defendant was not competent when he spoke with the detectives. At the same time, other competent evidence in the record points to the opposite conclusion. Conflicting evidence does not vitiate the conclusive and binding effect of the trial judge's findings on the appellate court. *See id.* The judge's finding that Dr. Rollins' opinion best identifies defendant's mental condition during the period in which he made his admissions to the police is supported by competent evidence in the record. We accept that finding as binding upon us. While we are not bound by the judge's conclusion that defendant was legally competent, we believe the findings do provide a sufficient basis for the judge's ruling. *See id.* We hold, therefore, that defendant's statements were not rendered involuntary by his mental condition and that defendant was legally competent to make those statements to the police detectives. Thus, we overrule this assignment of error.

III

We find no error in the trial judge's denial of defendant's motion *in limine* to suppress the statements defendant made to Detectives Holder and Munday. Consequently, the judgment in this case is

Affirmed.

Judges WELLS and JOHNSON concur.

GILDA WOOLARD, ADMINISTRATRIX OF THE ESTATE OF DOUGLAS ALLEN WOOLARD, DECEASED, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. 8810IC694

(Filed 21 March 1989)

1. **State § 4— Tort Claims Act—distinction between governmental and proprietary functions of State not recognized**

There was no merit to defendant's contention that a State employee was engaged in a discretionary governmental function and this action was barred because the State Tort Claims Act does not create liability for acts involving discretionary functions, since the North Carolina Supreme Court has held that with respect to tort actions, it recognizes no distinction between "governmental" or "proprietary" functions of the State.

2. **State § 8.2— design of ferry landing—motorist killed—no showing of proximate cause between State employee's design and motorist's death**

In an action to recover damages for the death of plaintiff's son resulting from the alleged negligence of the Department of Transportation in the design of a ferry landing, evidence did not support the findings of the Industrial Commission which in turn did not support its conclusion that actions by the State employee who allegedly designed the landing were a proximate cause of plaintiff's son's injuries, since the landing was already in existence before the named employee was asked to modify it to allow for loading of vehicles in differing order from their arrival to accommodate size restrictions on the ferry; there was no evidence that the named employee was the one who designed the original landing and no evidence that he designed the waiting area or created the problem of motorists driving in the wrong lane to the parking lot; the named employee merely recommended painting numbered spaces in one lane of the road; and there was no evidence that the recommendation was the proximate cause of the claimed injury.

APPEAL by defendant from Decision and Order of the Industrial Commission filed 2 March 1988. Heard in the Court of Appeals 25 January 1989.

Plaintiff filed this claim before the Industrial Commission seeking damages for the death of her son, Douglas Woolard (Woolard), resulting from the alleged negligence of the Department of Transportation in the design of the ferry landing facility on the north side of the Pamlico River on N.C. 306. By amended affidavit, plaintiff named Department of Transportation employee G. A. Eason as the state employee upon whose negligence the claim is based. The Deputy Commissioner found that Eason's negligence proximately caused Woolard's death and awarded $100,000 in damages under G.S. 143-291, the State Tort Claims Act. On appeal, the Full Commission affirmed and adopted the Deputy Commissioner's order. Defendant appeals.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., and Darrell B. Cayton, Jr., for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Monroe, Wyne, Atkins & Lennon, P.A., by George W. Lennon, for defendant-appellant.

LEWIS, Judge.

Defendant brings forward five assignments of error grouped into three arguments. First, it contends the action is barred by the doctrine of sovereign immunity. Second, the Department of Transportation contends the Industrial Commission erred in concluding defendant's employee, Eason, was negligent or that Eason's negligence was a proximate cause of Woolard's injury. Finally, defendant contends the Industrial Commission erred in finding that the negligence of a third party, David Jefferson, did not bar recovery against defendant.

The facts stipulated to by the parties and found by the Industrial Commission are as follows. At all pertinent times, N.C. 306, a two-lane paved road, twenty-two feet wide, led from the Pamlico River ferry dock on the north side of the river. The Department of Transportation maintained a parking lot to the southeast of N.C. 306 adjacent to the ferry dock. The parking lot had two entrances from N.C. 306 and was used by people who boarded the ferry as pedestrians. N.C. 306 was marked with double yellow lines in the center of the road.

Vehicles waiting for the ferry lined up in the southbound lane as there was no separate waiting lane. George Eason, an area traffic engineer employed by the Department of Transportation,

was asked to modify the ferry landing so that ferry attendants could load vehicles onto the ferry in differing order from their arrival to accommodate size restrictions on the ferry. Eason visited the ferry dock. After conducting an engineering study, he recommended painting numbered parking spaces in the southbound lane and erecting signs stating that vehicles might not be loaded in the order of arrival. Eason's recommendations were implemented in October 1983 by painting 20 numbered spaces in the southbound lane.

On the morning of 15 June 1984, a number of vehicles were waiting in the parking spaces in the southbound lane to board the ferry. David Earl Jefferson drove his vehicle in a southerly direction in the northbound lane to pass the parked cars and reach the parking lot. At approximately 6:45 a.m., Woolard drove his motorcycle off the ferry and proceeded in a northerly direction on N.C. 306. Woolard collided with the vehicle being driven by Jefferson in the northbound lane.

The Commission found as fact that Woolard's collision "was the proximate result of the negligence of George A. Eason . . . when he negligently designed the waiting spaces at the ferry facility." The Commission further found as fact that Jefferson's negligence in driving to the parking lot in the wrong lane "was not only foreseeable but was a risk that the design of the waiting area created" and that Woolard was not contributorily negligent. Based on these findings, the Commission awarded plaintiff $100,000 in damages.

[1] First, we address defendant's contention that this action is barred by the doctrine of sovereign immunity. It is well established "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). The Tort Claims Act, G.S. 143-291, partially waives this sovereign immunity in cases in which the negligence of a State employee acting within the scope of his employment proximately causes injury. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983); *Zimmer, supra.* Defendant contends Eason was engaged in a discretionary governmental function and this action is barred because the State Tort Claims Act does not create liability for acts involving discretionary functions. However, our Supreme Court has held that with respect to tort actions, "we continue to recognize no distinction between

'governmental' or 'proprietary' functions of the State as sovereign." *Guthrie*, 307 N.C. at 535, 299 S.E. 2d at 625. Plaintiff is entitled to pursue her claim under the Tort Claims Act.

At the time this action was filed, G.S. 143-291 provided in part:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, . . . but in no event shall the amount of damages awarded exceed the sum of one hundred thousand dollars ($100,000) cumulatively to all claimants on account of injury and damage to any one person.

Under this statute, "negligence is determined by the same rules as those applicable to private parties." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E. 2d 898, 900 (1988). Plaintiff must show that "(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Id.* at 709, 365 S.E. 2d at 900.

Defendant contends the Industrial Commission erred in finding as a fact that Eason was negligent or that his negligence was a proximate cause of Woolard's injury. In support of this contention, defendant challenges several of the Industrial Commission's findings of fact; defendant contends these findings are not supported by the evidence or are erroneous conclusions of law.

If there is any competent evidence to support the Industrial Commission's findings, they are conclusive on appeal. *Mackey v. Highway Comm.*, 4 N.C. App. 630, 167 S.E. 2d 524 (1969). However, the Industrial Commission's designation of a statement as a finding of fact is not conclusive. *Barney v. Highway Comm.*, 282 N.C. 278, 192 S.E. 2d 273 (1972). Negligence is a mixed question of law and fact, and we must determine whether the facts found by the Industrial Commission support its conclusion of negligence. *Id.*

[2] We hold that the findings of fact by the Industrial Commission do not reflect the evidence and that the evidence does not support the Industrial Commission's conclusion that Eason's actions were a proximate cause of Woolard's injuries. Evidence was presented to the Industrial Commission that even before Eason's recommended spaces were painted on the road, vehicles waiting to board the ferry had lined up in the southbound lane and vehicles wanting to reach the parking lot had passed the stopped vehicles by driving south in the northbound lane. The Industrial Commission is not required to make findings as to every detail of the credible evidence. *Bundy v. Board of Education*, 5 N.C. App. 397, 168 S.E. 2d 682 (1969). However, "the Industrial Commission must make findings of fact and conclusions of law to determine the issues raised by the evidence in a case before it." *Martinez v. Western Carolina University*, 49 N.C. App. 234, 239, 271 S.E. 2d 91, 94 (1980). A finding of the practice before the spaces were painted is important because there was no evidence before the Industrial Commission that Eason designed the waiting area or created the problem of motorists driving in the wrong lane to the parking lot. Thus, plaintiff has not shown that Eason's recommendations were a proximate cause of Woolard's injury.

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, *and without which the injuries would not have occurred*, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E. 2d 559, 565 (1984) (emphasis added). Plaintiff has not shown that Woolard's injuries would not have occurred if the spaces recommended by Eason had not been painted.

As the State's sovereign immunity was waived by statute, the statute must be strictly construed. *Etheridge v. Graham, Comr. of Agriculture*, 14 N.C. App. 551, 188 S.E. 2d 551 (1972). An individual making a claim under G.S. 143-291 must identify by affidavit the employee upon whose negligence the claim is based. G.S. 143-297. Plaintiff named Eason as that employee. If the design of the ferry landing is indeed negligent, there is no evidence that Eason was the employee who designed it. Eason merely recommended painting numbered spaces in the southbound lane. Plaintiff has not shown that Eason's recommendations were a proximate cause of Woolard's injury, and her claim fails.

In light of our holding that plaintiff has not proved Eason's negligence was a proximate cause of Woolard's injury, it is not necessary for us to address defendant's contention regarding Jefferson's negligence.

Reversed.

Judges EAGLES and PARKER concur.

SUSAN CAMPOS, PETITIONER-APPELLANT v. DAVID FLAHERTY, RESPONDENT-APPELLEE

No. 8818SC808

(Filed 21 March 1989)

Social Security and Public Welfare § 2— overpayment of benefits to plaintiff's ex-husband—recovery from plaintiff improper

A county social services agency could not recoup from plaintiff the AFDC overpayment made to her ex-husband merely because her dependent children were members of the father's assistance unit at the time the overpayment was made, and state and federal regulations which would allow recoupment from any member of the original assistance unit should be disregarded in favor of judicial interpretation of 42 U.S.C.S. § 602 which calls for recoupment from the individual applicant.

APPEAL by plaintiff, Susan Campos, from *Mills, Judge*. Judgment entered 14 June 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 February 1989.

Plaintiff was married to Peter Hans Januzys, the father of her four children. From August through December of 1986 plaintiff and her husband were separated and living apart and the four children lived with their father. From August through December of 1986 the father was a recipient of AFDC payments for the benefit of his four dependent children.

Sometime in 1987 three of the four dependent children moved in with plaintiff. In September 1987, plaintiff applied for AFDC payments for the benefit of her three dependent children now in her custody.

Also during 1987, the Guilford County Department of Social Services (county agency) learned that during August through December of 1986 the father had unreported income which when verified revealed that he had received an overpayment of AFDC benefits totaling $165.00 during 1986. The county agency was unsuccessful in its attempts to recoup the overpayment from the appellant's husband who was no longer a current AFDC recipient. In response to plaintiff's AFDC application, the county agency informed the plaintiff that the $165.00 overpayment made to the husband would be recouped from her AFDC check because three of the children who lived with the husband at the time of the overpayment were now living with her.

Plaintiff appealed the county agency decision to a state hearing officer. Relying on State AFDC regulations, the hearing officer found that both the federal and state regulations allowed recoupment from "[a]ny member of the original assistance unit," which "includes minors as well as adults" and affirmed the agency's decision in his opinion dated 3 February 1988. Pursuant to N.C.G.S. § 108A-79(k), plaintiff filed a petition for Judicial Review in Superior Court of Guilford County. In its 14 June 1988 order the Superior Court affirmed the decision of the hearing officer.

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

Attorney General Lacy H. Thornburg, by Associate Attorney General Martha K. Walston, for respondent appellee.

ARNOLD, Judge.

Plaintiff contends that the federal statute which governs recoupment in AFDC overpayment cases does not allow recoupment from

plaintiff's AFDC benefits merely because her three children were members of the overpaid assistance unit, when her ex-husband, the overpaid recipient, is not a member of plaintiff's assistance unit. We agree.

The governing federal statute was amended in 1981 as part of the Omnibus Budget Reconciliation Act (OBRA), Pub. L. No. 97-35. 95 Stat. 357:

> 42 U.S.C.S. § 602 State plans for aid and services to needy families with children . . .
>
> (a) Contents. A State plan for aid and services to needy families with children must—
>
> * * * *
>
> (22) provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan, and, in the case of—
>
> (A) an overpayment to an individual who is a current recipient of such aid (including a current recipient whose overpayment occurred during a prior period of eligibility), recovery will be made by repayment by the individual or by reducing the amount of any future aid payable to the family of which he is a member . . .
>
> * * * *
>
> (C) an underpayment, the corrective payment shall be disregarded in determining the income of the family, and shall be disregarded in determining its resources in the month the corrective payment is made and in the following month. . . .

We are asked to decide whether the State's position, that the terms "individual who is a current recipient" in the statute refers to the dependent children who were in the custody of their father when the overpayment was made, is correct.

When interpreting federal statutes the United States Supreme Court has stated "that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108, 64 L.Ed. 2d 766, 772, 100 S.Ct. 2051, 2056 (1980). North Carolina courts are in accord, though our

courts place primary emphasis on discovering legislative intent. *Williams v. Williams*, 299 N.C. 174, 179-80, 261 S.E. 2d 849, 853 (1980). In addition, nontechnical statutory words are to be given a common and ordinary meaning. *Id.* at 180, 261 S.E. 2d at 854. "Statutes dealing with the same subject matter must be construed *in pari materia* . . . as together constituting one law . . . and harmonized to give effect to each." *Id.* at 180-81, 261 S.E. 2d 854 (citations omitted). "[W]hen a statute contains a definition of a word or term used therein, such definition, unless the context clearly requires otherwise, is to be read into the statute wherever such word or term appears therein." *Smith v. Powell, Comr. of Motor Vehicles*, 293 N.C. 342, 345, 238 S.E. 2d 137, 140 (1977).

Applying these rules of construction to the question at hand, the plain language of the statute speaks of "overpayment to an individual," and does not concern itself with overpayment to an "assistance unit" or to "dependent children." The statute speaks in the singular. It does not lend itself to an interpretation that it is directing recoupment at persons other than the recipient, the individual who is the payee of the benefits check, unless the payee is a member of the family from whom recoupment is sought.

The language in 42 U.S.C. § 602(22)(A) which allows recoupment "by reducing the amount of any future aid payable to the family of which he is a member" does not further the interpretation of the county agency. Parents, when separated and subsequently divorced, are not members of the same family. Plaintiff states in her affidavit that she and her husband have not lived as a family since August of 1986.

The statute describes the "individual" who receives the overpayment as a "recipient." In the accompanying definitions section, 42 U.S.C. § 606(b), the "recipient" is described as the one enabled "to pay for specific goods, services, or items recognized by the State agency as part of the *child's* need. . . ." (Emphasis added):

> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death . . . or physical or mental incapacity of a parent. . . .
>
> (b) The term "aid to families with dependent children" means money payments with respect to a dependent child or dependent children. . . .

An individual who is a "recipient" is an individual with custody of "needy children." Never does the statute refer to the innocent children as recipients themselves.

In addition to the plain language, and the clarity of the accompanying definitions sections, 42 U.S.C. § 602(22) sets out the procedure for recoupment when an individual payee, the father here, is no longer the current recipient:

> (B) an overpayment to any individual who is no longer receiving aid under the plan, recovery shall be made by appropriate action under State law against the income or resources of the individual or the family . . . .

Generally in cases concerned with recoupment of AFDC benefits, the applicant alone was treated as the "individual" who was the recipient. *See State of Kansas ex rel. Sec. of Social and Rehab. Services v. Fomby*, 11 Kan. App. 2d 138, 715 P. 2d 1045 (1986) (husband who was not recipient of or applicant for public assistance was not liable for alleged payments on theory of fraud); *Peck v. Van Alstyne*, 82 A.D. 2d 927, 440 N.Y.S. 2d 736 (1981) (no recoupment in the absence of substantial evidence that the recipient and her family would not suffer undue hardship); *Chan v. Blum*, 75 A.D. 2d 732, 427 N.Y.S. 2d 621 (1980) (recipient not shown to have received notice to update income); *Terry v. Harris*, 175 N.J. Super. 482, 420 A. 2d 353 (1980).

We note that the statutory scheme requires the state to place equal emphasis on correcting underpayments as well as overpayments to recipients. Were the State's interpretation of the statute to stand, it would mean that had there been an underpayment to the father here, the mother would be a correct payee for reimbursement, as she now has custody of the children. This is indeed an unrealistic scenario.

We are aware of both the federal and state regulations upon which the county relies:

> The State shall recover an overpayment from (1) the assistance unit which was overpaid, or (2) any assistance unit of which a member of the overpaid assistance unit has subsequently become a member, or (3) any individual members of the overpaid assistance unit whether or not currently a recipient.

45 C.F.R. § 233.20(a)(13)(B). *See* N.C. AFDC Manual § 2630 III, B, 2.a. We have given due consideration to the administrative interpretation of 42 U.S.C. § 602(22) set forth above. We do not agree with it, nor are we bound by it. When there is a conflict between administrative interpretation and the interpretation of the courts, the latter will prevail. *Faizan v. Grain Dealers Mutual Insurance Co.*, 254 N.C. 47, 57, 118 S.E. 2d 303, 310 (1961); *State ex rel. Utilities Comm. v. Thornburg*, 316 N.C. 238, 245, 342 S.E. 2d 28, 33 (1986). Finally, we reject the county's policy argument in favor of recoupment from dependent children who may have benefited from the overpayment.

The county agency may not recoup from plaintiff the overpayment made to her ex-husband merely because her dependent children were members of the father's assistance unit at the time the overpayment was made. The order of the trial court is

Reversed.

Judges JOHNSON and PHILLIPS concur.

IN THE MATTER OF: ISAAC ANTONIO COUSIN

No. 8815DC978

(Filed 21 March 1989)

1. Infants § 18— adjudication of delinquency—breaking or entering and larceny—sufficiency of evidence

Evidence was sufficient to sustain an adjudication of delinquency based on respondent's commission of breaking or entering and larceny, though the only evidence placing respondent at the crime scene was the uncorroborated testimony of an accomplice, where it tended to show that respondent and three others used a knife to open a window to an apartment and then entered without permission; they "started searching around"; and they removed a television set, watches, and a clock from the apartment.

2. Infants § 20— juvenile delinquent—appropriateness of confinement—findings insufficient—consideration of dispositional alternatives not shown

The trial court erred in concluding that the confinement of the delinquent respondent was appropriate where the court's findings, which basically recounted the history of respondent's delinquency, did not sufficiently address the needs of the juvenile, such as medical or psychological evaluation, school records, home evaluation, or a history of parental neglect, nor did the findings suggest what community resources might be appropriate as non-custodial alternatives to commitment. N.C.G.S. §§ 7A-647, 7A-649.

APPEAL by respondent from *Washburn, Judge.* Orders entered 11 April 1988 and 9 May 1988 in ALAMANCE County District Court. Heard in the Court of Appeals 13 March 1989.

This is an appeal by respondent from juvenile court orders finding him to be delinquent and committing him to the custody of the Division of Youth Services.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Martha K. Walston, for the State.

Jacobs & Livesay, by Robert J. Jacobs, for respondent-appellant.

WELLS, Judge.

On 11 April 1988, respondent, born 21 May 1972, was adjudicated delinquent for breaking and entering, in violation of N.C. Gen. Stat. 14-54(a) (1986), and larceny, in violation of N.C. Gen. Stat. 14-72(b)(2) (1986). On 9 May 1988, the trial court conducted a dispositional hearing and ordered the commitment of defendant into the custody of the Division of Youth Services for an indefinite period. From adjudication and disposition orders, respondent appealed.

[1] Respondent first contends that the evidence was insufficient to sustain an adjudication of delinquency based on his commission of breaking or entering and larceny. We disagree. The respondent in a juvenile delinquent proceeding is entitled to have the evidence evaluated by the same standards as apply to adult criminal proceedings; N.C. Gen. Stat. 7A-634(a) (1986). *In re Walker*, 83 N.C. App. 46, 348 S.E. 2d 823 (1986). The standard of proof is whether

there is substantial evidence of each element of the offense and that respondent was the perpetrator. *Id.* Substantial evidence is that which a reasonable mind might accept as adequate. *State v. Greer*, 308 N.C. 515, 302 S.E. 2d 774 (1983). In addition, the evidence must be considered in the light most favorable to the State. *Id.*

The elements of felonious breaking or entering in violation of N.C. Gen. Stat. 14-54 (1986) are: (1) 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, 338 S.E. 2d 575 (1986). Where a defendant offers no explanation for breaking into the building or a showing of the owner's consent, intent may be inferred from the circumstances. *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982). In addition, the intent with which a defendant entered or broke and entered a dwelling may be inferred from what he did within the building. *State v. Bronson*, 10 N.C. App. 638, 179 S.E. 2d 823 (1971). The elements of larceny in violation of N.C. Gen. Stat. 14-72(b) (1986) are that the defendant: (1) took the property of another, (2) carried it away, (3) without the owner's consent, and (4) with the intent to deprive the owner of the property permanently. *State v. Reeves*, 62 N.C. App. 219, 302 S.E. 2d 658 (1983).

In the present case, the State's evidence tended to show that on 3 February 1988, Tony Griffis, Nathaniel Herbin, Maurice Leath, and respondent were together and went to an apartment occupied by Karen Bryson Hawkins which was located at 1406 Stout Street. Mr. Griffis testified that he did not have permission to enter the apartment. He further testified that Maurice Leath used a knife to open a window to the apartment and then entered. The young men entered the apartment and "started searching around." Mr. Griffis further testified that he grabbed a television set and that Maurice Leath started throwing eggs. Mr. Griffis also testified that Maurice Leath and respondent removed five watches and a digital clock from the apartment and took them to Maurice's house.

The State also presented the testimony of Lisa Morrow, Ms. Hawkins' next door neighbor. She testified that she called the police on 4 February 1988 because she had heard the house had been broken into and went into the apartment and observed eggs thrown on the wall, the contents of Ms. Hawkins' pocketbook piled on the kitchen floor, and her kitchen cabinets opened. Ms. Morrow

further testified that the back door was open and that the screen was out.

We find the foregoing evidence, considered in the light most favorable to the State, sufficient to establish the elements of breaking or entering and larceny and that the respondent was the perpetrator. Respondent argues that the evidence is insufficient to adjudicate him delinquent for breaking or entering and larceny because the only evidence placing him at 1406 Stout Street is the testimony of Tony Griffis. However, this Court has held that the unsupported testimony of an accomplice is sufficient to support a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant. *State v. Bailey*, 18 N.C. App. 313, 196 S.E. 2d 556, *cert. denied*, 283 N.C. 754, 198 S.E. 2d 724 (1973), *cert. denied*, 415 U.S. 976 (1974). This assignment of error is overruled.

[2] Next, respondent contends that the trial court erred in concluding that the confinement of respondent was appropriate where less restrictive alternatives to commitment were available. Pursuant to N.C. Gen. Stat. 7A-646 (1986), the trial judge has the duty to choose the least restrictive alternative in selecting a disposition, taking into consideration the seriousness of the offense, age, prior record, degree of culpability, and the circumstances of the case. The trial judge must also consider the best interest of the State. *In re Bullabough*, 89 N.C. App. 171, 365 S.E. 2d 642 (1988). Prior to committing a juvenile to the Division of Youth Services, the trial judge must first find that the alternatives to commitment contained in N.C. Gen. Stat. 7A-649 (1986) are inappropriate *or* that they have been unsuccessfully attempted *and* that the juvenile's behavior is a threat to the community. *Id.* In addition, these findings must be supported by detailed findings which are in turn supported by some evidence in the record of the dispositional hearing. *In re Khork*, 71 N.C. App. 151, 321 S.E. 2d 487 (1984).

In the present case, the trial court made the following findings:

> (2) The respondent was first before the court on July 12, 1984 for shoplifting of some candy and was placed on juvenile probation which he violated by failing to attend school on a regular basis.
>
> (3) His probation was extended on February 11, 1985 for an additional six months.

(4) On May 10, 1985, his probation was extended for an additional twelve (12) months.

(5) On October 14, 1985 the respondent was adjudicated delinquent for discharging a firearm (a [sic] air-rifle) within the city limits for which the respondent was given a seven (7) months stayed committment [sic].

(6) One of the conditions of his stayed committment [sic], the respondent was placed in Lake Waccamaw and that he attend school on a regular basis upon his return.

(7) He did cooperate at Lake Waccamaw until November of 1986 at which time he returned home.

(8) On February 26, 1987, the respondent was adjudicated undisciplined for failure to attend school on a regular basis, the juvenile probation having expired on June 6, 1986.

(9) On September 21, 1987 the respondent was again adjudicated for operating a mini-bike upon a highway without the proper license and was again placed on juvenile probation for a period of twelve months on certain conditions including regular school attendance and cooperation with out-of-home placement if appropriate.

(10) The petition dated March 11, 1988 is one for which the respondent has been adjudicated in this case.

(11) The exceptional children's program has been used on behalf of the respondent as has out-patient theraphy [sic] from Children of Youth Services division of the Alamance-Caswell Area Mental Health Center and the Final-Step Program at Western Correctional Center has also been utilized.

(12) The court finds that while there are resources within the community that have not yet been attempted with the respondent in view of his failure to attend school as a chronic problem, the court finds that the available resources have either been tried in this case or would not be effective or appropriate.

(13) The court does find that the respondent's behavior does constitute a threat to the property of person's [sic] in the community.

The trial court's findings do not sufficiently address the needs of the juvenile, such as medical or psychological evaluation, school

records, home evaluation, or a history of parental neglect. *See* N.C. Gen. Stat. 7A-647 (1986). Neither does the order contain sufficient findings as to community resources that might be appropriate as non-custodial alternatives to commitment. *See* N.C. Gen. Stat. 7A-649 (1986); *Bullabough, supra.* Therefore, we cannot determine from the court's order what consideration the trial court gave to these pertinent factors affecting its dispositional conclusion. We therefore remand for a further order consistent with this opinion. If a further hearing is necessary in order for the trial court to properly resolve the issues we have noted, such a hearing should be conducted.

Affirmed in part, reversed and remanded in part.

Judges PARKER and GREENE concur.

PEGGY HAITH THOMPSON v. ROBERT THOMPSON

No. 8818DC572

(Filed 21 March 1989)

Divorce and Alimony § 30— equitable distribution—consideration from separate property used to purchase tenancy by the entireties—new property is marital property

Where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence; therefore, the parties' residence in this case was properly classified as marital property where defendant used funds from the sale of a house which he had owned prior to marriage to buy a second house in both their names, and then used funds from that house to buy the house in question, and defendant failed to rebut the presumption of gift where the conveyance itself contained no statement that defendant intended to keep the residence his separate property, and there was no other evidence to that effect. N.C.G.S. § 50-20(b)(2).

APPEAL by defendant from *Morton (J. Bruce), Judge*. Order entered 23 March 1988 in District Court, GUILFORD County. Heard in the Court of Appeals 11 January 1989.

Defendant appeals from an order determining the parties' marital residence to be totally marital property for purposes of equitable distribution pursuant to the Equitable Distribution Act, G.S. sec. 50-20.

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff-appellee.

King & Stockton, by Michael Lee King, for defendant-appellant.

JOHNSON, Judge.

Plaintiff and defendant were married in 1966, separated in 1983, and divorced in 1985. One child was born of the union. In 1966, the couple first resided in a home on Cambridge Street in Greensboro which was owned by defendant prior to his marriage to plaintiff. In 1970, defendant sold the house and used part of the proceeds to finance the purchase of a larger residence on Asheboro Street in order to accommodate plaintiff's two children from a prior relationship who had come to live with the couple. This house was titled in the names of both plaintiff and defendant as tenants by the entireties. Defendant testified that premarital funds of his were used to renovate this residence. In 1979, the parties sold the Asheboro Street residence and used part of the proceeds to purchase a third house on Mystic Drive, also titled as entireties property.

Plaintiff instituted proceedings for divorce and equitable distribution on 21 December 1984. A judgment of absolute divorce was granted by the trial court, sitting without a jury, on 4 February 1985. On 23 March 1988, the court filed an equitable distribution order which held the real property on Mystic Drive to be marital property. Defendant appeals from this order.

The sole question presented by defendant for our review is whether the trial court erred in concluding as a matter of law that the Mystic Drive residence was totally marital property pursuant to G.S. sec. 50-20(b)(1) when evidence at trial established that the residence was purchased with both separate and marital funds.

The first step in the equitable distribution process is the classification of the parties' property as either separate or marital. G.S. sec. 50-20(a); *Cornelius v. Cornelius*, 87 N.C. App. 269, 360 S.E. 2d 703 (1987). Marital property includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, . . ." G.S. sec. 50-20(b)(1). Separate property, which is not included in the category of marital property, means

> all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.

G.S. sec. 50-20(b)(2).

This Court, in previously construing G.S. sec. 50-20(b)(2), has determined that "where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence." *McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E. 2d 910, 916-17, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985) (citation omitted). Further, the entireties conveyance itself sufficiently indicates the "contrary intention" under the statute to preserving separate property. *Id.* at 156, 327 S.E. 2d at 918.

The correctness of this presumption has been upheld by our Supreme Court in the recent case of *McLean v. McLean*, 323 N.C. 543, 374 S.E. 2d 376 (1988). The Court in *McLean*, in furnishing us with an extensive analysis of G.S. sec. 50-20(b)(2), resolves the ambiguity of the "interspousal gift" provision (the second sentence of G.S. sec. 50-20(b)(2)), and the "exchange" provision (the third sentence). After a full discussion of legislative intent, applicable case law, and the nature of the marital relationship and of the

entireties estate, all of which we need not detail here, the Court in *McLean* adopted the marital gift presumption of *McLeod* for entireties property. *McLean, supra.*

Applying this settled rule to the case *sub judice*, we conclude that the parties' residence on Mystic Drive, being titled in their names as entireties property, is presumed to have been a gift by defendant to the marital estate. *Id.* The question then becomes whether defendant has come forward with clear, cogent, and convincing evidence to rebut this presumption. We find that he has not.

The conveyance itself contained no statement that defendant intended to keep the residence his separate property. Whether evidence presented by defendant at trial is sufficient to "[rebut] the presumption of gift to the marital estate by clear, cogent, and convincing evidence is a matter left to the trial court's discretion." *Id.* at 555, 374 S.E. 2d at 383, *quoting with approval, McLean v. McLean*, 88 N.C. App. 285, 290, 363 S.E. 2d 95, 98-99 (1987).

At trial the only evidence properly before the court as to defendant's intent concerning the status of the residence on Asheboro Street was the following:

> Q: Mr. Thompson, was it your intent to have your former wife's name placed on the deed?
>
> A: No, and this is the reason I asked twice first.

As to defendant's intent concerning the property on Mystic Drive, the transcript reveals only the following interchange:

> Q: Whenever you bought the second house [on Mystic Drive], do you know whose names were put on the deed?
>
> A: The second house, due to the fact that Peggy's name was placed on the deed to my second house it was only natural then that her name was going to go to the third house.

We agree with plaintiff's argument that the above-quoted statements of defendant show merely that he considered whether to place plaintiff's name on the deed and then proceeded to do so. In any event, they certainly do not rise to the level of clear, cogent, and convincing evidence of defendant's intention not to make a gift to the marital estate.

For all the foregoing reasons, we hold that the trial court properly classified the residence on Mystic Drive as marital proper-

ty. We further hold that the court committed no abuse of discretion in failing to find that defendant rebutted the presumption that the residence was a gift to the marital estate.

Affirmed.

Judges WELLS and BECTON concur.

BIG B TRANSPORTATION, INC. v. U.S. INSURANCE GROUP

No. 8825SC679

(Filed 21 March 1989)

Insurance § 6.1— insurance purchased by trucking company— trip lease agreement not covered

An insurance policy purchased by plaintiff trucking company from defendant insurer did not cover a trip lease agreement whereby plaintiff furnished another company a truck and a driver to transport furniture from North Carolina to various points in the Midwest, since the policy in question provided coverage for plaintiff's legal liability "as a carrier under bills of lading or shipping receipts issued by [plaintiff]"; "bills of lading" and "shipping receipts" were both modified by the phrase "issued by the insured"; and no bill of lading or shipping receipt was issued by plaintiff for the furniture it transported under the trip lease agreement.

APPEAL by defendant from *Crawley (Jack), Judge*. Judgment entered 13 May 1988 in Superior Court, CATAWBA County. Heard in the Court of Appeals 25 January 1988.

Sigmon, Sigmon & Isenhower, by W. Gene Sigmon, for plaintiff-appellee.

Golding, Crews, Meekins & Gordon, by Rodney Dean, for defendant-appellant.

BECTON, Judge.

Defendant, U.S. Insurance Group, appeals from an order granting summary judgment to plaintiff, Big B Transportation, Inc. The

judge ruled that defendant insured plaintiff for losses resulting from a fire aboard one of plaintiff's trucks on 24 February 1985. We reverse and remand with instructions that the trial judge enter summary judgment for defendant.

I

Plaintiff, Big B Transportation, Inc. ("Big B"), is a trucking company. On 11 November 1984, Big B entered into an insurance contract with defendant, U.S. Insurance Group ("U.S. Insurance"). Under the policy, U.S. Insurance agreed to provide motor truck cargo coverage to Big B for a period of one year. In part, the policy provided that:

> This policy covers the legal liability of the Insured as a carrier under bills of lading or shipping receipts issued by the Insured with respect to shipments of lawful goods and merchandise . . . while such property is in the custody or control of the Insured, and while in the custody of connecting carriers. . . .

On 22 February 1985, Big B entered into a trip lease agreement with Cargo Carriers, Inc. ("Cargo Carriers") to transport furniture from Lexington, North Carolina, to various points in the Midwest. Big B furnished the truck for this shipment, and its employee, Alan K. Mummert, drove the truck. On 24 February 1985, a fire broke out in the truck's trailer, damaging the furniture.

Through its own insurer, Cargo Carriers paid the claims made by the owners of the damaged property. Cargo Carriers then brought a subrogation action against Big B. On 20 August 1987, Big B filed a declaratory action against U.S. Insurance, seeking to determine whether the policy it had purchased from U.S. Insurance covered the trip lease agreement. (On 30 April 1985, Big B added insurance coverage specifically covering such agreements.) Both Big B and U.S. Insurance prayed for summary judgment on this question. In an order dated 13 May 1988, the trial judge granted summary judgment for Big B. U.S. Insurance appeals.

II

The issue on appeal is the proper construction of the insurance policy language quoted above. U.S. Insurance contends that the policy clearly provides coverage only if Big B satisfied two conditions: first, that it acted as a "carrier," and second, that it issued a bill of lading or shipping receipt. Big B argues that the language

of the policy is ambiguous. It contends that the phrase "issued by the insured" modifies only "shipping receipts," and that, therefore, U.S. Insurance covered the legal liability of Big B under any bill of lading while property was in the custody and control of Big B. Because we reject Big B's reading of the "bill of lading" language, we do not decide whether Big B or Cargo Carriers was the carrier of the furniture shipment damaged on 24 February 1985.

Insurance companies select the words used in their policies; hence, any ambiguity arising out of that wording is construed against insurers and in favor of beneficiaries. *See Wachovia Bank and Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970). Ambiguity is not established, however, by the mere fact that the insurer and the beneficiary assert different constructions of the policy. *Id.* While the fact that the parties dispute the interpretation of the policy is some indication that ambiguity exists, ambiguity will not be established unless this court determines that the parties' varying interpretations fairly and reasonably arise from the policy language. *See St. Paul Fire and Marine Insurance Co. v. Freeman-White Associates, Inc.*, 322 N.C. 77, 83, 366 S.E. 2d 480, 484 (1988); *Westchester Fire Insurance*, 276 N.C. at 348, 172 S.E. 2d at 522; *see also Maddox v. Colonial Life and Accident Insurance Co.*, 303 N.C. 648, 650, 280 S.E. 2d 907, 908 (1981).

In our view, Big B unreasonably strains the language of the policy. We read the words "bill of lading" and "shipping receipts" as standing in apposition to one another, both being modified, therefore, by the phrase "issued by the insured." We think this is the only reasonable way to read the policy language. Our view is strengthened by the synonymous meanings of "bill of lading" and "shipping receipt." As defined by the Uniform Commercial Code, " 'Bill of Lading' means a *document* evidencing the *receipt* of goods *for shipment* issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill." *See* N.C. Gen. Stat. Sec. 25-1-201(6) (1986) (emphasis added).

In *Westchester Fire Insurance*, our Supreme Court cautioned that courts must enforce contracts as the parties have made them and must not, under the guise of interpreting ambiguous provisions, remake contracts so as to impose liability on insurance companies for which the policyholders did not pay. 276 N.C. at 354, 172 S.E. 2d at 522. In our view, Big B has sought to have this court remake its contract with U.S. Insurance, and that we will not do.

III

No bill of lading or shipping receipt was issued by Big B for the furniture it transported under the trip lease agreement with Cargo Carriers. Consequently, the trial judge erred in ruling that U.S. Insurance had liability under the policy. The order granting summary judgment is reversed and remanded, with instructions that the trial judge enter summary judgment for U.S. Insurance.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. MARK ANTHONY HALL

No. 8812SC561

(Filed 21 March 1989)

Bills of Discovery § 6— fingerprint evidence—failure to inform defendant—exclusion not required

Even if the State's failure to inform defendant about a second fingerprint failed to comply with the discovery order, the court's refusal to suppress the evidence or continue the trial was not necessarily error, since the court did sanction the State in one of the ways authorized by N.C.G.S. § 15A-910 by granting a recess and requiring the State's witness to confer with defense counsel and to be interrogated under oath before he testified; that way was neither inappropriate nor beyond the court's discretion; and since the first print was received into evidence without defendant's having had it examined by an expert, it appeared unlikely that he was prejudiced in any event by his inability to have the second print examined.

APPEAL by defendant from *Johnson (E. Lynn), Judge*. Judgment entered 4 February 1988 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 January 1989.

Defendant appeals his conviction of second degree burglary on the ground that the court refused to sanction the State for failing to comply with discovery. Pertinent thereto the State's

evidence and other parts of the record indicate that: The burglar entered the dwelling involved by opening the front door from the inside after knocking the glass out of an adjacent window. He left two fingerprints on a piece of the broken window glass, one of which was sent to the State Bureau of Investigation, where its expert concluded that defendant's left thumb made it. The other print, due to oversight, was not sent to the SBI and the district attorney for some unexplained reason did not learn about it until the trial was underway. Before trial defense counsel requested voluntary discovery in writing and under the district attorney's "open file policy" he was permitted to examine the file, which mentioned the print analyzed by the SBI but not the other one. During a trial recess the district attorney had the second print examined by the State's expert, who concluded that it was similar to defendant's left index finger. Citing the State's failure during discovery to inform him about the print defendant moved, pursuant to G.S. § 15A-910, that the court sanction the State either by suppressing the evidence or continuing the trial so that he could obtain an expert to analyze the print. The court denied the motion but allowed defendant during a trial recess to confer with and interrogate the State's expert under oath about his upcoming testimony. Defendant, who had been on the burglarized premises about a month earlier, but not around the window that was broken, had not had the other print examined by an expert.

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

Reid, Lewis & Deese, by Renny W. Deese, for defendant appellant.

PHILLIPS, Judge.

Discovery having been voluntarily agreed to, defendant contends that the State's failure to disclose the existence of the second fingerprint violated the discovery article and G.S. § 15A-910 required the court to sanction it by either suppressing the evidence or continuing the trial. The statute does not support the contention; the sanctions it authorizes are not mandatory, but permissive, optional and subject to the sound discretion of the judge. *State v. McNicholas*, 322 N.C. 548, 555, 369 S.E. 2d 569, 574 (1988). G.S. § 15A-910 provides as follows:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (3a) Declare a mistrial, or
>
> (3b) Dismiss the charge, with or without prejudice, or
>
> (4) Enter other appropriate orders.

Thus, even if the State's failure to inform defendant about the second fingerprint did not comply with the discovery article—as it did not, since district attorneys participating in discovery, no less than other lawyers, are obliged to know what documentary evidence exists in their cases and to disclose it when ordered, and discovery voluntarily undertaken is deemed by G.S. § 15A-902(b) "to have been made under an order of the court"—the court's refusal to either suppress the evidence or continue the trial was not necessarily error, as defendant argues. For the court did sanction the State in one of the ways authorized by the statute (by granting a recess and requiring the State's witness to confer with defense counsel and to be interrogated under oath before he testified) and that way was neither inappropriate nor beyond the court's discretion in our opinion. And since the first print was received into evidence without defendant having had it examined by an expert, it appears unlikely that he was prejudiced in any event by his inability to have the second print examined.

No error.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. JAMES THOMAS MOSLEY

No. 8819SC665

(Filed 21 March 1989)

1. **Criminal Law § 138.29— crime victim under 16—no aggravating factor of involvement of person under 16 in commission of crime**

The trial court erred in finding as a factor in aggravation that defendant involved a person under the age of 16 in the commission of the crime, since that factor is aimed at situations where children are encouraged and actually used in the commission of a crime, and the fact that the victim of a particular crime falls below the age of 16 is not included within the meaning of N.C.G.S. § 15A-1340.4(a)(1)(l); furthermore, this factor was not properly found based on evidence that another child under age 16 was present with the victim and defendant when the victim performed oral sex on defendant, since the acts involving the other child amounted to an uncharged joinable crime by defendant, and the other child's involvement in the crime for which defendant was being sentenced, the acts against the victim, was not a proper basis for an aggravating factor. N.C.G.S. § 15A-1340.4(a)(1)(l) and (o).

2. **Criminal Law § 138.16— inducing victim to take part in crime and exercising leadership or dominance over victim—no part of aggravating factor set out in N.C.G.S. § 15A-1340.4(a)(1)(l)**

The fact that a defendant induces a victim to take part in the offense or exercises leadership or dominance over a victim of a crime is not within the meaning of the aggravating factor set out in N.C.G.S. § 15A-1340.4(a)(1)(l).

APPEAL by defendant from *Freeman (William H.), Judge*. Judgment entered 25 February 1988 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 13 February 1989.

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

J. Jane Adams for defendant-appellant.

LEWIS, Judge.

Defendant was found guilty by a jury of taking indecent liberties with a minor. At trial, the State's evidence tended to show that the then 12-year-old victim visited defendant's mobile home nearly every afternoon to see Lisa, the daughter of defendant's live-in girlfriend. Defendant worked the night shift and was in bed during the victim's afternoon visits. Lisa and the victim began going into defendant's bedroom where Lisa would perform oral sex on defendant. At defendant's request, the victim eventually engaged in similar conduct. These activities took place on a weekly basis from November 1986 to January 1987. The State's evidence also tended to show that on or about 9 May 1987, the victim went to see Lisa at defendant's mobile home. Defendant and Lisa were seated in a car outside the home. The victim got in the car and observed Lisa performing oral sex on defendant. The victim left and went home but later returned to the car. She got in the car beside defendant and performed oral sex on him.

In sentencing defendant, the trial court found as aggravating factors that (1) "defendant induced others to participate in the commission of the offense"; (2) "defendant occupied a position of leadership or dominance of other participants in the commission of the offense"; and (3) "defendant involved a person under the age of 16 in the commission of the crime." The court found as a mitigating factor that "defendant has no record of criminal convictions." Finding the factors in aggravation outweighed the factor in mitigation, the trial court sentenced defendant to the maximum term of ten years. Defendant appeals assigning error to the finding of each factor in aggravation. We have reviewed the assignments of error and conclude defendant is entitled to a new sentencing hearing.

[1] First, we address defendant's contention that the trial court erred in finding as an aggravating factor that defendant involved a person under age 16 in the commission of the crime. This Court has held that "[t]he legislative intent behind this statutory aggravating factor . . . concerned situations where children are encouraged and actually used *in the commission* of a crime. The fact that the victim of a particular crime falls below the age of sixteen is not included within the meaning of G.S. § 15A-1340.4(a)(1)(l)." *State v. Waters*, 87 N.C. App. 502, 505, 361 S.E. 2d 416, 418 (1987) (emphasis original). Additionally, we do

not agree with the State's contention that this factor was properly found based on the evidence that Lisa, a child under age 16, was present with the victim and defendant when the victim performed oral sex on defendant. G.S. § 15A-1340.4(a)(1)(o) prohibits the trial court from aggravating a sentence by using convictions of "any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which defendant is currently being sentenced." Our Supreme Court has held that the "sentencing judge may not use a joined or joinable offense in aggravation." *State v. Rose*, 323 N.C. 455, 460, 373 S.E. 2d 426, 430 (1988). The acts involving Lisa amount to an uncharged crime by defendant and Lisa's involvement in the crime for which defendant is being sentenced, the acts against the victim, is not a proper basis for an aggravating factor. The trial court erred in finding as a factor in aggravation that defendant involved a person under the age of 16 in the commission of the crime.

[2] Next, we address defendant's contentions that the trial court erred in finding as aggravating factors that defendant induced others to participate in the offense and that defendant occupied a position of leadership or dominance of the other participants. We agree with defendant that these factors are not supported by the evidence. Neither factor was properly found as to defendant's inducing or leading or dominating Lisa. As stated above, defendant's activities with Lisa amount to an uncharged joinable offense which may not be used as the basis for aggravating factors in sentencing for the offense against the victim. *State v. Rose, supra.* Moreover, whether the trial court found the factors based on defendant's acts against Lisa or the victim, the factors are not proper. We do not believe that evidence that a defendant encourages a victim to participate in a crime or that a defendant exercises leadership or dominance of a victim will support these factors. We believe the legislature was concerned with situations in which a defendant induces others or leads or dominates others to join him in the commission of a crime. The fact that a defendant induces a victim to take part in the offense or exercises leadership or dominance over a victim of a crime is not within the meaning of G.S. § 15A-1340.4(a)(1)(a).

For errors in the finding of aggravating factors, defendant is entitled to a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

New sentencing hearing.

Chief Judge HEDRICK and Judge WELLS concur.

DEBORAH PHARR CULPEPPER, EMPLOYEE, PLAINTIFF-APPELLANT v. FAIRFIELD SAPPHIRE VALLEY, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER, DEFENDANT-APPELLEES

No. 8810IC419

(Filed 4 April 1989)

1. **Master and Servant § 55.5— workers' compensation—cocktail waitress—assaulted while stopped to assist customer with car trouble—injury arising out of employment**

In a workers' compensation action arising from an assault on a cocktail waitress at a resort after the waitress stopped to help a guest whom she recognized and whom she thought had car trouble, her actions were sufficiently work-related to warrant a conclusion that her injuries arose out of her employment where the record showed that her decision to stop had its origin in her employment in that the only reason she stopped on the resort road was to offer a guest assistance.

2. **Master and Servant § 55.5— cocktail waitress—assaulted while stopped to assist customer with car trouble—increased risk from employment**

A cocktail waitress who was assaulted after she stopped to help a customer with apparent car trouble was placed by her employment at an increased risk of sexual assault not shared by the general public where the nature of her job subjected her to unwelcome advances from male customers but at the same time required her to be cordial and friendly and nice; required her to serve alcoholic beverages to a variety of people, some of whom might be intoxicated; required her to work late at night in a remote mountain area; and her only relationship with her assailant was through her work.

3. **Master and Servant § 55.5— workers' compensation—cocktail waitress assaulted while assisting stranded customer—appreciable benefit test**

In a workers' compensation action arising from an assault on a cocktail waitress after she stopped to assist a customer who apparently had car trouble, the Industrial Commission erred by concluding that her resulting injuries did not arise out of her employment because stopping to assist a guest bore a clear relation to her employer's interests. Given the circumstances and her employer's instructions to be very cor-

dial and friendly and nice and to offer any assistance she could to members and guests at the resort since most of the people coming there were looking at buying property, she had reasonable grounds to believe that what she was doing was incidental to her employment and beneficial to her employer.

4. **Master and Servant § 55.6— workers' compensation—cocktail waitress—assaulted by stranded motorist—in the course of employment**

An assault on a cocktail waitress who had stopped to help a customer who seemed to have car trouble occurred in the course of her employment where she did not remain on her employer's premises after work for such an unreasonable length of time as to remove her from the course of employment; it was clear that her kidnapping and injuries occurred on the resort premises where she worked, and the portion of a public highway within the boundaries of the resort constituted the employer's premises for purposes of the going and coming rule; even if the waitress's side trip to see her friend was a frolic which removed her from the rule's protection, she was back in the course of her employment when she decided to stop to help a known guest; and the circumstances placed her within the course of her employment because she was engaged in a work-related activity reasonably calculated to benefit her employer.

Judge GREENE dissenting.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 17 December 1987. Heard in the Court of Appeals 29 November 1988.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Max E. Justice and William L. Brown; and Ball, Kelley & Arrowood, P.A., by Phillip G. Kelley, for plaintiff-appellant.

Russell & King, P.A., by Sandra M. King and Kathy A. Gleason, for defendant-appellees.

BECTON, Judge.

A cocktail waitress employed at a mountain resort filed this workers' compensation claim to recover for injuries sustained

when she tried to escape from a guest of the resort who kidnapped and sexually assaulted her. The attack occurred after the employee's workday ended when she stopped on a resort road to assist the guest, who she assumed had car trouble. The Industrial Commission held that the employee's injuries did not arise out of and in the course of her employment, and denied workers' compensation benefits. We reverse.

I

The result of this case, like most workers' compensation cases, turns upon its unique facts. The relevant facts follow.

Fairfield Sapphire Valley, the defendant-employer, is an extensive resort community located in a remote region of the western North Carolina mountains. The plaintiff-employee, Deborah Pharr Culpepper, worked as a bartender and cocktail waitress at Sapphire Valley Country Club, a club within the resort open only to the resort's members and guests. She sometimes worked as a bartender and food waitress at the Fairfield Inn, also part of the resort complex.

Ms. Culpepper was instructed when she was hired "to be very cordial and friendly and nice and [to] *offer any assistance that [she] could*" to members and guests since "[m]ost of the people coming up there were looking at buying property" at the resort. (Emphasis added.) She was directed to serve only members and guests, and was told who those people were. One of the guests pointed out to her was Ralph Harvey Henry. Ms. Culpepper had served Mr. Henry a number of times at the country club and at the Inn, and he phoned her once while she was on duty to ask for a date. She politely declined. They had no contact outside her serving duties.

About 11:00 p.m. on 17 August 1981, Ms. Culpepper finished her work at the country club and drove to the Fairfield Inn, traversing both the resort's private roads and Highway 64 to get there. Access to the resort's recreational, dining, lodging, and other facilities was by a system of private roads branching off Highway 64. The public highway ran the length of and through the middle of the resort community, and provided the only means of entering or exiting the resort. Ms. Culpepper parked in front of the Inn and went in to turn in the day's proceeds and paperwork. She saw Mr. Henry sitting at the bar. When Ms. Culpepper finished her work and left the Inn, she discovered that Mr. Henry had pulled

his car alongside hers and was standing at her car door. He asked her to go out with him. She again politely declined, this time explaining that she planned to say goodbye to a co-worker who was leaving the next day. She was "trying to be nice [since] he was a guest at the [I]nn. . . ."

Uncomfortable about this encounter, Ms. Culpepper waited for Mr. Henry to leave before she drove out of the parking lot. Once he was out of sight, she drove down the resort road leading away from the Inn. She turned right onto Highway 64, driving in the direction of her home. Before she reached the perimeter of the resort, she exited the highway, turning left onto the unlit resort road leading to the country club. The road also led to the employees' quarters, where her friend who was leaving stayed.

Ms. Culpepper slowed down when she saw a car stopped at the side of the road with its flashers blinking. A person stood in the road waving his arms, motioning her to stop. As she got nearer, Ms. Culpepper saw that the person was Mr. Henry. Assuming he had car trouble, she "stopped to see if he needed help or wanted [her] to tell someone . . . to go get him." Because "he was a guest and since he was on th[e resort] property, . . . [she] felt like it would be a good thing to do to stop and see if he needed help."

Mr. Henry walked over to Ms. Culpepper's car, leaned down to talk through the window, and then yanked the door open, forcing his way into the driver's seat. Ms. Culpepper jumped out the passenger side, and ran down the road. Henry caught her, struck her in the face, and forced her, kicking and screaming, into his car. He drove her to a secluded area where, after repeatedly threatening to kill her, he sexually assaulted her.

Ms. Culpepper eventually talked Henry into returning to her car on the pretense that she would go out with him. As they started down the resort road where the attack first began, they saw people standing around her car, apparently concerned because her door was ajar and the headlights were still on. Henry sped up to get away. Fearing for her life, Ms. Culpepper leaped headfirst from his car. Her ankle caught in the door. Her body struck the pavement and was dragged along the roadway until her foot came free.

The fall from the car left Ms. Culpepper with a skull fracture and injuries to her back, leg, and face. As a result of her head injury, she suffered partial hearing loss, partial loss of the sense of taste, and complete loss of the sense of smell.

II

Ms. Culpepper filed a claim for workers' compensation benefits.

Following a hearing, Deputy Commissioner McCrodden entered an interlocutory opinion and award in which she found that Ms. Culpepper's job as a cocktail waitress put her "at an *increased risk* of being confronted by male customers" and that the directive to be hospitable to guests at the resort "placed [her] in the position in which she found herself with Ralph Henry." (Emphasis added.) McCrodden concluded that "when plaintiff stopped to aid a guest of defendant-employer on the [employer's] premises . . ., she was acting in the scope of her employment . . ., and her injury arose in the course of that employment." McCrodden further concluded that Ms. Culpepper was "entitled to the compensable consequences of her injury by accident arising out of and in the course of her employment. . . ."

Deputy Commissioner Burgwyn later entered a separate opinion and award ordering the employer to pay Ms. Culpepper (1) $17,500 for her permanent injuries, (2) temporary total disability for a two-month period, and (3) all medical expenses incurred for treatment of her injuries. The employer appealed to the Full Commission.

The Full Commission vacated and reversed the interlocutory opinion and award. The Commission denied Ms. Culpepper compensation, finding that she "diverted from her direction home on a private mission. . . ." The Commission also made the following findings of fact:

1. . . . In her service to defendant employer's customers, plaintiff was directed to be cordial at all times *while on duty* since guests were prospective home buyers.

. . .

7. The configuration of the roads in the Fairfield complex were such that in leaving her final place of duty . . . plaintiff normally drove home by way of U.S. Highway 64. This is a public highway that runs through the resort community.

> *Her diversion off of this road into the private road owned by the resort community was for a mission and purpose personal to her and not connected with the interests of her employer.*

(Emphasis added.) The Commission concluded as a matter of law that Ms. Culpepper "was acting on a personal mission . . . and *was not under any employment duty* to travel upon that road or *to stop to assist anyone being located on that road.* Consequently, her injury by accident did not arise out of [and in the course of] her employment. . . ." (Emphasis added.)

III

Ms. Culpepper appealed to this court, contending that she is entitled to compensation because her injuries did arise out of and in the course of her employment.

A. *Injuries Compensable Under the Workers' Compensation Act*

An injury is compensable under the Workers' Compensation Act only if the injury (1) is an "accident" and (2) "aris[es] out of and in the course of the employment." N.C. Gen. Stat. Sec. 97-2(6) (1985). Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and the Industrial Commission's findings in this regard are conclusive on appeal if supported by competent evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E. 2d 529, 531 (1977).

Injuries resulting from an *assault* are caused by "accident" within the meaning of the Act when, from the employee's perspective, the assault was unexpected and was without design on her part. *Id. See also Stack v. Mecklenburg County*, 86 N.C. App. 550, 554, 359 S.E. 2d 16, 18 (1987), *disc. rev. denied*, 321 N.C. 121, 361 S.E. 2d 597 (1987) (injuries from sexual assault may be compensable under the Act). We hold that the Commission correctly concluded that Ms. Culpepper's injuries stemming from the sexual assault were caused by "accident." Thus, the remaining question is whether her injuries "arose out of" and "in the course of" her employment.

The employee must establish both the "arising out of" and "in the course of" requirements to be entitled to compensation. *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E. 2d 417, 420 (1988). However, while the "arising out of" and "in

the course of" elements are distinct tests, they are interrelated and cannot be applied entirely independently. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 252, 293 S.E. 2d 196, 199 (1982). Both are part of a *single test of work-connection. Watkins v. City of Wilmington*, 290 N.C. 276, 281, 225 S.E. 2d 577, 581 (1976) (citations omitted). Because "the terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other." *Hoyle*, 306 N.C. at 252, 293 S.E. 2d at 199 (citations omitted).

We turn now to Ms. Culpepper's contention that her injuries "arose out of" her employment.

B. *"Arising Out Of" the Employment*

The words "arising out of . . . the employment" refer to the origin or cause of the accidental injury. *Roberts*, 321 N.C. at 354, 364 S.E. 2d at 420. Thus, our first inquiry "is whether the employment was a *contributing cause* of the injury." *Id.* at 355, 364 S.E. 2d at 421 (emphasis added). Second, a contributing proximate cause of the injury must be a *risk* inherent or incidental to the employment, and must be one to which the employee would not have been equally exposed apart from the employment. *Gallimore*, 292 N.C. at 404, 233 S.E. 2d at 533. Under this "increased risk" analysis, the "causative danger must be *peculiar to the work and not common to the neighborhood." Id.* at 404, 233 S.E. 2d at 532 (citations omitted) (emphasis added). Finally, an injury will be deemed to "arise out of" the employment if the employee's acts on behalf of a third person are of "*appreciable benefit*" to the employer. *See Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955).

We conclude that each of these conditions was met in the case before us.

(1) *Causal Relation of Employment to Injury*

[1] The record shows that the *only* reason Ms. Culpepper stopped on the resort road—particularly since she felt uncomfortable around Mr. Henry—was to offer a guest assistance, as her employer instructed her to do. *See Bunny Bread v. Shipman*, 267 Ark. 926, 591 S.W. 2d 692 (1979) (truck driver reasonably interpreted employer's instruction to be helpful to potential customers to extend to assisting disabled motorist (citing with approval *Lewis*

v. Kentucky Central Life Ins. Co., 20 N.C. App. 247, 201 S.E. 2d 228 (1973)).

No evidence in the record supports the Commission's finding that Ms. Culpepper was told to be helpful and cordial to guests *only while on duty*. Contrary to the Commission's conclusions based on that finding, we believe that it was reasonable for Ms. Culpepper to assume that, but for the terrible outcome, her employer would have wanted her to stop to aid a known guest apparently in trouble on the resort premises, and that this act was incidental to her employment. *See id.* Moreover, had Ms. Culpepper simply driven past a guest stranded on the dark mountain road, she reasonably could have feared a reprimand by her employer, especially since the guest recognized her car and tried to wave her down. *See id.*

In our view, Ms. Culpepper's motivation for being on the employer's road is not as important as her motivation for stopping on that road. Because *her decision to stop had its origin in her employment*, we hold that her actions were sufficiently "work-connected" to warrant a conclusion that her injuries arose out of the employment. The Commission erred by concluding otherwise.

(2) *Increased Risk*

[2] The employer contends that Ms. Culpepper faced no greater risk of sexual assault than any other citizen. The employer further argues that the motive for Mr. Henry's assault was personal, not work-related, and therefore Ms. Culpepper was not entitled to compensation. We disagree. Compensation should be denied only if the circumstances surrounding an assault will not permit a reasonable inference that the *nature* of the employment, rather than some personal relationship, created the risk of attack. *See Robbins v. Nicholson*, 281 N.C. 234, 240, 188 S.E. 2d 350, 354 (1972). While it is generally true that "there is no clearer example of non-industrial motive than rape," it is equally true that the nature of a job may heighten the risk of sexual assault. Larson, 1 *Larson's Workmen's Compensation Law*, Sec. 11.11(b) (1984) (Supp. 1987).

In our view, Ms. Culpepper's employment placed her at an increased risk of sexual assault not shared by the general public. The nature of her job as a cocktail waitress and bartender subjected her to unwelcome advances from male customers, but at the same time, required her to be "cordial and friendly and nice." Her job required her to serve alcoholic beverages to a variety of people,

some of whom might be intoxicated, and required her to work late at night in a remote mountain area. Moreover, her only relationship with Mr. Henry was through her work. We hold that these work-related factors created a unique risk of sexual assault. *Accord Orr v. Holiday Inns, Inc.*, 6 Kan. App. 2d 335, 627 P. 2d 1193 (1981), *aff'd*, 230 Kan. 271, 634 P. 2d 1067 (1981) (female bartender raped while on break); *see also Commercial Standard Ins. Co. v. Marin*, 488 S.W. 2d 861 (Tex. Civ. App. 1972) (working during dark hours increased risk of rape and murder of female gas station attendant); *Employers Ins. Co. v. Wright*, 108 Ga. App. 380, 133 S.E. 2d 39 (1963) (employee required to wait upon and serve the public was exposed to greater risk of physical danger and sexual assault); *Giracelli v. Franklin Cleaners & Dyers, Inc.*, 132 N.J.L. 590, 42 A. 2d 3 (1945) (employee raped by customer faced increased risk of sexual assault because she was required "to wait on all types of people").

(3) *Injuries While Acting for Benefit of Another: Appreciable Benefit Test*

[3] Ms. Culpepper contends that the Commission erred in failing to apply the "appreciable benefits" test. The employer counters with the argument that the "appreciable benefits" test did not apply because Ms. Culpepper's decision to stop would have been of no benefit to the employer.

It is well settled that injuries suffered by an employee while assisting a third person are not compensable "unless the acts *benefit the employer to an appreciable extent.*" *Roberts*, 321 N.C. at 355, 364 S.E. 2d at 421 (emphasis added).

> [W]here competent proof exists that the employee understood, or *had reasonable grounds to believe* that the act resulting in injury was incidental to [her] employment, or . . . would prove beneficial to [her] employer's interests or was encouraged by the employer . . . for the purpose of creating a feeling of good will, . . . compensation may be recovered, since then a causal connection between the employment and the accident [is] established.

Guest, 241 N.C. at 452, 85 S.E. 2d at 599 (citation omitted) (emphasis added).

The employer argues that the decision in *Roberts v. Burlington Industries* controls this case. There, the Supreme Court applied

the appreciable benefits tests to deny workers' compensation benefits to the family of a furniture designer who was killed as he assisted an injured pedestrian, a stranger, while driving home from a business trip. The Court reasoned that the employee's acts were "purely altruistic," "bore no relation to his employer's interests," and provided "no actual benefit to the employer." 321 N.C. at 357, 364 S.E. 2d at 422. The Court contrasted the "Good Samaritan" situation before it from the situation presented in *Lewis v. Kentucky Cent. Life Ins. Co.*, 20 N.C. App. 247, 201 S.E. 2d 228 (1973). We believe that *Lewis*, not *Roberts*, controls the outcome here.

In *Lewis*, an insurance salesman was injured when he stopped on the highway to assist a woman he recognized as a policyholder. The Commission found that, at the time he stopped, the employee "had reasonable grounds to believe that [his assistance] would be beneficial to his employer's interests, was incidental to his employment, and would advance his employer's work." *Id.* at 249, 201 S.E. 2d at 230. This court upheld the compensation award, concluding that the employee "acted, not merely to an appreciable extent, but even to a substantial extent, for the benefit of his employer" by assisting a known customer with car trouble. *Id.* at 250, 201 S.E. 2d at 230. The same analysis applies here.

Ms. Culpepper was traveling on a private resort road in a remote mountain area when she encountered an apparently disabled motorist flagging her down. She recognized that person as a guest at the resort, and knew he recognized her. Given the circumstances and her employer's instructions, we conclude that she "had reasonable grounds to believe that what [s]he was doing was incidental to [her] employment and beneficial to [her] employer, and that, if [her] employer had been there, [the employer] would have instructed [her] to render such . . . assistance." *Guest*, 241 N.C. at 453, 85 S.E. 2d at 600. Because stopping to assist a guest bore a clear relation to her employer's interests, we hold that the Commission erred in concluding that her resulting injuries did not "arise out of" her employment.

We next address Ms. Culpepper's contention that her injury occurred "in the course of" her employment.

B. *"In the Course Of" Employment*

[4] The phrase "in the course of the employment" refers to (1) the time, (2) the place, and (3) the circumstances in which the

injury occurred. *Roberts*, 321 N.C. at 354, 364 S.E. 2d at 420. Applying these factors to the case before us, we hold that Ms. Culpepper's injuries occurred "in the course of" her employment.

(1) *Time*

The "course of employment" continues for a *reasonable time* after work ends, and may include time spent going to or coming from work. *See generally Harless v. Flynn*, 1 N.C. App. 448, 456, 162 S.E. 2d 47, 52 (1968). In our view, Ms. Culpepper did not remain on the employer's premises after work for such an unreasonable length of time as to remove her from the course of employment. *Cf. Alford v. Quality Chevrolet Co.*, 246 N.C. 214, 217, 97 S.E. 2d 869, 871 (1957) (because employee spent five hours "cavorting" before starting home, "[a]ll reasonable time for travel home from work had expired"), with *Zahn v. Associated Dry Goods Corp.*, 655 S.W. 2d 769 (Mo. App. 1983) (employee raped while leaving employer's premises after shopping there for 20 minutes was still in course of employment; time on premises did not exceed reasonable time in which to leave work). Here, the assault occurred only moments after Ms. Culpepper's workday ended. We hold that in the unique circumstances of this case, the time elapse did not exceed a reasonable time in which to leave work.

(2) *Place*

With respect to *place*, the "course of employment" includes the employer's premises, and may extend to adjacent premises used as a means of ingress and egress to the employer's premises. *Bass v. Mecklenburg County*, 258 N.C. 226, 233, 128 S.E. 2d 570, 575 (1962). In particular, injuries sustained *on premises controlled or owned by the employer* while going to or coming from work generally are deemed to occur "in the course" of employment. *Id.* at 232, 128 S.E. 2d at 574; *accord Robinson v. North Carolina State Highway Comm'n*, 13 N.C. App. 208, 185 S.E. 2d 333 (1971) (employee in course of employment while leaving work on road controlled by employer). *See also Helton v. Interstate Brands Corp.*, 155 Ga. App. 607, 271 S.E. 2d 739 (1980) (employee kidnapped from employer's parking lot and subsequently sexually assaulted was still in the course of employment).

It is clear that Ms. Culpepper's kidnapping and injuries occurred on the resort premises. What is disputed is whether she was still protected by the "going and coming" rule when she stopped

for Mr. Henry. The employer first argues that protection of the rule ended when Ms. Culpepper left the employer's private road leading from the Inn and entered the public highway. We disagree. Highway 64 was an integral part of the resort complex. Employees and patrons regularly traveled the highway to get from one part of the resort to another, and signs indicating where to turn to reach the various facilities appeared along the highway. At least one resort-owned building was located there. Given these circumstances, we conclude that the portion of Highway 64 within the boundaries of the resort constituted the employer's premises for purposes of the going and coming rule. *See, e.g., Rozelle v. Robertson*, 29 A.D. 2d 589, 285 N.Y.S. 2d 449 (1967) (public street through hospital grounds was part of employer's premises).

We reject the employer's next contention—and the Commission's conclusion—that because Ms. Culpepper deviated from the direct route home on a "personal mission," she was not covered by the going and coming rule, and therefore was no longer in the course of employment. Even had Ms. Culpepper's side trip to see her friend been a "frolic" which removed her from the rule's protection, in our view, she was *back in the course of employment* when she decided to stop to help a known guest. *See generally, Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 770-71, 281 S.E. 2d 718, 720-21 (1981), *aff'd*, 305 N.C. 292, 287 S.E. 2d 890 (1982) (employee returning to work from private mission is in course of employment); *Larson*, Secs. 19.10, 19.27 and cases cited therein (business motive intervening during personal mission bring employee back within course of employment). Although Ms. Culpepper *drove* on the road for a personal reason, what matters is that she *stopped* for a reason related to her employment.

(3) *Circumstances*

With respect to *circumstances*, an employee "engaged in activities that [s]he is authorized to undertake and that are calculated to further, directly or indirectly, the employer's business" acts within the course of employment. *Pittman v. Twin City Laundry & Cleaners*, 61 N.C. App. 468, 472, 300 S.E. 2d 899, 901-02 (1983). Even if an "employee is not engaged in the actual performance of the duties of [her] job," this "does not preclude [her] accident from being one within the course of employment." *Harless*, 1 N.C. App. at 456, 162 S.E. 2d at 53. *See also Brown v. Jim Brown's Service Station*, 45 N.C. App. 255, 257, 262 S.E. 2d 700, 702 (1980)

(injury occurring outside regular hours and normal place of work is, nonetheless, "in the course of" employment if employee performed activity requested by and for benefit of employer).

The employer relies on *Poteete v. North State Pyrophyllite Co.*, 240 N.C. 561, 82 S.E. 2d 693 (1954), to assert that when an employee returns for personal reasons to the employer's premises after the workday has ended, and is injured there, the employee is not entitled to compensation. In *Poteete*, the employee was injured when he fell from the wall where he sat waiting to collect a debt from a co-worker. Unlike the case before us, the employee in *Poteete* was not engaged in any work-related activity when he was injured. Had the employee been so engaged, he would have been entitled to compensation because he would have been back in the course of employment.

We conclude that Ms. Culpepper returned to the course of employment when she stopped to assist a guest. Because she was engaged in a work-related activity reasonably calculated to benefit her employer, the Commission erred in holding that her injury did not occur in the course of employment.

IV

We hold that Ms. Culpepper's injuries arose out of her employment because the injuries were causally connected to her employment, the nature of her job increased the risk of sexual assault, and her act of stopping to assist a guest was of appreciable benefit to her employer. We further hold that the conjunction of the time, place, and circumstance factors brought Ms. Culpepper's injury within the course of her employment. Accordingly, we reverse the Industrial Commission decision, and order the Commission to award Ms. Culpepper the compensable consequences of her injury.

Reversed.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with much of the majority's analysis of whether petitioner's injuries arose from, and occurred during the course of,

her employment. However, the majority has mistakenly dismissed the significance of Finding No. 1, the only finding by the Commission relevant to determining what petitioner's "employment" was. Determining the nature of plaintiff's employment is critical since it permits resolution of the mixed questions of law and fact whether petitioner's employment was a proximate cause of her injuries, presented a risk "peculiar to her employment," and rendered "reasonable" petitioner's apparent belief her actions were "incidental" to her employment and beneficial to her employer. *Cf. Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 355, 364 S.E. 2d 417, 421 (1988) (employment must be contributing cause of injury); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 403, 233 S.E. 2d 529, 532 (1977) (employment must subject employee to risk peculiar to, "and reasonably related to," employment); *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 453, 85 S.E. 2d 596, 600 (1955) (employee had reasonable grounds to believe act resulting in injury was incidental to employment and beneficial to employer's interests).

I particularly note the *Roberts* Court's manner of distinguishing its facts from those in *Guest*, where the employee was clearly carrying out his employment duties when he rendered the disputed assistance: "[T]he injured employee [in *Guest*] . . . *had reason to believe that . . . complet[ing] his mission for his employer was contingent upon*" rendering assistance. *Roberts*, 321 N.C. at 356, 364 S.E. 2d at 422 (emphasis added). To be "reasonable," petitioner's inference that her assistance was incidental to her employment must somewhere be premised on the objectively-determined facts of her employment, rather than on an endless chain of other inferences, however well-intentioned. In this case, it is therefore important that we determine what petitioner was employed to do, and what she in fact did as a result of that employment, in order to determine whether she had reason to believe her employment was, as in *Roberts*, "contingent" on rendering assistance to her former customer.

Under the particular facts revealed by this record, the reasonableness of this petitioner's belief primarily turns on one factual issue: whether her employer instructed her to be cordial and helpful while carrying out her primary duties as bartender and waitress, or whether her employer instead instructed her to be cordial and helpful at all times *in addition to* her bartending/waitressing duties. If the latter characterization is correct, then it may be correct to state petitioner reasonably extrapolated a

belief her employment justified her stopping to aid her former customer: if petitioner was in effect instructed to be prepared for intensely personal contact with her customers *at all times*, then her situation is analogous to the insurance salesman granted compensation in *Lewis v. Kentucky Central Life Ins. Co.*, 20 N.C. App. 247, 201 S.E. 2d 228 (1973). The *Roberts* Court approved compensation to the *Lewis* petitioner since the petitioner insurance salesman "was engaged in an 'intensely personalized calling' requiring frequent contact with his policy holders." 321 N.C. at 357 n.2, 364 S.E. 2d at 422 n.2. Conversely, if the former characterization is accurate, then petitioner's belief would not be reasonable since stopping to aid a former customer would be more directly analogous to the petitioner denied compensation in *Roberts*: the only benefit to petitioner's employer would be speculative goodwill. *Cf. Roberts*, 321 N.C. at 355-56, 364 S.E. 2d at 421 (rejecting speculations about goodwill).

I believe Commission Finding No. 1 resolves the characterization of petitioner's employment in this respect. It states:

> 1. In August 1981, plaintiff worked for defendant-employer, a resort community, as a bartender and part-time cocktail waitress. . . . In her service to defendant employer's customers, plaintiff was directed to be cordial at all times *while on duty* since guests were prospective home buyers.

The majority completely dismisses Finding No. 1 as unsupported by any evidence. This is simply incorrect. There is sufficient evidence in the record from which the Commission could have drawn reasonable inferences to support Finding No. 1—despite any argument a contrary inference might have been drawn with equal reason. At numerous points in the transcript, petitioner herself refers to her employment as only consisting of bartending, waitressing, and certain directly incidental duties:

> Q: What was your position of employment?
>
> A: I was a bartender and part-time waitress.
>
> Q: And, as a bartender and part-time waitress, just briefly tell us what your functions were—what you were to do.
>
> A: When I was a bartender, I would go on to make sure there was ice and open up, you know, the cabinets and bring out the bottles and the mixes and the juices and whatever

else I needed back there and then just go on and work with people when they came in and serve—only members could be served—serve the members of the club or guests at the inn. When I was a waitress, you know, I just waited on tables.

[T. 4].

. . . .

Q: Were you working as a bartender or a waitress [the night of your injuries]?

A: It was a family night dinner so I was doing both. I was working at the bar and also serving stuff and cleaning and all that.

. . . .

Q: And, when you completed your serving activities there, what else remained to be done as a part of your work?

A: Well, I had to clean up the bar and clean up the kitchen and lock it up—I had paper work to complete and turn in from the day and turn in money. So, I had to go take that to the inn.

[T. 7-8].

. . . .

Q: Okay. So, you drove your car from the country club around eleven or so at night. Your work at the country club as a bartender and waitress was concluded, is that correct?

A: After—

Q: With the exception that you had to turn the money in?

A: Yes.

[T. 42].

Q: And, when you turned in your paperwork and the xerox copy at the front desk, having already turned in the money, you had then completed your work responsibilities for that evening at Fairfield, isn't that correct?

A: Yes, sir.

[T. 44]. These exchanges certainly support the Commission's Finding No. 1 that petitioner's employment consisted of bartending/waitressing and only required petitioner to aid customers while on duty.

The *only* reference in the entire transcript to any requirement of her employment that petitioner be otherwise "cordial" or helpful to guests at the resort is the following:

> Q: Did you have occasion during the course of that employment to receive any instructions from your employer as to how you were to conduct yourself with regard *to those customers that you serve*?
>
> A: Well, yes. Most of the people coming up there were looking at buying property *and we were to be very cordial and friendly and nice and offer any assistance that we could.*

[T. 5 (emphasis added)]. This is the only reference in the record to any generalized cordiality or courtesy. There is no evidence anywhere else in the record that this petitioner, or any other bartender/waitress, ever aided a guest at the resort apart from their duties as bartender or waitress.

Given this solitary reference to the alleged "cordiality" requirement, petitioner is in a fatal quandary. If, as the majority asserts, petitioner's testimony did not itself constitute any competent evidence to support the Commission's Finding No. 1, then there is similarly no competent evidence from which the Commission could have conversely determined that petitioner *had been* instructed to be cordial and helpful even when not "on duty." If there is no competent evidence whatsoever on the question of any "cordiality" requirement, then plaintiff has clearly failed to meet her burden of showing cordiality was such a part of her employment that it justified her stopping to aid a former customer after she had completed her work as a bartender/waitress.

Conversely, if petitioner's lone reference *is* sufficient evidence from which the Commission could determine what petitioner's employer instructed her to do, then I believe the Commission's inferences were clearly reasonable and binding on this appeal. The Commission is the sole judge of the credibility of witnesses and the weight given their testimony. It may accept any part and reject any part of that testimony. *Blalock v. Roberts Co.*, 12 N.C. App. 499, 504, 183 S.E. 2d 827, 830 (1971). The Commission is permitted to draw reasonable inferences from the circumstances shown by the evidence: that other reasonable inferences could have been drawn is no indication of error since deciding which permissible inference to draw from evidentiary circumstances is as much within

the fact finder's province as its deciding which of two contradictory witnesses to believe. *Snow v. Dick & Kirkman, Inc.*, 74 N.C. App. 263, 267, 328 S.E. 2d 29, 32, *disc. rev. denied*, 314 N.C. 118, 332 S.E. 2d 484 (1985). "The courts are not at liberty to re-weigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached." *Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 330, 38 S.E. 2d 97, 100 (1946).

I note the Commission explicitly rejected petitioner's proposed finding that, "plaintiff had been directed by defendant-employer as part of her employment instructions to offer any assistance to guests that she could." Irrespective of how reasonable that finding may have been, I believe the Commission's Finding No. 1 was an equally (if not more) reasonable inference to draw from petitioner's lone reference in the transcript to her instruction to be "cordial." Under *Roberts*, Finding No. 1 in turn directly supports the Commission's Conclusion No. 2 that, "when plaintiff stopped to aid an individual who later assaulted her, she was not acting in the scope of her employment with defendant-employer and her injury did not arise out of the course of that employment." In addition, that finding would preclude any notion that petitioner had "returned" to her employment when she stopped to aid her former customer. Consequently, the Commission's findings also support its Conclusion No. 1.

My analysis of the record in no way arises from any gross generalization that an employer may always limit an employee's right to compensation simply by giving certain instructions. The nature of a petitioner's employment must be realistically based, not on any particular job title, but on what the employee actually does as a result of his employment. However, *under the facts of this particular administrative record*, the only factual basis petitioner asserts for her belief that her employment somehow required her to assist any guest in any way at any time is founded on the lone instruction by her employer quoted earlier. I simply believe that lone instruction as characterized in Finding No. 1 was insufficient to support a reasonable belief that petitioner's employment was contingent on her rendering aid under these circumstances. To hold otherwise is to adopt the "positional risk" doctrine rejected in *Roberts*.

Thus, I would affirm the order of the Commission denying petitioner compensation for her injuries. I therefore respectfully dissent.

STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION, INTERVENOR-APPELLEE; PUBLIC STAFF OF NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR-APPELLEE; ATTORNEY GENERAL LACY H. THORNBURG, INTERVENOR-APPELLEE, AND THE BOULEVARD FLORIST, INC., COMPLAINANT v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT, AND BELLSOUTH ADVERTISING & PUBLISHING CORPORATION, RESPONDENT-APPELLANT

No. 8810UC496

(Filed 4 April 1989)

1. **Telecommunications § 1— publisher of telephone directory and Yellow Pages—no jurisdiction of Utilities Commission**

The Utilities Commission had no jurisdiction over the publisher of a telephone directory and Yellow Pages (1) pursuant to N.C.G.S. § 62-94(b)(2), since the publisher was not a public utility; (2) pursuant to N.C.G.S. § 62-51, which authorizes the Commission to inspect the books and records of corporations affiliated with public utilities, since that statute is not applicable to nonratemaking actions such as this one, and, even if it were applicable, the Commission would not be given jurisdiction over the publisher but would only be empowered to sanction the affiliated public utility; (3) on the theory that the publisher was the agent of the utility, since there was no evidence to support a finding of agency, and, even if a principal/agent relationship were properly found to exist, it would merely mean that any wrongs by the publisher could be imputed to the utility, not that the Commission would have jurisdiction over the publisher; and (4) on the theory that the publisher was the alter ego of the utility, since the utility did not attempt to evade its duty by treating the publisher as a separate entity but instead accepted its responsibility to make complainant whole.

2. **Telecommunications § 1— Yellow Pages publisher—no jurisdiction of Utilities Commission**

The publishing of Yellow Pages advertisements by an unregulated private entity is an unregulated activity, and the

Utilities Commission therefore had no jurisdiction over a complaint regarding service to a Yellow Pages customer.

3. Utilities Commission § 52— administrative remedies not exhausted—futile effort—judicial review proper

Defendant publisher of Yellow Pages was not required to exhaust all administrative remedies as a prerequisite to seeking judicial review of the Utilities Commission's decision, since the Commission had repeatedly ruled against defendant on the sole issue which it appealed to the Court of Appeals, namely, the Commission's jurisdiction over it, and pursuing a further hearing before the agency would have been a futile gesture for defendant.

Judge WELLS concurring in the result.

THIS is an appeal by respondent-appellant Bellsouth Advertising & Publishing Corporation from a 20 December 1987 order of the Utilities Commission in which the Commission asserted jurisdiction over respondent-appellant and ordered it to pay damages to complainant Boulevard Florist, Inc. in the form of a three-month billing credit. Heard in the Court of Appeals 9 January 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lorinzo L. Joyner, for intervenor-appellee.

Executive Director Robert P. Gruber and Chief Counsel Antionette R. Wike, by Staff Attorney A. W. Turner, Jr., for intervenor-appellee Public Staff of North Carolina Utilities Commission.

Petree Stockton & Robinson, by John T. Allred, L. Elizabeth Henry and Richard E. Fay, for respondent-appellant Bellsouth Advertising and Publishing Corporation.

JOHNSON, Judge.

Respondent-appellant Bellsouth Advertising and Publishing Corporation (BAPCO) brings this appeal from a 20 December 1987 order of the North Carolina Utilities Commission (Commission) directing respondent Southern Bell Telephone and Telegraph Company (Southern Bell) to grant complainant Boulevard Florist, Inc. (Boulevard) a three-month billing credit in the amount of $450.72 for local telephone service and also directing both Southern Bell and BAPCO to grant complainant a three-month billing adjustment for advertising charges for the 1985 Yellow Pages advertisement

placed by Boulevard in the Charlotte telephone directory. These credits were awarded to compensate Boulevard for the malfunctioning of a telephone intercept service which was to operate in conjunction with Boulevard's Yellow Pages advertisement.

In answer to the complaint, BAPCO filed a letter termed a "special appearance/response" in which it moved to dismiss the complaint on the grounds that BAPCO is not subject to the Commission's jurisdiction. The motion was denied over the dissent of one Commissioner. After an evidentiary hearing on the merits of Boulevard's complaint, Hearing Examiner Robert H. Bennink, Jr. issued a "Recommended Order Granting Complaint in Part" on 1 December 1987. Neither Southern Bell nor BAPCO appealed the order to the full Commission. Therefore, the recommended order became a final order on 20 December 1987. On 19 January 1988, BAPCO filed notice of appeal from the order to this Court, contending, *inter alia*, that the order is void because the Utilities Commission lacks jurisdiction over BAPCO. Southern Bell did not appeal.

Complainant Boulevard is a North Carolina corporation doing business as a florist in Charlotte. BAPCO and Southern Bell are both wholly-owned subsidiaries of Bellsouth Corporation. Southern Bell, which is a public utility, holds a franchise to provide telephone service in and around the Charlotte area and in other areas of North Carolina. Since 1 January 1984, BAPCO has published the Charlotte telephone directory and has sold Yellow Pages advertisements for that publication. Prior to 1984, Southern Bell published the Charlotte directory and sold Yellow Pages advertisements.

Boulevard contracted with BAPCO to place an advertisement in the Yellow Pages section of the 1985 Charlotte telephone directory. During negotiations, Boulevard's president, Michael Milton, explained to BAPCO's representatives that shortly after distribution of the 1985 directory, his business would be moving to a new address in the Charlotte area. This move would necessitate Boulevard's getting a new telephone number.

Mr. Milton agreed to have his future address and telephone number published in his Yellow Pages advertisement on assurance that intercept equipment would be installed to direct callers to Boulevard's old number until its move was complete. The advertisement was published accurately and intercept equipment installed by Southern Bell. As it happened, Boulevard did not move to its

new location until 3 March 1986 because of delays in the construction of its new building.

Boulevard alleged in its complaint that from July 1985, when the 1985 directory became effective, through February 1986, that the intercept equipment installed to provide Boulevard's present telephone number frequently did not function properly so that potential customers were unable to reach the business by telephone. Boulevard alleged a substantial loss of business because of the malfunction. On various occasions the company reported problems with the intercept system to both BAPCO and Southern Bell. When BAPCO was contacted it notified the repair department of Southern Bell to correct the problem. In May 1986, after repeated problems, Boulevard filed a complaint with the Commission, alleging that the faulty recording transfer system constituted inadequate telephone service and inadequate Yellow Pages advertising.

By this appeal, BAPCO raises two Assignments of Error for our review. First, BAPCO contends it is not a public utility, and therefore the Commission has no jurisdiction in this matter. Second, it argues that even if BAPCO were a public utility, the Commission has no jurisdiction to entertain a complaint concerning Yellow Pages advertising because such advertising is not a regulated activity.

Before addressing these questions, we note that the scope of our review of a decision of the Utilities Commission is governed by G.S. sec. 62-94. The statute provides, in pertinent part, the following:

> [The reviewing court] may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

G.S. sec. 62-94(b).

[1] Turning to the question of the Commission's jurisdiction pursuant to G.S. sec. 62-94(b)(2), we observe that the Utilities Commission is a creature of the legislature and may exercise jurisdiction and regulatory authority only as defined by Chapter 62 of the General Statutes. *Utilities Commission v. Merchandising Corp.*, 288 N.C. 715, 220 S.E. 2d 304 (1975). Specifically, G.S. sec. 62-73 (along with G.S. sec. 62-74 which is not applicable here) governs the Commission's jurisdiction with regard to complaints: "Complaints may be made by the Commission on its own motion or by any person having an interest, . . . setting forth any act or thing done or omitted to be done by any *public utility*, . . ." (emphasis added). Thus, the Commission's jurisdiction in complaint proceedings is limited to complaints against public utilities.

"Public utility" is defined in G.S. sec. 62-3(23)(a) as "a person . . . [c]onveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation." Also, "[n]either the Commission nor this Court has authority to add to the types of business defined by the Legislature as public utilities." *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 268, 148 S.E. 2d 100, 109 (1966).

Further, G.S. sec. 62-51, which authorizes the Commission "to inspect the books and records of corporations affiliated with public utilities" cannot give the Commission jurisdiction over BAPCO. That statute grants broad power to the Commission to inspect the books and records of affiliated companies in ratemaking disputes. *Utilities Commission v. Intervenor Residents*, 305 N.C. 62, 286 S.E. 2d 770 (1982). However, G.S. sec. 62-51 is not applicable to a nonratemaking action such as this which involves a complaint between private parties. *Id.* Even if the provision were applicable, its effect would not be to confer jurisdiction on the Commission concerning BAPCO. Rather, the Commission would be empowered to sanction the affiliated public utility Southern Bell if BAPCO did not cooperate in allowing inspection of its books and records.

We also do not believe that the Commission has jurisdiction over BAPCO on the theories that BAPCO is either the agent or alter ego of Southern Bell. In order for a principal/agent relationship to exist, Southern Bell, as principal, would have to exert control over BAPCO. *Vaughn v. Dept. of Human Resources*, 296 N.C. 683, 252 S.E. 2d 792 (1979). In examining the record, we do not

find the control necessary for the relationship. The fact that BAPCO relayed Boulevard's service complaints to Southern Bell appears to us to be a customer courtesy, rather than acts sufficient to create a principal/agent relationship. The Commission concluded in its findings of fact numbered seven, twenty-four and twenty-five that BAPCO assumed responsibility, under express or implied authority, to act as Southern Bell's agent or alter ego concerning certain of its duties pursuant to its tariffs, including handling service problems. Our examination of the record does not disclose substantial, competent evidence to support these findings. Therefore, they are overruled. Assuming that a principal/agent relationship were properly found to exist, it would merely mean that any wrongs by BAPCO could be imputed to Southern Bell. It would not confer jurisdiction to the Commission over BAPCO.

We also disagree that the situation before us merits treating BAPCO as the alter ego of Southern Bell. We recognize that it may often be necessary to "pierce the corporate veil" in order to ascertain the actual scope of a public utility enterprise so that the utility cannot evade its responsibilities to the public. *Utilities Commission v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405 (1970), *affirmed on reh.*, 278 N.C. 235, 179 S.E. 2d 419 (1971). Here, however, we do not find that Southern Bell will at all evade its duty to the complainant because BAPCO is treated as a separate entity. Southern Bell has accepted its responsibility to make the complainant whole, and, indeed, does not appeal the judgment. Moreover, Boulevard's complaint really only involved faulty service, rather than error in the advertisement published by BAPCO.

We conclude that the Commission does not have jurisdiction over BAPCO as a public utility, and we do not find the existence of equitable principles which would justify disregarding BAPCO's status as a corporate entity separate from Southern Bell.

[2] Intervenor-appellees also contend that Yellow Pages advertisements are part of the service provided by telephone companies, and that as such this operation is subject to oversight by the Commission, even though the function has been delegated to a separate corporate entity. BAPCO counters by arguing that Yellow Pages advertising is not a regulated activity, and that, therefore, even if it were found to be a public utility (which we hold that it is not), it would not be subject to regulation in this instance.

It points to G.S. sec. 62-3(23)(d) which states in part: "If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter."

We recognize that in the past there has been some apparent conflict between two opinions of our Supreme Court, *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 221 S.E. 2d 499 (1976) and *State ex rel. Utilities Commission v. Southern Bell*, 307 N.C. 541, 299 S.E. 2d 763 (1983), concerning the extent to which Yellow Pages advertisements in the classified directory are part of a public utility's function. However, we agree with the reasoning of this Court in *In re Proposed Assessment v. Carolina Telephone*, 81 N.C. App. 240, 344 S.E. 2d 46, *disc. rev. denied*, 318 N.C. 283, 347 S.E. 2d 465 (1986), that *Gas House* and *Southern Bell* are not inconsistent and may be read together.

In *Gas House, supra*, the Supreme Court upheld the validity of a limitation of liability provision in a contract for the publication of a Yellow Pages advertisement over the plaintiff's contention that the provision was contrary to public policy by allowing a public utility to avoid the consequences of its own negligence. In so holding, the Court stated that "[t]he business of carrying advertisements in the yellow pages of its directory is not part of a telephone company's public utility business." *Id.* at 184, 221 S.E. 2d at 505.

Seven years later in *Southern Bell, supra*, a ratemaking case, the Court held that the Utilities Commission could include investments, costs, and revenues related to directory advertising in ratemaking proceedings. 307 N.C. at 547, 299 S.E. 2d at 767.

The Court noted that

> the yellow pages have never been and are not now regulated by the Utilities Commission. However, the fact that a specific activity of a utility is not regulated does not mean that the expenses and revenues from that activity cannot be included in determining the rate structure of the utility.

307 N.C. at 544, 299 S.E. 2d at 765.

The Court went on to say that the statement of *Gas House* quoted above, which it termed *obiter dictum*, was overruled only to the extent that it, and any other language in the opinion, is

inconsistent with the holding in *Southern Bell. Id.* at 547, 299 S.E. 2d at 766.

In re Proposed Assessment v. Carolina Telephone, supra, although decided on principles of statutory construction not relevant here, attempted to reconcile the language of *Gas House* with the holding in *Southern Bell. Proposed Assessment* made the following analysis:

> As we read it, *Gas House* holds that the business of *carrying advertisements* in the yellow pages is not part of a telephone company's public utility business. *Southern Bell* holds that the *classified directory* in which advertising appears, is an integral part of the public utility's function of providing adequate service to citizens of North Carolina. We read *Southern Bell* strictly to mean that, for ratemaking purposes, it is the furnishing of the classified directory which is integral to providing reasonable, adequate telephone service and not the additional advertisements that appear in the classified directory. In *Southern Bell* the distinction is recognized: "This language [in *Gas House*] does not go so far as to say that the furnishing of a *classified listing of subscribers*, like that found in the yellow pages, to its customers is not an integral part of the public utility's function of providing adequate telephone service to the citizens of North Carolina." [Emphasis added.] 307 N.C. at 547, 299 S.E. 2d at 766.

81 N.C. App at 246-47, 344 S.E. 2d at 50-51 (emphasis in original).

We agree with this analysis that the publishing of Yellow Pages advertisements is an unregulated activity when conducted, as in *Proposed Assessment*, by a regulated public utility. Carrying this to its logical conclusion, we must conclude that the publishing of Yellow Pages advertisements by an unregulated private entity, such as BAPCO, is also an unregulated activity.

[3] Finally, we turn to intervenor-appellee Public Staff's contention that we should not hear this appeal because BAPCO failed to exhaust its administrative remedies in the Utilities Commission. They point out that BAPCO did not appeal the recommended order of the hearing examiner to the full Commission, thereby allowing it to become final nineteen days later. Under the particular facts of this case, we find this argument to be without merit.

On 22 December 1986, the full Commission issued an order denying BAPCO's motion to dismiss for lack of jurisdiction. Then on 29 May 1987, in an order enjoining BAPCO from requiring Boulevard to pay for its 1987 Yellow Pages advertisement in advance, the Commission again formally asserted its jurisdiction over BAPCO. Appeals of both these orders asserting jurisdiction were dismissed by this Court as interlocutory. The 1 December 1987 recommended order became final on 20 December without exception by BAPCO or modification made by the Commission on its own initiative.

It is well established that generally a party must exhaust all administrative remedies as a prerequisite to seeking judicial review of an agency's decision. G.S. sec. 150B-43; *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979); *Davis v. Dept. of Transportation*, 39 N.C. App. 190, 250 S.E. 2d 64 (1978), *disc. rev. denied*, 296 N.C. 735, 254 S.E. 2d 177 (1979) (both decided when former G.S. sec. 150A-43 was in force). However, this rule should not be inflexibly applied in the rare case in which exhaustion would for some reason prove inadequate or futile. *Cafferello v. U.S. Civil Service Commission*, 625 F. 2d 285 (9th Cir. 1980); *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972); *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E. 2d 890 (1980); *Stocks v. Thompson*, 1 N.C. App. 201, 161 S.E. 2d 149 (1968). We believe this is just such a case. The Commission had already repeatedly ruled on the sole issue appealed by BAPCO to this Court, namely, the Commission's jurisdiction over it. Pursuing a further hearing before the agency would have been a futile gesture for BAPCO.

For all the foregoing reasons, we hold that this appeal was properly brought before this Court, and that the Utilities Commission erred in asserting its jurisdiction over BAPCO in this case. The 20 December 1987 order of the North Carolina Utilities Commission is affirmed as to Southern Bell Telephone and Telegraph Company in all respects and is vacated as to BAPCO.

Affirmed in part and reversed in part.

Judge BECTON concurs.

Judge WELLS concurs in the result.

Judge WELLS concurring in the result.

The "Yellow Pages" of Southern Bell's telephone directories are an integral part of its providing telephone service to the public. The Yellow Pages are a convenient and helpful service to telephone customers, without which those customers would have to resort to wasteful, time-consuming searches for important information on countless sources of a huge variety of services needed by telephone customers.

Additionally, Southern Bell, by its own activities, holds itself out to the public as being the provider of its Yellow Pages. In the Yellow Pages themselves, one finds prominent and frequent references to "The Southern Bell Yellow Pages," such references clearly intended to both attract advertisers and to increase telephone subscriber's reliance on the Yellow Pages.

I find the "separateness" of Southern Bell and BAPCO to be illusory. It is more reasonable to assume that BAPCO is a mere business device by or through which Southern Bell has its Yellow Pages processed and printed, and that BAPCO is therefore the agent or the alter ego of Southern Bell in its Yellow Pages role.

I believe, however, that the majority has reasonably used applicable North Carolina case law precedents to reach the result of holding that BAPCO is not subject to commission regulation, and I therefore concur in the result.

STATE OF NORTH CAROLINA v. JAMES DAVID PURDIE

No. 8813SC483

(Filed 4 April 1989)

1. Automobiles § 112; Criminal Law § 50— automobile accident —homicide prosecution—accident reconstruction expert— admissibility of opinion testimony

In a prosecution for manslaughter arising from an automobile accident, the trial court did not err in allowing an expert in accident reconstruction to testify and give his opinions where three witnesses testified that defendant crossed the center line and struck an oncoming vehicle in its lane of travel; defendant and another witness testified that the

accident occurred when the oncoming car slid into defendant's lane; physical evidence was presented regarding damages to the vehicles, rotation and resting places of the vehicles, gouge marks in the pavement, and distribution of debris; and the expert was in a better position than the jury to interpret this evidence and to draw conclusions from it based on scientific principles. N.C.G.S. § 8C-1, Rules 702 and 704.

2. **Automobiles § 112; Criminal Law § 50.2— testimony of accident reconstruction expert—basis for opinions sufficient**

In a prosecution for manslaughter arising from an automobile accident, there was no merit to defendant's contention that an accident reconstruction expert had an insufficient basis for his opinions because he did not physically examine the scene or personally interview witnesses, since an expert witness need not testify from first-hand personal knowledge, so long as the basis for the expert's opinion is available in the record or on demand, and if, as in this case, the facts or data are of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject, then the facts or data need not be admissible in evidence. N.C.G.S. § 8C-1, Rule 703.

3. **Criminal Law § 50.2— accident reconstruction expert—information on which opinion based—admissibility of testimony**

An accident reconstruction expert could properly testify to the information he relied on in forming his opinion, even though that information was otherwise inadmissible, since it was of a type reasonably relied upon by experts in his field.

4. **Criminal Law § 87.2— leading question—no prejudice**

In a prosecution for manslaughter arising from an automobile accident, defendant was not prejudiced by a leading question which may have suggested to the jury that defendant's truck veered into the lane of oncoming traffic, since the witness had already testified that defendant's truck crossed over the center line and struck an oncoming vehicle; the context showed that the prosecutor was merely trying to ask the witness a permissible question with regard to a detour at the scene of accident; defense counsel used the same language when cross-examining two State's witnesses about the path of travel; and defendant was therefore not prejudiced by the leading question. Furthermore, defendant's argument in his brief did

not correspond with his assignment of error, and his assignment should therefore be deemed abandoned. Appellate Rule 28.

5. Criminal Law § 73— hearsay statement of unavailable witness excluded—no error

In a prosecution for homicide arising from an automobile accident, the trial judge did not err in excluding a hearsay statement of an eyewitness who was unavailable for trial, since the statement that the victim's car appeared to hit a wet spot and may have crossed over the center line was speculative, no more probative on the point for which it was offered than any other evidence defendant could procure through reasonable efforts, and therefore inadmissible. N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(5).

6. Criminal Law § 86.6— defendant's statement made without benefit of Miranda warnings—statement suppressed—cross-examination about statement for impeachment purposes proper

In a prosecution for manslaughter arising from an automobile accident, the trial court did not err in allowing the State to cross-examine defendant about a statement he made to an officer one month after the collision, even though the statement had been suppressed on direct examination because the State failed to show that defendant had first been given a *Miranda* warning or that he fully understood his rights, since a statement taken in violation of a defendant's *Miranda* rights may nonetheless be used to impeach defendant's credibility if the statement was not involuntary and defendant testified at trial.

7. Automobiles § 113.1— automobile accident—involuntary manslaughter—sufficiency of evidence

Evidence in an involuntary manslaughter case was sufficient to be submitted to the jury where it tended to show that defendant's blood alcohol concentration measured .181 two hours after the accident, thus demonstrating a willful violation of N.C.G.S. § 20-138.1; three eyewitnesses testified that the collision occurred in the victim's lane of travel; the opinion of an accident reconstruction expert was that the physical evidence supported their testimony; and the reasonable inference to be drawn from the State's evidence was that de-

fendant's drinking bore a causal relation to the collision and therefore to the other driver's death.

APPEAL by defendant from *Henry W. Hight, Jr., Judge.* Judgment entered 11 November 1987 in Superior Court, BLADEN County. Heard in the Court of Appeals 9 January 1989.

Attorney General Lacy Thornburg, by Assistant Attorney General Linda Anne Morris, for the State.

James R. Melvin for the defendant.

BECTON, Judge.

Defendant James David Purdie was convicted of involuntary manslaughter and sentenced to ten years imprisonment for his role in a head-on collision in which the driver of the other car was killed. Purdie appeals, contending that the trial judge erred by: 1) allowing an accident reconstruction expert to testify; 2) permitting the prosecutor to ask a witness a leading question on direct examination; 3) refusing to allow Purdie's former attorney to testify regarding a statement made to him by an unavailable witness; 4) allowing Purdie to be cross-examined about a statement made to a police officer one month after the collision; and 5) denying Purdie's motions to dismiss. We hold that Purdie's trial was without error.

I

The pertinent facts are as follows:

At 6:00 p.m. on 19 May 1986, Purdie was driving north on U.S. 701 near Elizabethtown when his Chevrolet pickup truck collided with a southbound Ford Fiesta. The accident occurred a short distance after the northbound traffic merged and detoured to the left due to highway construction. Upon impact, both vehicles spun and came to rest in the Fiesta's lane. Most of the debris from the collision was in the Fiesta's lane, and gouge marks caused by metal striking the road dented the pavement in that lane. The driver of the Fiesta died at the scene, and his passenger was seriously injured. Purdie also suffered injuries.

Purdie had been drinking. The police officer on the scene, Officer Paschal, smelled alcohol on Purdie's breath and found a can of beer in the pickup truck. Two hours after the accident, Purdie's blood alcohol concentration measured .181.

At Purdie's trial on charges of felony death by vehicle and involuntary manslaughter, three eyewitnesses testified for the State. Two of the witnesses had been travelling in a crew cab behind the Fiesta. Both testified that Purdie was travelling four to five feet over the center line, in the Fiesta's lane, when the vehicles collided. They also testified that the Fiesta remained in its proper lane until the collision. The third witness had been driving in front of Purdie's pickup. He testified that he noticed nothing unusual about the Fiesta as he passed it, and that he looked in his rearview mirror when he heard the crash and saw the pickup in the Fiesta's lane. Each of these witnesses denied seeing a blue car; Purdie and another defense witness would later testify that the Fiesta passed a blue car just before the collision.

Over objection, an accident reconstruction expert also testified for the State. The expert was a civil engineer who had extensive experience in accident reconstruction, having investigated approximately 1,000 automobile accidents since 1969. The expert based his testimony on information he gleaned from the police accident report, an interview with the investigating officer, photographs of the accident scene, an aerial photograph of the area, review of a transcript of a State witness's testimony, and listening to the witnesses at trial. He stated:

> [I]n my opinion it would be totally inconsistent with the laws of physics for this wreck to happen in the right-hand or northbound lane, with the contact areas that were made between the two vehicles, for them just to slide sideways and come to rest over in the southbound lane. Conversely, all the evidence, the debris, the final positions and rotation of the vehicles, is consistent with what I heard the witnesses testify to as the direction of travel and what occurred.

The expert gave his opinion—based, he said, on the rotation and final resting position of the cars, the location of the debris, the gouge marks in the pavement, and the contact between the cars—that the accident occurred in the Fiesta's lane.

Defense witnesses gave a different account of the accident. An eyewitness for the defense testified that as he travelled south, the Fiesta passed his car and slid into Purdie's lane. (On cross-examination, this witness admitted a prior conviction for giving false information to a police officer.) Purdie took the stand and testified that the Fiesta passed a blue car and then slid into the

northbound lane. Purdie also tried, without success, to have his former attorney recount an unavailable eyewitness's statement that the Fiesta "may have crossed" the center line.

Purdie did not deny that he had been drinking, although he did deny that the can of beer found in his truck was open and still cold, as Officer Paschal had testified. Purdie testified that he drank four beers between 7:30 a.m. and 2:30 p.m. the day of the accident. Over objection, the State was permitted to cross-examine Purdie about his statement to Officer Paschal, made one month after the accident, that he had consumed a six-pack of beer that day. Purdie first admitted making the statement, but later qualified that answer. Purdie also admitted a prior conviction for reckless driving after drinking, and admitted that he had been charged and convicted for another DWI incident while the present case was pending.

Purdie was found guilty of involuntary manslaughter and was sentenced to ten years imprisonment. He appeals, raising seventeen assignments of error.

II

[1] Eleven of Purdie's assignments of error concern the testimony of the accident reconstruction expert. Specifically, Purdie contends that it was error to permit the expert to testify as to how the accident occurred and what the investigating officer told him about the accident scene. He further contends that it was error to allow the expert to give an opinion as to: the vehicles' original lanes of travel; the vehicles' speeds; the vehicles' direction of travel; the rotation of the vehicles; the position of the vehicles after the accident; the gouge marks on the road; the cause of the gouge marks; the consistency of the photographs with the State's witnesses' testimony; and the lane in which the accident occurred. Essentially, Purdie argues that the expert's testimony and opinions were inadmissible. Purdie does not challenge the witness's qualifications as an expert in accident reconstruction.

A. *Expert Testimony and Opinions Must Be Helpful to Trier of Fact*

Expert *testimony* is admissible when it "can assist the jury to draw certain inferences from facts because the expert is better qualified" than the jury to interpret the information presented. *State v. Bullard*, 312 N.C. 129, 139, 322 S.E. 2d 370, 376 (1984).

The test for admissibility of expert testimony is simply "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). A trial judge has "wide latitude of discretion" when determining the admissibility of expert testimony. *Id.*

An expert may give an *opinion* "[i]f the [expert's] scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." N.C. Gen. Stat. Sec. 8C-1, R. Evid. 702 (1988). Opinion testimony is no longer inadmissible simply because it embraces an ultimate issue to be decided by the jury. N.C. Gen. Stat. Sec. 8C-1, R. Evid. 704 (1988). However, expert opinion is not helpful—and therefore is not admissible—if it is impossible for anyone, expert or nonexpert, to draw a particular inference from the evidence. *See, e.g., State v. Jackson*, 320 N.C. 452, 460, 358 S.E. 2d 679, 683 (1987) (jury in as good a position as expert to determine whether defendant was "probably" father of rape victim's baby); *Shaw v. Sylvester*, 253 N.C. 176, 180, 116 S.E. 2d 351, 355 (1960) (physical evidence at scene made it impossible for any non-observer to determine who had been driving car; expert opinion properly excluded).

Here, three witnesses testified that Purdie crossed the center line and struck the Fiesta in the southbound lane, while Purdie and another witness testified that the accident occurred when the Fiesta slid into the northbound lane. Physical evidence was presented regarding damage to the vehicles, rotation and resting places of the vehicles, gouge marks in the pavement, and distribution of debris. We hold that the expert was in a better position than the jury to interpret this evidence and to draw conclusions from it based upon scientific principles. Because the expert's testimony and opinions could be of appreciable help to the jury, the trial judge did not abuse his discretion in admitting that testimony.

B. *Basis of Expert Opinion: Information Reasonably Relied Upon by Experts in Field*

[2] Purdie's central challenge to the expert's opinion testimony is that the expert had an insufficient basis for his opinions because he did not physically examine the scene or personally interview witnesses.

Purdie relies upon *Hicks v. Reavis*, 78 N.C. App. 315, 337 S.E. 2d 121 (1985), *cert. denied*, 316 N.C. 553, 344 S.E. 2d 7 (1986),

to contend that the physical evidence made known to the expert provided an insufficient basis upon which to form an opinion. In *Hicks*, this court held that neither an expert nor a non-expert may give an opinion as to the speed of a vehicle if that opinion is based upon physical evidence obtained at the scene rather than personal observation. *Id.* at 323, 337 S.E. 2d at 126.

Purdie's reliance on *Hicks* is misplaced. *Hicks* itself was based upon *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E. 2d 351 (1960), a case decided 24 years before the new rules of evidence were adopted. The view that experts may not rely upon skid marks, vehicle damage, rotation and resting positions of vehicles, and other physical evidence to give an opinion as to speed has been rejected by the majority of jurisdictions deciding this question, *see, e.g.*, 29 A.L.R. 3d 248 (1970) (Supp. 1988); 93 A.L.R. 2d 287 (1964) (Later Case Serv. 1983) (Supp. 1988), and has been challenged by Professor Brandis. *See* Brandis, 1 *Brandis on North Carolina Evidence*, Sec. 131, n.69 (3d ed. 1988) ("this writer has always believed that qualified expert opinion about such matters, based upon observation of physical facts, should be admitted"). More importantly, the holding in *Hicks* is limited to opinions regarding *speed*; it does not apply to opinions concerning other elements of an accident. Despite Purdie's assertions to the contrary, the expert in the case before us gave no opinion as to the speed of either vehicle.

It is well settled that an expert witness need not testify from firsthand personal knowledge, so long as the basis for the expert's opinion is available in the record or on demand. *See, e.g., State v. Smith*, 315 N.C. 76, 101, 337 S.E. 2d 833, 849 (1985); *Thompson v. Lenoir Transf. Co.*, 72 N.C. App. 348, 350, 324 S.E. 2d 619 (1985). Rule 703 provides that

> The facts or data . . . upon which an expert bases an opinion or inference may be those perceived by *or made known to him* at or before the hearing. *If of a type reasonably relied upon by experts in the particular field* in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. Gen. Stat. Sec. 8C-1, R. Evid. 703 (1988) (emphasis added).

We hold that the expert's opinion was based on information reasonably relied upon by experts in the field of accident reconstruction. *See, e.g.*, cases cited in 66 A.L.R. 2d 1048 (1959) (Later Case

Serv. 1984) (Supp. 1988); 38 A.L.R. 2d 13 (Later Case Serv. 1977) (Supp. 1988); 49 A.L.R. Fed. 363 (1980) (Supp. 1988) (trend in law, particularly among jurisdictions that have adopted federal rules of evidence, is to permit qualified accident reconstruction expert to base opinions about matters surrounding an accident upon physical evidence). *Cf. McKay v. Parham*, 63 N.C. App. 349, 353, 304 S.E. 2d 784, 787 (1983) (accident reconstruction expert permitted to answer hypothetical questions regarding post-collision movement of cars; testimony based upon application of laws of physics to physical evidence at scene). The fact that an expert's opinion is not based on personal observation of the accident scene affects the *weight* to be accorded the testimony, not its admissibility.

C. *Inadmissible Evidence May Form Basis of Opinion*

[3] We reject Purdie's contention that it was error to permit the expert witness to testify about what Officer Paschal told him about the accident scene and the photographs on the ground that the officer's statements were inadmissible hearsay. If an expert's opinion is admissible, the expert may testify to the information he relied on in forming it for the purpose of showing the basis of his opinion, even when that information would otherwise be inadmissible, so long as the information is of a type reasonably relied upon by experts in his field. *See, e.g., State v. Allen*, 322 N.C. 176, 184, 367 S.E. 2d 626, 630 (1988) (applying R. Evid. 703). Moreover, out-of-court statements offered to show the basis for the expert's opinion are not hearsay. *State v. Huffstetler*, 312 N.C. 92, 106-07, 322 S.E. 2d 110, 120 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985).

In light of the foregoing, we overrule each of Purdie's assignments of error relating to the expert's testimony.

III

[4] We next consider Purdie's contention that the trial judge erred by overruling his objection to the following question asked by the State on direct examination: "All right. He had to veer to the left —." The question, cut off by Purdie's objection, was neither completed nor answered. Purdie argues that this was a leading question that impermissibly suggested to the jury that the pickup truck veered into the Fiesta's lane. We overrule this assignment of error for two reasons.

First, although Purdie correctly asserts that the challenged question was leading, he fails to show prejudice. The witness had *already testified* that Purdie's truck crossed over the center line and struck the Fiesta. Moreover, the context of preceding and subsequent questions shows that the prosecutor was merely trying to ask the witness whether northbound drivers on U.S. 701 had to move to the left at the detour. Defense counsel used the same language when cross-examining two State witnesses about the path of northbound travel. No abuse of discretion occurred here. *See State v. Riddick*, 315 N.C. 749, 756, 340 S.E. 2d 55, 59 (1986).

Second, Purdie's objection and assignment of error were directed to the witness's purported "unresponsive answer"; however, the accompanying argument in the brief concerns the leading nature of the question by the prosecutor. When, as here, the argument in the brief does not correspond to the assignment of error, that assignment should be deemed abandoned under Rule 28 of the Rules of Appellate Procedure. *Accord Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 57, 63, 330 S.E. 2d 622, 626 (1985).

IV

[5] Purdie next contends that the trial judge erred in excluding the hearsay statement of an eyewitness who was unavailable for trial. We disagree.

Purdie sought to introduce his former attorney's summary of an interview with an eyewitness who had been driving behind Purdie at the time of the accident. The witness told Purdie's former attorney that the Fiesta "appeared to hit a wet spot" and "may have crossed over" the center line. Attempts to locate the witness before trial were unsuccessful.

After *voir dire* examination of the former attorney, the trial judge ruled that this hearsay evidence was inadmissible under the residual exceptions to the hearsay rule found in N.C. Gen. Stat. Sec. 8C-1, R. Evid. 803(24) and R. Evid. 804(b)(5). Applying the six-prong test set out in *Smith*, the judge found that the statement failed the test's fifth prong because the statement was not more probative on the point for which it was offered than any other evidence Purdie could procure through reasonable efforts. *See Smith*, 315 N.C. at 96, 337 S.E. 2d at 846. The judge reasoned, first, that the eyewitness's statement would have been inadmissible even had he appeared at trial because the statement was speculative,

and second, that several other eyewitnesses were available to testify about the path of the vehicles.

We agree that the statement that the Fiesta *appeared* to hit a wet spot and *may* have crossed over the center line was (1) inadmissible, *see* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 401 (1988), and (2) no more probative of the issue than the testimony of the other defense witnesses. Accordingly, this assignment of error is overruled.

V

[6] Purdie contends that it was error to allow the State to cross-examine him about a statement he made to Officer Paschal one month after the collision because, he argues, the statement was taken in violation of his *Miranda* rights.

A *voir dire* examination of Officer Paschal was conducted to determine the admissibility of the statement. Paschal testified that he happened to be at the Magistrate's office on 13 June 1986 when Purdie was brought before the Magistrate on a warrant for felony death by vehicle. He testified that he asked Purdie "How are you doing?" Purdie answered "[a]ll right" and then summoned Paschal over to him. Paschal testified that Purdie said "I'm going to tell you the truth. I had been drinking that day. I drank about a six-pack on the way. . . . I hadn't drunk anything since that day. I've learned my lesson. And I'm sorry for what happened to those people." The trial judge excluded this evidence, finding that the State failed to show that Purdie had first been given a *Miranda* warning or that he fully understood his rights.

The State later attempted to use the statement to impeach Purdie regarding his testimony that he had only four beers the day of the accident. After a *voir dire* examination, the judge ruled that Purdie had not been interrogated and that he made the statement freely and voluntarily. The judge allowed the State to question Purdie about the statement.

Purdie argues on appeal that the statement could not come out on cross-examination since it had already been suppressed on direct examination of Paschal. We disagree. A statement taken in violation of a defendant's *Miranda* rights may nonetheless be used to impeach the defendant's credibility if (1) the statement was not involuntary, and (2) the defendant testified at trial. *Harris v. New York*, 401 U.S. 222, 224, 28 L.Ed. 2d 1, 4 (1971). " 'The

shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.' " *State v. Bryant*, 280 N.C. 551, 555-56, 187 S.E. 2d 111, 114 (1972), *cert. denied*, 409 U.S. 995, 34 L.Ed. 2d 259 (1972) (quoting *Harris*, 301 U.S. at 226, 28 L.Ed. 2d at 5). Purdie's reliance on *State v. Butler*, 269 N.C. 483, 153 S.E. 2d 70 (1967), decided before both *Harris* and *Bryant*, is misplaced.

VI

We do not reach Purdie's contention that the trial judge erred in denying his motion to dismiss at the close of the State's evidence. Purdie is foreclosed from appealing denial of that motion since he subsequently introduced his own evidence. *See* N.C. Gen. Stat. Sec. 15-173 (1983). *Accord State v. Bruce*, 315 N.C. 273, 280, 337 S.E. 2d 510, 515 (1985). However, we do consider Purdie's next contention that the judge erred in denying his motion to dismiss made at the close of all the evidence.

[7] On appeal from denial of a motion to dismiss, the State is entitled to every reasonable inference that can be drawn from its evidence. *State v. Williams*, 90 N.C. App. 120, 122, 367 S.E. 2d 345, 346 (1988). We conclude that the State presented substantial evidence of each of the elements of the crimes charged, namely (1) willful violation of N.C. Gen. Stat. Sec. 20-138.1, and (2) a causal link between that violation and the death of the other driver. *State v. McGill*, 314 N.C. 633, 637, 336 S.E. 2d 90, 92 (1985). *See also State v. Williams*, 90 N.C. App. 614, 621, 369 S.E. 2d 832, 837 (1988), *disc. rev. denied*, 323 N.C. 369, 373 S.E. 2d 555 (1988) (offense of felony death by vehicle requires same elements as involuntary manslaughter). First, Purdie's .181 blood alcohol concentration unquestionably demonstrated a willful violation of Section 20-138.1. Second, it is common knowledge that intoxication impairs the ability to drive. Three eyewitnesses testified that the collision occurred in the Fiesta's lane, and the opinion of the accident reconstruction expert was that the physical evidence supported their testimony. The reasonable inference to be drawn from the State's evidence was that Purdie's drinking bore a causal relation to the collision, and, therefore, to the other driver's death. The case was properly taken to the jury.

VII

We hold that the trial of defendant James David Purdie was without prejudicial error.

No error.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. ISA ABDUL GHAFFAR

No. 8716SC1107

(Filed 4 April 1989)

Searches and Seizures § 44— search of automobile trunk—findings at suppression hearing—insufficient

A trial court order suppressing evidence seized from the trunk of defendant's automobile was remanded for a new hearing for specific findings dealing with the issues of whether the officer had a reasonable and articulable suspicion to detain defendant pursuant to his inquiries, whether the length of the detention was reasonable, and whether defendant gave his oral consent to search the vehicle. The evidence at the suppression hearing presented questions of fact which can only be resolved by the factfinder, based largely on the credibility of the witnesses.

Chief Judge HEDRICK concurs in the result.

APPEAL by the State from the Order of *Fred J. Williams, Judge*, entered 14 August 1987 in ROBESON County Superior Court. Heard in the Court of Appeals 9 May 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General W. Dale Talbert, for the State, appellant.

Cohen, Dunn & Sinclair, by Gerald Bruce Lee and James M. Desimone; and Beaver, Thompson, Holt & Richardson, by H. Gerald Beaver, for defendant appellee.

COZORT, Judge.

This appeal is from an order of the trial court granting the defendant's motion to suppress evidence seized from the trunk of his automobile. Defendant was stopped on an interstate highway for speeding and driving without a seat belt. The officer making the stop testified that the defendant consented to the search. The

trial court excluded the evidence after concluding that the State failed to satisfy its burden of proving consent. We vacate and remand for a new hearing on defendant's motion. The facts and procedural history follow.

On 20 February 1987, defendant was arrested and charged with trafficking by transportation of more than 400 grams of cocaine. On 19 May 1987, the defendant filed a motion to suppress evidence seized when the defendant was arrested. The motion came on for hearing before the Superior Court of Robeson County on 16 July 1987. At the motion to suppress hearing, the State and the defendant presented sharply conflicting versions of the events leading up to the arrest of the defendant on 20 February. Officer Willard Mitchell of the North Carolina Highway Patrol testified that he stopped an automobile driven by defendant on Interstate 95 in Robeson County because the car was being driven in excess of the speed limit and the driver was not wearing a seat belt. Defendant was the driver of the automobile. Upon request, the defendant produced his driver's license and the vehicle registration card. The defendant's driver's license showed a Virginia address. The registration card for the vehicle identified the owner to be Gail Woods of College Park, Georgia. Defendant told Officer Mitchell that he now lived in Washington, D. C. When asked who owned the car, defendant responded, "Philip." Defendant did not know Philip's last name or address and did not know Gail Woods. Defendant became very nervous and talkative. He began to tell Officer Mitchell about an investigation by the Equal Employment Opportunity Commission, about a trip to Florida to escape personal problems, and about going to Atlanta to submit a job application. Defendant was unable to tell Officer Mitchell specifically how he came into possession of the automobile. According to Officer Mitchell, the information and answers the defendant was giving were not responsive to the questions he was asking. Officer Mitchell asked defendant if he had any weapons, alcohol or contraband in the vehicle. Defendant replied negatively. Officer Mitchell asked defendant for permission to search the vehicle, and defendant gave the officer permission to search. Upon receiving permission to search the vehicle, Officer Mitchell radioed for a backup officer to come to the scene to assist him. He also requested by radio a check through the computer to determine whether defendant's automobile had been stolen. There were no warrants outstanding on the vehicle. When the backup officer arrived, the backup officer stayed

with defendant while Officer Mitchell searched defendant's automobile. In the trunk, he found, among other things, a loaded .357 magnum revolver. There was also a red plastic bag which contained a shoe box wrapped in tape. Officer Mitchell pulled the tape off the box and found a freezer bag full of coffee grounds inside. Under the coffee grounds, Officer Mitchell found a rectangular-shaped package wrapped in tape. Officer Mitchell approached defendant's car, and without his saying anything to defendant, the defendant stated that the red bag was not his. Officer Mitchell cut open the small package and found inside it a white powdery substance which later tested as cocaine. After Officer Mitchell had opened the small package with the white powdery substance, he placed defendant under arrest and advised him of his rights. Defendant was taken downtown for processing. He was not issued a traffic citation until after he was taken downtown. Officer Mitchell did not obtain written consent to search defendant's automobile at the scene because he was not driving his regular car, and the substitute car he was driving contained no consent to search forms. Officer Mitchell testified that his initial conversation with defendant lasted approximately 15-20 minutes. After he obtained defendant's consent to search, it took approximately 15 minutes for the backup officer to arrive. The search locating the cocaine took place about an hour after Officer Mitchell initially stopped the defendant. The traffic citation was issued about 90 minutes after the initial stop.

The defendant's testimony at the suppression hearing sharply contradicted that of Officer Mitchell. The defendant testified that, when he was initially stopped, Officer Mitchell told him he was stopped for not wearing a seat belt. He was not told he was stopped for speeding. The defendant denied that he was ever asked to give permission to search his car, and he denied ever giving any consent to search. He also denied ever making statements to the officer about any employment investigation, personal problems, or any of the other matters testified to by Officer Mitchell. He testified that the search of his car was conducted without his consent by Officer Mitchell while he was sitting in a patrol car with the backup officer who was called by Officer Mitchell. He also testified that while he was stopped on the side of the road, his driver's license and the automobile registration card were never returned to him, and he was never given a citation. Thus, he did not feel he was free to leave at any time.

On 14 August 1987, the Superior Court issued an order granting the defendant's motion to suppress the evidence seized by Officer Mitchell and the statements made by the defendant. In that order, the trial court made the following pertinent findings of fact and conclusions of law:

> 5. The Sergeant approached the vehicle and observed the defendant, a thirty-seven year old black male, was the operator and sole occupant. The Sergeant asked the defendant for his operator's license, which was produced, identifying him as Isa Abdul Ghaffar, a resident of 195 Highland Ave., Wytheville, Virginia;
>
> 6. The defendant responded to the Sergeant that he was living in Washington, D.C. The defendant also told Sergeant Mitchell a man named Phillip lent him the vehicle; but, the defendant did not know Phillip's last name or any other information about Phillip, or would not divulge it.
>
> 7. The Sergeant attempted to inquire further about the vehicle ownership. However, Sergeant Mitchell determined that the defendant was acting nervous. The defendant related that he was coming from Jacksonville, Florida and going to Washington, D.C. The defendant denied knowing Gail Woods, the registered owner of the vehicle and did not or could not answer the sergeant's further inquiries about his possession and the ownership of the vehicle;
>
> 8. Based upon the defendant's statements about how he got the vehicle and why, the nature of his travels and other statements which were unsatisfactory to the officer, Sergeant Mitchell asked the defendant if there was any alcohol, contraband or weapons in the vehicle and the defendant replied "No."
>
> 9. While still in possession of the defendant's license and registration, Officer Mitchell radioed for an NCIC check on the vehicle and defendant's license, which checked out; the defendant being in the custody of Officer Mitchell, in that the defendant was not free to leave, as no citation had been issued.
>
> 10. Request to search the car was sought by Sergeant Mitchell, but no consent to search form was presented to the defendant, as is normal procedure for warrantless searches not supported by other exigent circumstances or probable cause.

11. That approximately twenty to thirty minutes elapsed from the time of the stop until Officer Mitchell radioed for backup; Officer Rittenhouse arrived to serve as a backup while he searched the automobile driven by the defendant;

12. Upon Trooper Rittenhouse's arrival, Mr. Ghaffar was immediately placed in the trooper's vehicle. By this time, thirty to forty minutes had elapsed since the defendant was stopped for the infractions;

13. Sergeant Mitchell then began to search the vehicle. The Sergeant found nothing in the passenger compartment and taking the keys from the ignition switch, opened, and searched the trunk. In the trunk the Sergeant found a bag containing numerous oranges, limes, and lemons, which were several days old. There was a bag containing a recently purchased "London Fog" coat. There was a garment bag lying on the trunk floor containing items of clothing and a loaded .357 Magnum pistol in a leather holster. Sergeant Mitchell also observed a red plastic shopping bag and in it found a shoe type box taped with plastic tape. The Sergeant opened the box and saw a freezer ziploc bag containing what appeared to be coffee grinds; and under that bag was a rectangular shaped package wrapped in waterproof tape with lettering and writing on it. The Sergeant cut through the tape wrapping and found a white powdery substance similar to cocaine. The search of the entire vehicle took approximately thirty minutes;

14. The Sergeant returned to Trooper Rittenhouse's vehicle with the package of white powdery substance. The Sergeant advised the defendant he was under arrest for possession and transportation of cocaine and advised him of his "Miranda Rights";

15. The Sergeant then called State Bureau of Investigation Agent James Bowman to the scene for a field test of the white powdery substance. The preliminary field test indicated a cocaine type substance. The defendant was then transported to the Robeson County Courthouse where he was served with warrants charging him with possession of cocaine and transportation of cocaine and a citation for speeding 65 in a 55 zone.

16. The entire episode, from the time the defendant was stopped until he was issued a citation for the original stop and drug related offenses lasted approximately ninety minutes.

17. While being served with papers relating to all of the criminal offenses and infractions, the defendant refused to sign a consent to search form.

CONCLUSION [SIC] OF LAW

* * * *

1. Sergeant Mitchell made a routine stop for speeding and a seat belt violation pursuant to the infraction statutes of the State of North Carolina.

2. That Sergeant Mitchell pursued a drug investigation initially after the stop made for the traffic violations, and by retaining the registration and driver's license presented to him by the defendant, effectively deprived the defendant of his right to leave;

3. That the State has not satisfied its burden, by showing by a preponderance of the evidence, that the defendant, Isa Abdul Ghaffar, gave consent to search the automobile from which the contested evidence was seized.

4. That the seizure of the defendant by Officer Mitchell on the infractions violations for this extended period of time without probable cause, as to other criminal activity and consistent with 15A-1113(b) and (c), violates the defendant's constitutional rights against unreasonable seizures as guaranteed by the 4th and 14th Amendments of the U.S. Constitution and N.C. Constitution, Article I, § 19;

5. That the search of the automobile without probable cause, and the nonexistence of any exigent circumstance justifying the search where voluntary consent has not been given by the defendant violates the defendant's rights against unreasonable searches as guaranteed by the 4th and 14th Amendments of the U.S. Constitution and N.C. Constitution Article I, § 19.

The State filed timely notice of appeal. The State argues that the trial court's order should be vacated and the cause remanded for further findings and conclusions. We agree.

The trial court's decision to grant the motion to suppress appears to be based on its conclusions of law numbered 3, 4, and 5. In those conclusions, the trial court concluded that (1) the State

has not satisfied its burden of proving that the defendant gave consent to search, (2) that the seizure of the defendant for an extended period of time was without probable cause in violation of the defendant's constitutional right, and (3) that the search without probable cause and without voluntary consent violated the defendant's constitutional rights. These conclusions are not supported by the findings of fact made by the trial court.

The defendant's motion to suppress and the evidence presented at the suppression hearing raised two issues: (1) Was the defendant detained for an unreasonable length of time after he was stopped for speeding and driving without a safety belt? and (2) did the defendant voluntarily consent to the search of his vehicle and its contents? The rules governing encounters between law enforcement officers and citizens have been discussed in many cases in the courts of this State and the United States Supreme Court in recent years. In *State v. Allen*, 90 N.C. App. 15, 367 S.E. 2d 684 (1988), this Court listed and summarized many of the recent pertinent cases dealing with the detention of citizens by law enforcement officers. *Id.* at 26-27, 367 S.E. 2d at 690-91. There we stated the following:

> "2. Brief seizures must be supported by reasonable suspicion;" . . .
>
> * * * *
>
> The facts in this case involve an ongoing and unfolding situation; therefore, the facts must be analyzed in light of the extent of the intrusion caused by the officers' actions and the facts and circumstances known by the officers to warrant the intrusion as the situation developed.
>
> * * * *
>
> Even if we were to accept defendant's argument that [a seizure had occurred], the officer did have a reasonable and articulable suspicion that defendant was engaged in criminal activity.

Id. at 27-28, 367 S.E. 2d at 691 (citations omitted).

In the case below, the trial court found and concluded that the defendant was in custody and was not free to leave. This is equivalent to the court's finding that the defendant had been seized. That finding, however, does not stop the trial court's in-

quiry. As we stated in *Allen*, the trial court must determine whether the officer had a reasonable and articulable suspicion that the defendant was engaged in criminal activity. The trial court below found only that the defendant was seized for an extended period of time. The amount of time alone is not all the trial court should consider. The trial court should consider all of the circumstances in determining whether the amount of time the officer detained the citizen was reasonable under all the attendant circumstances. *See State v. Darack*, 66 N.C. App. 608, 312 S.E. 2d 202 (1984).

Officer Mitchell testified at the suppression hearing below that he was suspicious that the defendant was involved in some criminal activity because he could not specifically identify the owner of the automobile, and the officers' follow-up questions about the automobile were met with inconsistent and unresponsive answers. The defendant's testimony disputed Officer Mitchell's testimony. Therefore, there was a credibility issue involved and a factual determination which could be made only by the trial court, as the finder of fact. When the trial court fails to make sufficient factual findings to resolve the issues presented, the case must be remanded for a new hearing. *State v. Johnson*, 310 N.C. 581, 313 S.E. 2d 580 (1984); *State v. Prevette*, 39 N.C. App. 470, 250 S.E. 2d 682, *disc. rev. denied*, 297 N.C. 179, 254 S.E. 2d 38 (1979). Thus, we must vacate the trial court's order and remand the case for a new hearing at which the trial court must make specific findings dealing with the issues of whether Officer Mitchell had a reasonable and articulable suspicion to detain the defendant to pursue his inquiries and whether the length of the detention was reasonable.

The trial court likewise failed to make sufficient findings on the issue of whether the defendant voluntarily gave consent to the search of his automobile. Officer Mitchell testified that defendant gave consent to search, and the trial court could have found that consent was given freely and voluntarily. The defendant testified that he did not give consent and that the officer never asked for consent to search. In *State v. Brown*, 306 N.C. 151, 170, 293 S.E. 2d 569, 582, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642, 103 S.Ct. 503 (1982), our Supreme Court held that the issue of whether a consent to a search was voluntary or the product of duress or coercion is a question of fact which must be determined from the totality of all the circumstances. In its order below, the trial court found that the defendant refused to sign a consent

form and then concluded that the State had failed to satisfy its burden of proving that the defendant had given consent to search. The trial court's finding does not support its conclusion. The conclusion appears to be based on a legal misperception that consent must be in writing to be valid. There is no requirement that consent to search be made in writing. *See* N.C. Gen. Stat. § 15A-221 (1988), and *e.g.*, *State v. Glaze*, 24 N.C. App. 60, 210 S.E. 2d 124 (1974).

The trial court's order below simply does not resolve the issue of fact of whether the defendant gave his oral consent to search the vehicle. The evidence at the suppression hearing presented a question of fact which can be resolved only by the factfinder, largely on the credibility of the witnesses.

For these reasons, this case must be remanded to the Superior Court of Robeson County for a new hearing on defendant's motion to suppress.

Vacated and remanded.

Judge WELLS concurs.

Chief Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA v. ERNEST JAMES McDOWELL, JR.

No. 8810SC773

(Filed 4 April 1989)

1. Criminal Law § 34.5— subsequent crime—admissibility to show identity

Evidence of defendant's participation in a robbery two days after the robbery for which he was being tried was properly admitted to identify defendant as a perpetrator of the robbery in question where the evidence tended to show that both robberies were committed by the same persons in that the male victims in both robberies were made to disrobe and were tied up with duct tape; the robbers in both cases took money and jewelry, asked about weapons, and caused a telephone to be ripped from the wall; and one of the gunmen in each of the robberies wielded a machine gun. N.C.G.S. § 8C-1, Rule 404(b).

2. Criminal Law § 46.1— flight of defendant—admission to show how police obtained stolen property—harmless error

Evidence that defendant attempted to flee from the arresting officer was improperly admitted in an armed robbery case to show how defendant and property taken in the robbery came into police custody because its probative value was outweighed by the danger of unfair prejudice. However, defendant failed to show that he was prejudiced by the admission of this evidence. N.C.G.S. § 8C-1, Rule 403.

APPEAL by defendant from *F. Gordon Battle, Judge.* Judgment entered 9 October 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 21 February 1989.

Attorney General Lacy Thornburg, by Assistant Attorney General William B. Ray, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Staples Hughes, for defendant-appellant.

BECTON, Judge.

A jury convicted defendant, Ernest James McDowell, Jr., of robbery with a dangerous weapon, first degree burglary, and two counts of second degree kidnapping. The judge sentenced defendant to the presumptive term of 14 years for the armed robbery offense, to the presumptive term of 15 years for the burglary conviction, and to the presumptive nine-year term for each of the two kidnapping offenses. The judge ordered that defendant serve the sentences consecutively, with the exception that one of the nine-year terms was to run concurrently with the first sentence he serves. Defendant appeals from the judgment. We affirm.

I

On 22 November 1985, two men came to the home of Ray Freeman and told him they wanted to buy drugs. Mr. Freeman said he did not have drugs, and the men left. The next evening, Mr. Freeman heard a knock at his kitchen door. He pulled aside a curtain covering a window in the door and saw the two men who had come to his house the previous day. When Mr. Freeman opened the door, the men forced their way in at gunpoint. One of the men carried a submachine gun.

Marcella Privette, Mr. Freeman's girlfriend, called out from another part of the house to ask who had knocked at the door. The gunmen told Mr. Freeman to call Ms. Privette into the kitchen. When she arrived, the two men ordered Mr. Freeman and Ms. Privette to remove their jewelry and to take their money out of their pockets. They then forced Mr. Freeman to remove his clothing. One of the men used duct tape to hogtie Mr. Freeman's hands to his ankles; he was placed on the floor of a hallway. After forcing Ms. Privette to pull the telephone out of the wall, the men bound her and left her beside Mr. Freeman.

The men searched through each room of the house. They continually asked where Mr. Freeman kept money, "reefers," and firearms. In addition to the jewelry and money, the men took clothing, books, a cordless telephone, a television, and a stereo. After the men left, Mr. Freeman and Ms. Privette were able to free themselves and telephone the police. Mr. Freeman gave the police a list of the property that had been stolen from him.

Two days later, on 24 November, two men came to the home of Alonzo Wilson. When the men arrived, Mr. Wilson noticed a white Toyota automobile in his driveway. The men asked Mr. Wilson if they could use his telephone. Mr. Wilson assented, and the men entered the house. One of them put a gun against Mr. Wilson's side and demanded his money. The men then ordered Mr. Wilson to take off his clothes; when he did, they hogtied him with tape.

At one point during the burglary, Ms. Wilson fled the house with one of her children. A third man, outside, stopped her and made her return to the house. Inside, the men bound the rest of the family and made them lie on the floor next to Mr. Wilson.

One of the gunmen went into a bedroom and overturned a jewelry box. He then returned and asked Mr. Wilson about weapons. (As happened during the Freeman robbery, the men ripped the Wilsons' telephone out of the wall. In addition, one of the two men inside the house carried a machine gun.) The men left the Wilson house with $1,500-$2,000 in cash.

Nearly three months later, on 19 February 1986, Durham Police Sergeant R. L. Layton pulled behind a white Toyota and turned on his lights and siren. The Toyota did not stop, and a chase ensued. The Toyota turned down a dead-end street, and defendant,

the driver, jumped from the vehicle and ran. Sergeant Layton pursued defendant and caught him.

At the Durham County Jail, jailer Paul Carlyle inventoried the items defendant had in his possession. Among the items were a watch, a bracelet, four necklaces, and three rings. The following day, investigators with the Durham Sheriff's Department took control of defendant's property. On 2 June 1986, a Wake County grand jury indicted defendant for the crimes stemming from the Freeman robbery.

At trial, Mr. Freeman identified the watch taken from defendant at the jail as being the watch that had been taken from him during the burglary of his home. Ms. Privette identified several of the items from the jail inventory as belonging to her or to Mr. Freeman. Ms. Privette also testified that, a few days after the robbery, she and Mr. Freeman identified defendant and his accomplice from books of photographs ("mug books").

Mr. Wilson testified that, a few days after the robbery at his home, he looked through mug books but had been unable to identify his assailants. Two or three weeks later, he viewed other pictures, and, this time, he identified defendant. Ms. Wilson identified defendant in the same manner.

Defendant's evidence tended to show that he and his wife, Willa Mae Geter McDowell, visited Ms. McDowell's mother in Sumter, South Carolina, from mid-November 1985 through the Thanksgiving holidays. Gloria Geter, defendant's sister-in-law, testified she saw defendant and Willa Mae McDowell regularly during that time, and she specifically recalled seeing defendant on 24 November. John Geter, the husband of Gloria Geter, corroborated his wife's testimony. Whilamena Geter, defendant's mother-in-law, gave testimony consistent with Gloria and John Geter's.

Willa Mae McDowell testified that she and defendant had visited in Sumter during the last two weeks in November. She examined each piece of jewelry taken from defendant at the Durham County Jail and testified that it belonged to him.

II

[1] Defendant first argues that the trial judge erred by allowing the jury to hear evidence of the Wilson robbery. At trial, the judge conducted a *voir dire* examination of Mr. Wilson and ruled

that his testimony was admissible under Rule 404(b) of the North Carolina Rules of Evidence because it bore on the identity of the perpetrator of the Freeman robbery. Defendant contends that the judge erred because Mr. Freeman and Ms. Privette made positive identifications of defendant and because the Freeman and Wilson robberies significantly differed from one another. He argues that the unfairly prejudicial effect of the evidence of the Wilson robbery outweighed its probative value.

Rule 404(b) prohibits evidence of other crimes, wrongs or acts to prove the defendant's penchant to commit the crime for which he is on trial. N.C. Gen. Stat. Sec. 8C-1, R. Evid. 404(b) (1988). Generally, this rule means the State may not present evidence that the defendant committed other crimes that are distinct, independent, or separate from the offense charged, notwithstanding that the other offense is of the same type for which defendant is being tried. *See State v. Moore*, 309 N.C. 102, 106, 305 S.E. 2d 542, 544 (1983). Rule 404(b), however, though ostensibly proscriptive, is riddled with exceptions. If, for example, "the evidence tends to identify the accused as the perpetrator of the crime charged[,] it is admissible notwithstanding that it also shows defendant to be guilty of another criminal offense." *State v. Freeman*, 303 N.C. 299, 301, 278 S.E. 2d 207, 208 (1981).

As in *Freeman*, "The principal issue in this case was that of identification of defendant." *Id.* at 302, 278 S.E. 2d at 208. Although Mr. Freeman and Ms. Privette identified defendant as being one of the two gunmen, "defendant's evidence of alibi made the question of whether defendant was, indeed, the perpetrator the very heart of the case." *Id.* at 302, 278 S.E. 2d at 208-09. Evidence of the Wilson robbery, therefore, was relevant to the critical issue whether defendant helped commit the Freeman robbery.

Defendant alleges that the two incidents differed significantly enough to have made evidence of the Wilson robbery inadmissible. *See Moore*, 309 N.C. at 106, 305 S.E. 2d at 545 (before evidence of other crimes admissible, unusual facts or particularly similar acts must be present in both crimes to indicate same person committed them). In our view, the two robberies contained enough similarities to have suggested the same people committed both crimes. We find it especially probative that in both robberies only the male victims were made to disrobe, and, in each case, the male victims were hogtied with tape. In addition, in both robberies

the men took money, jewelry, asked about weapons, caused a telephone to be ripped from the wall, and one of the gunmen wielded a submachine gun.

We hold, therefore, that the judge correctly permitted the State to introduce evidence of the Wilson robbery. Defendant's defense of alibi put in issue whether he participated in the crimes at Mr. Freeman's house. The Wilsons' evidence, when coupled with the evidence of Mr. Freeman and Ms. Privette, tended to show that both burglaries were committed by the same people, and that defendant was one of the people involved. *See State v. Leggett*, 305 N.C. 213, 224, 287 S.E. 2d 832, 839 (1982). We overrule this assignment of error.

III

[2] Defendant assigns error to the trial judge's allowing the jury to hear evidence that defendant attempted to flee from Sergeant Layton prior to defendant's arrest. We agree that the judge erred by permitting the State to introduce this evidence, but the error was harmless.

Evidence of a defendant's flight is admissible to demonstrate his consciousness of guilt. *See State v. Jones*, 292 N.C. 513, 525, 234 S.E. 2d 555, 562 (1977). A remote temporal connection between the crime and the flight episode relates merely to the weight of the evidence and not its admissibility. *State v. DeBerry*, 38 N.C. App. 538, 539-40, 248 S.E. 2d 356, 357 (1978). In this case, however, the judge declined to instruct the jury on flight as evidence of guilt because of the lapse of time between the Freeman robbery and defendant's arrest. The judge, though, did allow the State to present evidence of the car chase to show how the stolen property came into police custody. By permitting the evidence for this purpose, the judge erred.

In our view, the circumstances of defendant's apprehension by the police, if relevant at all, had only the slightest relevance. Although we recognize that evidence which is essentially background in nature may be admissible as an aid to a jury's understanding in some circumstances, *Santora, McKay & Ranieri v. Franklin*, 79 N.C. App. 585, 589, 339 S.E. 2d 799, 802 (1986), the probative value of testimony about the car chase was a dubious aid at best. Assuming, however, that the flight evidence was relevant to demonstrate how defendant and his possessions came into police

custody, the potential that this evidence might unfairly prejudice the jury should have caused the judge to exclude it pursuant to Rule 403 of the Rules of Evidence. The judge erred by not excluding the evidence under this rule.

In spite of the error, however, defendant has not demonstrated that, but for admission of this evidence, a different result would have been reached at trial. N.C. Gen. Stat. Sec. 15A-1443(a) (1988); *cf. State v. Kimbrell*, 320 N.C. 762, 767-69, 360 S.E. 2d 691, 693-95 (1987). Given the identification testimony and defendant's possession of the stolen property at the time of his arrest, defendant has not demonstrated that the judge committed reversible error by allowing the jury to hear the flight evidence. We overrule this assignment of error.

IV

We hold that defendant received a fair trial, free from prejudicial error. Consequently, the judgment is

Affirmed.

Judges PARKER and ORR concur.

DR. LEO W. UICKER v. THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

No. 8810SC137

(Filed 4 April 1989)

Physicians, Surgeons, and Allied Professions § 6.2— dentist—failure to discover patient's cancer—use of unlicensed personnel to practice dentistry—sufficiency of evidence to suspend license

There was substantial evidence to support respondent's findings which in turn supported its conclusions, and the trial court therefore erred in overturning respondent's decision to suspend petitioner's license to practice dentistry for six months and to place him on probation for five years where the evidence tended to show that petitioner examined a patient at a time when he had cancerous lesions in his mouth and a large

cancerous lump on his neck, but petitioner failed to discover the oral cancer and refer the patient to an oncologist for further diagnosis and treatment; and failure to discover the condition and refer the patient was negligence and malpractice under N.C.G.S. § 90-41(a)(12) and (a)(19). Furthermore, findings and conclusions concerning petitioner's use and employment of unlicensed personnel to practice dentistry were likewise supported by substantial evidence where it was undisputed that assistants who worked for petitioner took dental x-rays and placed and adjusted dentures in patients' mouths; these activities are deemed to be the practice of dentistry; and it was undisputed that each assistant practiced dentistry without a license while under petitioner's supervision and that such practice was a violation of N.C.G.S. § 90-41(a)(6), (a)(13), and (a)(21).

APPEAL by respondent from judgment of *Robert L. Farmer, Judge*, entered 14 September 1987 in WAKE County Superior Court. Heard in the Court of Appeals 8 June 1988.

Walter L. Horton, Jr., for petitioner appellee.

Bailey & Dixon, by Ralph McDonald and Alan J. Miles, for respondent appellant.

COZORT, Judge.

The State Board of Dental Examiners (hereinafter the Board), suspended Dr. Leo W. Uicker's license to practice dentistry after a hearing revealed that Dr. Uicker failed to notice a large cancerous mass in the mouth and on the neck of one of his patients. The evidence also revealed that Dr. Uicker permitted unlicensed hygienists to practice dentistry. Dr. Uicker appealed the Board's decision to suspend his license for six months and to place him on probation for five years. The Board's decision was reversed by the Wake County Superior Court. We vacate the trial court's order and reinstate the Board's decision.

Dr. Uicker practiced general dentistry one day per week at the Edwards, Henson, Lambeth and Hammer Clinic in Conover in addition to practicing in Charlotte at the time of the incidents in question. John Coffey had suffered pain in his mouth and throat and went to the Conover Clinic for treatment. Dr. Uicker examined Mr. Coffey on 14 April 1986 and decided to pull one of his teeth

to try to relieve his pain. On 21 April 1986 Mr. Coffey returned to the clinic to have Dr. Uicker fit him with an upper denture.

The pain in Mr. Coffey's mouth continued, and he sought treatment with his family doctor. Mr. Coffey's family physician examined his mouth and discovered a lesion that he suspected was cancerous. Mr. Coffey was then referred to Dr. Harry King, a head and neck specialist. Dr. King examined Mr. Coffey on 29 April 1986. Dr. King discovered a "large ulcerating mass" in Mr. Coffey's mouth and a large lump on the right side of his neck. Dr. King performed a biopsy on the lesion and determined that Mr. Coffey had oral cancer. Mr. Coffey was then referred to another specialist, Dr. Brian Matthews, who saw him on 2 May 1986 and confirmed Dr. King's diagnosis.

After a hearing, the Board made the following relevant findings:

> 5. On April 14 and 21, 1986, Mr. Coffey had oral cancer.
>
> 6. An individual acting in accordance with the standard of care for the practice of dentistry in North Carolina would or should have discovered this oral cancer on April 14 and 21, 1986, and advised Mr. Coffey of the need for immediate further care of this condition.
>
> 7. Respondent failed and neglected to discover this condition or, having discovered it, failed to advise Mr. Coffey of the need for immediate further care or treatment.

Based on those findings the Board concluded in part as follows:

> 1. The failures and neglect described in Findings of Fact 2 through 7 constituted negligence in the practice of dentistry and malpractice in the practice of dentistry in violation of N.C. Gen. Stat. §§ 90-41(a)(12) and 90-41(a)(19).

Dr. Uicker also appealed the Board's findings and conclusions regarding the practice of dentistry by unlicensed hygienists under his supervision. Three assistants who worked for Dr. Uicker testified at the hearing that they performed x-rays and placed and adjusted dentures in the patient's mouth while under Dr. Uicker's supervision and control. Each testified that she was unlicensed as a dental hygienist or dentist. Only one testified that she had any training as a dental assistant. The Board made findings based on their testimony and concluded that Dr. Uicker violated N.C. Gen. Stat. § 90-41(a)(6), (a)(13), and (a)(21) (1981).

Dr. Uicker's license was suspended for six months, and he was placed on a five-year probation subject to completion of a course of study set by the Board. The Board's decision was reversed without explanation by the Wake County Superior Court and remanded for further proceedings. The Board appeals.

The issue before us is whether the Board's findings are supported by competent evidence and whether the Board's conclusions are supported by the findings. Based on the whole record, we find the Board's findings are supported by substantial evidence and the Board's conclusions are correct as a matter of law.

The scope of review of final agency decisions is governed by N.C. Gen. Stat. § 150A-51 (1985), the statute in effect at the time this case was before the superior court, which provided: "Based on the record and evidence presented to the court, the court may affirm, reverse, or modify the decision or remand the case to the agency for further proceedings." N.C. Gen. Stat. § 150A-51 (1985), *amended by* N.C. Gen. Stat. § 150B-51(b) (1987). As noted above, Chapter 150B applies to petitions filed on or after 1 September 1987 and is, therefore, not applicable because Dr. Uicker's petition was filed 29 April 1987. Nonetheless, our Supreme Court has held that "[a]lthough the 1985 amendment of former N.C.G.S. § 150A-51 deleted the phrase 'in view of the entire record as submitted,' we hold that the [1985] amendment maintains the whole record test for judicial review under the Administrative Procedures Act." *In re Appeal of K-Mart Corp.*, 319 N.C. 378, 380, 354 S.E. 2d 468, 469 (1987).

The whole record test means that the courts are bound by a Board's findings if the Board's findings "are supported by competent, material, and substantial evidence in view of the entire record as submitted." *Id.* We are not to look at the whole record *de novo* and decide whether we could reach a different result. *Thompson v. Wake County Bd. of Ed.*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). "On the other hand, the 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence." *Id.* We find that the Board's findings are supported by substantial evidence, and the trial court erred in reversing the Board.

Dr. King testified that in his expert opinion the cancer inside Mr. Coffey's mouth would have been "easily observable" six months

before Mr. Coffey was treated by Dr. King on 29 April 1986. Dr. King said that the mass on Mr. Coffey's neck, measuring seven centimeters on 29 April 1986, would have been "easily visible without palpation" (*i.e.*, visible without examination or exploration by touching) three to four months before Dr. King treated Mr. Coffey. Mr. Coffey saw Dr. King on 29 April 1986, a mere eight days after Dr. Uicker had last seen Mr. Coffey on 21 April 1986. During his diagnosis Mr. Coffey told Dr. King that the lump on his neck had not changed since the last time he saw Dr. Uicker. It was Dr. King's expert opinion that there was no significant change in the mouth and neck tumors during the eight-day interval between Dr. Uicker's last treatment and Dr. King's examination.

Dr. Brian Matthews, another cancer specialist who treated Mr. Coffey, examined Mr. Coffey on 2 May 1986. He testified that Mr. Coffey's type of cancer was slow growing and that there had probably been some change in the mouth lesions from the time Dr. Uicker saw the patient until Dr. Matthews examined him. Dr. Matthews stated, however, that the mouth lesions would have been evident on 14 April 1986 when Dr. Uicker first treated Mr. Coffey. The nodes on Mr. Coffey's neck would probably have been observable on 14 April 1986, but Dr. Matthews could not say that the nodes were observable with a reasonable medical certainty.

Dr. Uicker offered the expert opinion of Dr. Harold Pillsbury, a head and neck surgeon, who testified that "over a period of *several weeks* there could be a very rapid, dramatic growth of a cancer." (Emphasis added.) But Dr. Pillsbury also said that in Mr. Coffey's case, "I certainly would say that the whole thing couldn't have grown in two weeks . . . ."

We believe that the Board's finding that on 14 April and 21 April 1986 Mr. Coffey had oral cancer is supported by substantial evidence in view of the entire record.

Dr. Dean Powell, an expert in general dentistry, testified that he was familiar with the standard of care for dentists in observing oral cancer and on advising patients with oral cancer. He said that a patient with oral cancer should immediately be referred to an oncologist (cancer specialist) or an oral surgeon.

Finally, Dr. Uicker testified that he performs oral cancer screenings on all of his patients. He agreed with Dr. Powell that had he seen Mr. Coffey's oral cancer he would have referred him im-

mediately. Dr. Uicker said, "Whether I got momentarily distracted or what, I don't know, but, apparently, he [Mr. Coffey] had a lesion of some significance that I just, simply, did not see."

We believe substantial evidence supports the Board's findings that a dentist acting with reasonable care would have discovered this oral cancer on 14 April and 21 April 1986 and referred Mr. Coffey for further diagnosis and treatment. Dr. Uicker's failure to discover this condition and refer Mr. Coffey was negligence and malpractice under N.C. Gen. Stat. § 90-41(a)(12) and (a)(19) (1985), respectively.

The findings and conclusions concerning Dr. Uicker's use and employment of unlicensed personnel to practice dentistry are likewise supported by substantial evidence. It was undisputed that each of the assistants involved took dental x-rays and placed and adjusted dentures in the patient's mouth. These activities are deemed to be the practice of dentistry. N.C. Gen. Stat. § 90-29(b)(8) and (b)(9) (1985); *see also* 21 N.C. Admin. Code 16H.0202. It was also undisputed that each practiced dentistry without a license while under Dr. Uicker's supervision and that such practice was a violation of N.C. Gen. Stat. § 90-41(a)(6), (a)(13) and (a)(21) (1985).

The order of the trial court is vacated, and the case is remanded to the Superior Court of Wake County with instructions to reinstate the Board's decision.

Vacated and remanded.

Judges JOHNSON and PARKER concur.

JAMES H. KUTZ v. KOURY CORPORATION D/B/A HOLIDAY INN FOUR SEASONS

No. 8826SC666

(Filed 4 April 1989)

Negligence §§ 57.11, 58— fall in hotel bathtub—insufficiency of evidence of negligence—contributory negligence as matter of law

In an action to recover for injuries sustained by plaintiff when he slipped and fell in a bathtub in a hotel owned by

defendant, the trial court properly granted defendant's Rule 50(b)(1) motion for directed verdict, after the jury could not reach a verdict, on the grounds that the evidence was insufficient to submit the issue of negligence to the jury and that plaintiff was contributorily negligent as a matter of law where the evidence tended to show that defendant placed some non-slip strips on the bottom of the tub; plaintiff contended that some were missing and that defendant, having undertaken to cover the bottom of the tub, was required to maintain that same number at all times; it is common knowledge that bathtub surfaces are slippery; even with half the strips missing, plaintiff could have showered while standing on the remaining strips; plaintiff had showered the day before without incident; and plaintiff did not look into the tub before either shower to ascertain its condition.

APPEAL by plaintiff from *Boner, Judge*. Judgment entered 17 February 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 January 1989.

This is a "slip-and-fall" retrial in which the plaintiff alleges he was injured as a result of defendant's negligence while he was a guest in defendant's hotel. Plaintiff had stayed at the defendant's hotel for two nights. Plaintiff alleges that on the second morning of his stay, as he was rinsing the soap off while taking a shower, his foot slipped. This was the second time the plaintiff had used the shower in his room. He testified that the first shower was without incident. Plaintiff testified that as his foot was slipping, he started to fall backwards and reached out with his hand. Plaintiff testified that he "grabbed hold of . . . [the] soap dish and broke [his] fall." Plaintiff also testified that when he grabbed the dish, pain shot up his left arm, up his shoulder and to the side of his neck. Plaintiff's testimony was that after he slipped, he finished showering and stepped out of the bathtub. Plaintiff's evidence tended to show that on the morning of his slip, in the bottom of the bathtub there were some non-slip strips but some were missing and his foot had slipped in the area of the tub that the strips did not cover. Plaintiff testified that later while he was drying himself with a towel he looked at the bottom of the bathtub and noticed that only half of the surface was covered by non-slip strips. Plaintiff checked out of the hotel that morning but did not report his slip to anyone on the hotel staff. Plaintiff testified that

when he returned to Charlotte later that day, he visited a clinic in order to obtain relief from the pain that had persisted since his slip. Plaintiff eventually underwent a cervical fusion to remedy his discomfort.

Defendant's evidence tended to show that on the bottom of the bathtub in each room there were a number of non-slip strips. Defendant's housekeeping and maintenance programs were designed so that if anything was amiss in a guest room, the problem would be discovered when the housekeeping staff went through the room each day. However, there was no written record of when, or if, needed repairs were performed in any particular room. The trial court submitted the issues of negligence and contributory negligence to the jury. After the jury reported its inability to reach a unanimous verdict, the trial court declared a mistrial and granted defendant's Rule 50(b)(1) motion for directed verdict on the grounds that the evidence was insufficient to submit the issue of negligence to the jury and that the plaintiff was contributorily negligent as a matter of law. Plaintiff appeals.

Hedrick, Eatman, Gardner and Kincheloe, by John F. Morris and John Brem Smith, for plaintiff-appellant.

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

EAGLES, Judge.

The question here is whether the trial court properly granted defendant's motion for directed verdict following the jury's inability to return a unanimous verdict. We find that defendant was entitled to judgment as a matter of law and affirm.

Rule 50(b)(1) provides that if a party moved for directed verdict at the close of all the evidence, he may move for judgment in accordance with his motion if a jury verdict is not returned. "[T]he motion shall be granted if it appears that the motion for directed verdict could properly have been granted." G.S. 1A-1, Rule 50. Defendant in this case made the proper motion and the trial court granted a directed verdict in defendant's favor. In passing on a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmovant. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). A directed verdict is not properly allowed "unless it appears, as a matter

of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Graham v. Gas Co.*, 231 N.C. 680, 683, 58 S.E. 2d 757, 760 (1950). Under these principles, defendant is not entitled to a directed verdict unless plaintiff has failed as a matter of law to establish the elements of actionable negligence or unless the evidence, viewed in the light most favorable to plaintiff, shows contributory negligence as a matter of law.

Plaintiff argues that since defendant undertook to cover the bottom of the bathtub with a number of non-slip strips, he is required to maintain that same number at all times. However, the standard of care applicable here is determined by the status of the parties.

"An invitee is a person who goes upon the premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself." *Mazzacco v. Purcell*, 303 N.C. 493, 497, 279 S.E. 2d 583, 587 (1981). Plaintiff was an invitee. A proprietor owes an invitee

> a duty to use ordinary care to maintain the premises in a condition reasonably safe for the contemplated use and a duty to warn the invitee against dangers, which are known to or should have been discovered by the proprietor and which are not readily apparent to such observation as may reasonably be expected of such an invitee to such an establishment.

Hedrick v. Tigniere, 267 N.C. 62, 66, 147 S.E. 2d 550, 553 (1966). Stated otherwise, "[a]n innkeeper is not an insurer of the personal safety of his guests. He is required to exercise due care to keep his premises in a reasonably safe condition and to warn his guests of any hidden peril." *Page v. Sloan*, 281 N.C. 697, 702, 190 S.E. 2d 189, 192 (1972), *citing Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180 (1949). "Where a condition of the premises is obvious . . . generally there is no duty on the part of the owner . . . to warn of that condition." *Jones v. Pinehurst, Inc.*, 261 N.C. 575, 578, 135 S.E. 2d 580, 582 (1964), *citing Shaw v. Ward Co.*, 260 N.C. 574, 133 S.E. 2d 217 (1963). However,

> since the duty to keep the premises in a reasonably safe condition implies the duty to make reasonable inspection and to correct unsafe conditions which a reasonable inspection would reveal, *Grady v. Penney Co.*, 260 N.C. 745, 133 S.E. 2d 678

(1963), such breach of duty would constitute actionable negligence on defendant's part.

Rappaport v. Days Inn, 296 N.C. 382, 387, 250 S.E. 2d 245, 249 (1979) (failure to maintain adequate lighting in parking lot that was "pitch black" was alleged cause of plaintiff's fall).

In this case, looking at the evidence in the light most favorable to the plaintiff, one-half of the bathtub's bottom surface was not covered by non-slip strips. This lack of coverage could have been revealed on a reasonable inspection of the room. Defendant introduced evidence that the guest rooms were inspected on a regular basis and that checking the bottom of the bathtub for non-slip strips was one item on the inspection checklist. We cannot say, however, that failure to maintain any certain number of non-slip strips was negligence on defendant's part. It is common knowledge that bathtub surfaces, especially when water and soap are added, are slippery and that care should be taken when one bathes or showers. Here there was evidence that, even with one-half of the strips missing, plaintiff could have showered while standing on the remaining strips. We note that plaintiff had showered in the same bathtub the day before his slip without incident. The bathtub here was not so unnecessarily dangerous so as to give rise to a claim of negligence. *See LaBart v. Hotel Vendome Corp.*, 213 F. Supp. 958 (D. Mass. 1963) (absence of bathmat and statement that tub was very smooth and shiny was not sufficient to warrant a finding for plaintiff; further, even if absence of the mat created a condition which was unnecessarily dangerous, state case law makes it clear there is no duty on defendant to warn plaintiff of a condition which was open and obvious to anyone using ordinary diligence); *Coyle v. Beryl's Motor Hotel*, 171 N.E. 2d 355 (Ohio App. 1961) (no evidence of actionable negligence in case where plaintiff slipped and fell in hotel shower that did not have bathmat). The trial court correctly found that defendant was entitled to judgment as a matter of law on plaintiff's negligence claim and the directed verdict was proper.

Assuming *arguendo* that defendant was negligent, the trial court nevertheless was correct in its directed verdict for defendant because we hold that plaintiff was contributorily negligent as a matter of law. We agree that "[a] directed verdict for defendant on the basis of contributory negligence [is] proper only if the evidence, taken in the light most favorable to plaintiff [establishes plaintiff's], negligence so clearly that no other reasonable conclusion could

[be] drawn therefrom." *Fields v. Chappell Associates*, 42 N.C. App. 206, 208, 256 S.E. 2d 259, 260 (1979). "Plaintiff, as an invitee, had the duty to see that which could be seen in the exercise of ordinary prudence, and to use reasonable care." *Prevette v. Wilkes General Hospital, Inc.*, 37 N.C. App. 425, 428, 246 S.E. 2d 91, 93 (1978). In this case, plaintiff testified that he did not look inside the tub either before his first shower in the hotel room or before his shower on the next morning. As we have noted, common sense tells us all that bathtubs are slippery and care should be taken when one is in a bathtub. Plaintiff failed to exercise "ordinary prudence" when he failed to look into the bathtub before he stepped in to shower. Because of plaintiff's negligence in failing to look before he stepped in, defendant was entitled to judgment as a matter of law based on plaintiff's contributory negligence. *See Miller v. Shull*, 48 So. 2d 521 (Fla. 1950) (plaintiff did not even make a cursory glance at the tub before she entered and therefore failed to exercise ordinary care for her safety). *Contra Lincoln Operating Co. v. Gillis*, 232 Ind. 551, 114 N.E. 2d 873 (1953) (plaintiff had no duty to inspect the bathtub before using it and his failure to inspect cannot be contributory negligence as a matter of law).

For the reasons stated, we affirm the judgment below.

Affirmed.

Judges PARKER and LEWIS concur.

STATE OF NORTH CAROLINA v. ROBERT LANE WISE

No. 8819SC615

(Filed 4 April 1989)

Criminal Law §§ 50.1, 86.8— expert opinion on credibility of witness—prejudicial error

Testimony by an expert in counseling children that an alleged rape victim was "genuine" when talking to her in counseling sessions amounted to an opinion that the victim was telling the truth and violated N.C.G.S. § 8C-1, Rules 405(a) and 608. Furthermore, the admission of such testimony was prejudicial error where the trial was basically a matter of the victim's accusations against defendant's denials.

APPEAL by defendant from *Collier, Robert A., Jr., Judge.* Judgment entered 21 January 1988 in Superior Court, CABARRUS County. Heard in the Court of Appeals 23 January 1989.

Defendant Robert Lane Wise was tried before a jury on two separate indictments charging first degree rape of a twelve-year-old girl in violation of G.S. sec. 14-27.2(a)(1). The jury convicted the defendant of the rape which allegedly occurred on 14 June 1986, and found him not guilty of the charge stemming from the 30 May 1987 allegations. The trial judge imposed a mandatory life sentence for conviction of the 14 June 1986 offense, and defendant gave notice of appeal in open court.

Attorney General Lacy H. Thornburg, by Associate Attorney General Katherine R. White, for the State.

Cruse and Spence, by Kenneth B. Cruse and Thomas K. Spence, for defendant-appellant.

JOHNSON, Judge.

The State's prosecuting witness testified to the following: Defendant is the step-uncle and neighbor of the prosecutrix. On 14 June 1986, defendant asked the prosecutrix to come to his house to babysit. When she arrived he asked her to accompany him to a storage building about five minutes away by car to help him pick up something. Defendant's two-year-old son went with the two to the warehouse, but remained asleep in defendant's van. After defendant and the prosecutrix got the item and walked to one end of the warehouse, the prosecutrix fell. At that point defendant held the child down on the floor by putting his knee on her stomach while pulling her shorts off. Defendant then proceeded to have sexual intercourse with the prosecutrix. The child waited until the defendant left and then put on her clothes and went home.

In June or July of 1987, the prosecutrix confided to the leader of her church youth group, Nadine Wilcox, that the defendant had had sexual intercourse with her. Mrs. Wilcox informed the prosecutrix's mother, and the defendant was subsequently charged with rape.

Defendant denied all of the allegations against him and testified that he was working at his job as manager of the Country Barn, a facility for lease to private groups for social functions, on 14 June 1986.

We find that only defendant's third Assignment of Error merits discussion. Insofar as the others are concerned, they are overruled.

By his third Assignment of Error, defendant contends that the trial court committed reversible error in allowing an expert witness who had interviewed the prosecutrix to testify that, in effect, the prosecutrix was telling the truth.

Gail Kay Mason, a professional counselor who worked with the prosecutrix during the investigation of this case, testified for the State. We note at the outset that the State's attorney did not initially tender Mrs. Mason as an expert in counseling children, nor did the court specifically find her to be an expert. After the witness had testified extensively on direct examination, defense counsel challenged Mrs. Mason's status as an expert and was allowed to question her about her qualifications. Although the court did not then specifically find Mrs. Mason to be an expert in counseling children, defendant's objection to her testimony was overruled. Our perusal of the record indicates that the witness Mason was qualified to testify as an expert. In the absence of a special request that a court expressly find that a witness is qualified as an expert, that finding will be deemed implicit in the court's admitting the witness' testimony. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. Perry*, 69 N.C. App. 477, 317 S.E. 2d 428 (1984). We believe that the situation before us falls under this general rule, and that the trial court may be deemed to have implicitly accepted Mrs. Mason as a witness by admitting her testimony.

In her testimony Mrs. Mason gave a detailed statement from her notes of what the prosecutrix told her in a counseling session concerning the alleged 14 June 1986 incident. The following interchange between the State's attorney and Mrs. Mason then occurred.

Q. Did you engage her also in a conversation concerning what had occurred on May 30, 1987?

A. I did not. All I have recorded is May 30th, same warehouse.

Q. So you didn't ask her specifically about individual, just in general.

A. Right. She was referred to me through victims' assistance. I was in a counseling—that was the way I perceived it, as far as a counseling endeavor.

Q. Now ma'am, could you describe her emotionally when she was telling you these things during these counseling sessions?

A. Genuine.

Although defense counsel objected to the witness' description of the prosecutrix during counseling sessions as "genuine," the court did not rule on the objection.

Defendant contends that Mrs. Mason's statement amounted to an expert opinion that the prosecutrix was telling the truth and violated G.S. sec. 8C-1, Rules 405 and 608, of the North Carolina Rules of Evidence. We agree that the response was improper.

G.S. sec. 8C-1, Rule 405(a) provides in part that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." In addition, G.S. sec. 8C-1, Rule 608(a) states partially that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), . . ." In observing the relation between the two rules of evidence, the commentary to Rule 608 states that "[t]he reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible." Our Supreme Court has upheld the mandate of Rules 405(a) and 608 in holding that expert opinion is inadmissible as it relates to the credibility of a witness. *State v. Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1986); *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565 (1986).

In the case *sub judice*, Mrs. Mason's testimony that the prosecutrix was "genuine" when talking to her in counseling sessions clearly bore on the prosecutrix's credibility. The question which elicited her response, which inquired about the child's emotional state during the sessions, was not improper. It did, however, squarely invoke the witness' status as a professional. Her answer that the child was genuine, though unresponsive to the question, undoubtedly had the effect of establishing that the prosecutrix was telling the truth. *Kim, supra.* It is also important that Mrs. Mason's response came only moments after her detailed recounting of the alleged rape on 14 June 1986 as told to her by the prosecutrix. Thus, it improperly gave credibility to the prosecutrix's testimony concerning that incident. *Id.*

Having decided that the counselor's statement was improper, we must now determine whether the error was prejudicial to de-

fendant so as to merit a new trial. To demonstrate prejudice, a defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." G.S. sec. 15A-1443(a); *State v. Teeter*, 85 N.C. App. 624, 355 S.E. 2d 804, *writ denied, appeal dismissed, disc. rev. denied*, 320 N.C. 175, 358 S.E. 2d 66-67 (1987). We believe the contested statement meets this standard and was therefore prejudicial to defendant.

The State's case rested on the credibility of the prosecutrix. She did not report the incident in question until about a year after it allegedly occurred. Therefore, there was no medical evidence directly implicating the defendant. Although a physician who examined the prosecutrix on 29 June 1987 testified that there was evidence of penetration, he could not conclude that the prosecutrix had actually had sexual intercourse. Further, there was some inconsistency in the prosecutrix's statements. In one session with Mrs. Mason she claimed that defendant slapped her and threatened her verbally on 14 June 1986. The child later told the counselor that the slapping and threat never occurred. The prosecutrix also admitted at trial that she had lied earlier under oath when she claimed that she did not understand certain language allegedly used by defendant on 14 June 1986.

This trial was basically a matter of the prosecutrix's accusations against the defendant's denials. The credibility of each was critical. When Mrs. Mason declared the prosecutrix to be "genuine" she invaded the jury's province as sole fact finder to the prejudice of the defendant. Further, this comment stood without any instruction by the court to ignore it as to the prosecutrix's credibility. Under these facts, we conclude that in the absence of the challenged testimony there is a reasonable possibility that a different result would have been reached.

For the foregoing reasons we hold that defendant is entitled to a

New trial.

Judges WELLS and BECTON concur.

BRETT BLACKWELL AND DANA E. BLACKWELL v. GEORGE DOROSKO, CHARLES H. WEST AND CAROLINA BEACH REALTY, INC. v. KICK ENTERPRISES, INC., D/B/A CAROLINA BEACH REALTY AND SEASIDE REALTY, D/B/A CAROLINA BEACH REALTY

No. 885SC650

(Filed 4 April 1989)

1. **Vendor and Purchaser § 6— sale of beachfront property—representations as to beach erosion—reliance on representations—summary judgment for seller proper**

The trial court properly entered summary judgment for defendant landowner and defendant real estate agent in plaintiffs' action for fraud in the sale of beachfront property where plaintiffs' own evidence established that defendant real estate agent in no way impeded plaintiffs' opportunity to make further pertinent inquiries as to beach erosion but instead offered to obtain details from the Homeowners' Association about erosion, but plaintiffs did not accept the offer.

2. **Vendor and Purchaser § 6— sale of beachfront property—negligent misrepresentations as to erosion alleged—summary judgment for seller proper**

The trial court properly entered summary judgment for defendant landowner and defendant real estate agent in plaintiffs' action for negligent misrepresentation in the sale of beachfront property where the evidence unequivocally established plaintiffs' own negligence in failing to make inquiries as to beach erosion and unjustifiably relying on defendant agent's statements with regard to erosion.

3. **Unfair Competition § 1— sale of beachfront property—no unfair and deceptive trade practices**

The trial court properly granted summary judgment for defendant landowner and defendant real estate agent in plaintiffs' action for unfair and deceptive trade practices in the sale of beachfront property, since defendant landowner, as a private vendor of realty, could not be subject to liability under N.C.G.S. § 75-1.1; nothing in the depositions suggested that defendant real estate agent or his employer engaged in any unfair or deceptive act; at no time did the agent hold himself out to plaintiffs as having extensive familiarity with the beach where the property was located; and for this reason

the agent offered to supplement his statements about the beach's history of erosion by speaking to people who had greater familiarity with the area.

APPEAL by plaintiffs from *Napoleon B. Barefoot, Judge*. Judgment entered 30 March 1988 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 23 January 1989.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellants.

Burney, Burney, Barefoot & Bain, by Roy C. Bain, for defendant-appellees Charles H. West and Carolina Beach Realty, Inc.

Prickett and Corpening, by Carlton S. Prickett, Jr.; and by Bruce H. Jackson, Jr., for defendant-appellee George Dorosko.

BECTON, Judge.

Plaintiffs, Brett Blackwell and Dana E. Blackwell, sued defendants, Carolina Beach Realty, Charles West, and George Dorosko, alleging fraud, negligent misrepresentation, and unfair and deceptive trade practices. The parties executed a Stipulation of Dismissal against third-party defendant Kick Enterprises, Inc., on 22 April 1987. On 28 March 1988, the trial judge entered an order granting summary judgment for the remaining defendants. From this judgment plaintiffs appeal. We affirm.

I

Brett Blackwell and Dana Blackwell are residents of Farmington Hills, Michigan. In May 1985, the Blackwells came to North Carolina to investigate purchasing resort property. They met defendant Charles West, a real estate agent with defendant Carolina Beach Realty. Mr. West showed the Blackwells a condominium at the Riggins Condominium project at Kure Beach. Defendant George Dorosko owned the unit and had listed it for sale with Carolina Beach Realty.

Mr. Dorosko's condominium faced the ocean, and the Blackwells, concerned about the proximity of the unit to the water, asked Mr. West whether beach erosion threatened the property. Mr. West told the Blackwells that Carolina Beach, another beach in the area, had recently been renourished by having sand pumped in, but that he did not know of any history of erosion problems at Kure Beach. Mr. West said that during Hurricane Diana in 1984, approx-

imately six to eight feet of beachfront at Kure Beach eroded, and that Hurricane Diana was the first hurricane to trouble the area in twenty years. During a second visit to the unit, Mr. West and Mr. Blackwell stepped off the distance between the Riggins building and the shoreline. They calculated that twenty to twenty-five feet of beachfront divided the building from the water. Mr. West offered to speak with the president of the Riggins Homeowners' Association to obtain more information for Mr. Blackwell about erosion at Kure Beach, but Mr. Blackwell did not think any further investigation was necessary.

The Blackwells purchased Mr. Dorosko's unit in August 1985. After closing, the beachfront adjacent to the Riggins project eroded because of strong gale winds ("northeasterlies"). This erosion caused decks and balconies to fall away from the building. The Homeowners' Association required the Blackwells and its other members to pay special assessments, to make payments for sandbags, consulting fees, and legal counsel, and to pay an increase in monthly homeowners' dues. When they received this notice, the Blackwells contacted the Homeowners' Association and allegedly learned that Kure Beach's history of erosion problems was more severe than Mr. West had indicated. Mr. and Mrs. Blackwell filed a Complaint in Superior Court seeking to rescind the sale and alleging fraud, negligent misrepresentation, and unfair and deceptive trade practices.

II

The single issue on appeal is whether the trial judge erred in granting summary judgment for the defendants. Plaintiffs contend that genuine issues of material fact existed at the time the judge entered his order, and that summary judgment was, therefore, improper.

When a party moves for summary judgment, the issue for the trial judge is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, demonstrate the absence of a genuine issue of material fact so as to entitle the party to judgment as a matter of law. *See Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 656, 267 S.E. 2d 584, 586 (1980). The moving party may establish that no genuine issue of material fact exists by showing through discovery that the opposing party cannot produce sufficient evidence to support an essential element of the claim. *Id.* In ruling on a summary judgment motion, the judge must view the record in the light

most favorable to the non-moving party. *E.g., Brice v. Moore*, 30 N.C. App. 365, 367, 226 S.E. 2d 882, 883 (1976). We analyze each of the three counts contained in the Blackwells' Complaint to determine if the judge properly entered summary judgment in favor of defendants.

A. *Fraud*

[1] In North Carolina, an action for fraud with respect to a real estate purchase will lie only if the vendor induced the purchaser to forego inquiries the latter would otherwise have made. *See Robertson v. Boyd*, 88 N.C. App. 437, 442, 363 S.E. 2d 672, 675 (1988). When the purchaser has a "full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in fraud will not lie." *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E. 2d 565, 568 (1983), *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983) (citation omitted).

The Blackwells' own evidence establishes that Mr. West in no way impeded their opportunity to make further pertinent inquiries. To the contrary, Mr. West offered, as Mr. Blackwell admitted at his deposition, to obtain details from the Homeowners' Association about erosion at Kure Beach. Mr. Blackwell did not accept the offer. Because nothing in the evidence suggests Mr. West employed any artifice to induce the Blackwells to refrain from making further investigation, the judge properly entered summary judgment for defendants on the Blackwells' fraud claim.

B. *Negligent Misrepresentation*

[2] Justifiable reliance is an essential element of the tort of negligent misrepresentation. *See Stanford v. Owens*, 76 N.C. App. 284, 286, 332 S.E. 2d 730, 732 (1985), *disc. rev. denied*, 314 N.C. 670, 336 S.E. 2d 402 (1985). In *Stanford*, this court held that the entry of a directed verdict for defendants was improper when the evidence supported, but did not require, a finding of contributory negligence on the part of plaintiffs. *Id.* at 288, 332 S.E. 2d at 733. In this case, however, the evidence unequivocally establishes the Blackwells' own negligence.

The depositions indicate that Mr. West informed the Blackwells about the renourishment of Carolina Beach and that he offered to speak with the Homeowners' Association about Kure Beach. Assuming that Mr. West "fail[ed] to exercise . . . care and com-

petence in obtaining and communicating the information" about erosion, the Blackwells' reliance on Mr. West's statements was not justifiable. *Id.* at 286, 332 S.E. 2d at 732 (citation omitted). The Blackwells could easily have accepted Mr. West's offer that the latter obtain additional information from the Homeowners' Association. Alternatively, it would have been a simple matter for the Blackwells to speak to a resident of the Kure Beach area. Thus, even if Mr. West's statements constituted misrepresentations, the Blackwells imprudently relied upon those statements and were contributorily negligent as a matter of law. We hold that the judge correctly granted summary judgment for defendants on this count.

C. *Unfair or Deceptive Trade Practices*

[3] Plaintiffs' final contention is that defendants are guilty of unfair or deceptive trade practices, in violation of N.C. Gen. Stat. Sec. 75-1.1 (1988). Defendant Dorosko, as a private vendor of realty, cannot be subject to liability under this statute, and thus, the judge properly granted him summary judgment on this count. *See Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E. 2d 63, 67 (1979).

An unfair act or practice is one that offends established public policy, is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. *See, e.g., Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E. 2d 397, 403 (1981). A deceptive act is one calculated to deceive the other party. *Id.* If a party is guilty of engaging in such a practice, he cannot escape liability on the basis of the other party's contributory negligence. *See Winston Realty Co. v. C.H.G., Inc.*, 314 N.C. 90, 96, 331 S.E. 2d 677, 681 (1985).

In our view, nothing in the depositions suggests that Mr. West or his employer engaged in any unfair or deceptive act. At no time did Mr. West hold himself out to the Blackwells as having any extensive familiarity with Kure Beach. For this reason, he offered to supplement his statements about the beach's history of erosion by speaking to people who had greater familiarity with the area. We do not find evidence in the depositions that defendants attempted to deceive the Blackwells through misrepresentations. Defendants were entitled to summary judgment on this count.

III

We hold that the trial judge properly entered summary judgment on behalf of the defendants. The judgment, therefore, is

Affirmed.

Judges WELLS and JOHNSON concur.

FRANCES WATSON v. JOB WALDO WATSON

No. 886DC506

(Filed 4 April 1989)

Divorce and Alimony § 23— child custody—subject matter jurisdiction—filing of statement under oath required

Though it is the better practice for district court judges to require a statement to be filed under oath as required by N.C.G.S. § 50A-9 by the parties seeking custody before the court undertakes a custody determination, the trial court in this case properly tried and determined subject matter jurisdiction.

APPEAL by defendant from *Long, Nicholas, Judge.* Order entered 15 February 1988 in HALIFAX County District Court. Heard in the Court of Appeals 13 February 1989.

On 31 March 1987, plaintiff wife filed a complaint against defendant husband seeking divorce from bed and board, alimony, custody of the parties' minor children and child support. Following a hearing, by order of 10 July 1987, the trial court, Judge McCoy presiding, awarded plaintiff child support, alimony, and custody of their minor child, Jennifer. Defendant did not appeal from that order.

On 28 January 1988, defendant filed a motion in the cause seeking relief from Judge McCoy's order, asserting that the trial court lacked jurisdiction to enter the order. By order dated 15 February 1988, Judge Long denied defendant's motion. Defendant appeals from that order.

Josey, Josey & Hanudel, by C. Kitchin Josey, for plaintiff-appellee.

Moore, Diedrick, Carlisle & Hester, by J. Edgar Moore, for defendant-appellant.

WELLS, Judge.

To put this appeal in context we first note that although defendant's 28 January 1988 motion stated that it was made "pursuant to Rule 60 and Rule 12(b) of the Rules of Civil Procedure" and asserted that the trial court lacked jurisdiction to hear the case and enter its judgment of 10 July 1987, the motion failed to set out any basis or reason as to why the trial court lacked jurisdiction. In his brief, however, defendant argues that the jurisdictional flaw was plaintiff's failure to comply with the requirements of N.C. Gen. Stat. § 50A-9(a) (1984), which we note is a portion of the North Carolina Uniform Child Custody Jurisdiction Act (Uniform Act), G.S. §§ 50A-1 to -25 (1984). Although neither defendant's motion nor defendant's brief make any reference to subject matter jurisdiction, it would appear that plaintiff and Judge Long treated defendant's motion as challenging the trial court's subject matter jurisdiction.

Next, to put this appeal in better context, we quote the sections of the Uniform Act which we consider pertinent to this appeal.

> § 50A-2. *Definitions.*
>
> As used in this Chapter:
>
> . . .
>
> (5) "Home state" means the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months, ...
>
> § 50A-3. *Jurisdiction.*
>
> (a) A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:[1]
>
> (1) This State (i) is the home state of the child at the time of commencement of the proceeding . . . .
>
> § 50A-9. *Information under oath to be submitted to the court.*

1. G.S. § 7A-244 (Cum. Supp. 1988) confers general subject matter jurisdiction in the District Court Division of the General Court of Justice for the trial of civil actions and proceedings for, *inter alia*, child custody and support.

(a) Every party in a custody proceeding in such party's first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) Such party has participated as a party, witness, or in any other capacity in any other litigation concerning the custody of the same child in this or any other state;

(2) Such party has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) Such party knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(b) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction . . . .

(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which such party obtained information during this proceeding.

We next put this appeal in a more detailed procedural context. Following defendant's 28 January 1988 motion, on 2 February 1988 plaintiff submitted interrogatories to defendant, which were answered as follows:

1. Do you know of any action in connection with custody and child support involving the plaintiff and defendant and minor children, Sterling Watson and/or Jennifer Watson, which was pending in any court of this jurisdiction or any other jurisdiction on March 30, 1987?

ANSWER: No.

2. What legal grounds do you base your claim that the Court did not have jurisdiction to enter the July 10, 1987 Order?

ANSWER: N.C.G.S. 50A-9 requires certain information which was not provided in this action.

In her verified complaint, plaintiff alleged that she was a resident of Halifax County and had been a resident of that county for more than one year preceding the institution of her action. This was admitted in defendant's answer.

In an affidavit filed 15 February 1988 plaintiff provided information which showed that North Carolina was Jennifer's home state, and also supplied the remaining information required under G.S. § 50A-9.

Following a hearing held on 15 February 1988, Judge Long entered his order denying defendant's motion. Judge Long made extensive findings of fact, the most pertinent of which is as follows:

> 5. That North Carolina is now and was at the time of the commencement of the proceeding the home state of both minor children involved in this action; that it is in the best interest of each of the children which are the subject of this action that a Court of this State should assume jurisdiction because the children and the children's parents have a significant connection with this State, to-wit: both parents were at the time of the bringing of this action residents of Halifax County, North Carolina; that both children were physically present in Halifax County, North Carolina, and there was at the time of the bringing of the action available in North Carolina substantial evidence relevant to the children's present or future care, protection, training and personal relationships and that no other state would have jurisdiction under the prerequisites substantially in accordance with paragraphs (1) and (2) of G.S. 50A-3.

Judge Long's order contained the following conclusion of law:

> THAT BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW:
>
> 1. That the District Court of Halifax County under the provisions of GS 50-A(3) [sic] had jurisdiction and has jurisdiction to make a child custody determination in this matter and the Order heretofore entered on July 10, 1987 by this Court was and is valid.

We next note that in his brief defendant takes no exception to Judge McCoy's order as it pertains to alimony and does not except to any of Judge Long's findings of fact or his conclusion of law, but only argues that the trial court erred "by assuming jurisdiction of a child custody suit without first requiring a statement to be filed under oath as required by N.C.G.S. 50A-9(a)."

While we recommend that it would be the better practice for District Court judges to require conformity with the provisions of G.S. § 50A-9 by the parties seeking custody before undertaking a custody determination, we nevertheless affirm Judge Long's order. The question of subject matter jurisdiction having been tried and correctly determined below, we therefore reject defendant's argument.

While this case has every aspect of a routine North Carolina child custody and support action, this litigation and appeal should serve to emphasize to the trial bar the requirements of the Uniform Act as it affects subject matter jurisdiction in child custody actions. *See also our opinion in Hart v. Hart*, 74 N.C. App. 1, 327 S.E. 2d 631 (1985).

The order of the trial court appealed from is

Affirmed.

Chief Judge HEDRICK and Judge LEWIS concur.

MARY ROBINSON, PETITIONER-APPELLANT v. DAVID T. FLAHERTY, SECRETARY, N. C. DEPT. OF HUMAN RESOURCES, RESPONDENT-APPELLEE

No. 8818SC488

(Filed 4 April 1989)

Social Security and Public Welfare § 2— recoupment of past AFDC overpayments—utility allowances not considered

The DSS may not treat Section 8 utility allowances as part of a family's "liquid resources and income" in computing the amount it can withhold from monthly AFDC checks in recouping past AFDC overpayments under 42 U.S.C.A. Sec. 602(a)(22) so long as the State AFDC plan does not expressly

consider such allowances as income in determining the recipient family's initial need for aid under 42 U.S.C.A. Sec. 602(a)(7)(C)(ii).

APPEAL by petitioner from *Beaty (James A., Jr.), Judge.* Order entered 12 February 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 November 1988.

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

Attorney General Lacy H. Thornburg, by Associate Attorney General Martha K. Walston, for the respondent-appellee.

GREENE, Judge.

This appeal arises from the superior court's affirmation of the decision by the North Carolina Department of Human Resources, Division of Social Services ("DSS") to recover certain AFDC overpayments to petitioner by reducing her monthly AFDC check. The administrative record shows that, over a period of several years, DSS mistakenly overpaid petitioner $852 in AFDC benefits. In exercising its statutory authority to recoup such overpayments, DSS included certain utility allowances (hereinafter, "Section 8 utility allowances") as income in computing the monthly amount DSS was authorized to withhold. *See* 42 U.S.C.A. Sec. 1437f (West 1978 & 1988 Cum. Supp.) (authorizing utility allowances under Section 8 of the United States Housing Act of 1937); 42 U.S.C.A. Sec. 602 et seq. (West 1983 & 1988 Cum. Supp.) (hereafter sometimes called "Section 602").

In authorizing DSS to reduce future aid in order to recoup past overpayments, Section 602(a)(22) provides that DSS cannot reduce a monthly AFDC check "*when added to such family's liquid resources and its income . . .*" to "less than 90 percent of the amount payable under the State plan" for a family of that particular size. 42 U.S.C.A. Sec. 602(a)(22) (West 1983) (emphasis added). DSS added petitioner's $309 AFDC check and petitioner's $121 Section 8 utility allowance to arrive at a total assessable income of $430 per month. From that total amount of $430, DSS subtracted $278 (90 percent of $309, the AFDC "payment standard"), leaving $152 that DSS could recoup from petitioner's monthly AFDC check. Thus, petitioner's monthly check was reduced from $309 to $152. After a preliminary injunction was issued enjoining DSS from con-

sidering such utility allowances in recouping AFDC overpayments, the superior court affirmed the DSS hearing officer's decision allowing the consideration of such subsidies. Petitioner appeals.

The sole issue presented is, given the State's current AFDC plan for services, whether Section 602(a)(22) permitted DSS to treat Section 8 utility allowances as part of a family's "liquid resources and income" in computing the monthly amount it could withhold in recouping past AFDC overpayments. In light of the overall structure of Section 602 and the express language of Section 602(22), we hold DSS may not treat Section 8 utility allowances as "liquid resources or income" for recoupment purposes so long as the State AFDC plan does not expressly consider such subsidies as income in determining the recipient's initial need for aid under Section 602(a)(7)(C)(ii). We therefore reverse the superior court's judgment.

The statutory source of DSS's obligation to recoup AFDC overpayments is Section 602(a)(22):

> [The State plan shall] provide that the State agency will promptly take all necessary steps to correct any overpayment . . . and, in the case of—
>
> (A) an overpayment to an individual who is a current recipient of such aid, recovery will be made by repayment by the individual or by reducing the amount of any future aid payable to the family of which he is a member, except that such recovery shall not result in the reduction of aid payable for any month, such that the aid, when added to such family's liquid resources and to its income (*without application of paragraph (8)*), is less than 90 percent of the amount payable under the State plan to a family of the same composition with no other income . . .

42 U.S.C.A. Sec. 602(a)(22) (West 1983 & 1988 Cum. Supp.) (emphasis added). In enacting Section 602(a)(22), Congress has balanced petitioner's need for an adequate monthly income with the government's need to recoup overpayments by permitting DSS to assess petitioner's income without excluding certain income sources (listed in Section 602(a)(8)) which are otherwise disregarded in computing petitioner's income. Section 8 utility allowances are nowhere listed as a proper "disregard" under Section 602(a)(8). Since there are thus no sources of income added by excluding Section 602(a)(8),

the permitted sources of assessable income for recoupment purposes are in this case controlled by the general income provisions set forth in Section 602(a)(7). *See Smith v. Powell*, 293 N.C. 342, 345, 238 S.E. 2d 137, 140 (1977) (unless context clearly requires otherwise, statutory definition of term employed wherever such term appears). Sub-section (C) of Section 602(a)(7) states:

> [The State agency] may, in the case of a family claiming or receiving aid under this part for any month, take into consideration as income (*to the extent the State determines appropriate, as specified in such plan, and notwithstanding any other provision of law*) . . . (ii) an amount not to exceed the value of any rent or housing subsidy provided to such family, to the extent such value duplicates the amount for housing included in the maximum amount that would be payable under the State plan to a family of the same composition with no other income.

42 U.S.C.A. Sec. 602(a)(7)(C)(ii) (West 1983) (emphasis added). In this case, Section 8 utility allowances may not be considered under Section 602(a)(7)(C)(ii) since DSS admits that the State plan nowhere expressly specifies consideration of such subsidies as "income" in determining a recipient's need for aid. Thus, we conclude under these facts that DSS is accordingly not authorized to consider Section 8 utility allowances in computing the amount it may recoup from monthly AFDC checks under Section 602(a)(22).

We also note that, even if the State plan had permitted consideration of such allowances, Section 602(a)(7)(C)(ii) limits the amount of such subsidy considered to "an amount not to exceed the value of any rent or housing subsidy provided . . . *to the extent such value duplicates the amount for housing included in the maximum amount that would be payable under the State plan to a family of the same composition with no other income* . . . ." 42 U.S.C.A. Sec. 602(a)(7)(C)(ii) (emphasis added). Thus, even if Section 8 utility allowances were considered under the current State plan, the record does not show DSS considered the limits provided in Section 602(a)(7)(C)(ii).

We reject DSS's reliance on a decision of the Minnesota Supreme Court holding the definition of "income" used in computing a recipient's initial need for aid did not necessarily define the scope of "income" subject to recoupment. *Steere v. State Dept. of Public Welfare*, 308 Minn. 390, 243 N.W. 2d 112 (1976). The *Steere* analysis

represents that court's attempt to balance the recipient's need for an adequate income against the State's need to recoup overpayments; however, *Steere* was decided before Congress enacted the mandatory statutory recoupment scheme set forth in Section 602(a)(22). Therefore, the legislative balancing of interests evidenced by Section 602(a)(22) and related provisions has supplanted any contrary judicial scheme.

Accordingly, we hold that DSS exceeded its statutory authority in considering Section 8 utility allowances for purposes of recouping AFDC overpayments under Section 602(a)(22). We thus reverse the judgment of the superior court affirming DSS's consideration of petitioner's Section 8 utility allowances for recoupment purposes and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

Judges BECTON and EAGLES concur.

IRIS SUE APPERSON SELF v. JOHN BURTON SELF, JR.

No. 8821DC598

(Filed 4 April 1989)

1. **Divorce and Alimony § 19.4— modification of alimony decree—changed circumstances—insufficiency of evidence**

In ruling on plaintiff's motion in the cause for an increase in alimony, the trial court's conclusions of law that plaintiff was no longer a "dependent spouse" and that there had been a substantial change in circumstances were not supported by the findings of fact where the court failed to make any findings regarding plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income.

2. **Divorce and Alimony § 19— modification of alimony order—additional and independent findings by modifying court proper**

A court modifying an alimony order is not limited only to those findings of fact made by the court which entered the original alimony order, and the modifying court may make

additional and independent findings of fact under N.C.G.S. § 50-16.5 as to the parties' health and financial needs existing at the time of the original alimony order based on evidence presented at the modification hearing.

3. Divorce and Alimony § 19— modification of alimony order —sufficiency of evidence to support findings

In a proceeding for an increase in alimony, evidence was sufficient to support the trial court's finding that plaintiff had no independent estate at the time the original order was entered, and because the basis of this alimony modification was alleged to be plaintiff's changed financial needs and not defendant's ability to pay, an identical finding regarding defendant's independent estate was not necessary for a determination in this case.

APPEAL by plaintiff from *Biggs (Loretta C.), Judge.* Order entered 15 January 1988 in District Court, FORSYTH County. Heard in the Court of Appeals 13 February 1989.

Plaintiff and defendant were married in 1949. In 1975, plaintiff filed a complaint seeking *inter alia* custody of the couple's two minor children, child support, alimony *pendente lite* and permanent alimony. In February 1977, the trial court entered judgment awarding custody of the couple's minor daughter to plaintiff and ordering defendant to pay child support and permanent alimony. In July 1986, plaintiff filed a motion in the cause seeking an increase in alimony. Defendant thereafter filed a response to plaintiff's motion and a motion to terminate alimony. After a hearing on these motions, the court concluded, in part, that plaintiff was no longer a "dependent spouse" and terminated plaintiff's alimony. Plaintiff appeals.

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

White and Crumpler, by Fred G. Crumpler, Jr., and Christopher L. Beal, for defendant-appellee.

LEWIS, Judge.

Plaintiff sets forth in the record on appeal numerous assignments of error which she brings forward in her brief under four basic arguments. Plaintiff alleges the court failed to follow proper procedure in modifying the alimony award; abused its discretion in

denying an alimony increase and instead terminating plaintiff's alimony altogether; misapprehended the law and thus erred in finding that plaintiff had no independent estate in 1977; and erred in concluding a) that there had been a substantial and material change in plaintiff's financial circumstances, b) that plaintiff was no longer a "dependent spouse" and c) that it was within its discretion to terminate alimony because such conclusions were not supported by the findings of fact.

[1] Plaintiff first contends that the trial court did not follow the proper procedure because it failed to find certain factors required to be found in an order modifying alimony. Specifically, she alleges that the trial court was required but failed to make findings regarding defendant's 1987 assets and liabilities and plaintiff's 1987 liabilities.

Under G.S. Section 50-16.9 a court may modify an alimony award upon a showing of a change of circumstances. This power to modify includes the power to terminate alimony altogether. *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966). The changed circumstances which will warrant a modification of an alimony award "must bear upon the financial needs of the dependent spouse *or* the ability of the supporting spouse to pay." *Britt v. Britt*, 49 N.C. App. 463, 470-71, 271 S.E. 2d 921, 926 (1980), *quoting, Stallings v. Stallings*, 36 N.C. App. 643, 645, 244 S.E. 2d 494, 495, *disc. rev. denied*, 295 N.C. 648, 248 S.E. 2d 249 (1978) (emphasis added). Further, these changes must be substantial and based on a comparison of facts existing at the time of the original order and the time when the modification is sought. *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E. 2d 772, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). Our court has asserted that the trial court must look to the factors set out in G.S. 50-16.5 to modify an award under G.S. 50-16.9 and has stated:

> G.S. 50-16.9 allows modification for change of circumstance, but lists no circumstances. G.S. 50-16.5 provides a list of circumstances to be regarded in the initial determination of alimony. We believe the only logical construction of G.S. 50-16.9 is that it requires application of the G.S. 50-16.5 standards again at the time of the modification hearing. If the relevant circumstances in G.S. 50-16.5 list differ materially at the time from the circumstances which obtained at the time the initial order was entered, G.S. 50-16.9 authorizes the judge to modify

> the order to more fairly accommodate the present circumstances of the parties. . . . We hold that the 'change of circumstances' in G.S. 50-16.9 refers to those circumstances listed in G.S. 50-16.5.

Rowe v. Rowe, 52 N.C. App. 646, 654, 280 S.E. 2d 182, 187 (1981), *aff'd in part, rev. in part and remanded*, 305 N.C. 177, 287 S.E. 2d 840 (1982). G.S. 50-16.5 requires that the trial court give due regard to the "estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case," and findings of fact to indicate proper consideration of each of these factors must be made to support an alimony award. *See Skamarak v. Skamarak*, 81 N.C. App. 125, 343 S.E. 2d 559 (1986).

The trial court properly made findings of fact comparing the original 1977 position of plaintiff to her present situation as to income, earnings, earning capacity and property holdings. The court did not make adequate findings as to Mrs. Self's present needs and the reasonableness of her expenses, stating "both parties introduced affidavits showing their respective monthly expenses but the Court makes no finding as to the reasonableness of these expenses."

A court's determination that a party is a "dependent spouse" must be based on the factors enumerated in G.S. 50-16.5. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E. 2d 129 (1985). "[A] conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error." *Britt*, 49 N.C. App. at 470, 271 S.E. 2d 921 at 926. In *Rowe* our court determined that it was error for a court to modify an alimony award based only on a change in the parties' earnings and stated:

> The significant inquiry is how [the] change in income affects a supporting spouse's ability to pay or a dependent spouse's need for support. The trial court should have considered the *ratio* of [plaintiff's] earnings to the funds necessary to maintain her accustomed standard of living. . . . The court's failure to consider, or to make findings of fact on, the ratio of [plaintiff's] earnings to her needs constitutes error. The court should have found as a fact that [plaintiff's] earnings now exceed her needs, and concluded therefrom that there has been a change in circumstances.

52 N.C. App. at 655, 280 S.E. 2d at 187 (emphasis original). Thus, we hold that the trial court's failure to make any findings regarding

plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income constitute error. Its conclusions of law that plaintiff is no longer a "dependent spouse" and that there has been a substantial change in circumstances are therefore not supported by the findings of fact.

In this case, the defendant's ability to pay was not at issue. The trial court did not err in failing to make findings regarding defendant's current liabilities or expenses.

[2, 3] Plaintiff next contends that the trial court erred in finding that in 1977 she had no independent estate of any value. She argues in her brief that the trial court could not consider plaintiff's independent estate 1) because it was not a consideration in the original order and this trial court was limited to the facts found in the original order; 2) because plaintiff's independent estate is irrelevant given the original finding that plaintiff and defendant owned various properties as tenants by the entireties; and 3) because the court failed to view the defendant's estate in a like fashion.

As we have previously stated, modification of an alimony award requires consideration of G.S. Section 50-16.5 standards. We do not believe this mandate limits a modifying court to only those findings of fact made by the court which entered the original alimony order or that the modifying court cannot make additional and independent findings of fact under G.S. 50-16.5 as to the parties' health and financial needs existing at the time of the original alimony order based on evidence presented at the modification hearing. In this case, evidence was presented that in 1977 plaintiff was not working at a job outside of the home and that all the property in which she had an interest was owned with defendant as tenants by the entirety. Based on these facts, the trial court's finding that plaintiff had no *independent* estate in 1977 is technically correct. Also, because the basis of this alimony modification was alleged to be plaintiff's changed financial needs and not defendant's ability to pay, an identical finding regarding defendant's independent estate is not necessary for a determination in this case.

We find error in the trial court's failure to make any findings as to plaintiff's current reasonable expenses and her income and earning capacity and the ratio between them.

Reversed in part and remanded for further findings in accord with this decision.

Reversed in part and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

CARL EUGENE LOYE, PLAINTIFF v. FRANCES K. LOYE, DEFENDANT

No. 8818DC52

(Filed 4 April 1989)

1. **Divorce and Alimony § 30— equitable distribution—marital property—valuation proper**

The trial court in an equitable distribution proceeding properly valued a rental house and lot owned by the parties as tenants by the entirety.

2. **Divorce and Alimony § 30— equitable distribution—interest on distributive award—accrual from announcement of judge's decision**

Interest should begin accruing on a distributive award in an equitable distribution action from the date the decision is announced in open court rather than from the date the judgment is signed or the date payments on the award begin.

APPEAL by defendant and cross-appeal by plaintiff from Judgment of *William L. Daisy, Judge*, entered 23 February 1987 in GUILFORD County District Court. Heard in the Court of Appeals 31 May 1988.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for plaintiff appellee, cross-appellant.

Donaldson, Horsley & Greene, P.A., by Richard M. Greene, for defendant appellant.

COZORT, Judge.

Plaintiff and defendant appeal an equitable distribution order. Defendant claims that substantial evidence supported an unequal distribution in favor of her instead of the equal distribution made by the trial judge. Defendant also claims that she was entitled to interest on the distributive award accruing from the entry of

judgment. Plaintiff contends that the trial judge erred in valuing certain rental property.

Plaintiff-husband and defendant-wife were married on 25 November 1960, separated 27 June 1984, and divorced 17 February 1986. They had three children, one of whom is a minor. He resides with his mother, the defendant.

In 1969 plaintiff and defendant founded Sentry Watch, Inc. (hereinafter referred to as Sentry). The company sells, designs, leases, and maintains commercial and residential security systems. Sentry is the principal marital asset. Together plaintiff and defendant own 97.8% of Sentry's shares of stock. Both parties have worked for the company since its inception, with plaintiff serving as president and defendant serving as secretary. The trial judge found that plaintiff was the key person in the company. He also found that defendant's employment with the company was interrupted by child-rearing responsibilities, along with performing homemaking services and most of the household chores.

Defendant's gross income was $11,738 in 1984, $13,035 in 1985, and $10,000 in 1986. Defendant has started a training and development business in addition to being licensed to sell insurance. She has received $1,419 in advances from Sentry.

Plaintiff's gross income from Sentry was $26,058 in 1984, $36,502 in 1985, and $40,800 in 1986. Sentry has made cash advances to plaintiff in the amount of $13,618.

The other major marital assets are the marital home and a rental home and lot owned by the parties as tenants in the entirety (hereinafter referred to as the Home Street property). The parties stipulated that the net value of the Home Street property was $42,000. This property was transferred by the parties to Sentry at the request of one of the company's creditors. Sentry issued a note payable to plaintiff and defendant for $33,978. The Home Street property was distributed to defendant. The value assigned to it was a net value of $8,022, calculated by subtracting from the stipulated fair market value of $42,000 the $33,978 note owed by Sentry to plaintiff and defendant.

The trial judge heard expert testimony concerning the value of Sentry. In addition he considered as proof of value an offer made by another company to purchase Sentry in September 1985. The tax consequences of liquidation were also considered. The trial

court found the value of the Sentry stock to be $380,000. The court determined that an equal division of the marital property would be equitable. The court concluded that payment to defendant of $144,488 in exchange for her Sentry stock would be proper. The trial judge then ordered Sentry to retire defendant's stock, leaving plaintiff as sole stockholder. Plaintiff was ordered to direct the corporation to pay defendant a lump sum of $25,000 cash, and to pay defendant $2,000 per month at eight percent interest until the balance of $116,488 was paid in full (which was expected to take nine years). Interest was set to begin accruing from 15 July 1987, the date the first $2,000 payment was due. Both parties appealed.

[1] In his appeal plaintiff argues that the Home Street property's value of $42,000 should not have been reduced by the amount of the note, $33,978, which was owed to plaintiff and defendant jointly and severally by Sentry. He contends that, since the Home Street property was given to defendant, the reduction in value from $42,000 to $8,022 increased the amount plaintiff had to pay defendant in the distributive award. We disagree. Plaintiff's argument ignores the fact that plaintiff was awarded all of Sentry's stock and the debt of Sentry on the Home Street property was extinguished. The value of Sentry was increased therefore by the amount of the debt now cancelled. Since defendant cannot receive payment for her share of the debt, it was proper to reduce the value of the property and increase the value of Sentry. Plaintiff's argument is overruled.

In her appeal, defendant claims she is entitled to a greater share of marital assets, citing "factors" found by the trial courts in two previous cases decided by this Court. *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E. 2d 809, *disc. review denied*, 316 N.C. 730, 345 S.E. 2d 385 (1986); and *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E. 2d 312 (1985). She argues that those same factors are present in this case. Defendant did not, however, demonstrate what "factors" below required the trial court to make an uneven division of assets.

[2] Defendant next contends that the trial court erred by ordering interest to run from the date the judgment was signed rather than from the date the court announced its decision. The plaintiff responds that it was within the trial court's discretion to order interest to run from the date of signing rather than from the

date the court announced its decision. While both parties have misconstrued the trial court's order, we find the defendant to be correct in her contention that interest should run from the date the trial court announced its decision.

The matter below came on for hearing at the 2 February 1987 Session of Guilford County District Court. The trial court announced its decision in open court on 23 February 1987. The trial court's written order was signed on 22 June 1987 and filed on 23 June 1987. The written order provides that interest on the unpaid balance of the monthly installments of the distributive award shall begin running on 15 July 1987, the date the first $2,000 monthly installment was due to be paid by plaintiff to defendant. Thus, interest did *not* begin running on the date of the trial court's signing of the order. Nonetheless, the issue remains: when should interest begin accruing on a distributive award in an equitable distribution action?

In *Appelbe*, the trial court ordered defendant to pay plaintiff prejudgment interest on a cash award defendant was to deliver to plaintiff. The trial court's order was entered on 22 May 1984. On appeal, defendant contended plaintiff was not entitled to prejudgment interest. This court agreed with defendant, stating:

> In our opinion the court also erred in requiring defendant to pay prejudgment interest on $14,686.25 from October 4, 1981 when the parties separated, and that part of the judgment is reversed. When the parties separated plaintiff's right to any of the funds or things of value held by defendant had not been established and was not established until May 22, 1984, more than two and a half years later. The order to pay interest on any sum of plaintiff's that defendant retained *after* [emphasis in original] May 22, 1984 *when it was adjudged that those funds were hers is authorized by law* and defendant does not contest it. But no provision in the Equitable Distribution Act authorizes the payment of prejudgment interest on an equitable distribution, nor does any other statute of which we are aware.

Id. at 394, 333 S.E. 2d at 313 (emphasis supplied).

We find the *Appelbe* court's reasoning applicable to this case. The trial court announced its decision on 23 February 1987. Under N.C. Gen. Stat. § 1A-1, Rule 58 (1988), "where judgment is rendered

in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules." Therefore, judgment was entered below on 23 February 1987, and it was on that date that plaintiff was adjudged to owe defendant $144,488. Interest begins to accrue on that date. This case must be remanded for the trial court to amend the order to include interest from 23 February 1987.

Remanded.

Judges JOHNSON and PARKER concur.

ZORBA'S INN, INC. v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY v. STEPHEN C. EATON

No. 8821DC467

(Filed 4 April 1989)

Insurance § 134; Uniform Commercial Code § 43— insurance on collateral—no right of secured party against insurer

If a secured party is not named as a loss payee or coinsured on a policy of fire insurance on the collateral, or if the security agreement does not require the debtor to obtain insurance on the collateral for the benefit of the secured party, and there has been no assignment of rights to the insurance policy, then the secured party has no right, legal or equitable, enforceable against the insurer with respect to the proceeds of the policy. N.C.G.S. § 25-9-306.

APPEAL by plaintiff from Order of *Loretta C. Biggs, Judge*, entered 21 December 1987 in FORSYTH County District Court. Heard in the Court of Appeals 2 November 1988.

John R. Surratt, P.A., by John R. Surratt and Anita M. Yova, for plaintiff appellant.

Petree Stockton & Robinson, by W. Thompson Comerford, Jr., and Barbara E. Brady, for defendant appellee.

COZORT, Judge.

The question raised by this appeal is whether a secured party under Article 9 of North Carolina's Uniform Commercial Code may maintain an action against an insurer to enforce the secured party's right to insurance proceeds as provided in N.C. Gen. Stat. § 25-9-306. We hold that, under the facts of the case before us, the secured party has no enforceable claim against the insurer. We therefore affirm the judgment below.

On or about 4 March 1986, plaintiff and third-party defendant Eaton entered into an asset purchase agreement whereby Eaton purchased from plaintiff the assets of plaintiff's restaurant business for $75,000. Of that purchase price, Eaton paid $50,000 in cash and executed a note for the remaining $25,000. To secure the loan, the parties entered into a Security Agreement granting plaintiff a security interest in the machinery, equipment, and fixtures located on the premises of the restaurant.

On 5 June 1986, defendant Nationwide Mutual Fire Insurance Company issued to "Steve C. Eaton DBA Steve's Restaurant" an insurance policy covering equipment and other personal property located in the restaurant. Plaintiff was not named a loss payee under that policy. Two months later, the restaurant was damaged by fire. Eaton thereafter defaulted on his obligations under the promissory note, thus triggering plaintiff's rights under the Security Agreement.

Plaintiff informed defendant Nationwide of plaintiff's security interest in the insured property and requested that any payments made for damages to the contents of the restaurant be made payable jointly to Eaton and plaintiff. Plaintiff's verified complaint alleges that, in return for its promise not to sue defendant, defendant agreed to include plaintiff in any payments made to Eaton under the insurance policy. However, in contravention of this alleged promise, defendant paid Eaton $7,000.00 in settlement of Eaton's claim.

Plaintiff thereafter brought the instant action for breach of contract and negligent payment. The trial court granted summary judgment in defendant's favor. We affirm.

In order to maintain an action for breach of contract, a plaintiff must show that the contract to be enforced was supported by consideration. *Investment Properties of Asheville, Inc. v. Norburn,*

281 N.C. 191, 188 S.E. 2d 342 (1972). Forbearance or a promise to forbear the exercise of a legal right is a sufficient consideration for a promise made on account of it. *Myers v. Allsbrook*, 229 N.C. 786, 51 S.E. 2d 629 (1949). However, forbearance of a right which does not exist, or a promise to refrain from doing that which the promisee cannot legally do, cannot constitute consideration. 17 C.J.S. *Contracts* § 103 (1963). Whether plaintiff's forbearance from bringing suit against defendant constituted adequate consideration thus depends on whether plaintiff had a legal or equitable right to the insurance funds which was enforceable before the funds reached the hands of the debtor.

The law governing the relationship between debtors and their secured creditors is set forth in Article 9 of Chapter 25 of our General Statutes. *See* N.C. Gen. Stat. §§ 25-9-101 *et seq.* Transactions with respect to interests in or claims under insurance policies are excluded from Article 9, *see* N.C. Gen. Stat. § 25-9-104(g), except insofar as a secured creditor's interest in collateral continues in proceeds of insurance covering that collateral. *Id.*

If a debtor and a creditor enter into a security agreement granting to the creditor a security interest in certain collateral, and if value is given and the debtor has rights in the collateral, then the creditor becomes a secured party with a security interest which is enforceable against the debtor as to that collateral. *See* N.C. Gen. Stat. §§ 25-9-203(1)(a)-(c) (1988). Once the creditor has enforceable rights against the debtor as a secured party, it is said that the secured party's interest "attaches" to the collateral. *See* § 25-9-203(2). Furthermore, unless otherwise agreed, a security agreement gives the secured party the rights to proceeds, including insurance proceeds. N.C. Gen. Stat. §§ 25-9-203(3) and 25-9-306(1).

Section 25-9-306 provides, in pertinent part, as follows:

> (1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement.

N.C. Gen. Stat. § 25-9-306 (1988). Therefore, Article 9 clearly gives the secured party a security interest in insurance proceeds which is enforceable against the debtor upon default. In other words, the secured party's interest in damaged or destroyed collateral

continues in the insurance proceeds payable because of that damage or loss. *See* § 25-9-306(2).

Having an enforceable security interest does not necessarily mean that a secured party has a claim against the insurer for those proceeds. The creditor's security interest in proceeds is enforceable against the debtor as soon as the proceeds are in the debtor's hands, and, if continuously perfected, that interest is superior to the claims of intervening creditors from the moment insurance is payable. *See* §§ 25-9-306(3) and 25-9-312.

If the secured party is not named as a loss payee or coinsured, or if the security agreement does not require the debtor to obtain insurance on the collateral for the benefit of the secured party, and there has been no assignment of rights to the insurance policy, then the secured party has no right, legal or equitable, enforceable against the insurer with respect to the proceeds of the policy. The mere fact that plaintiff has a security interest (and that is all the record before us will support) is insufficient to give rise to a claim against defendant under Article 9 or otherwise. Therefore, there was no consideration for defendant's alleged promise, and the trial court properly concluded that defendant was entitled to judgment as a matter of law.

For the reasons stated above, we also hold that plaintiff cannot maintain an action against defendant for negligent payment. Defendant owed no duty to plaintiff, the breach of which would give rise to an action in negligence. There is likewise no merit to plaintiff's third-party beneficiary theory.

Judgment affirmed.

Judges ARNOLD and WELLS concur.

STANLEY LIVINGSTON, EMPLOYEE, PLAINTIFF v. JAMES C. FIELDS & CO., EMPLOYER, AND SELF-INSURED (CAROLINA ADMINISTRATORS, INCORPORATED), CARRIER, DEFENDANT

No. 8810IC1101

(Filed 4 April 1989)

Master and Servant § 65.2— workers' compensation—back injury—specific traumatic incident—failure to show proximate cause

Plaintiff failed to show that his back injury was the result of a specific traumatic incident of his assigned work where plaintiff's evidence tended to show that he felt a stiffness in his back which gradually increased during a two-hour period he spent moving a pile of trash from a home construction site; his medical expert did not know the cause of plaintiff's herniated disc; and plaintiff had moved his own household goods, including appliances and furniture, during the three months before his back stiffened.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award filed 3 June 1988. Heard in the Court of Appeals 13 March 1989.

On 10 April 1987, the Deputy Commissioner filed an opinion and award in favor of plaintiff. Upon appeal by defendant, the Full Commission vacated and reversed denying compensation.

On 16 May 1985, plaintiff was employed as a superintendent in defendant's home-building business and was responsible as part of his job for seeing that home sites were cleaned up. Plaintiff's employer directed plaintiff to have removed a pile of trash six to eight feet in diameter, three feet high. Because none of the employees who usually did that work were available, plaintiff undertook the task himself. After about one hour of moving debris, plaintiff felt some stiffness in his back which gradually increased during the two hours he spent moving the trash. Plaintiff experienced increased back pain during ensuing days and was ultimately diagnosed as having a lumbar disc disease. He underwent a lumbar laminectomy 12 June 1985.

Donald B. Hunt for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Jack S. Holmes, for defendant-appellee.

LEWIS, Judge.

In *Richards v. Town of Valdese*, 92 N.C. App. 222, 374 S.E. 2d 116 (1988), this Court faced a similar issue. Citing G.S. 97-2(6), the Court said a claimant may show a back injury by proving either (1) injury by accident, defined as an unlooked for and untoward event which is not expected or designed by the injured person or (2) injury arising from a specific traumatic incident. *Id.* A "specific traumatic incident" means the "injury must not have developed gradually but must have occurred at a cognizable time." *Bradley v. E. B. Sportswear, Inc.*, 77 N.C. App. 450, 452, 335 S.E. 2d 52, 53 (1985). In this context, "cognizable" means capable of being judicially known and determined. Here, over a period of two hours, plaintiff picked up various pieces of trash and threw or carried them to another place. He testified that the pieces were no heavier than things he normally lifted though he usually did not move trash.

In *Richards v. Town of Valdese, supra*, this Court stated:

> We believe that through the [1983] amendment [to G.S. 97-2(6)], 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.

Id. at 225, 374 S.E. 2d at 118-19. Plaintiff contends there is evidence that his back injury occurred during a cognizable time period and therefore he is entitled to compensation. We disagree.

We recognize that a "specific traumatic incident" could occur during a "cognizable time" of two hours but in every case there must be evidence of proximate cause between the "specific traumatic incident" and the injury. In this case plaintiff's witness, Dr. Rendleman, testified that he did not know the cause of plaintiff's herniated disc. He did not have an opinion satisfactory to himself that the back condition was a result of the activity plaintiff undertook on the 16th of May. Plaintiff testified he had moved his own household goods including appliances and furniture "between March and May" of 1980.

The Full Commission found as fact that "[g]iven the gradual onset of the stiffness and the difficulty suffered by plaintiff, plaintiff's injury to his back, which was later diagnosed and treated as a herniated lumbar disc, was not the result of a specific traumatic incident of his assigned work" and concluded that "[o]n May 16, 1985 the plaintiff did not sustain an injury to his back which was the direct result of a specific traumatic incident of his assigned work. N.C.G.S. 97-2(6)." 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 v. Burlington Industries*, 61 N.C. App. 258, 300 S.E. 2d 455 (1983). Plaintiff's own evidence supports the findings of fact. The Industrial Commission has competent evidence to support its findings and conclusions.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

MICHAEL H. SHUPING, PLAINTIFF v. NCNB NATIONAL BANK OF NORTH CAROLINA, AS EXECUTOR OF THE ESTATE OF EMORY E. JAMES, JR., BUSINESS COMMUNICATIONS, INC., FLOYD BRENDLE, L. GORDON PFEFFERKORN, DEFENDANTS

No. 8821SC674

(Filed 4 April 1989)

Appeal and Error § 6.2— appeal from injunction—interlocutory appeal

The trial court's order enjoining defendant from disposing of or encumbering shares of stock of a corporation until a final determination could be made as to whether defendant was legally bound to sell the stock to plaintiff was interlocutory, and defendant's appeal therefrom is dismissed.

APPEAL by defendant NCNB National Bank of North Carolina from *Freeman, Judge*. Order entered 22 March 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 January 1989.

The appeal is from a preliminary injunction restraining defendant bank from disposing of shares of corporate stock it holds as executor under the will of Emory E. James, Jr. James died owning 88% of the capital stock of Business Communications, Inc., a North Carolina corporation; plaintiff owns 8% and defendants Floyd Brendle and L. Gordon Pfefferkorn own the remaining 4%; the corporation's by-laws provide that upon the death of a shareholder his stock had to be offered to the corporation and if the corporation did not buy it

> . . . the stock must be offered to the remaining stockholders, pro-rata at the book value set out in the last balance sheet, on terms to be set over a period of five (5) years. In the event the remaining stockholders do not purchase the stock, then it may be offered to anyone at any price desirable at any terms the seller desires.

Defendant executor in a letter that reserved the right to claim that the foregoing by-laws provision is not binding offered to sell James' shares to the corporation and after the corporation failed to accept submitted a similar offer to the three surviving shareholders on 27 January 1988. By a writing dated 5 February 1988 plaintiff accepted the offer subject to several conditions, which were explained and supplemented by another writing dated 11 February 1988. The executor, construing the two writings to be a counteroffer, refused to accept it and plaintiff sued, asking that the court declare the rights of the parties and to enjoin defendant executor from disposing of or encumbering the shares. Following a hearing at which all the documents above referred to and several affidavits were presented the court granted the injunction until "a final hearing may be had on the complaint."

Moore & Brown, by B. Ervin Brown, II, and Wright, Parrish, Newton & Rabil, by Dudley A. Witt, for plaintiff appellee.

House, Blanco & Osborn, by Reginald F. Combs, for defendant appellant.

PHILLIPS, Judge.

The appeal is unauthorized and we dismiss it. Fragmentary, piecemeal appeals from interlocutory orders are not usually permitted in this state; they are authorized only when it appears that a substantial right of the appellant will be lost if the order is

not reviewed before the case has finally run its course in the trial court. G.S. 1-277; G.S. 7A-27(d); *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). The preliminary injunction appealed from in this case is such an order, as its effect is temporary rather than permanent, *State v. Fayetteville Street Christian School*, 299 N.C. 351, 261 S.E. 2d 908, *appeal dismissed*, 449 U.S. 807, 66 L.Ed. 2d 11, 101 S.Ct. 55 (1980), and appellant has not shown that any right which the law regards as substantial will be lost if the order remains in effect until the trial court determines whether the appellant is legally bound to sell the stock to plaintiff, as he alleges. Indeed, its argument on the appealability question is only that a substantial right will be lost because the order restrains it from disposing of the stock until the case is tried, and our law does not favor restraints on alienation. This argument begs rather than addresses the appealability question; for G.S. 55-16(c) expressly authorizes North Carolina corporations to restrict the alienation of their stock, the restriction involved was adopted pursuant thereto, and nothing in our law of which we are aware forbids its enforcement. What appellant's arguments do address, extensively, are disputed questions of both fact and law that the trial court has not considered and must determine before we can; questions it could have determined before now if this appeal had not been attempted.

Appeal dismissed.

Judges COZORT and GREENE concur.

BARBARA ANN KOPELMAN, INDIVIDUALLY AND AS GUARDIAN OF DAVID PAUL KOPELMAN v. SALLY MERRILL McCLURE

No. 8828DC788

(Filed 4 April 1989)

Courts § 9.4— entry of summary judgment as to liability—litigation of issue by another judge—no authority of second judge to overrule first

Where partial summary judgment in favor of plaintiffs with respect to the issue of liability was entered by one superior court judge, another superior court judge in effect overruled

the first by submitting to the jury an issue as to liability over plaintiffs' objections, by denying plaintiffs' motion for a directed verdict as to the issue of liability, and by denying plaintiffs' motion for a new trial as to the issue of liability, and this the second judge had no authority to do.

APPEAL by plaintiffs from *Cash, Judge*. Judgment entered 13 January 1988 in District Court, BUNCOMBE County. Heard in the Court of Appeals 13 March 1989.

This is a civil action wherein plaintiffs seek damages for personal injuries allegedly resulting when the automobile in which plaintiffs were riding as passengers was struck from behind by an automobile operated by defendant.

Plaintiffs moved for partial summary judgment on the issue of liability. After defendant was permitted to amend the answer, District Judge Roda granted plaintiffs' motion for partial summary judgment and entered an order stating in pertinent part, "Based upon Defendant's Amendment to Answer, admitting liability it is hereby ordered that this matter proceed to trial on the issue of damages solely."

The matter came on for trial before Judge Cash on 11 January 1988, and over plaintiffs' objections the court submitted the following issues to the jury which were answered as indicated:

1. Was the plaintiff, Barbara Ann Kopelman, injured as a proximate cause of the negligence of the defendant?

ANSWER: No

2. What amount, if any, is the plaintiff, Barbara Ann Kopelman, entitled to recover from the defendant for her personal injuries?

ANSWER: N/A

3. Was the plaintiff, David Paul Kopelman, injured as a proximate cause of the negligence of the defendant?

ANSWER: No

4. What amount, if any, is the plaintiff, David Paul Kopelman, entitled to recover from the defendant for his personal injuries?

ANSWER: N/A

From a judgment entered on the verdict, plaintiffs appealed.

Ronald C. True for plaintiffs, appellants.

Louise Critz Root for defendant, appellee.

HEDRICK, Chief Judge.

Defendant did not object or except to the partial summary judgment in favor of plaintiffs with respect to liability entered by Judge Roda on 9 October 1987 nor did defendant cross-appeal from the judgment entered on 13 January 1988. Thus, no question is raised on this appeal regarding the propriety of partial summary judgment for plaintiffs as to liability entered on 9 October 1987.

Our Supreme Court in *Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E. 2d 579, 580 (1966) stated:

> The power of one judge of the superior court is equal to and coordinate with that of another, and a judge holding a succeeding term of court has no power to review a judgment rendered at a former term on the ground that the judgment is erroneous. No appeal lies from one superior court judge to another.

See, also, Johnson v. Johnson, 7 N.C. App. 310, 172 S.E. 2d 264 (1970).

In the present case, Judge Cash had no authority to overrule the partial summary judgment in favor of plaintiffs with respect to the issue of liability entered by Judge Roda on 9 October 1987. By submitting to the jury the first issue as to liability over plaintiffs' objections, denying plaintiffs' motion for a directed verdict as to the issue of liability, and by denying plaintiffs' motion for a new trial as to the issue of liability, Judge Cash, in effect, overruled or reversed the order of District Judge Roda in the same case. The verdict of the jury finding no liability, and the judgment entered thereon must be vacated and the cause remanded to the district court for trial on the single issue as to what damages, if any, plaintiffs have suffered.

Vacated and remanded.

Judges WELLS and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 MARCH 1989

BUCK v. URBANEK No. 8817SC700	Surry (87CVS308)	Affirmed
CRAIN v. HIATT No. 8824SC632	Yancey (86CVS153)	Affirmed
GROGAN v. PATRICK No. 8825SC546	Caldwell (87CVS534)	No error in part, vacated in part and remanded
IN RE BRITT No. 8816DC848	Robeson (81J216)	Affirmed
M & M BUILDERS v. RUNGE No. 883DC367	Craven (86CVD1446)	Affirmed
MILLER v. U. S. LIABILITY INS. CO. No. 8821SC1061	Forsyth (87CVS5221)	Affirmed
MUSE v. MUSE No. 8827DC503	Gaston (85CVD2594)	Affirmed
STATE v. CARVER No. 8814SC802	Durham (87CRS21919)	No Error
STATE v. CATHEY No. 8818SC1026	Guilford (87CRS37682)	No error at trial. Remanded for resentencing.
STATE v. CLEMMER No. 8824SC764	Watauga (87CRS1963)	No Error
STATE v. DAWKINS No. 8821SC1029	Forsyth (87CRS24550)	No Error
STATE v. HUNTER No. 8826SC999	Mecklenburg (87CRS055314-01)	New Trial
STATE v. LLOYD No. 885SC1078	New Hanover (88CRS3811)	No Error
STATE v. MOORE No. 887SC747	Edgecombe (87CRS3271)	No Error
STATE v. POOVEY No. 8827SC93	Gaston (87CRS1429) (87CRS1430) (87CRS1432) (87CRS1441)	No error. Motion for appropriate relief denied.

STATE v. SHUTT No. 8819SC835	Randolph (85CRS13996) (85CRS13997)	No Error
STATE v. STRICKLAND No. 8811SC988	Johnston (87CRS2456)	No Error
STATE v. TAYLOR No. 8812SC1011	Cumberland (87CRS22536)	No Error
STATE v. WARDLOW No. 889SC950	Person (86CRS1158) (86CRS1159)	No Error
STATE v. WILLIAMS No. 888SC824	Wayne (87CRS8551)	No Error

FILED 4 APRIL 1989

GRIFFITH v. GRIFFITH No. 8812DC868	Cumberland (88CVD1911) Johnston (88CVD523)	Affirmed
IRVING v. IRVING No. 8821DC420	Forsyth (84CVD5901)	Affirmed
PAUL YOUNT FARM, INC. v. YOUNT No. 8827SC689	Lincoln (86CVS254)	Affirmed
POTTER v. POTTER No. 888DC692	Wayne (87CVD1496)	Reversed & Remanded
ROSEMAN v. GISH No. 8819SC800	Rowan (86CVS421)	Affirmed
SEWELL v. DELANCY No. 886SC742	Halifax (87CVS627)	Appeal Dismissed
STATE v. DUCKWORTH No. 8829SC667	Henderson (87CRS4663) (87CRS4664)	No Error
STATE v. KINSER No. 884SC490	Onslow (87CRS5114) (87CRS5115) (87CRS6163) (87CRS6164)	No Error
STATE v. KNIGHT No. 8818SC448	Guilford (84CRS81005) (85CRS20543)	Affirmed

STATE v. PARKER No. 8816SC790	Robeson (85CRS23109) (85CRS23110)	Vacated & Remanded
STATE v. SPELLMAN No. 883SC322	Pitt (87CRS3298) (87CRS12445)	No Error
STATE v. WILSON No. 881SC620	Dare (87CRS3520)	No Error
STEWART v. TEAGUE No. 8828SC462	Buncombe (84SP388)	Vacated & Remanded
WATKINS v. WATKINS No. 8815DC345	Orange (71CVD4)	Dismissed

STATE OF NORTH CAROLINA v. GLENN CHARLES AGEE

No. 8812SC334

(Filed 18 April 1989)

1. **Criminal Law § 26.5— double jeopardy collateral estoppel—admission by defendant—constitutional issue not waived**

Defendant's admission in a prosecution for felonious possession of LSD that he possessed marijuana at the time of his arrest did not waive his constitutional objection to double jeopardy collateral estoppel. Once the State was permitted to introduce such evidence, the alleged prejudice to that right had already occurred and defendant's subsequent admission that he possessed marijuana was not inconsistent with insisting the bar against double jeopardy had been violated.

2. **Criminal Law § 26.5— double jeopardy collateral estoppel—requirements**

A defendant has the burden of showing two requirements in order to invoke double jeopardy collateral estoppel: (1) the previous jury's acquittal must necessarily have been based on an ultimate fact issue which defendant seeks to foreclose in a subsequent trial; (2) it must be absolutely necessary to defendant's conviction of the second offense that the jury find against defendant on the same fact issue the first jury necessarily found in his favor.

3. **Criminal Law § 26.5— felonious possession of LSD—concurrent possession of marijuana—double jeopardy collateral estoppel**

In a prosecution for felonious possession of LSD in which defendant sought to exclude testimony regarding his concurrent arrest for possession of marijuana because he had been acquitted of the possession of marijuana charge in district court, the trial court correctly ruled that double jeopardy collateral estoppel was not a proper basis for excluding the disputed evidence because, while defendant established the first requirement of double jeopardy collateral estoppel in that the issue of whether the substance he possessed was marijuana was decided in his favor by the district court judge, the State's evidence of defendant's marijuana possession was offered for a different and proper purpose at his trial for possession of

LSD, i.e., to establish the circumstances surrounding his alleged possession of LSD.

4. Criminal Law § 34.2— possession of LSD—evidence of concurrent possession of marijuana—objection waived

In a prosecution for felonious possession of LSD in which defendant sought to exclude evidence of his concurrent arrest for misdemeanor possession of marijuana, defendant waived his objection under N.C.G.S. § 8C-1, Rule 403 to the admission of the evidence by admitting during his direct examination the truth of the State's allegation that he possessed marijuana at the time of his arrest.

Judge EAGLES concurs in the result.

Judge BECTON dissenting.

APPEAL by defendant from *Ellis (B. Craig), Judge*. Judgment entered 10 November 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 25 October 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

Assistant Public Defender Paul F. Herzog for defendant-appellant.

GREENE, Judge.

Defendant appeals his conviction of felonious possession of LSD under Section 90-95(a)(3). In March 1987, a police officer stopped defendant who was operating an automobile carrying several other passengers. After searching defendant for weapons and searching the rest of the car, the officer charged defendant with: 1) driving while impaired; 2) driving with a revoked license; 3) displaying a fictitious license plate; 4) misdemeanor possession of marijuana; and 5) felonious possession of LSD. The district court judge acquitted defendant of the misdemeanor possession of marijuana charge as well as all other misdemeanor offenses except the driving-while-impaired charge.

Prior to trial of the felonious possession of LSD charge in superior court, defendant moved *in limine* to exclude any reference to his arrest for the offenses of which he was acquitted. Defendant based his motion on the Fourteenth Amendment, the "law of the

land" clause of our state constitution, and various state rules of evidence. Defendant contended that, since defendant had been acquitted of the marijuana offense, evidence of defendant's marijuana possession was "res judicata" and had "no further life in the criminal justice system, and [was] irrelevant for any purpose at this particular point in time." Defense counsel furthermore stated that:

> I know that at some point in time [the prosecutor] will probably argue that [the arrests] are part of the *res gestae* of what happened here. But since there has already been a prior judicial disposition, their effect is—the prejudicial affect is far outweighing the probative value to this defendant.

Counsel contended that the State had ample other evidence from which it could show why defendant was stopped while operating his automobile.

The prosecutor responded:

> Your honor, it's my understanding that with respect to the possession of marijuana, that this is a situation where the defendant had the item on his person. Apparently during the handling of the matter in district court, the lab results were not yet back at the time of disposition of the driving cases and all were called for trial and, therefore, there was no choice. There was just no lab report to submit. Judge Hair entered a not guilty [sic] with respect to that. We would suggest, however, to the Court that under the rules of evidence, it is a "prior conduct" that is wrongful, and we should not be barred from going into that particular aspect of the case.

Defense counsel did not dispute this characterization of the trial in district court.

After hearing these arguments, the trial court made the following ruling:

> As to the marijuana, I can see where that may be relevant as to what action took place on the evening . . . it would be inappropriate as to what—to talk about what took place in district court as to whether he was found guilty or not guilty, for the State to refer to that. But as to the transactions that went on that evening between the officer and the defendant at this point I think would be relevant to just what transpired

out there, would be relevant to the case, and I will deny the motion *in limine* as to that.

Defense counsel objected to that ruling and stated that, since the court was going to allow the State to introduce evidence that defendant possessed marijuana during his arrest, defendant "may feel compelled to introduce evidence he was found not guilty of having marijuana."

At trial, the State introduced the arresting officer's testimony that he had seen defendant throw a red object to the floor of the car and that a subsequent search had disclosed a red cigarette box which contained LSD. The following exchange occurred during the arresting officer's direct examination:

Q: When you got the passengers out of the vehicle, what, if anything, did you note about the person of those individuals?

A: They were all very well inebriated.

Q: What then occurred, Officer Thomas?

A: Once Officer Varner and Captain Neisham got there, we started to search the subject for our safety, and . . . since I had advised Mr. Agee that he was under arrest for driving while impaired, I patted—well I, I searched him for weapons before I placed my handcuffs on him and was going to transport him to our police station.

. . .

Q: What occurred as a result of your search of his person, sir?

A: As I was searching him, when I checked his right rear pocket, I found a plastic bag—

Mr. Herzog: Objection.

The Court: Overruled.

Q: What did you find, sir?

A: I found a plastic bag with a green vegetable matter inside of it.

Mr. Herzog: Move to strike.

Court: Overruled.

After the officer testified concerning his familiarity with the appearance of marijuana, the trial court allowed the officer to state his opinion that the "green vegetable matter" was marijuana, but did not allow the officer to testify as to any subsequent laboratory testing done on the alleged marijuana.

During his subsequent direct examination, defendant also recounted the events of his arrest and added the following admission:

> Q: Okay. What happened when you proceeded to the front of the car with Patrolman Thomas?
>
> . . .
>
> A: He patted me down, and I had, you know—he patted me down at the front of the car.
>
> Q: Okay. After that happened, what happened?
>
> A: He patted me down and he found something in my pocket.
>
> Q: What was in your pocket?
>
> A: A bag of marijuana.

The defendant presented other evidence that the cigarette pack containing the LSD belonged to another passenger in the car; the other passenger himself testified that the LSD belonged to him and that defendant did not know of its existence; however, the passenger had difficulty identifying other persons in the car on the night of defendant's arrest. The jury convicted defendant of felonious possession of LSD. Defendant appeals.

These facts present the following issues: I) where, at a trial for LSD possession, the State introduces evidence tending to show defendant possessed marijuana the time of his arrest although defendant was previously acquitted of that offense, (A) what requirements must defendant show in order to exclude such evidence under double jeopardy collateral estoppel? and (B) has defendant shown such requirements?; and II) if the admission of such evidence was not constitutionally estopped, whether defendant's admission he in fact possessed marijuana waived any objection under Rule 403 of our Rules of Evidence.

I

On appeal, defendant contends his acquittal of the misdemeanor marijuana possession charge collaterally estopped the State in the subsequent LSD trial from introducing any evidence tending to show defendant possessed marijuana at the time of his arrest. Defendant specifically bases his contention on *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970). In *Ashe*, the United States Supreme Court held the doctrine of collateral estoppel is part of the constitutional guarantee against double jeopardy.

> 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of *ultimate fact* has once been determined by a valid and final judgment, *that* issue cannot again be litigated between the same parties in any future lawsuit . . . The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires the court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings' . . . Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

397 U.S. at 443-44, 90 S.Ct. at 1194, 25 L.Ed. 2d at 475-76 (emphasis added) (citations omitted). While there are arguably sources of collateral estoppel other than the Fifth Amendment, the only source of collateral estoppel argued in defendant's brief and consequently addressed in this opinion is the federal constitutional protection against double jeopardy, and will sometimes hereafter be called "double jeopardy collateral estoppel." N.C.R. App. 28(b)(5); *see* 2 W. LaFave and J. Israel, *Criminal Procedure* Sec. 17.4(a) at 387

(1984) (noting other possible constitutional and state sources of collateral estoppel).

[1] Double jeopardy collateral estoppel is based upon "considerations of judicial economy, conservation of public funds, and avoidance of multiple litigations underlying the doctrine. Implicit, of course, in any limitation on relitigation of issues already determined in the criminal context is an appreciation of the substantial burdens, psychological as well as otherwise, placed on one who must defend against criminal prosecution." *Phillips v. United States*, 502 F. 2d 227, 230 (4th Cir. 1974), *vacated on other grounds*, 518 F. 2d 108 (4th Cir. 1975) (per curiam) (en banc). Thus, given the interests protected by double jeopardy collateral estoppel, defendant's admission on direct examination that he possessed marijuana at the time of his arrest did not waive this constitutional objection since its basis is defendant's right not to be compelled to relitigate an ultimate fact issue previously found in his favor. Once the State was permitted to introduce such evidence, the alleged prejudice to that right had already occurred. Defendant's subsequent admission he possessed marijuana was not inconsistent with insisting the bar against double jeopardy had been violated. *See State v. Gaiten*, 277 N.C. 236, 239, 176 S.E. 2d 778, 781 (1970) (may waive constitutional objection by express consent, failure to assert in time, or conduct inconsistent with purpose of objection).

We also note that the *Ashe* Court referred only to the preclusive effect of "ultimate" fact issues—rather than "evidentiary" fact issues. The admittedly subtle distinction between the two was stated by our Supreme Court in *Farmers Bank v. Michael T. Brown Distributors, Inc.*, 307 N.C. 342, 346, 298 S.E. 2d 357, 359 (1983):

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts . . . Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other . . . An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts . . .

(quoting *Woodard v. Mordecai*, 234 N.C. 463, 470-72, 67 S.E. 2d 639, 644-45 (1951)).

A

[2] The first requirement defendant must show in order to claim double jeopardy collateral estoppel is that the issue he seeks to foreclose in his second trial has necessarily been determined in his favor as an ultimate fact issue:

> Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once decided by a valid and final judgment, cannot again be litigated in any future lawsuit. Subsequent prosecution is barred only if the jury could not rationally have based its verdict on an *issue* other than the one the defendant seeks to foreclose . . . When a 'fact is not *necessarily* determined in the former trial, the possibility that it may have been does not prevent re-examination of that issue.' . . . Thus, in determining whether *this aspect* [emphasis added] of double jeopardy acts to bar subsequent prosecution, 'unrealistic and artificial speculation about some far-fetched theory upon which the jury might have based its verdict of acquittal' is foreclosed . . . In advancing a collateral estoppel double jeopardy defense, the defendant has the burden of persuasion.

State v. Edwards, 310 N.C. 142, 145, 310 S.E. 2d 610, 613 (1984) (emphasis in original) (citations omitted).

However, the *Edwards* Court recognized a second "aspect" to double jeopardy collateral estoppel which must additionally be established in order to invoke the doctrine:

> *Finally, and of particular importance to our decision in this case*, we must emphasize that the 'same evidence' test is not the measure of collateral estoppel in effect here. *The determinative factor is not the introduction of the same evidence . . . but rather whether it is absolutely necessary to defendant's conviction . . . that the second jury find against defendant on an issue upon which the first jury found in his favor . . . '[T]he "same evidence" could, in an appropriate case, conceivably be introduced at the second trial for an entirely different purpose than that which it served at the earlier trial'* . . . The State was not precluded from introducing evidence, albeit the 'same evidence' tending to implicate defendant [in the commission of the first crime] *where the sole [and different] purpose of the evidence was to prove . . . an issue which was neither raised nor resolved by his acquittal . . .*

310 N.C. at 144-46, 310 S.E. 2d at 613-14 (emphasis added) (quoting *Triano v. Superior Court of New Jersey*, 393 F. Supp. 1061, 1070 n.8 (D.N.J. 1975), *aff'd per curiam*, 523 F. 2d 1052 (3d Cir. 1975)).

Thus, defendant has the burden to show two requirements in order to invoke double jeopardy collateral estoppel under the *Edwards* interpretation of *Ashe*. First, the previous jury's acquittal must necessarily be based upon an ultimate fact issue which defendant seeks to foreclose in a subsequent trial. *E.g.*, *State v. Alston*, 323 N.C. 614, 616-17, 374 S.E. 2d 247, 249 (1988) (no estoppel where previous acquittal of firearm possession at 3:30 a.m. did not necessarily determine whether defendant had firearm at 12:00 a.m. in subsequent armed robbery trial). Second, it must be "absolutely necessary" to defendant's conviction of the second offense that the second jury find against defendant on the same fact issue the first jury necessarily found in his favor. *Cf. State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977) (estoppel shown where first jury necessarily found defendant did not violate drunk driving statute which was essential element on which State attempted to obtain contrary finding in involuntary manslaughter trial).

We note the *Triano* decision on which the *Edwards* Court relied arose from that defendant's contention that he could not even be indicted for the second offense. *Triano*, 393 F. Supp. at 1071. Under *Edwards*, the issues whether double jeopardy collateral estoppel bars re-prosecution after an acquittal and, if not, what evidence from that prior trial may be introduced in the re-prosecution apparently both turn on the same elements of double jeopardy collateral estoppel. *Compare Edwards*, 310 N.C. at 143, 310 S.E. 2d at 611 (primary issue is whether Court of Appeals erred in holding double jeopardy prevented introduction of evidence of larceny of which defendant acquitted) *with id.* at 144, 310 S.E. 2d at 612 (issue presented is whether defendant's re-prosecution for breaking and entering was barred by earlier larceny acquittal); *cf.* N.C.G.S. Sec. 15A-954(7) (1988) (must dismiss prosecution if issue of fact or law previously adjudicated in defendant's favor is "essential" to successful prosecution).

Thus, double jeopardy collateral estoppel under *Edwards* does not preclude the State from introducing evidence tending to show defendant committed an offense of which he was previously acquitted *unless* the evidence is introduced for the purpose of proving a fact issue (1) which was necessarily determined in defendant's

favor by his earlier acquittal and (2) which is absolutely necessary to convict defendant of the second offense. Professor LaFave has explained the rationale of permitting the introduction of evidence of criminal counts of which the defendant has been acquitted:

> [T]he acquittal only is a bar to a later determination that there is *not* a reasonable doubt on the same fact issue . . . The failure to prove guilt beyond a reasonable doubt does not foreclose proof of the same crime by a preponderance of the evidence at a [parole] revocation proceeding . . . *On similar reasoning, it certainly may be argued that notwithstanding a defendant's prior acquittal of a certain crime, evidence of that crime may be received in a later prosecution under some exception to the "other crimes" rule (e.g., that it help show identity or motive in the instant case).* In such a situation, proof of the prior crime is an 'evidentiary fact' rather than an 'ultimate fact' in the second prosecution, and as such it is not a matter the prosecution must prove beyond a reasonable doubt but rather is a matter which, if proved by preponderance of the evidence, can contribute to a conviction beyond a reasonable doubt for the second crime. However, the courts are not in agreement as to how *Ashe* should be applied in such circumstances.

2 W. LaFave, Sec. 17.4(a) at 384-85; *see also Huddleston v. United States*, 485 U.S. ---, 108 S.Ct. 1496, 1501, 99 L.Ed. 2d 771, 780-81 (1988) ("other crimes" evidence under Rule 404(b) need only be proved by preponderance of evidence for admission).

Despite the dissent's interpretation of *Edwards*, the facts of *Edwards* illustrate how the Court applied both elements of its two-part test to permit the State to re-litigate "evidentiary" fact issues. In the *Edwards* defendant's first trial, the State attempted to prove defendant committed the crime of larceny by proving the essential elements of: (1) a wrongful taking and carrying away, (2) of the personal property of another, (3) without his consent, (4) with the intention to permanently deprive the owner of possession. Defendant was acquitted of the larceny charge. In defendant's subsequent trial for breaking or entering with the intent to commit a felony (i.e. larceny), the *Edwards* Court permitted the State to introduce evidence which had been admitted at the first trial. First, the State could introduce evidence from the first trial that defendant had actually broken into a store since "[t]hat aspect of the

offense was not at issue in and was not an element of the larceny charge." 310 N.C. at 146, 310 S.E. 2d at 614. Thus, defendant failed to show the evidence of his breaking and entering met the first requirement stated above.

Second, the *Edwards* Court also held the State could "furthermore" introduce at defendant's second trial evidence which *did* tend to show defendant had committed the elements of larceny (which *were* necessarily at issue in the first trial) since the evidence was used at the second trial for a *different* purpose. The evidence was offered by the State at the second trial "for the sole purpose" of proving "the defendant's *intent* to commit the crime of larceny, *an issue which was neither raised nor resolved by his acquittal of the larceny charge.*" 310 N.C. at 146, 310 S.E. 2d at 614 (emphasis added). The issue of defendant's intent was a proper evidentiary issue at the *Edwards* defendant's first trial for larceny; however, since it was not an ultimate fact issue, the issue could be re-litigated since it was not "resolved" by the earlier acquittal and consequently it was not "absolutely necessary to defendant's conviction . . . that the second jury find against defendant on an issue upon which the first jury found in his favor . . . ." 310 N.C. at 146, 310 S.E. 2d at 614.

As indicated by Professor LaFave, several federal circuits also adopt the *Edwards* Court's application of double jeopardy collateral estoppel to evidentiary issues. *E.g.*, *Flittie v. Solem*, 751 F. 2d 967, 972 (8th Cir. 1985) (introduction of evidence not collaterally estopped since evidence used to prove "evidentiary" rather than "ultimate" fact in second trial); *Oliphant v. Koehler*, 594 F. 2d 547, 555 (6th Cir. 1979) (although defendant acquitted of prior sexual assaults, State could introduce evidence of prior assaults to show plan or scheme in subsequent rape trial); *United States v. Addington*, 471 F. 2d 560, 567 n.5 (10th Cir. 1973) (fact of acquittal of prior offenses is important but not determinative factor in determining admissibility); *see also United States v. Kills Plenty*, 466 F. 2d 240, 243 (8th Cir. 1972), *cert. denied*, 410 U.S. 916, 93 S.Ct. 971, 35 L.Ed. 2d 278 (1973) (no double jeopardy collateral estoppel where fact issue previously resolved was not "essential" element of second charge).

On similar reasoning, various state courts also hold double jeopardy collateral estoppel does not prevent the State from introducing evidence of a crime of which defendant has been acquit-

ted where the evidence is offered to prove an evidentiary fact issue requiring proof by only a preponderance of evidence. *E.g., Commonwealth v. Hillebrand*, 536 S.W. 2d 451, 453 (Ky. 1976); *State v. Paridis*, 106 Id. 117, 676 P. 2d 31, 37 (1983), *cert. denied*, 468 U.S. 1220, 104 S.Ct. 3592, 82 L.Ed. 2d 888 (1984); *State v. Seftin*, 125 N.H. 533, 485 A. 2d 284, 285 (1984); *cf. State v. Suggs*, 86 N.C. App. 588, 591-92, 359 S.E. 2d 24, 26-27, *cert. denied*, 321 N.C. 299, 362 S.E. 2d 786 (1987) (where defendant charged with offense and later acquitted, evidence of offense admissible before defendant's acquittal under Rule 404(b)); *see generally* Annotation, *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense*, 25 A.L.R. 4th 934, secs. 5-6 (1983 & 1988 Supp.).

It appears one panel of the Fourth Circuit Court of Appeals initially rejected the requirement that the collaterally-estopped issue be essential to the second conviction in *Phillips v. United States*, 502 F. 2d 227, 232 (4th Cir. 1974) (collateral estoppel barred evidence defendant was present during robbery of which he was acquitted even though evidence offered to show defendant knew money he received was stolen). However, the first *Phillips* opinion was vacated by the court sitting en banc. *Phillips v. United States*, 518 F. 2d 108 (4th Cir. 1975) (per curiam) (en banc). Only four of the en banc judges discussed the first panel's specific analysis of double jeopardy collateral estoppel: those four rejected the first panel's analysis and stated the defendant's acquittal of bank robbery did not estop the government in a subsequent trial from showing defendant's "guilty knowledge" that the money he received was stolen by proving defendant had participated in the bank robbery. *Id.* at 109-10. Although it is difficult to determine the precedential effect of the per curiam decision in *Phillips*, the plurality's analysis appears to comport with the *Edwards* statement that evidence of a crime of which defendant has been acquitted may be used for a different purpose in a subsequent prosecution.

As noted above by Professor LaFave, and by the dissent, some federal circuits have expanded *Ashe* beyond its facts to preclude the introduction of evidence for *any* purpose if the evidence tends to show defendant committed a crime of which he has been acquitted. *E.g., Wingate v. Wainwright*, 464 F. 2d 209, 212-15 (5th Cir. 1972) (double jeopardy collateral estoppel bars introduction of same "evidentiary facts" for any purpose; estoppel not limited to issues essential to second conviction); *accord Blackburn v. Cross*, 510

F. 2d 1014, 1019 (5th Cir. 1975) (stating *Wingate* "expanded" *Ashe* to include evidentiary as well as ultimate facts); *United States v. Mespoulede*, 597 F. 2d 329, 334-35 (2nd Cir. 1979); *Albert v. Montgomery*, 732 F. 2d 865, 869-70 (11th Cir. 1984) (bound by Fifth Circuit decisions).

The logic of this exception to the use of "other crimes" evidence under Rule 404(b) has been criticized. *E.g.*, *Hillebrand*, 536 S.W. 2d at 453 (criticizing *Wingate*); 2 J. Weinstein and M. Berger, *Weinstein's Evidence* Sec. 404[10] at 74-75 n.16 (1988) (characterizing as "illogical" the *Wingate* and *Mespoulede* extension of collateral estoppel to bar acquittal evidence under Rule 404(b)). However, we recognize that *Wingate* and its progeny do not purport to apply *Ashe* or the rules of evidence in a narrowly logical manner. Those courts have instead expanded *Ashe* based on admittedly persuasive policy grounds:

> We do not perceive any meaningful difference in the quality of "jeopardy" to which a defendant is again subjected when the State attempts to prove his guilt by re-litigating a settled fact issue which depends upon whether the re-litigated issue is one of "ultimate" fact or merely an "evidentiary" fact in the second prosecution . . . It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded that he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime. Wingate was charged with robbing Helman and Angel and as a result of those charges he endured the perils of trial. He was acquitted of those very charges and that should end the matter.

Wingate, 464 F. 2d at 213-15. Similarly, the *Mespoulede* Court stated that:

> The essential point is that the defendant must defend against charges or factual allegations that he overcame in the earlier trial . . . We do not rest our decision on the force of [Third or Fifth Circuit] precedent alone. To put it bluntly, to refuse to allow the assertion of collateral estoppel in this case would simply be inequitable.

Indeed, the concerns quoted above echo those set forth in the Court of Appeals opinion below which the *Edwards* Court quoted at length:

> The issue of defendant's participation in the . . . theft was tried and forever set at rest in the first trial. Having safely run that 'gauntlet' the defendant had a constitutional right not to again be jeopardized by that evidence. Though the crime that defendant was tried for this time . . . is not the same crime that he was acquitted of by the first trial . . ., defendant's former jeopardy rights were nonetheless violated to the prejudice of his liberty, since the *truth* of the . . . evidence was again put in issue against him and no doubt contributed greatly to his conviction.

Edwards, 310 N.C. at 144, 310 S.E. 2d at 612 (quoting *State v. Edwards*, 63 N.C. App. 92, 94, 304 S.E. 2d 245, 246 (1983)) (emphasis in original).

However, the *Edwards* Court emphasized the Court of Appeals' contention that the "truth" of the State's evidence had been forever settled for any purpose—and then rejected it. Throughout its opinion, the *Edwards* Court emphasizes that the protection against double jeopardy precludes only the re-litigation of ultimate fact "issues": it does not necessarily preclude the State from re-litigating the "truth" of the evidence used to prove those issues. The *Edwards* Court clearly rejected the expansion of *Ashe* by *Wingate* which is premised on the assertion that collateral estoppel is *not* limited to issues which are essential to the second prosecution. While it may be argued that reconsideration of *Edwards* is desirable, we are bound until such reconsideration to apply *both* requirements which the Court set forth and then applied in determining the scope of double jeopardy collateral estoppel.

B

1. *Ultimate Fact Issue Necessarily Determined by Defendant's Prior Acquittal*

[3] Misdemeanor possession of marijuana requires two elements be proved beyond a reasonable doubt: (1) defendant's possession of a substance (2) which is marijuana. *See* N.C.G.S. Sec. 90-95(a)(3) (1985). Since the district court acquitted defendant of the misdemeanor charge of marijuana possession, defendant argues that acquittal necessarily precludes any reference to any of the facts

underlying his arrest for that offense. This is incorrect: *Ashe* simply bars the re-litigation of those *ultimate* fact issues upon which the previous fact-finder necessarily based its verdict.

As defendant was acquitted in district court, there is no transcript of those prior proceedings, and thus no evidence concerning the first trial other than the verdict sheet and scattered references in the transcript of the second trial. However, it appears from the oral argument on defendant's motion *in limine* quoted earlier that the district court did not question testimony that the arresting officer found a bag of some substance on defendant. Absent laboratory analysis of that substance, the district court was simply not convinced beyond a reasonable doubt that the substance found was in fact marijuana.

Thus, viewing the circumstances of the district court proceeding with the "realism and rationality" required under *Ashe*, it appears the district court judge acquitted defendant because the State failed to prove beyond a reasonable doubt that the substance possessed by defendant was marijuana: the only ultimate fact issue of preclusive effect arising from defendant's earlier acquittal is thus the identification of the substance as marijuana. At defendant's subsequent trial for LSD possession, the State introduced the arresting officer's testimony that he removed a plastic bag of "green vegetable matter" from defendant's person and that the substance was marijuana in his opinion. We conclude defendant has established the first requirement of double jeopardy collateral estoppel that the issue whether the substance he possessed was marijuana was decided in his favor by the district court judge.

2. *Necessity of Issue of Defendant's Marijuana Possession to Second Prosecution*

Given the elements of felonious possession of LSD, it was certainly not "absolutely necessary" that the second jury find defendant possessed marijuana in order to convict him of felonious possession of LSD. The State offered the evidence of defendant's marijuana possession, and the court allowed it, for the purpose of establishing the "chain of circumstances" surrounding the alleged discovery of defendant's possession of LSD. The relevance of "chain of circumstances" evidence and similar evidence was stated in *State v. Jenerette*, 281 N.C. 81, 89, 187 S.E. 2d 735, 740 (1972):

> [I]t is equally well settled that all facts, relevant to the proof of the defendant's having committed the offense with which he is charged, may be shown by evidence, otherwise competent, even though that evidence necessarily indicates the commission by him of another criminal offense. . . . Thus, such evidence of other offenses is competent to . . . make out the *res gestae*, or to exhibit a *chain of circumstances* in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions.

(quoting *State v. Atkinson*, 275 N.C. 288, 312-13, 167 S.E. 2d 241, 256 (1969)) (emphasis added); *accord State v. Shane*, 304 N.C. 643, 654, 285 S.E. 2d 813 (1982), *cert. denied*, 465 U.S. 1104, 104 S.Ct. 1604 (1983) ("other crimes" evidence relevant if bears upon "connected crimes"); *State v. McMillan*, 59 N.C. App. 396, 401, 297 S.E. 2d 164, 167 (1982) (permitting use of "chain of circumstances" evidence); *see generally* 1 H. Brandis, Jr., *Brandis on North Carolina Evidence* Sec. 92 at 352 n.19 (1982 & 1986 Cum. Supp.) (collecting cases permitting "other crimes" evidence to prove "chain of events" or *res gestae*). The adoption of Rule 404(b) of the North Carolina Rules of Evidence has not changed this result. N.C.G.S. Sec. 8C-1, Rule 404(b) (1986) comment ("Subdivision (b) is consistent with North Carolina practice"); 1 H. Brandis, Sec. 92 at 352 n.19 (1986 Cum. Supp.) (Rule 404(b) still permits proof of connected crimes). We also note the Fourth Circuit Court of Appeals has ruled the identical federal version of Rule 404(b) permits the introduction of "other crimes" evidence to establish the "setting" of the offense as well as other aspects of what is loosely called the *res gestae* of the offense. *United States v. Masters*, 622 F. 2d 83, 86-88 (4th Cir. 1980).

As further discussed below, the prejudicial impact of "other crimes" evidence used in this manner will often outweigh the probative value of the State's establishing the factual setting of the defendant's alleged crime; however, so long as the two-part *Edwards* test is otherwise met, there is no infringement of defendant's *double jeopardy* rights in using evidence of a crime of which defendant has been acquitted in order to establish the chain of circumstances surrounding the offense.

The State's evidence of defendant's marijuana possession was in fact offered for a different (and proper) purpose at his trial for possession of LSD, i.e., to establish the circumstances surrounding his alleged possession of LSD. Accordingly, we conclude under

Edwards that defendant has failed to show all the requirements necessary for establishing double jeopardy collateral estoppel. We consequently hold that constitutional ground was not a proper basis for excluding the disputed evidence.

II

[4] Irrespective of the scope of double jeopardy collateral estoppel under *Edwards*, the fact of defendant's acquittal of marijuana possession is relevant to the admission of this evidence:

> [O]therwise relevant and admissible evidence of another offense is not rendered inadmissible by the fact that the defendant was tried and acquitted of that offense, *except to the extent that the acquittal may be a factor to be included in balancing the probative value of the evidence against the prejudicial impact, and in determining the threshold question as to whether the evidence of the other offense is sufficiently convincing [by a preponderance of the evidence] to warrant its admission* . . .

Annot., 25 A.L.R. 4th at 943 (emphasis added).

During the hearing on his motion *in limine*, defendant contended that the prejudicial impact of introducing evidence of his marijuana possession would outweigh whatever probative value the evidence had for the State's case. Rule 403 of our Rules of Evidence states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. Sec. 8C-1, Rule 403 (1986). In weighing the probative value of this evidence against its prejudicial impact, we note the reason that "chain of circumstances" evidence is probative at all is its relevance in establishing the "context" of the crime charged: "[T]here is no reason to fragmentize the event under inquiry by suppressing part of the *res gestae* . . . The jury is entitled to know the setting of a case. It cannot be expected to make its decision in a void—without knowledge of the time, place and circumstances of the acts which form the basis of the charge." *Masters*, 622 F. 2d at 86 (citations and footnotes omitted).

Given the facts of this case, it would appear the arresting officer's opinion defendant possessed marijuana was of minimal

probative value at best since the purposes for admitting "chain of circumstances" evidence could have easily been accomplished without the arresting officer's opinion. Furthermore, the risk of prejudice to the defendant was significant since both the marijuana possession the State sought to prove as well as the LSD possession charged were similar narcotics offenses. We believe that in nearly all cases the prejudicial impact of "other crimes" evidence will outweigh its probative value under Rule 403 where the defendant has actually been acquitted of the "other crime" and the purpose of the evidence is simply to establish the chain of circumstances surrounding the defendant's offense.

However, we note defendant has arguably waived any objection under Rule 403 on appeal since his brief limits itself to the constitutional basis of his objection. *Cf.* N.C.R. App. 28(b)(5) (assignment of error without argument is abandoned). In any event, the instant case presents the unique circumstance that the defendant admitted during his direct examination the truth of the State's allegation that he possessed marijuana at the time of his arrest. At the least, this circumstance precludes any argument based on his acquittal that the State did not prove by a preponderance of evidence that defendant possessed marijuana: although the arresting officer's testimony was simply some evidence defendant possessed marijuana at the time of his arrest, defendant's admission removed all uncertainty about the identity of the substance.

More important, defendant's admission that he possessed marijuana waived any objection he may have had under Rule 403 to the arresting officer's testimony that he possessed marijuana. It is well-settled that a defendant waives his objection to evidence of his prior misconduct by subsequently introducing similar evidence without objection, unless he does so in order to "explain the evidence of his prior misconduct, or to destroy its probative value, or to contradict it with other evidence . . ." *State v. Wills*, 293 N.C. 546, 551, 240 S.E. 2d 328, 331 (1977). In *Wills*, the defendant objected to evidence that he confessed to a prior breaking and entering. The *Wills* defendant took the stand to contradict that evidence but, in so doing, admitted he broke into the same store on another occasion. The *Wills* Court held defendant had waived his objection to the State's introduction of evidence of the prior offenses:

> Defendant's testimony in the present case regarding the September break-in was not an attempt to explain or contradict

> the evidence of his prior misconduct; nor was it an attempt to impeach the credibility or to establish the incompetency of the testimony. *Instead, the witness was simply producing the same and additional evidence of the facts that had already been testified to over his objection. See* 1 Stansbury, North Carolina Evidence Sec. 30, p. 80 (Brandis ed. 1973). In denying that he had confessed [to a break-in], defendant added that he had . . . attempted to break into the same store [previously], . . . Such testimony does not come within the requirements . . . for the preservation of the exception to the allegedly improper testimony. Hence, we hold that, by presenting the same evidence on his direct examination as was earlier presented by the State, the defendant waived the benefit of his earlier objection to that evidence.

293 N.C. at 551-52, 240 S.E. 2d at 331 (emphasis added). While the defendant in *Wills* had not been acquitted of the other offenses the State sought to prove, we note our Supreme Court subsequently applied *Wills* in holding a defendant waived his objection to being questioned concerning crimes of which he had been acquitted where he later testified at length about the trial of those crimes. *N.C. State Bar v. DuMont*, 52 N.C. App. 1, 23, 277 S.E. 2d 827, 840 (1981), *modified and aff'd*, 304 N.C. 627, 631, 286 S.E. 2d 89, 92 (1982) (Supreme Court specifically adopting Court of Appeals on this point).

Although defense counsel stated during argument on the motion *in limine* that he might feel compelled to offer evidence the defendant was acquitted of the marijuana possession charge, he never did so. *Cf. State v. Calloway*, 268 N.C. 359, 150 S.E. 2d 517 (1966) (per curiam) (where evidence of prior crimes offered, error to exclude defendant's explanation that he had been acquitted of prior crimes or that convictions were reversed); 1 H. Brandis, Sec. 143 at 568-69 (defendant may introduce evidence of prior judgments or judicial findings to establish *res judicata*). As in *Wills*, the defendant here did not attempt to explain or contradict the evidence of his alleged crime, but instead decided to corroborate the State's evidence with his own testimony. We may speculate that defendant was attempting to enhance the credibility of his testimony concerning his possession of LSD by admitting his misdemeanor possession of marijuana; however, any attempt to enhance the credibility of his testimony on other points does not come within the exception to the waiver rule that the defendant only

may explain the evidence of his prior misconduct, destroy its probative value, or contradict it with other evidence. Defendant's apparent decision to risk further prejudice to his case in order to secure some tactical advantage is simply inconsistent with any claim that he was unduly prejudiced by the admission of this disputed evidence. Under *Wills* and *DuMont*, we thus have no choice but to conclude that defendant waived his objection under Rule 403 to the admission of this evidence.

In passing, we also note defendant asserts he was entitled either to a requested instruction or a pattern instruction on the issue of his identity as the perpetrator of the crime of possessing LSD. However, there was no issue as to defendant's identity as the driver of the car where the LSD was discovered. We find no facts in the record which would otherwise require defendant's requested instructions on the issue of identity.

No error.

Judge EAGLES concurs in the result.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that this case is controlled by *Ashe v. Swenson*, and, therefore, that the trial court committed reversible error by permitting the State to present evidence of defendant's alleged marijuana possession in his subsequent trial for possession of LSD, I dissent.

First, the majority's reliance on *State v. Edwards* is misplaced. In *Edwards*, the State was permitted to introduce evidence of the defendant's participation in a larceny—even though he had been acquitted of that crime—in a later trial on a related charge of breaking or entering *with the intent to commit larceny*. The *Edwards* court explained that the "sole purpose [for introducing] the evidence was to prove defendant's [larcenous] intent . . ., an issue . . . neither raised nor resolved by his [prior] acquittal. . . ." 310 N.C. at 146, 310 S.E. 2d at 614. The court reasoned that the collateral estoppel rule recognized in *Ashe* did not bar this evidence since intent to commit larceny *was not an element* of the crime of larceny and *was not an issue decided* in the prior action. *Id.*

at 146, 310 S.E. 2d at 613-14. In the case before us, defendant's possession of marijuana *was an element* of the crime charged, misdemeanor possession of marijuana, and *was an issue decided* in the first trial. Accordingly, the doctrines of collateral estoppel and double jeopardy precluded presentation of that evidence in the subsequent trial since the issue was necessarily decided in defendant's favor. *See Ashe*, 397 U.S. at 445, 25 L.Ed. 2d at 476; *State v. McKenzie*, 292 N.C. 170, 175, 232 S.E. 2d 424, 428 (1977).

Furthermore, I take issue with the majority's citation of *State v. Suggs* as a case implicitly supporting its interpretation of *Edwards*. In *Suggs*, the defendant was acquitted of the "other crime" at issue *several months after* the trial from which defendant appealed. 86 N.C. App. at 590, 359 S.E. 2d at 26. *Suggs* is inapposite.

Second, I am not persuaded by the majority's conclusion that evidence of marijuana possession was admissible under a "chain of circumstances" exception to the "other crimes" rule as that rule is recognized in this state. The chain of circumstances cases cited by the majority were decided long before the Rules of Evidence were adopted. Rule 404(b) now provides the governing standard for the admission of "other crimes" evidence. That rule, in my view, would not permit the present evidence to be introduced.

Rule 404(b) lists several exceptions to the general prohibition against introduction of evidence of "other crimes"; "chain of circumstances" is not one of these. *See* N.C. Gen. Stat. Sec. 8C-1, R. Evid. 404(b) (1988). Although the list in Rule 404 is not exhaustive, *State v. Morgan*, 315 N.C. 626, 637, 340 S.E. 2d 84, 91 n.2 (1986), no cases decided after the rule was adopted expand that list to include "chain of circumstances." *See, e.g., State v. Ruffin*, 90 N.C. App. 705, 709, 370 S.E. 2d 275, 277 (1988). Moreover, *none* of the pre-Rule 404 cases that allowed evidence of "other crimes" to be introduced to establish the "chain of circumstances" involved crimes for which the defendant had been charged and *acquitted. See, e.g., Jenerette. Edwards*, which was decided before the adoption of the Rules of Evidence, was not a "chain of circumstances" case. In my view, the State's attempt to relitigate the possession of marijuana issue under the guise of "chain of circumstances" was barred by collateral estoppel. *See Albert v. Montgomery*, 732 F. 2d 865, 869-70 (11th Cir. 1984); *Wingate v. Wainwright*, 464 F. 2d 209, 215 (5th Cir. 1972). *See also Blackburn v. Cross*, 510 F. 2d 1014, 1017 (5th Cir. 1975) (collateral estoppel extends to evidentiary as

well as ultimate facts). The most the State needed to show to put the LSD charge "in context" was that defendant was stopped for an alleged vehicular violation and that LSD was found in the car. Possession of marijuana formed no permissible link in the so-called "chain of circumstances."

Third, evidence of defendant's possession of *marijuana* was irrelevant to the separate substantive offense of possession of *LSD*. The majority's conclusion that the evidence "was certainly not 'absolutely necessary' . . . to convict him of felonious possession of LSD," shows the irrelevancy of the challenged evidence. In any event, as the majority concedes, even had defendant's marijuana possession been remotely relevant, its prejudicial impact far outweighed any probative value it might have had. *See State v. McDowell*, 93 N.C. App. 289, 378 S.E. 2d 48 (1989) (flight evidence to show how stolen property came into police custody was of dubious relevancy, and, in any event, should have been excluded due to danger of unfair prejudice).

Finally, defendant did not waive his constitutional, relevancy, or prejudicial objections to the State's evidence of marijuana possession by his subsequent reference to the marijuana on direct examination. The damage had already been done. In my view, defendant chose the only course he could: to address that prejudicial evidence head-on, with the aim of bolstering his credibility in the hope that the jury would conclude that he was "being completely open and straightforward and worthy of belief." *State v. Hedgepeth*, 66 N.C. App. 390, 400, 310 S.E. 2d 920, 925 (1984). *Cf. Jones v. Bailey*, 246 N.C. 599, 602, 99 S.E. 2d 768, 771 (1957); *State v. Wells*, 52 N.C. App. 311, 315, 278 S.E. 2d 527, 530 (1981) (no waiver of objection to introduction of incompetent evidence by later attempt to explain or destroy probative value of that evidence). Had defendant failed to respond to the officer's testimony, the jury would have been left with the impression that he was dishonest about the marijuana, and so probably also lied about the LSD. *Wills*, upon which the majority relies to conclude that defendant waived his objection to introduction of the evidence of marijuana possession, did not involve an objection to constitutionally impermissible evidence, that is, evidence of another crime for which defendant had been *acquitted*. *See Wills*, 293 N.C. at 550, 240 S.E. 2d at 330-31 (there defendant suffered no violation of a specific constitutional right, and his subsequent testimony was not induced by erroneous admission of evidence of prior crime).

In short, defendant's possession of marijuana played no permissible part in establishing the context of his arrest for possession of LSD. The error in admitting that evidence entitles defendant to a new trial.

NEWTON WALTON v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY

No. 8823SC456

(Filed 18 April 1989)

1. **Courts § 19; Master and Servant § 16.1; Pensions § 1— employer's refusal to bridge prior service—collective bargaining agreement—fraud claim not pre-empted by federal law**

A state law claim against a former employer for fraud in refusing to bridge plaintiff's prior service with an affiliated company for all purposes after plaintiff had worked for defendant for five years because a collective bargaining agreement prohibited bridging prior service at another company was not pre-empted under Sec. 301 of the Labor Management Relations Act since plaintiff's claim was not founded directly upon the terms of the collective bargaining agreement and required no interpretation of the agreement.

2. **Limitation of Actions § 8.1— employer's refusal to bridge prior service—notice of fraud—jury question**

Plaintiff's 1985 claim against his former employer for fraud in refusing to bridge plaintiff's prior service with an affiliated company for all purposes, including layoffs, after five years of employment with defendant because a collective bargaining agreement prohibited bridging prior service of another company was not barred by the three-year statute of limitations as a matter of law; rather, the evidence presented a jury question as to whether plaintiff was put on notice of the alleged fraud in 1981 by a disposition of his grievance, which focused on whether plaintiff's credited service entitled him to preferential selection of work schedules and vacation times, or whether plaintiff reasonably continued to rely upon defendant's representations until 1983 when, after five years of employment with defendant, he was laid off.

3. Master and Servant § 10— fraud action against employer— employment at will doctrine inapplicable

Plaintiff's claim against his former employer for fraud in refusing to bridge his prior service with an affiliated company for all purposes after five years of employment with defendant was not barred by the employment at will doctrine.

APPEAL by defendant from *Julius A. Rousseau, Jr., Judge.* Order entered 22 July 1987 in Superior Court, WILKES County. Heard in the Court of Appeals 25 January 1989.

Richard L. Doughton; and Hall & Brooks, by John E. Hall, for plaintiff-appellee.

Robert Carl Voigt, Senior Attorney, Carolina Telephone and Telegraph, for defendant-appellant.

BECTON, Judge.

The plaintiff, Newton Walton ("Walton"), brought this action against his former employer, defendant Carolina Telephone and Telegraph ("CTT"), alleging fraud and misrepresentation in connection with his transfer to CTT from North Electric Company ("NEC"). The gist of Walton's complaint is that CTT induced his transfer by promising him that, upon completion of five years' work at CTT, Walton's period of employment (important for purposes of determining seniority and entitlement to other benefits) would be measured from the time he began at NEC (1970), rather than the time he started at CTT (1978). CTT later refused to "bridge" Walton's prior NEC service for all purposes, explaining that it was prohibited from doing so by an existing collective-bargaining agreement between CTT and its unionized employees. As a result, in 1983, after five and a half years of employment at CTT, Walton had earned insufficient CTT seniority to withstand a layoff.

The central questions before us on appeal are (1) whether Walton's state-law tort claim is pre-empted by federal law, and (2) whether Walton's claim is barred by the statute of limitations. We hold that Walton's claim is neither federally pre-empted nor time-barred.

I

A. Facts

Late in 1977, Walton, a telephone installer at NEC, began negotiating with CTT regarding a transfer from NEC's plant in

Galion, Ohio, to CTT's plant in Siler City, North Carolina. Critical to these negotiations, according to Walton, was the promise he obtained from CTT that his seniority and service benefits, acquired by virtue of his continuous employment with NEC since 1970, would carry over to his employment with CTT upon completion of five years of work at CTT. Walton alleged that he agreed to transfer based on these representations.

At the time Walton's negotiations began, NEC and CTT were subsidiaries of United Telecommunications, Inc. ("United Telecommunications"). However, on 1 January 1978, within days of Walton's planned transfer and while he was still employed at NEC, International Telephone and Telegraph ("ITT") fractured that relationship by purchasing NEC from United Telecommunications. Walton subsequently sought and received assurances from CTT that this transaction did not affect their agreement, and on 21 January 1978, Walton left NEC. Five days later, on 26 January 1978, he started work at CTT as a telephone installer and repairman.

Although Walton did not belong to a union, he was a member of a work group at CTT represented by Local Union 1912 of the International Brotherhood of Electrical Workers ("IBEW"). As the exclusive bargaining agent for Walton's work group, the IBEW entered into a series of contracts with CTT in 1977, 1978, 1980, and 1983. CTT alleged that these contracts set the terms and conditions of employment for all employees in Walton's work group and that the contracts implicitly prohibited bridging prior service at any company outside CTT.

Walton continued to work for CTT until July 1983, when he and other employees were laid off on the basis of seniority. Walton's seniority was measured from the time he started with CTT in January 1978; both parties agree that had his NEC seniority been bridged at CTT, Walton would not have been laid off. CTT paid Walton a $9,829.60 termination allowance, which included credit for his prior NEC service.

B. Procedural History

On 23 September 1983, Walton brought suit against United Telecommunications and CTT for breach of contract. On 2 February 1985, that complaint was voluntarily dismissed without prejudice. Walton filed a second complaint on 8 August 1985 against CTT, alleging fraud and misrepresentation. CTT answered and moved

for summary judgment. CTT's motion for summary judgment was granted 23 April 1987. However, on 22 July 1987, after reviewing this court's decision in *Welsh v. Northern Telecom, Inc.* (filed 21 April 1987), the trial judge vacated the summary judgment order, and denied CTT's motion for summary judgment. CTT appealed, and this court granted certiorari.

CTT contends on appeal that it was entitled to summary judgment for three reasons: (1) Walton's state-law claim was federally pre-empted under Section 301 of the Labor Management Relations Act; (2) Walton's claim for fraud and misrepresentation was barred by the statute of limitations; and (3) Walton's employment with CTT was governed by the employment at will doctrine. We address these contentions in order.

II

[1] CTT contends that Walton's fraud claim was federally pre-empted because resolution of the claim would require analysis of the collective-bargaining agreement since that agreement addressed seniority, bridging of prior service, and layoffs. CTT further asserts that *Welsh* is inapposite to this case, and thus, that the trial judge erred by vacating the prior summary judgment order. Walton, on the other hand, contends that his fraud claim would not require interpretation of the collective-bargaining agreement and that *Welsh* controls. In addressing these contentions, we first examine general principles governing federal pre-emption.

Section 301 of the Labor Management Relations Act (also known as the Taft-Hartley Act), 29 U.S.C.A. Sec. 185(a), mandates federal adjudication of all claims—including those ostensibly grounded in state law—that require substantial interpretation of a collective-bargaining agreement for resolution. *See, e.g., Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 7 L.Ed. 2d 593 (1962) (recognizing pre-emptive effect of Section 301); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 85 L.Ed. 2d 206, 216 (1985) (Section 301 pre-empts any state-law "tort claim . . . inextricably intertwined with consideration of the terms of [a] labor contract"). The rationale behind pre-emption is that uniform federal interpretation of the terms of collective-bargaining agreements will "promote the peaceable, consistent resolution of labor-management disputes." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. ---, 100 L.Ed. 2d 410, 417 (1988). Of course, pre-emption does not mean that a plaintiff is without

a remedy; it simply means that the remedy must be sought in federal court.

A leading case on the pre-emptive effect of Section 301 on state-law claims is *Allis-Chalmers Corp. v. Lueck*, upon which both parties rely. In *Lueck*, an employee brought a state-law tort claim for bad faith handling of disability benefit payments due under a collective-bargaining agreement. Because the claim was rooted in the collective-bargaining contract and required interpretation of the contract's provisions, the Court held that the claim was federally pre-empted. The Court set out the following rule: "when resolution of a state-law claim is *substantially dependent upon analysis of the terms of [a collective-bargaining] agreement . . . , that claim must either be treated as a [Section] 301 claim . . . or dismissed as pre-empted* by federal labor-contract law." 471 U.S. at 220, 85 L.Ed. 2d at 221 (emphasis added) (citations omitted).

However, the Court limited its holding:

> Of course, *not every dispute* concerning employment, or *tangentially involving a provision of a collective-bargaining agreement, is pre-empted by [Section] 301* or other provisions of the federal labor law. . . . In extending the pre-emptive effect of [Section] 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt *state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.*

Id. at 211-12, 85 L.Ed. 2d at 215-16 (emphasis added). The Court continued, explicitly "emphasizing the narrow focus of [its] conclusion":

> *[We do not] hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by [Section] 301.* The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis.

Id. at 220, 85 L.Ed. 2d at 221 (emphasis added).

Lueck was "fleshed out" in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 96 L.Ed. 2d 318 (1987). *Caterpillar*, factually similar to the case before us, involved employees covered by a collective-bargaining agreement who were laid off even though their employer

had allegedly made representations assuring them job security. The employees sued for breach of their individual employment contracts, fraud, and other tortious conduct. The unanimous Court held that the state-law claims were not "completely pre-empted" by Section 301 since that section controls only "[1] claims founded *directly on rights created by collective-bargaining agreements*, and . . . [2] claims *'substantially dependent on analysis of a collective-bargaining agreement.'*" *Id.* at ---, 96 L.Ed. 2d at 328 (emphasis added) (citations omitted).

The Court explained that the employees' power to assert claims based upon pre-existing oral contracts with their employer was not abrogated simply because they were also covered by a collective-bargaining agreement at the time of the layoff:

> . . . [I]ndividual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law. . . . [A] plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement.

Id. at ---, 96 L.Ed. 2d at 329-30 (emphasis supplied). *Cf. Lingle*, 486 U.S. at ---, 100 L.Ed. 2d at 419 (Court unanimously held that employee's state-law claim for retaliatory discharge was not pre-empted by Section 301 because it was not necessary to interpret terms of collective-bargaining agreement to establish elements of state-law tort); *Electrical Workers v. Hechler*, 481 U.S. 851, 95 L.Ed. 2d 791, 803 (1987) (employee's state-law tort claim held clearly pre-empted by Section 301 because claim was based directly upon violations of collective-bargaining agreement and resolution required interpretation of agreement's terms).

A number of lower courts have considered the question now before us, that is, whether a state-law tort claim for misrepresentation and fraud, brought by an employee covered by a collective-bargaining agreement, was pre-empted by Section 301. Many courts have held that the claims were not pre-empted because the representations sued upon were independent of the collective-bargaining agreement, and resolution of the claims required no interpretation of the agreement. *See, e.g., Varnum v. Nu-Car Carriers, Inc.*, 804 F. 2d 638 (11th Cir. 1986), *cert. denied*, 481 U.S. 1049, 95 L.Ed.

2d 838 (1987) (representations made regarding seniority); *Andersen v. Ford Motor Co.*, 803 F. 2d 953 (8th Cir. 1986), *cert. denied*, --- U.S. ---, 97 L.Ed. 2d 747 (1987) (representations regarding "bumping" or layoffs); *Malia v. RCA Corp.*, 794 F. 2d 909 (3d Cir. 1986), *cert. denied*, --- U.S. ---, 96 L.Ed. 2d 696 (1987) (representations regarding promotion); *Miller v. Fairchild Indus., Inc.*, 668 F. Supp. 461 (D. Md. 1987) (representations regarding job security); *Paradis v. United Technologies*, 672 F. Supp. 67 (D. Conn. 1987) (representations regarding termination); *Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405 (W.D. Wis. 1985) (representation that severance benefits would be exchanged for seniority rights). *Contra Bale v. Gen. Tel. Co. of Calif.*, 795 F. 2d 775 (9th Cir. 1986); *Martin v. Associated Truck Lines, Inc.*, 801 F. 2d 246 (6th Cir. 1986) (fraud and misrepresentation claims pre-empted because adjudication would require reference to and interpretation of terms of collective-bargaining agreement) (both cases decided before *Caterpillar*).

Until now, this state has not addressed the question of Section 301 pre-emption of state-law actions. However, this court has twice considered whether employees' state-law claims were federally pre-empted under "ERISA," 29 U.S.C.A. Secs. 1001, *et seq. See Welsh v. Northern Telecom, Inc.*, 85 N.C. App. 281, 354 S.E. 2d 746 (1987), *disc. rev. denied*, 320 N.C. 638, 360 S.E. 2d 107, *reconsideration dismissed*, 320 N.C. 798, 361 S.E. 2d 90 (1987); *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 306 S.E. 2d 519 (1983), *disc. rev. denied*, 310 N.C. 154, 311 S.E. 2d 294 (1984). Because Section 301 "closely parallels" the pre-emption provisions of ERISA, *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 95 L.Ed. 2d 55 (1987), we consider *Welsh* and *Shaver* instructive in deciding the case before us. *Accord Tener v. Hoag*, 697 F. Supp. 196 (W.D. Pa. 1988).

In *Shaver*, an employee brought an action against his employer alleging that the employer misrepresented that the employee's pension benefits would continue in order to induce the employee to remain with the employer and to forego salary increases and bonuses. The fraudulent misrepresentation claim was held not pre-empted by ERISA because, among other things, the claim only incidentally or tangentially involved a pension plan, and did not concern the plan's substance or regulation. 63 N.C. App. at 610, 306 S.E. 2d at 523.

Welsh, upon which the trial judge relied in vacating his prior summary judgment order, involved facts similar to those in the present case. There, an employee alleged that a Northern Telecom

representative promised him that "if [he] came to work with Northern Telecom and worked there five years, [his] previous Bell System service would be bridged" for purposes of establishing entitlement to certain benefits. 85 N.C. App. at 283-84, 354 S.E. 2d at 747. The employee brought a breach of contract action when the employer later refused to bridge his prior service. The employer appealed from a jury verdict in favor of the employee, contending that the claim "related to" the employer's pension plan, and therefore was pre-empted under ERISA. Guided by *Shaver*, this Court rejected the employer's contention:

> *[Plaintiff's] action is not against the plan.* Rather, his action is against the defendant for failing to uphold its promise to provide benefits. . . . His claim neither concerns the substance of the pension plan nor the plan's regulation. The plan is only incidentally or tangentially involved. *Because plaintiff's claim is only tangential to the plan, his claim is not pre-empted by ERISA.*

Id. at 289, 354 S.E. 2d at 751 (emphasis added).

Applying the foregoing principles to the case before us, we hold that Walton's fraud and misrepresentation claim was not pre-empted by Section 301 of the Labor Management Relations Act. Walton's claim was neither "founded directly on rights created by [the] collective-bargaining agreement[ ]," nor will resolution of it be "substantially dependent on analysis of [the terms of the] collective-bargaining agreement." *Caterpillar*, 482 U.S. at ----, 96 L.Ed. 2d at 328 (quoting *Lueck*). Walton's fraud claim at most only tangentially concerns provisions of that agreement. *See Lueck*, 471 U.S. at 211-12, 85 L.Ed. 2d at 215-16; *Welsh; Shaver.*

Our holding does not undermine the principle honoring the sanctity of collective-bargaining agreements. It merely allows an employee to bring a state-law claim in state court if the claim is not founded directly upon the terms of a collective-bargaining agreement. *Accord Caterpillar*, 482 U.S. at ---, 96 L.Ed. 2d at 329-30 ("individual employment contracts are not inevitably superseded by any subsequent collective-bargaining agreement") (distinguishing *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339, 88 L.Ed. 762, 768 (1944)). Here, there is no direct challenge to the collective-bargaining agreement. *See id.* The alleged representations about which Walton complains were made independently of the collective-bargaining agreement. *See id.* Any other result might suggest that

an employer could flout with impunity the restrictive provisions of a collective-bargaining agreement by making individual, independent promises to an employee, and then raise the collective-bargaining agreement as a defense when the employee seeks to have those promises fulfilled. In our view, an employee should be entitled to sue in state court for allegedly fraudulent promises made by an employer, even if those promises contravene the terms of a collective-bargaining agreement, so long as resolution of the claim does not require interpretation of that agreement. *See id.* at ---, 96 L.Ed. 2d at 331.

This assignment of error is overruled.

III

[2] CTT contends that it was entitled to summary judgment as a matter of law because Walton's 1985 fraud claim was barred by the three-year statute of limitations. CTT argues that Walton knew of or should have known of the alleged fraud (1) in December 1978, when the first IBEW contract was renewed, or (2) in January 1981, when a grievance brought by the union on Walton's behalf was denied. Walton asserts that it was not until 1983, when CTT began laying off employees, that he first realized that CTT was not going to honor its promise that his seniority would be bridged for all purposes after five years of work.

In light of *Caterpillar's* holding that an employee's independent contract is "not inevitably superseded by any subsequent collective-bargaining agreement," we do not discuss whether Walton knew or should have known of the alleged fraud at the time the IBEW contract was renewed. Instead, we examine the notice issue in connection with Walton's grievance.

A. Walton's Grievance

Sometime in 1980, Walton contacted United Telecommunications, CTT's parent company, regarding the credit he expected to receive for his prior NEC service. (It is not clear from the record why Walton made this inquiry after only two years of employment with CTT.) In response to Walton's communication, a United Telecommunications representative sent a letter to CTT's plant manager. The letter stated:

> We recently received an inquiry from Newton Walton . . . concerning credit for service with [NEC] prior to merger of

> that company with ITT. . . . *[S]uch service is creditable for all purposes except pension computation.* This would include such things as eligibility for sickness payments and vacations, choice of work schedules, as well as pension eligibility. . . . [I]f Mr. Walton will provide us with evidence of his previous employment with [NEC], we will make a special annotation on his personnel record card indicating that *his service for all purposes except pension computation has been bridged to include his service with that company.*

(Emphasis added.) CTT representatives then discussed the letter with Walton, and—even though Walton had not yet worked at CTT for five years—acted to extend his CTT "net credited service" date to his starting date at NEC.

In December 1980, Walton filed a formal grievance against CTT regarding denial of certain privileges he believed accompanied the extension of his net credited service date. The basis of the grievance was that Walton had not been permitted to exercise work schedule privileges or preferential vacation selection. Walton's grievance did not concern that aspect of seniority which determines layoff status.

In January 1981, CTT made the following disposition of Walton's grievance:

> Mr. Walton's "Net Credited Service" date was changed to include the period from 9-8-1970 to 1-21-1978 that he was employed by [NEC]. . . . This *"Net Credited Service" date is used,* as outlined in the definitions for the IBEW contract, *for computing eligibility for pension and benefits. Seniority for selection of work tours and vacation schedules along with determining layoff status is defined* in Article 11, paragraph 11.01 [of the IBEW contract] *as continuous work with the company* at the specified locations. *The contract does not permit using "Net Credited Service" for these selections.*

(Emphasis added.) Walton's grievance was denied on the ground that IBEW contract provisions had not been violated. The union chose not to pursue Walton's grievance further.

Walton then wrote to United Telecommunications, again complaining about his work and vacation selections. Walton claimed that he was being denied his "full Seniority rights, including Schedule Selection Privileg[e]s," stating that ". . . in a Grievance meeting

with the Company I was told . . . I would not be allowed Schedule or Vacation Selection according to my Seniority Status because of a term in the [IBEW] Contract denying me of these rights." Walton did not raise an issue about the effect his seniority had on his layoff status. In April 1981, a company representative responded, explaining to Walton that

> . . . an error had been made when you were mistakenly told that full seniority rights would be extended to you upon employment with Carolina Telephone. . . . While the rule prevents you from exercising competitive seniority rights using your total service within United Telecommunications, Inc., most employees prefer to have protection in the contract which prevents more senior employees from being transferred into their company and exercising seniority over them. . . . We understand your dissatisfaction, particularly after having been given erroneous information, but nonetheless we must abide by the provisions of a legal and binding [IBEW] contract.

This letter did not specifically address Walton's seniority as it pertained to layoffs. Walton contends that he continued to believe, based on the representations made to him before he transferred to CTT, that his seniority would be bridged for that and all other purposes after five years of work with CTT.

B. Appropriateness of Summary Judgment in Fraud Actions

Summary judgment in a fraud action, as in other cases, should be granted when the pleadings, depositions, interrogatories, admissions on file, and affidavits, if any, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 56 (1983); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). While "[a]llegations of fraud do not readily lend themselves to resolution by way of summary judgment," *Johnson*, 300 N.C. at 260, 266 S.E. 2d at 619, it is also true that summary judgment is proper when it appears as a matter of law that the statute of limitations on the fraud action has expired. *See, e.g., Hiatt v. Burlington Indus., Inc.*, 55 N.C. App. 523, 286 S.E. 2d 566 (1982), *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 566 (1982).

The statute of limitations for fraud is three years from the date the fraud was, or reasonably should have been, discovered.

N.C. Gen. Stat. Sec. 1-52(9) (1983); *Feibus & Co., Inc. v. Godley Constr. Co., Inc.*, 301 N.C. 294, 304, 271 S.E. 2d 385, 391 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981). "Because fraud is difficult to define, it is likewise difficult to establish with certainty when the statute of limitations on a claim of fraud begins to run." *Jennings v. Lindsey*, 68 N.C. App. 710, 715, 318 S.E. 2d 318, 321 (1984). Thus, whether a plaintiff should have discovered the facts constituting the fraud more than three years before the action was filed ordinarily is a *question of fact for the jury. Feibus*, 301 N.C. at 305, 271 S.E. 2d at 392; *see, e.g., Cowart v. Whitley*, 39 N.C. App. 662, 664, 251 S.E. 2d 627, 629 (1979). Only when "it clearly appears that plaintiff's claim is barred by the running of the statute of limitations," may that question be determined as a *matter of law. Poston v. Morgan-Schultheiss, Inc.*, 46 N.C. App. 321, 323, 265 S.E. 2d 615 (1980), *cert. denied*, 301 N.C. 95 (1980). *See, e.g., Hiatt*, 55 N.C. App. at 527-29, 286 S.E. 2d at 568-70 (deposition testimony clearly showed plaintiff's knowledge of matters allegedly constituting fraud; case provided "an example of inexcusable procrastination even after discovery of the facts which plaintiff contends constituted fraud"); *Brown v. Vick*, 23 N.C. App. 404, 407-09, 209 S.E. 2d 342, 344-45 (1974), *cert. denied*, 286 N.C. 412, 211 S.E. 2d 216 (1975) (clear that party had knowledge of all the facts and circumstances surrounding the alleged fraud). However, "summary judgment [is] inappropriate in a fraud case [whenever] the court is called upon to draw a factual inference in favor of the moving party. . . ." *Johnson*, 300 N.C. at 260, 266 S.E. 2d at 619.

C. Jury Question Whether Statute of Limitations Expired

With the foregoing principles in mind, we cannot say that the 1981 disposition of Walton's grievance or the subsequent letter should have, *as a matter of law*, put Walton on notice that his seniority would not be bridged for any purpose, including layoff status, after five years of employment. Viewing the evidence in a light most favorable to Walton, *see Cowart*, 39 N.C. App. at 664, 251 S.E. 2d at 629, it appears that the focus of the grievance was whether Walton's net credited service entitled him to preferential selection of work schedules and vacation times; the disposition merely informed him that the term "net credited service" did not apply to those privileges or to layoffs. In our view, it is a question for the jury whether, at that point, three years into his CTT employment, Walton should have known of the alleged fraud, or whether

he reasonably continued to rely upon CTT's earlier representations until 1983, when, after five years of work, he was laid off.

Although we express no opinion whether the evidence is sufficient to support an ultimate finding in Walton's favor, "we do consider [the evidence] sufficient to create an issue of fact for the jury. . . ." *Feibus*, 301 N.C. at 305, 271 S.E. 2d at 392. Accordingly, this assignment of error is overruled.

IV

[3] CTT's contention that Walton's action is barred by the employment at will doctrine is without merit. Walton is not suing for wrongful discharge; his complaint asserts that he was fraudulently induced to come to work for CTT.

V

We hold that the trial judge properly denied CTT's motion for summary judgment because Walton's claim was neither federally pre-empted nor time-barred, and we order that the trial proceed.

Affirmed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. JEFFREY HARLISS FREEMAN

No. 8817SC592

(Filed 18 April 1989)

1. **Constitutional Law § 31— refusal to appoint psychiatrist**

Motion by an indigent defendant charged with statutory rape and first degree sexual offense for the appointment of a psychiatrist to examine and test defendant was properly denied by the trial court where defendant's assertions that the requested assistance would be beneficial were not sufficiently particularized.

2. **Criminal Law § 161.2— assignment of error not pertinent to argument—abandonment**

Where an assignment of error set forth in defendant's brief relating to a particular argument is not pertinent to

the question argued, the assignment of error set out in the brief is deemed abandoned. Appellate Rule 28(b)(5).

3. Criminal Law § 102.9— prosecutor's jury argument—reference to defendant as "animalistic"

The trial court did not abuse its discretion in failing to respond to defendant's objection when the prosecutor called defendant an "animalistic human being" during closing arguments in a statutory rape and first degree sexual offense case.

4. Criminal Law § 89.3— corroboration—extrajudicial statement of another—harmless error

The trial court erred in permitting a witness to corroborate her own testimony with an extrajudicial statement of another, but such error was not prejudicial.

5. Criminal Law § 102.2— opening statement—trial court's interruption and classification as jury argument

The trial court did not abuse its discretion in interrupting defense counsel during his opening statement and telling him that he was "arguing to the jury" when counsel stated that defendant "is convinced that you will find that he's not guilty" and again when counsel stated that the evidence will show "one thing about which there is no disagreement." However, the trial court did abuse its discretion in interrupting counsel and classifying as argument his statement asking the jury to consider each piece of evidence carefully, but such error was not prejudicial. N.C.G.S. § 15A-1221(a)(4) (1988); Rule 9, General Rules of Procedure for Superior and District Courts.

6. Criminal Law § 102.5— question about "rolling" cigarette—absence of prejudice

The prosecutor's question to a witness as to whether defendant "rolled" a cigarette was not prejudicial, even if it implied the use of an illegal substance, where defendant admitted at trial that he smoked marijuana, took Valium and drank heavily on the day in question.

7. Criminal Law § 102.5— improper question by prosecutor—absence of prejudice

Assuming the prosecutor's question to a witness, "You didn't see another diaper in the room anywhere?" erroneously

permitted the prosecutor in essence to testify about items in the room, the court's allowance of such question was not prejudicial to defendant.

8. **Criminal Law § 86.1— credibility of defendant—events day before crime**

The State's questioning of witnesses about events which occurred the day before the crimes for which defendant was on trial was properly permitted for consideration by the jury on the issue of defendant's credibility.

9. **Constitutional Law § 81— consecutive life sentences—no cruel and unusual punishment**

Consecutive life sentences imposed on defendant for first degree rape and first degree sexual offense were not grossly disproportionate because the crimes were committed within moments of each other and thus did not constitute cruel and unusual punishment.

Judge PHILLIPS concurs in the result.

APPEAL by defendant from *Wood (William Z.), Judge.* Judgment entered 15 January 1988 in Superior Court, SURRY County. Heard in the Court of Appeals 7 December 1988.

Attorney General Lacy H. Thornburg, by Associate Attorney General Clarence J. DelForge, III, for the State.

Mills & Rives, by Hugh C. Mills, for defendant-appellant.

GREENE, Judge.

Defendant was indicted for the offense of statutory rape, N.C.G.S. Sec. 14-27.2 (1986), and the offense of first-degree sexual offense, N.C.G.S. Sec. 14-27.4 (1986). The defendant pled not guilty and was found guilty by a jury on both charges. The defendant was sentenced to two consecutive life sentences. Defendant appeals.

At trial the State's evidence tended to show the following: On 14 April 1987 the alleged victim was approximately twenty-three months old. The mother of the alleged victim, Tammy Sizemore, was a girl friend of the defendant. On 14 April 1987 at approximately 5:30 p.m., the defendant came to the apartment in Mount Airy, North Carolina where Tammy Sizemore, her minor daughter, her brother Billy and Billy's girl friend lived. The defendant entered

the apartment after having used alcohol, marijuana, and other substances. The defendant then had a short conversation with Tammy Sizemore and when she went into the bathroom and began taking a bath, the defendant went into the bedroom where the minor child was sleeping and had vaginal and anal intercourse with her. After the mother of the child heard the child crying, she came from the bathroom and found the child bleeding and prepared to take the child to the doctor. The defendant was in the living room area of the apartment and remained there after the child was taken to the hospital and was there when Detective Larry Reeves of the Mount Airy Police Department arrived, placed him under arrest, and took him to the Mount Airy Police Department. At the police department, the defendant was questioned by Detective Reeves and voluntarily surrendered his underwear.

At trial the State introduced as evidence the sheet on which the minor child was found by its mother, a sweater which contained bloodstains, a diaper and various items of clothing worn by the minor child on the date of the alleged acts. Lucy Milks, a forensic serologist at the State Bureau of Investigation, testified that the blood samples on the underwear taken from the defendant were the same as the blood type of the minor child. Dr. Tom Vaughn of Mount Airy testified he was the physician who examined the minor child on 14 April 1987 and that entry had been made into her vagina and anus by foreign objects and in his opinion the foreign object was a penis.

The defendant's evidence tended to show the following: On 14 April 1987 the defendant did in fact go to the apartment of Tammy Sizemore about 5:30 p.m. and that when the defendant entered the apartment he found Tammy Sizemore very upset. She was crying and on more than one occasion told the defendant "You had better leave." The defendant sat down in the living room area, had a conversation with Tammy Sizemore, and noticed that her minor child was crying in the bedroom. When Tammy Sizemore walked into the kitchen area the defendant went into the bedroom and found the minor child bleeding. Defendant had taken off his pants in the living room area before sitting down and when he walked into the bedroom he immediately picked up the small child and got blood on his underwear at that time. The defendant then handed the child to her mother and told Tammy Sizemore to take the child to the hospital. Tammy Sizemore was getting the child ready to leave to seek medical treatment when Kim Browder, the

girl friend of Tammy Sizemore's brother, came into the apartment. Kim Browder and Tammy Sizemore then left the apartment and took the minor child to the hospital. The defendant remained at the apartment until he was subsequently arrested. On the way to the police station, he was taken to Northern Hospital of Surry County where the minor child was being treated. He was allowed to go into the hospital to see how the minor child was doing. Afterwards he was taken into custody and was questioned by Detective Larry Reeves.

The eight questions presented for review are whether the trial court: I) erred in denying defendant's pre-trial motion for appointment of expert psychiatric assistance; II) erred in denying defendant's motion *in limine* to prohibit the State from referring to statements defendant may have made before the crime date about his preference for sex with virgins; III) erred in failing to respond to the objection of the defendant when the State's attorney called the defendant an "animalistic human being" during closing arguments; IV) erred in admitting the testimony of a witness regarding out of court statements to corroborate the witness's own testimony; V) erred in restricting counsel from arguing during opening statements; VI) erred in allowing the State to ask allegedly leading questions; VII) erred in allowing the State to cross-examine the defendant about events which occurred the day before the crimes were committed; VIII) erred in sentencing the defendant to two consecutive life sentences on the ground that such sentencing constitutes cruel and unusual punishment in violation of the North Carolina and United States Constitutions.

I

[1] Defendant contends the trial court committed prejudicial error in denying his motion for appointment of a psychiatrist. Specifically, the defendant, determined by the court to be indigent, requested the appointment of a "qualified psychiatrist" authorized to

> examine the medical condition of the Defendant and to conduct the clinical, standard psychological, and other tests necessary, including but not limited to a penial plethismograph [sic], for the purpose of examining the Defendant and assisting the Defendant in evaluating, preparing, and presenting his defense; and that the costs of such testing be paid by the State of North Carolina because of Defendant's indigency.

Under N.C.G.S. Sec. 7A-450(b) (1986), the State must provide an indigent defendant "with counsel and other necessary expenses of representation." Our Supreme Court has interpreted this provision to require the appointment of expert assistance only upon a showing by the defendant that: "(1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *State v. Wilson*, 322 N.C. 117, 125, 367 S.E. 2d 589, 594 (1988); *see also State v. Lloyd*, 321 N.C. 301, 318, 364 S.E. 2d 316, 327 (1988) (for expert assistance at sentencing phase, these requirements have been interpreted as requiring defendant to make showing that a mitigating circumstance relating to his mental condition will be a significant factor at sentencing). The showing by the defendant must be "particularized" and "undeveloped assertions that the requested assistance would be beneficial" are insufficient. *State v. Artis*, 316 N.C. 507, 512-13, 342 S.E. 2d 847, 851 (1986). In determining whether the trial court erred in denying the defendant's motion, focus "must be upon what was before the trial court at the time of the motions." *Wilson*, 322 N.C. at 126, 367 S.E. 2d at 594.

An examination of this record shows that at the time the trial court denied the defendant's motion, the defendant had argued in his affidavit that the appointment of a psychiatrist would assist the defendant in "evaluating, preparing, and presenting his defense." At the presentation of the motion to the trial court, the defendant's counsel argued the evidence obtained by an appointed psychiatrist could be used in the "guilt or innocence phase of the trial . . . [and] also . . . in the sentencing phase." At one point in the argument, the defendant's counsel argued that if the psychiatrist determined the defendant was not a pedophiliac (person with a paraphilia in which children are the preferred sexual object), it "would be evidence of his physical makeup, his physical reactions and his mental condition, which would be used to show that he was not inclined on this occasion to favor children of the age of the alleged victim."

Considering everything the defendant's counsel had to offer to the trial court in support of his motion for the appointment of a psychiatrist, we find "little more than undeveloped assertions that the requested assistance would be beneficial," *Artis*, 316 N.C. at 512, 342 S.E. 2d at 851, and these assertions are not sufficiently particularized. Therefore, we find the trial court did not err in denying the defendant's motion for appointment of a psychiatrist.

II

[2] The defendant argues the trial court erred in denying his motion *in limine* to prohibit the State from referring to statements defendant may have made before the crime date about his preference for "sex with virgins." As the assignment of error set forth in the defendant's brief relating to this particular argument is not pertinent to the question argued, the assignment of error set out in the brief is abandoned. App. R. 28(b)(5) ("[i]mmediately following each question shall be a reference to the assignments of error and exceptions *pertinent to the question* . . . ." (emphasis added)). The exceptions and assignment of error pertinent to the question argued in the brief are likewise abandoned as they are not set out in the brief. *Id.* ("Assignments of error not set out in the appellant's brief . . . will be taken as abandoned.")

III

[3] Defendant next assigns as error the trial court's failure to respond to the objection of the defendant when the State's attorney called the defendant an "animalistic human being" during closing arguments.

Our appellate courts ordinarily will not "review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Taylor*, 289 N.C. 223, 227, 221 S.E. 2d 359, 362 (1976). Here, the prosecution made this remark in attempting to draw an analogy between a dog leaving tracks in the snow and the numerous bits of circumstantial evidence leading to defendant's guilt. We therefore hold that the statement taken in context was not "clearly calculated to prejudice the jury in its deliberations" nor was the remark so extreme as to warrant our review of the trial judge's discretion.

IV

[4] The defendant next contends the trial court erred in overruling the defendant's objections to the following questions asked by the district attorney of Tammy Sizemore:

> Q. Were you present with Lisa Robertson, one of the witnesses Mr. Hugh Mills has asked you about?
>
> A. Yes.

Q. Did she tell you in our presence that she didn't say anything about you leaving the apartment and going to the store?

A. Yeah.

MR. MILLS: Objection. That's not going to be corroborated at all that I know of.

THE COURT: Overruled.

Specifically, the defendant argues the evidence was inadmissible hearsay and was "elicited by the State in an effort to undercut the Defendant's argument that Tammy Sizemore may have left the apartment and allowed something to happen to her minor child." The State, however, argues the testimony is not hearsay as it "was not offered to prove the truth of the matter asserted but merely to corroborate Tammy's own in-court testimony." Tammy Sizemore did testify that she never told Lisa Robertson that she left the apartment to go to the store.

Testimony which may be hearsay is nonetheless admissible for the non-hearsay purpose of corroboration if it in fact corroborates the witness's testimony. *State v. Locklear*, 320 N.C. 754, 761, 360 S.E. 2d 682, 686 (1987). However, while a witness may corroborate herself, she may not do so with the "extra-judicial declarations of someone other than the witness purportedly being corroborated." 1 Brandis on North Carolina Evidence, Sec. 52 at 243 (3d ed. 1988); *see also State v. Pearce*, 296 N.C. 281, 287, 250 S.E. 2d 640, 645 (1979) (witness may "corroborate herself by testifying that she had made a statement to another person"); *State v. McAdoo*, 35 N.C. App. 364, 367, 241 S.E. 2d 336, 338, *disc. rev. denied*, 295 N.C. 93, 244 S.E. 2d 262 (1978) (witness not permitted to testify as to "another person's extra-judicial statements" even though it would have corroborated the witness's own testimony); *but see Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 481, 157 S.E. 2d 131, 139 (1967) (statement of witness as to extrajudicial declaration of plaintiff was admitted for purpose of corroboration); 1 Brandis on North Carolina Evidence, Sec. 52 at 244 (3d ed. 1988) ("[h]owever, in a few cases declarations of others, though ordinarily inadmissible under the hearsay rule, have been admitted to corroborate a witness").

As the witness, Tammy Sizemore, was attempting to corroborate her own testimony with an extrajudicial statement of Lisa Robertson, the trial court erred in overruling the objection. However,

such error does not require a new trial unless the appellant can show he suffered prejudice as a result of the error. *State v. McKnight*, 87 N.C. App. 458, 465, 361 S.E. 2d 429, 433 (1987), *disc. rev. denied*, 321 N.C. 477, 364 S.E. 2d 663 (1988). This burden may be met by showing there is a reasonable possibility a different result would have resulted had the error not been committed. N.C.G.S. Sec. 15A-1443(a) (1988); *State v. Weeks*, 322 N.C. 152, 163, 367 S.E. 2d 895, 902 (1988). The defendant has not shown the error was so prejudicial that without the error it is likely a different result would have been reached.

V

[5] The defendant argues the trial court committed prejudicial error by limiting as it did the manner and extent of defense counsel's opening statement. Specifically, three times during defense counsel's opening statement, the court interrupted the lawyer and told him in open court "you're arguing to the jury."

N.C.G.S. Sec. 15A-1221(a)(4) (1988) provides that in a criminal jury trial "[e]ach party must be given the opportunity to make a brief opening statement . . . ." The statute does not define the scope of the opening statement allowed. *State v. Paige*, 316 N.C. 630, 646, 343 S.E. 2d 848, 858 (1986). However, in *Paige*, 316 N.C. at 648, 343 S.E. 2d at 858, our Supreme Court quoted with approval a portion of *State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E. 2d 632, 636, *disc. rev. denied, appeal dismissed*, 311 N.C. 765, 321 S.E. 2d 148 (1984), in which this Court addressed the scope of the opening statement authorized by N.C.G.S. Sec. 15A-1221(a)(4):

> While the exact scope and extent of an opening statement rest largely in the discretion of the trial judge, we believe the proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it. *See generally*, 23 A[sic]C.J.S., *Criminal Law*, Sec. 1086 (1961). It should *not be permitted to become an argument* on the case or an instruction as to the law of the case.

Paige, 316 N.C. at 648, 343 S.E. 2d at 859 (quoting *Elliott*, 69 N.C. App. at 93, 316 S.E. 2d at 636) (emphasis added).

The scope and extent of an opening statement are admittedly vague and must be determined in light of the purpose of opening statements:

> The purpose of an opening statement is to permit the parties to present to the judge and jury the issues involved in the case and to allow them to give a general forecast of what the evidence will be.

State v. Gladden, 315 N.C. 398, 417, 340 S.E. 2d 673, 685, *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed. 2d 166 (1986). Furthermore, trial counsel should generally be "afforded wide latitude in the scope of the opening statement." *Id.*

With the general guidelines enunciated in *Elliott*, *Paige* and *Gladden*, it is clear that "asking the jury to resolve disputes, make inferences, or interpret facts favorable to the speaker. . . ." are agumentative remarks and therefore prohibited. J. Tanford, *The Trial Process* 271 (1983). However, counsel is permitted in his opening remarks something more than just a limited preview of his evidence and should be allowed to state his "legal claim or defense in basic terms." *Id.*; *see also Paige*, 316 N.C. at 648, 343 S.E. 2d at 859 (permissible for counsel in opening statement to state that defendant "would rely on the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt"); Rule 9 of the General Rules of Procedure for the Superior and District Courts (in opening statement counsel may set forth "grounds for his claim or defense"). Nonetheless, in previewing the evidence, counsel generally should not (1) refer to inadmissible evidence, *see Gladden*, 315 N.C. at 417, 340 S.E. 2d at 685, (2) "exaggerate or overstate" the evidence, *Tanford*, at 272, or (3) discuss evidence he expects the other party to introduce. *Id.* When a party does not intend to offer evidence, he nonetheless may in his opening statement "point out to the jury facts which he reasonably expects to bring out on cross-examination." *Paige*, 316 N.C. at 648, 343 S.E. 2d at 859.

We now determine whether the trial court abused its discretion in interrupting defendant's counsel and classifying the remarks as "argument." The first statement of counsel which the trial court classified as argument was as follows:

> MR. MILLS: . . . And when you hear a piece of evidence I hope you will remember where it was located as you went

> along this roadway. And after you do that Mr. Freeman is *convinced that you will find that he's not guilty.* So in that regard we ask you to consider what you find as you go through—

(emphasis added). In this statement counsel was expressing his client's conviction that the jury would find him not guilty. This is in the nature of an argument and is more appropriately reserved for final jury argument. Accordingly, the trial court did not abuse its discretion in interrupting the defendant's counsel and telling him that he was "arguing to the jury."

Next, the defense counsel stated:

> MR. MILLS: The evidence will show, ladies and gentlemen, *one thing about which there is no disagreement—*
>
> THE COURT: Now, you're arguing to the jury about what's disagreement. You just tell them what your evidence is going to be.

(emphasis added). Here the defendant's counsel was expessing his opinion as to whether there was any disagreement about the evidence. This goes beyond the permissible scope of an opening statement and is in the nature of an argument. Again the trial court did not abuse its discretion in classifying this statement as argument.

Finally, the defendant's counsel stated:

> MR. MILLS: . . . This is not an argument, or is not intended to be. As I stated in the beginning, a road map of what the defendant's evidence will show. *We ask that you consider each piece of this evidence carefully.*
>
> THE COURT: Now you're arguing.
>
> MR. MILLS: And that's as much as I will say at this point. I thank you for your attention.

(emphasis added). Here the defendant's counsel was asking the jury only to consider each piece of the evidence carefully. We find nothing argumentative in that statement nor do we find that it violates any other rules relating to opening statements. Accordingly, the trial court abused its discretion in interrupting the trial

counsel and classifying this as argument. Nonetheless, the error is not prejudicial as the defendant has not met his burden of showing that "had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. Sec. 15A-1443(a) (1988) (burden is on defendant to show prejudicial error).

VI

The defendant contends the court committed reversible prejudicial error by allowing the State's attorney to lead Tammy Sizemore during direct examination. The two questions defendant objects to as leading are: "Did he make a cigarette, smoke a cigarette, roll a cigarette?" and "You didn't see another diaper in the room anywhere?"

A leading question is one which suggests the desired response and may often be answered yes or no. *State v. Riddick*, 315 N.C. 749, 755, 340 S.E. 2d 55, 59 (1986). Rulings "on the use of leading questions are discretionary and reversible only for an abuse of discretion." *Id.* at 756, 340 S.E. 2d at 59.

[6] Defendant first argues he was prejudiced by the question using the term "roll a cigarette" because it amounted to the district attorney's testimony that the defendant may have engaged in some type of illegal activity by rolling the cigarette. The defendant argues that the "common usage of this term implies that marijuana or some other illegal substance may have been rolled into a cigarette and used by defendant." We conclude this question did not prejudice the defendant as the defendant himself during the trial admitted that he had smoked marijuana, taken Valium and drunk heavily on the day in question.

[7] The defendant next argues that the question "You didn't see another diaper in the room anywhere?" was prejudicial error as it permitted the district attorney in essence to testify about items that may have been located in the bedroom. Assuming this leading question was error, it was harmless on the facts of this case as the defendant has not met his burden of showing there was a reasonable possibility a different result would have been reached had the error not been committed. *Weeks*, 322 N.C. at 163, 367 S.E. 2d at 902.

VII

[8] Defendant next contends the trial court erred when it overruled defendant's objection to the repeated and continuous ques-

tions by the State about events of and times during 13 April 1987, the day before the crime, because such events were irrelevant and were in fact brought out only in an attempt to confuse the jury and did in fact confuse the jury. After the defendant objected to the line of questioning, the trial judge stated that "it goes to credibility." We find this assignment of error to be completely without merit.

The trial court generally has wide discretion in admitting evidence which it determines would be helpful to a jury's appraisal of credibility. *State v. Stills*, 310 N.C. 410, 415, 312 S.E. 2d 443, 446 (1984). The trial court did not abuse its discretion here in allowing questioning on events of 13 April 1987. The defendant during direct examination contradicted or denied much of the testimony offered by several different witnesses. Therefore, the jury was entitled to hear evidence bearing on the defendant's credibility in order to reach a proper verdict.

VIII

[9] The defendant finally argues the trial court committed reversible prejudicial error when the court sentenced the defendant to consecutive life sentences because such sentences constitute cruel and unusual punishment.

Defendant acknowledges that our Supreme Court has found that a mandatory life sentence for first-degree rape and a mandatory life sentence for first-degree sexual offense do not constitute cruel and unusual punishment. *See State v. Peek*, 313 N.C. 266, 276, 328 S.E. 2d 249, 255-56 (1985); *State v. Higginbottom*, 312 N.C. 760, 764, 324 S.E. 2d 834, 837 (1985). However, the defendant argues that consecutive life sentences for acts which may have occurred within a very few moments of each other is punishment grossly disproportionate to the acts and therefore cruel and unusual.

We need therefore to determine whether the imposition of consecutive life sentences against the defendant resulted in a punishment so grossly disproportionate to the crimes committed that it violates the Eighth Amendment. "The imposition of consecutive life sentences, standing alone, does not constitute cruel or unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E. 2d

436, 441 (1983). The jury convicted defendant of two specific and distinct criminal acts. The "acts constitute some of the most serious crimes recognized by our statutes." *Id.* at 787, 309 S.E. 2d at 441. Defendant received the mandatory life sentence for each offense. "There was also no evidence indicating that the offenses were committed negligently or under duress or provocation." *Id.* Furthermore, a "review of multiple offense cases in which a rape was committed reveals that consecutive sentences are frequently imposed." *Id.* Accordingly, consistent with *Ysaguire*, defendant's consecutive sentences do not represent cruel and unusual punishment in North Carolina and "we find nothing so grossly disproportionate in this sentencing judgment for these criminal offenses to justify our upsetting via the Eighth Amendment the traditional sentencing prerogatives of the Legislature and the trial court." *Id.*

IX

Other assignments of error entered by the defendant in the record which have not been argued or correctly preserved are abandoned. App. R. 28(a) and (b)(5).

No error.

Judge COZORT concurs.

Judge PHILLIPS concurs in the result.

STATE OF NORTH CAROLINA v. EMMETT DANIEL HELMS

No. 8829SC789

(Filed 18 April 1989)

1. **Criminal Law § 101.4— jury—request to hear evidence again—refusal of judge to exercise discretion**

The trial court erred in a prosecution for first degree sexual offense when the jury sent a note to the judge during deliberations asking to hear the victim's testimony again and the judge replied in writing "NO. That is not possible." The judge's words must be interpreted as a statement that he believed he did not have discretion to consider the request, and the judge thus erred by failing to exercise his discretion. There was prejudice in that the most important witness to testify at defendant's trial was the victim and whether the jury fully understood the victim's testimony was material and critical to their determination of defendant's guilt or innocence. N.C.G.S. § 15A-1233(a) (1988).

2. **Criminal Law § 101.4— jury—request to review evidence—denied by note to jury room—no prejudicial error**

There was no prejudicial error in a prosecution for first degree sexual offense when the judge received a note from the jury asking to review evidence and replied in writing that that was not possible, even though N.C.G.S. § 15A-1233(a) requires that the jury be present in the courtroom when the judge receives its request and when the judge responds to it, because the judge specifically asked defendant's lawyer if the latter required the jury to be returned to the courtroom, and the lawyer consented to the communication procedure.

3. **Criminal Law § 50.1— first degree sexual offense—result of psychological testing—opinion that defendant's responses accurate**

The trial court erred in a prosecution for first degree sexual offense by sustaining the State's objection to defendant's asking a witness whether tests given to defendant to detect pedophilic traits "were done in such a way as to determine the accuracy of the responses that were given?" The judge's ruling undermined the scientific basis of the doctor's testimony by advancing the impression put forth by the State

that the doctor founded his conclusions about defendant on insufficient or unsound data.

4. Criminal Law § 50.1— first degree sexual offense—psychological testing—State's objection sustained

There was no prejudicial error in a prosecution for first degree sexual offense from not allowing testimony about a study which allegedly supported a theory that pedophiles fear women where defendant failed to make a proffer of testimony after the judge sustained the State's objection; from the failure to allow the doctor to testify that none of the testimony offered by the State's witnesses indicated defendant had any of the traits associated with pedophilia where defendant failed to lay the necessary foundation for the admission of this testimony; and testimony by one doctor that another had told him that the victim had built with building blocks a snake with several penises during the child's visit with the doctor was properly admitted under N.C.G.S. § 8C-1, Rule 703.

APPEAL by defendant from *Chase B. Saunders, Judge.* Judgment entered 17 March 1988 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 23 February 1989.

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

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

BECTON, Judge.

On 17 March 1988, a jury convicted defendant, Emmett Daniel Helms, of one count of first degree sexual offense (engaging in fellatio with his son). The trial judge sentenced defendant to the statutory term of life imprisonment. Defendant appeals. We reverse the judgment and remand the case for a new trial.

I

Defendant, Emmett Daniel Helms, and Ruth Beddingfield married in August 1982. Their son, whom we shall call "A.H.," was born the following September. In April 1985, defendant and Ruth Helms separated. Ms. Helms took custody of A.H., and the two went to live with Ms. Helms' parents.

Defendant and Ruth Helms agreed that A.H. would not have overnight visits with defendant until the child was three years old. A.H.'s first overnight visit with defendant took place on 3 January 1987. Their second, and last, visit occurred two weeks later.

The State's evidence tended to show that, when A.H. returned from his second visit with defendant, he complained that his penis hurt because defendant had pinched it. The following day, Ruth Helms took A.H. to a pediatrician. The physician did not discover any abnormality. A day later, A.H. told his mother that defendant had given him "green pills." Ruth Helms then scheduled a 30 January appointment for A.H. to see Dr. Terrence Clark, a psychiatrist. She also arranged for A.H. to meet with Dr. Gregg Simms, Dr. Clark's associate, on 27 January. Dr. Simms did not diagnose the child as having been abused.

Prior to defendant's trial, A.H. saw Dr. Clark approximately 24 times. During one of the visits, Ruth Helms reported that she had noticed two small scabs on A.H.'s arm and that A.H. told her, "That's where Daddy Dan [A.H.'s name for defendant] gave me the shots." Dr. Clark examined A.H.'s arm and concluded the scabs "could in fact have been consistent with the size of a needle puncture." Dr. Clark informed Ruth Helms that, based on his evaluation of the child, he believed it necessary to report A.H. as a possible victim of sexual abuse to the Department of Social Services (DSS).

Rose Erskine, a DSS social worker, interviewed Ruth Helms and A.H. on 11 and 25 February 1987. Sometime in March, Ruth Helms notified Rose Erskine that A.H. had said defendant "had put his [defendant's] penis in [A.H.'s] mouth and peed old bad-tasting stuff and that it made him sick."

At trial, A.H. claimed that, during the first overnight visit, defendant twice injected "green stuff" into both their arms with a needle A.H. described as being two to three feet long. A.H. testified that defendant said, "Shit, shit, damn" as he injected A.H. and that the injections made him sleepy. He further testified that, after the injections, defendant put his penis into A.H.'s mouth and rectum. He said that the penis tasted like "rotten oranges," that it made him sleepy, that he "fell back two or three times," and that defendant said, "Shit, piss, damn." A.H. testified that defendant showed him a black dildo and said, "Shit, piss, damn" when displaying it. He further alleged that, on the first overnight

visit, defendant locked him out of the apartment for "20 hours," that defendant was nude for "20 hours," and that defendant stole all of A.H.'s toys.

The State introduced statements attributed to A.H. that were contained in letters written by Rose Erskine to the Transylvania County Sheriff's Department. Ms. Erskine wrote that A.H. had said defendant pinched his penis, gave him green pills, and stuck him with a needle when defendant and A.H. stayed at a motel with defendant's fiancee, Anita Whitaker, and her nine-year-old son during A.H.'s second visit with defendant. According to Ms. Erskine, A.H. also alleged that, at the motel, defendant and Anita switched each other with sticks while nude, that A.H. switched Anita, and that Anita's son pinched A.H.'s penis.

Defendant denied having molested his son. Regarding A.H.'s first visit, he testified that he put A.H. to bed about 8:00 p.m. Anita Whitaker and Ron Graves corroborated defendant's testimony.

Defendant testified that, when A.H. made his second overnight visit, defendant, Anita, her son, and A.H. went to Charlotte to visit defendant's parents. During the drive home, defendant, Anita, and her son opted to stop at a motel and finish the trip the next day because the weather was inclement, and because sleet had been forecast for later in the evening. A.H. was, by this time, asleep in the car. He continued to sleep until morning, when he awoke in the motel and thought he was at the beach. Anita Whitaker and her son corroborated this testimony.

Dr. Darwin Dorr, a psychologist, testified that defendant hired him to administer psychological tests to determine if defendant possessed any pedophilic characteristics, i.e., those characteristics associated with child abusers. Dr. Dorr testified he found no evidence that defendant had any of the personality traits associated with pedophiles.

We now turn to the issues defendant has raised on appeal.

II

[1] Defendant's first assignment of error arises from a note the jury sent to the trial judge during deliberations. The note asks, "May the jurors please be permitted to hear [A.H.'s] testimony again?" Underneath this question are the words, "NO. That is not possible. Judge Saunders." The transcript reflects that the judge,

after receiving the note, held a conference with defendant and the State outside the presence of the court reporter. Following the conference, the judge put the following into the transcript:

> The Court: The jury sent a written note to the Judge and the writing was "Can we hear from [A.H.], the minor victim?" Answer from the Judge, in writing, the answer being written in the presence of Counsel for the defendant and the State was "No" and signed by the Judge and conveyed by the Sheriff back to the Jury Room. Counsel did not object to the procedure and did not request, when specifically inquired of, did not require the Judge to return the Jury to the Courtroom. Counsel for the defense was willing to handle it this way.

Defendant contends that the judge committed reversible error by failing to exercise discretion when he denied the jury's request and by failing to return the jury to the courtroom to receive and respond to their inquiry. We agree.

When a jury requests to review testimony, N.C. Gen. Stat. Sec. 15A-1233(a) (1988) specifies the procedure the trial judge is to follow. The statute provides that

> [i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

The statute mandates that the judge fulfill two duties: first, that all the jurors be returned to the courtroom and, second, that the judge exercise discretion in ruling upon the request. *See State v. Ashe*, 314 N.C. 28, 34, 331 S.E. 2d 652, 656 (1985).

The State argues that the jury's request in this case was to hear additional testimony from A. H. himself, thus making Section 15A-1233(a) inapplicable. The State contends our focus should be upon the judge's summary of the jury's request that appears in

the transcript, arguing that "the conflict between the note relied upon by defendant and the quotation from the bench in the transcript should be resolved in favor of the transcript because it alone is a verbatim account of the proceedings as they occurred." Defendant responds that the note itself, contained in the record on appeal, is binding upon our inquiry.

The transcript does not contain a "verbatim account of the proceedings as they occurred." Judge Saunders merely recounted to the court reporter the events that transpired following the jury's request. The note he characterized had already been returned to the jury room. The note itself appears as a part of the certified record, and we agree with defendant that the State may not challenge the note's authenticity on appeal. *See State v. Hedrick*, 289 N.C. 232, 234-35, 221 S.E. 2d 350, 352 (1976) (certified record imports verity and binds appellate court). We decide this issue by looking to Section 15A-1233(a), and we conclude that the judge did not fulfill its two requirements.

A. *Discretion*

The State argues that the brevity of Judge Saunders' reply—"NO. That is not possible"—does not demonstrate that the judge failed to employ his discretion in denying the jury's request. We find this argument untenable. In *State v. Lang*, our Supreme Court found the trial judge's refusal to allow the jury to review testimony because the trial transcript was not available to be "an *indication*" that the judge did not exercise discretion. 301 N.C. 508, 511, 272 S.E. 2d 123, 125 (1980) (emphasis added). At the very least, Judge Saunders' declaration that it was "not possible" for the jury to reexamine A.H.'s testimony likewise "indicated" that he did not use discretion. However, our view is that the judge's answer is more than a mere indication of an absence of discretion, and we hold that his words "must be interpreted as a statement that the [judge] believed [he] did not *have* discretion to consider the request." *Id.* at 510, 272 S.E. 2d at 125 (emphasis added). As in *Lang*, the judge in this case denied the jury's request as a matter of law. *See id.* at 511, 272 S.E. 2d at 125. This constituted error.

The State directs us to *State v. Lewis*, 321 N.C. 42, 361 S.E. 2d 728 (1987), in which our Supreme Court found no error in a trial judge's refusal to allow a jury to review a witness' testimony. In *Lewis*, the jury foreperson asked if the jury might be permitted

to reexamine the evidence, " 'either by transcript or by pictures[.]' " *Id.* at 51, 361 S.E. 2d at 734. The judge conferred with trial counsel and then allowed the jurors to look at photographs in the jury box. He denied the jury's request to review the testimony by having the court reporter read from her notes, saying, "I just don't think that's the way to do things." Our Supreme Court held that the judge exercised discretion because he permitted the jury to look at the photographs and did not allow them to rehear portions of the testimony. *Id.* at 52, 361 S.E. 2d at 734.

The State argues that *Lewis* involved two separate decisions, the first concerning the photographs and the second the testimony. The State thus cites *Lewis* for the proposition that when a judge says, "I just don't think that's the way to do things," the judge has exercised discretion concerning a jury's request to review testimony. Contrary to the State, we read the Supreme Court's holding in *Lewis* as resting on the Court's view that the trial judge made a single decision—that he would allow the jury to review evidence—and exercised his discretion concerning the manner in which he would permit them to do so. Even if the State's construction of *Lewis* is correct, the judge's statement in the case before us is more analogous to *Lang*, in which the trial judge, in effect, also told the jurors it was "not possible" for them to review testimony, because no transcript had been prepared. *See also Ashe*, 314 N.C. at 35, 331 S.E. 2d at 656-57; *State v. Thompkins*, 83 N.C. App. 42, 45-46, 348 S.E. 2d 605, 607 (1986).

Having concluded that the judge erred by failing to exercise discretion, we now rule whether the error entitles defendant to a new trial. Defendant's burden is to demonstrate that, had this error not occurred, there is a reasonable possibility that his trial would have had a different outcome. N.C. Gen. Stat. Sec. 15A-1443(a) (1988); *see State v. McLaughlin*, 320 N.C. 564, 570, 359 S.E. 2d 768, 772 (1987). We hold that defendant has carried this burden.

In *Lang*, the jury requested a review of the testimony of defendant's alibi witness. The judge, without using discretion, denied the request. The Supreme Court said that

> . . . the requested evidence was testimony which, if believed, would have established an alibi for defendant. . . . Thus, whether the jury fully understood the alibi witness' testimony was material to the determination of defendant's guilt or innocence.

301 N.C. at 511, 272 S.E. 2d at 125; *see also Ashe*, 314 N.C. at 37, 331 S.E. 2d at 658; *Thompkins*, 83 N.C. App. at 46, 348 S.E. 2d at 607.

The most important witness to testify at defendant's trial was A.H. Arguably, portions of his testimony seem fanciful and might reasonably have led the jury to question whether any crime occurred. Additionally, defendant and his witnesses contradicted A.H.'s allegations. We express no opinion as to how the jury members might have assessed A.H.'s testimony had they been permitted to review it. *See Ashe*, 314 N.C. at 38, 331 S.E. 2d at 658. We are convinced, however, that whether the jury fully understood A.H.'s testimony was material—indeed, critical—to their determination of defendant's guilt or innocence. As in *Lang*, defendant "was at least entitled to have the jury's request resolved as a discretionary matter, and it was prejudicial error for the trial judge to refuse to do so." 301 N.C. at 511, 272 S.E. 2d at 125. Defendant is entitled to a new trial.

B. *Returning the Jury to the Courtroom*

[2] Section 15A-1233(a) requires that the jury be present in the courtroom when the judge receives its request, and when the judge responds to it. *See Ashe*, 314 N.C. at 36, 331 S.E. 2d at 657. Judge Saunders erred, therefore, by failing to comply with this provision of the statute. We hold, however, that defendant may not receive a new trial on the basis of this error.

In the transcript, Judge Saunders notes that he specifically asked defendant's lawyer if the latter required the jury to be returned to the courtroom. The lawyer did not ask that the jury be brought in, and he acceded to the procedure Judge Saunders used. A lack of objection at trial does not bar a defendant's right to assign error to a judge's failure to comply with the mandates of Section 15A-1233(a). *See id.* at 40, 331 S.E. 2d at 659. In this case, however, defendant's lawyer, beyond simply failing to enter an objection, consented to the communication procedure. We hold, therefore, that defendant has waived his right to assert, on appeal, the judge's failure to bring the jury to the courtroom.

In spite of our holding, we observe that this case illustrates one reason it is error for a trial judge to receive and dispose of a jury's request to review evidence without communicating directly with them. The requirement that all jurors be brought to the court-

room helps ensure that the judge understands what the jury has asked. In this case, the discrepancy between the note and the judge's later restatement of its contents arguably suggests that Judge Saunders misinterpreted the jury's request. Had defendant not waived his right to bring forward this issue on appeal, we would award a new trial on the basis of this error.

III

[3] Defendant assigns error to the trial judge's sustaining the State's objection to a question defendant asked Dr. Dorr on redirect examination. We agree that the judge erred and award a new trial on this ground as well.

After his arrest, defendant employed Dr. Dorr to conduct tests to determine if defendant had any of the characteristics of a pedophile. Dr. Dorr testified that, in his opinion, defendant did not possess pedophilic traits. On cross-examination, the State's line of questioning suggested that Dr. Dorr's opinion was based merely on information given to him by defendant and Anita Whitaker. On redirect, defendant asked Dr. Dorr if he had conducted physiological tests also. When Dr. Dorr answered that he had, defendant asked, "[W]ere [those tests] done in such a way as to determine the accuracy of the responses that were given by Mr. Helms?" The State objected to this question, and the judge sustained the objection.

The judge's ruling ran counter to our Supreme Court's holding in *State v. Kennedy*, 320 N.C. 20, 357 S.E. 2d 359 (1987). In *Kennedy*, a psychologist testified that a rape victim had responded in an "honest fashion" to questions on personality and IQ tests. Defendant argued on appeal that the testimony amounted to the expert's stating an opinion as to the victim's credibility. Our Supreme Court disagreed, saying:

> We do not consider the testimony of [the psychologist] that the victim answered the test questions in an "honest fashion" to be an expert opinion as to her character or credibility. It was merely a statement of opinion by a trained professional based upon personal knowledge and professional expertise *that the test results were reliable* because the victim seemed to respond to the questions in an honest fashion. . . . The psychologist's testimony went not to the credibility of the victim but to the reliability of the test itself.

Id. at 31, 357 S.E. 2d at 366 (emphasis added) (citations omitted). The question asked of Dr. Dorr addressed the reliability of the test results even more clearly than did the testimony in *Kennedy*. The question was, therefore, a proper one for defendant to have asked. The judge erred by sustaining the State's objection.

Defendant argues that the judge's error deprived him of his right to due process of law and that, under the United States Supreme Court's ruling in *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967), the State has the burden to demonstrate beyond a reasonable doubt that the error was harmless. The State contends that defendant must show, pursuant to N.C. Gen. Stat. Sec. 15A-1443(a) that, but for the error, there is a reasonable possibility a different result would have been reached at trial. Even if we employ the standard favorable to the State, we view the error to be sufficiently prejudicial to defendant so as to constitute reversible error.

We agree with defendant that the judge's ruling undermined the scientific basis of Dr. Dorr's testimony by advancing the impression put forth by the State that Dr. Dorr founded his conclusions about defendant on insufficient or unsound data. The impeachment of Dr. Dorr in this way makes it impossible for us to hold that, had the judge not erred, the jury would have returned the same verdict. Defendant is thus entitled to a new trial.

IV

We shall briefly address defendant's three remaining assignments of error as they are likely to recur at a second trial.

[4] Defendant first contends that the judge erred by not allowing Dr. Dorr to testify about a study, the results of which allegedly support a theory that pedophiles fear women. In our view, this evidence might have been admissible as showing a basis for Dr. Dorr's opinion that defendant did not meet the psychological profile of a pedophile. *See generally* Brandis, 1 *Brandis on North Carolina Evidence*, Sec. 136 (1988). Defendant, however, failed to make a proffer of the testimony after the judge sustained the State's objection. Thus, our ability to review whether the judge in fact erred, and whether that error was prejudicial, is precluded. *See id.* at Sec. 26. We overrule this assignment of error.

Defendant next argues that Dr. Dorr should have been permitted to testify that none of the testimony offered by the State's

witnesses indicated defendant had any of the traits associated with pedophilia. Rule 703 of the Rules of Evidence plainly allows an expert witness to base opinions on facts or data "perceived or made known to him at or before the hearing." N.C. Gen. Stat. Sec. 8C-1, R. Evid. 703 (1988). These facts or data, however, must "be of a type reasonably relied upon by experts in the particular field." *See id.* and comment. Defendant failed to lay the necessary foundation for the admission of this testimony, and the judge properly sustained the State's objection. We overrule this assignment of error.

Defendant's last assignment of error is to the trial judge's allowing Dr. Clark to testify that Dr. Simms had told him A.H. had built, with building blocks, a snake with several penises during the child's visit with Dr. Simms. We hold that the judge properly admitted this testimony under Rule 703 and overrule this assignment of error.

V

For the reasons we have given above, defendant is entitled to a

New trial.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. MEDGAR BATTS

No. 884SC486

(Filed 18 April 1989)

1. Jury § 7.14— peremptory challenges—racial discrimination —no prima facie showing

The defendant in a prosecution for breaking or entering, rape and sexual offense, robbery with a dangerous weapon, kidnapping, and assault failed to establish a *prima facie* case of purposeful racial discrimination in jury selection by the State's use of peremptory challenges where two of the twelve jurors empaneled to hear the case were black; one of the black jurors peremptorily challenged by the State stated that he had been convicted once for nonsupport and three times

for uttering worthless checks and that his brother was currently charged with manslaughter and represented by counsel for defendant in the instant case; the second black juror peremptorily challenged by the State stated that she knew members of defendant's family and that she once attended school with defendant's brother, that she had formed an opinion about the case from television reports but that she could set her opinion aside, and initially denied being charged with the crime of larceny from the person but recanted her denial upon further questioning by the State.

2. **Criminal Law § 98.2— motion to sequester witnesses—denied—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for rape, sexual offense, breaking or entering, robbery, kidnapping, and assault by denying defendant's motion to sequester witnesses even though several witnesses were to testify to the same set of facts. N.C.G.S. § 15A-1225.

3. **Constitutional Law § 30— discovery of witnesses' statements—denied—no error**

The trial court did not err in a prosecution for rape, sexual offense, robbery, kidnapping and assault by denying defendant's motion to discover witnesses' statements in advance of their testimony where the trial court afforded defense counsel sufficient time to examine and study these statements and to prepare for cross-examination after the witnesses had testified on direct examination. Defendant did not contend nor did the record show that this procedure prevented counsel from effectively cross-examining witnesses or effectively representing defendant. N.C.G.S. § 15A-903(f)(1).

4. **Criminal Law §§ 66.7, 66.15— in-court identification—not tainted by pretrial photographic identification—not impermissibly suggestive**

The trial court did not err in a prosecution for rape, sexual offense, breaking or entering, robbery, kidnapping, and assault by concluding that the pretrial photographic lineup was not so unnecessarily suggestive and conducive to irreparable mistaken identity as to constitute a denial of due process and that the witness's in-court identification of defendant was of independent origin and was therefore admissible where the victim examined a photographic lineup of twelve photographs,

one of the twelve photographs being a photograph of the defendant; no one made any statement to her or took any action in her presence concerning or indicating the identification of any of the individuals appearing in the twelve photographs; she looked at all twelve photographs and picked out defendant's photograph without hesitation as being that of her assailant; the persons appearing in the photographs were of the same sex and race as defendant and were of substantially the same age, color tone, and hairstyle; none of the persons appearing in the twelve photographs had any remarkable or unique distinguishing facial features or were wearing clothing of such a distinctive nature as to create a difference of perception in the photographs or to make one photograph stand out over any other photograph in the group; defendant never attempted to conceal his face or identity during the time he was in the victim's presence; the defendant and victim were in each other's immediate physical presence over a period of approximately three to four hours; and during this span of time they were in places where the lighting was sufficient for the witness to make memorable observations of defendant.

APPEAL by defendant from *Phillips, Herbert O., III, Judge.* Judgment entered 18 September 1987 in Superior Court, ONSLOW County. Heard in the Court of Appeals 9 January 1989.

Defendant was convicted of five (5) counts of first degree rape, one (1) count of felonious breaking or entering, three (3) counts of first-degree sexual offense, one (1) count of robbery with a dangerous weapon, one (1) count of aggravated kidnapping, and two (2) counts of assault with a deadly weapon with intent to kill inflicting serious injury. From judgments pronounced thereon, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Julia F. Renfrow, for the State.

Timothy E. Merritt and Georgann Geracos for defendant-appellant.

JOHNSON, Judge.

The State presented evidence which tended to show the following. On 10 March 1987, at about 2:00 a.m., defendant entered a two bedroom apartment occupied by Marianne and her boyfriend

Roger. The apartment is located in the Brandywood Apartment complex in Jacksonville, North Carolina. Defendant entered through the front door which was closed but left unlocked. The door was left unlocked for Marianne's friend Wanda, who was expected to arrive without her key. Defendant entered the second bedroom of the apartment where Marianne and Roger were sleeping. Defendant sat upon Marianne, straddling her chest and commenced stabbing Roger who was lying beside her. Roger was rendered practically unconscious by the injuries inflicted. Defendant removed Marianne's panties, unzipped his jeans and had vaginal intercourse with her. He then forced her into the first bedroom where he had vaginal intercourse with her three separate times and forced her to commit the act of fellatio upon him. When Marianne tried to get away, he caught her and forced her back into the first bedroom where he tried to choke her. Defendant forced her back into the second bedroom and had vaginal intercourse with her for a fifth time. He forced her into the first bedroom again, had vaginal intercourse with her and again forced her to commit fellatio upon him. All during this time the defendant held the knife in his hand, or had it on the bed next to him.

Defendant then made Marianne dress, took her car keys, Roger's bank cards, and while pointing the knife in her back, took her to her car. He drove her to two banks where he attempted to use the bank cards. After riding around for a while, defendant drove to a wooded area where he had vaginal intercourse with Marianne twice and again forced her to commit fellatio upon him. Defendant also inserted his finger into her anus. Thereafter, defendant drove around for a while, stopped in another wooded area and again had vaginal intercourse with her. He then removed her from the car and told her that he was going to kill her. Defendant stabbed her several times and left her on the ground. Marianne managed to crawl and walk to a nearby highway. A passing motorist saw her, stopped and gave her assistance.

Marianne was in defendant's presence during the series of attacks for approximately three to four hours. She suffered six stab wounds to the left side and back of her chest. Each wound pierced the rib cage, entered the chest cavity causing damage to blood vessels and causing the lung to collapse.

Roger sustained multiple stab wounds over his back, neck, right arm, chest and abdomen. The wound to his abdomen caused

injury to his right kidney and colon; the stab wound to his back lacerated the inferior vena cava artery.

Defendant presented evidence which tended to show that he did not know the victims, and that at the time of the commission of the crimes, he was in bed with his girlfriend Monica McAllister.

[1] Defendant first contends the trial court erred in holding that defendant's right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution had not been violated by the exclusion of members of defendant's race from the petit jury.

Prior to trial, defendant, who is black, raised the issue of purposeful racial discrimination in jury selection by the State by requesting the trial court to prohibit such a practice. During jury selection defendant again raised the issue by objecting to the State's use of two of its peremptory challenges to exclude two potential jurors who were black from the petit jury.

It is well established that purposeful racial discrimination in jury selection, whether it involves the selection of the jury venire, grand jury or petit jury, violates the equal protection clause of the Fourteenth Amendment. *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed. 2d 599 (1967); *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965); *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880). Ordinarily a prosecutor may exercise permitted peremptory challenges for any reason at all, so long as that reason is related to the prosecutor's view concerning the outcome of the case to be tried. However, the equal protection clause of the Fourteenth Amendment prohibits the State from challenging potential jurors solely on the basis of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a member of the black race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986).

In *Batson*, the United States Supreme Court set forth the burden of proof required and the standards for assessing a *prima facie* case of racial exclusion from the jury by the states through the use of peremptory challenges. The Court held that the burden is on the defendant who alleges discriminatory selection of the

jury to establish a *prima facie* case of purposeful discrimination. *Id.* In order to establish such a *prima facie* case the defendant must be a member of a cognizable racial group, and defendant must show that the State has used peremptory challenges to remove from the jury members of 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 made. When the trial court determines that a *prima facie* case has been made, the burden then shifts to the State to go forward with a clear and reasonably specific neutral explanation for challenging jurors of the cognizable group which relates to the particular case to be tried; the State's explanation need not rise to the level of justifying a challenge for cause. After the State has offered its explanation, the trial court must then determine if the defendant has established purposeful discrimination. *Id.* The trial court's finding as fact as to whether a defendant has established purposeful discrimination should be accorded great deference. *Id.* The principles of *Batson* were recently applied by our State Supreme Court in *State v. Jackson*, 322 N.C. 251, 368 S.E. 2d 838 (1988).

In determining whether the defendant in the case *sub judice* had established a *prima facie* case, the trial court considered the following evidence in addition to the fact that defendant is a member of a cognizable racial group and that the State used peremptory challenges to excuse two members of defendant's race from the jury: First, that of the twelve jurors empanelled to hear the case, two of the jurors were black. Second, one of the black jurors peremptorily challenged by the State stated that he had been convicted once for nonsupport and three times for uttering worthless checks, and that his brother is currently charged with manslaughter and is represented by counsel for the defendant in the instant case. The second black juror peremptorily challenged by the State stated that she knew members of defendant's family and that she once attended school with defendant's brother; that she has formed an opinion about the instant case based upon television reports, but that she could set her opinion aside; and that she was once charged with the crime of larceny from the person. (This juror initially denied even being charged with the crime of larceny from the person but recanted her denial upon further questioning by the State.)

The trial court also noted and found as fact that "during the course of examination of Jurors [by the State] there did not appear to be any pattern exercised by the prosecutor with respect to

the excuse of black jurors and the questions asked . . . to indicate a plan or purpose on the part of the State to exercise peremptory challenges on the basis of race alone."

The trial court made findings consistent with the evidence and concluded that defendant had failed to establish a *prima facie* case of purposeful discrimination and that the responses of the two black jurors peremptorily challenged by the State "serve as a neutral explanation, a neutral basis for the exercise of a peremptory challenge for the excuse [of the two jurors]."

Upon assessing the evidence supporting the trial court's findings as they relate to this case, and giving the required deference to those findings, we hold that the trial court properly ruled that there was no violation of defendant's right to equal protection of the laws by the State's use of peremptory challenges to exclude the two black jurors.

[2] Defendant next contends the trial court erred in the denial of his motion to sequester witnesses. Defendant argues that where several witnesses are to testify "about the same or similar facts, with the potential for a consensus account of those facts," the trial judge is required to grant the motion to sequester. We disagree.

G.S. sec. 15A-1225 provides that:

> Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently.

A motion to sequester witnesses is addressed to the sound discretion of the trial court, and the court's ruling on the motion will not be disturbed in the absence of a showing of abuse of that discretion. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976); *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976). *See also State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E. 2d 230, 236 (1984), where this Court held that "[d]ue process does not automatically require separation of witnesses who are to testify to the same set of facts." We find no abuse of discretion in the case *sub judice*. Accordingly, this assignment of error is without merit.

[3] By his next Assignment of Error defendant contends that the trial court erred in denying his motion to discover witnesses' statements in advance of their testimony. The guidelines governing the discovery of witnesses' statements are stated in G.S. sec. 15A-903(f)(1) which provides:

> In any criminal prosecution brought by the State, no statement or report in the possession of the State that was made by a State witness or prospective State witness, other than the defendant, shall be the subject of subpoena, discovery, or inspection until that witness has testified on direct examination in the trial of the case.

Defendant argues that this procedure which requires defendant to wait until after the witness has testified on direct before defendant has access to the statement denies him due process of law and the right to counsel.

No right of discovery in criminal cases existed at common law. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). Therefore, questions concerning discovery must be resolved by reference to statutes and due process principles. *State v. McDougald*, 38 N.C. App. 244, 248 S.E. 2d 72 (1978), *disc. rev. denied, appeal dismissed*, 296 N.C. 413, 251 S.E. 2d 472 (1979). Where a statute expressly restricts pretrial discovery, the trial court has no authority to order discovery. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *State v. Miller*, 61 N.C. App. 1, 300 S.E. 2d 431 (1983). "Due process requires that the prosecution not suppress information favorable to an accused upon his request for its production, where the evidence is material either to guilt or punishment." *McDougald, supra*, at 254, 248 S.E. 2d at 81, *citing Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). *See also United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976).

The statements defendant sought to discover in the instant case were not suppressed. Therefore, the question of due process does not arise. Upon ruling on defendant's motion, the trial judge stated:

> [C]ounsel [will] have opportunity to see those [statements] after the testimony is offered and counsel will be given adequate opportunity by the Court to review those [statements] over a reasonable period of time to be certain that counsel has a full opportunity to understand the contents of it and to prepare for cross-examinations.

The trial court followed the requirements of G.S. sec. 15A-903(f)(1) in making the witnesses' statements available to the defense after the witnesses had testified on direct. *Hardy, supra.* The court afforded defense counsel sufficient time to examine and study the statements and to prepare for cross-examination. Defendant does not contend nor does the record show that this procedure prevented counsel from effectively cross-examining any witness or from effectively representing defendant. We find no constitutional violations of defendant's rights. This assignment of error is overruled.

[4] Defendant next contends the trial court erred in the denial of his motion to suppress his in-court identification. Defendant suggests that his in-court identification was tainted by a pretrial photographic identification that was impermissibly suggestive and conducive to irreparable misidentification. The trial court, after conducting a voir dire hearing, making findings of fact and conclusions of law, admitted both the pretrial and in-court identifications of defendant by Marianne, the female rape victim.

The admission over defendant's objection at trial of eyewitness identification testimony following a pretrial identification by photograph will be held reversible error only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *State v. Williams*, 308 N.C. 339, 302 S.E. 2d 441 (1983); *State v. Conyers*, 33 N.C. App. 654, 236 S.E. 2d 393 (1977).

Evidence presented at the voir dire hearing showed the following. On 14 March 1987, Marianne examined a photographic lineup consisting of twelve photographs, one of the twelve photographs being a photograph of the defendant. No one made any statement to her or took any action in her presence concerning or indicating the identification of any of the individuals appearing in the twelve photographs. She looked at all twelve photographs and picked out defendant's photograph without hesitation as being that of her assailant. The persons appearing in the photographs were of the same sex and race as the defendant and were of substantially the same age, color tone, and hairstyle. None of the persons appearing in the twelve photographs had any remarkable or unique distinguishing facial features or were wearing clothing of such a distinctive nature as to create a difference of perception in the photographs or to make one photograph stand out over any other photograph in the group.

The evidence further showed that defendant never attempted to conceal his face or identity during the time he was in the victim's presence; that defendant and Marianne were in each other's immediate physical presence over a period of approximately three to four hours; that during this span of time they were in places where the lighting was sufficient for the witness to make memorable observations of defendant; and that the witness' in-court identification was of independent origin based on her observations of the defendant at the time of the commission of the crimes and was not influenced by the photographic lineup procedure.

The trial court made findings of fact consistent with this evidence and concluded as a matter of law that (1) the pretrial photographic lineup was not so unnecessarily suggestive and conducive to irreparable mistaken identity as to constitute a denial of due process, and (2) that the witness' in-court identification of defendant was of independent origin and was therefore admissible.

The evidence supports the court's findings of fact and the findings of fact support the court's conclusions of law. We find no merit to defendant's contentions.

By his next three Assignments of Error, defendant contends the court erred in its rulings on the admission of various evidence, and by his last Assignment of Error he contends the court erred in the denial of his motion for appropriate relief. We have carefully examined these issues and find each to be without merit and unnecessary for discussion.

Defendant has received a fair trial free of prejudicial error.

No error.

Judges WELLS and BECTON concur.

A. J. RIVENBARK v. SOUTHMARK CORPORATION AND DREXEL BURNHAM LAMBERT REALTY COMPANY, INC.

No. 8818SC607

(Filed 18 April 1989)

1. **Judgments § 5.1; Rules of Civil Procedure § 60.2— payment into court—erroneous interlocutory order**

An interlocutory order of the court requiring plaintiff to pay into court $46,704.88 in rents collected for property sold to one defendant was erroneous and must be reversed. The order was not properly entered under N.C.G.S. § 1A-1, Rule 60(a) as a clarification of a previous order because it involved matters of a "serious or substantial nature." Nor was it proper under N.C.G.S. § 1-508 where plaintiff made no admission that the money belonged to another but contended that he had the right under the contract of sale to continue to act as landlord and collect rents.

2. **Contempt of Court § 3— failure to comply with erroneous order**

Because an erroneous order is valid until corrected, plaintiff could be held in contempt for failure to comply with an erroneous order requiring him to pay collected rents into court.

3. **Rules of Civil Procedure § 41.2— failure to comply with court order—dismissal of complaint—necessity for considering lesser sanctions**

Before the trial court may dismiss a plaintiff's complaint under Rule 41(b) for failure to comply with a court order, it must first consider other less severe sanctions. The circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience, and the court should make findings and conclusions as to whether less drastic sanctions would be effective in ensuring compliance with the court's order or would best serve the interests of justice.

APPEAL by plaintiff from *Hobgood (Hamilton H.), Judge, Wood, Judge*, and *Seay, Judge*. Orders entered 5 March 1984, 12 June 1984, 10 March 1986, and 28 December 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 January 1989.

Plaintiff A. J. Rivenbark (plaintiff) sued defendants Southmark Corporation (Southmark) and Drexel Burnham Lambert Realty Com-

pany, Inc. (Drexel) for breach of contract. Plaintiff sold Southmark certain commercial property in Guilford County known as Wendover Business Park, Phase II. Southmark then sold the property to Drexel subject to a master lease agreement.

Pursuant to paragraph X of the parties' Agreement of Purchase and Sale, upon Southmark's purchase of the property Southmark immediately leased the entire property back to plaintiff. During the term that the master lease was in effect plaintiff was allowed to sublet part of the property to other tenants. According to the Agreement of Purchase and Sale the purchase price consisted of two components: a minimum purchase price of $2.5 million dollars and the final purchase price. Southmark paid the minimum purchase price at closing. The final purchase price was to be calculated using a complex formula dependent upon the rents generated during the term plaintiff leased the property. The master lease required that plaintiff receive Southmark's prior written approval in order to sublet to any prospective subtenant. The lease further provided that "Southmark shall not unreasonably withhold or delay" approval. By its terms the master lease was to terminate on 23 February 1984.

On 20 February 1984 plaintiff filed a complaint against defendants for breach of contract seeking damages in the amount of $709,305.75. Plaintiff's complaint also sought a preliminary injunction allowing him to stay in possession of Wendover Business Park with the right to collect rents from subtenants until the action was concluded. Plaintiff alleged that defendants had breached the contract by failing to give their approval to five subleases when properly submitted. Defendants answered denying plaintiff's allegations and counterclaimed that plaintiff had breached the contract by failing to assign all subleases upon termination of the master lease.

On 5 March 1984 Judge Hobgood conducted a hearing on plaintiff's request for a preliminary injunction. Judge Hobgood denied plaintiff's motion concluding

> that injunctive relief is not necessary to protect any right of the plaintiff pending a trial on the merits; and that the interest [sic] of justice will best be served pending trial by allowing the defendants possession of the property with the right to collect rents from the tenants, provided that the defendant Southmark place a letter of credit with the Court as hereinafter set forth.

Judge Hobgood signed the order on 8 March 1984 and gave defendant Southmark thirty days to post the letter of credit. He then ordered "[t]hat, upon placing the letter of credit with the Court pursuant to the terms of this Order, the defendant Southmark shall be entitled to possession of the Wendover Business Park, Phase II property and may collect as landlord any rents due from the Wendover Business Park, Phase II tenants." No party appealed from this order. Defendant Southmark posted a letter of credit on 6 April 1984. Upon the posting of the letter of credit plaintiff has forwarded all rental payments received thereafter to defendant Southmark.

On 31 May 1984 defendants moved that plaintiff be held in contempt for violating the court's 5 March 1984 order. Defendants alleged that prior to their retaking possession of Wendover Business Park on or about 6 April 1984 plaintiff had collected rents from the tenants for the months of February, March, and April. They requested that the trial court order plaintiff to pay the rents collected to them. Plaintiff responded that he had not violated the court's order because the order allowed him to remain in possession and collect rents until defendants posted a letter of credit.

On 12 June 1984 Judge Hobgood heard defendants' motion and ruled that entitlement to the February rent was a matter for trial. In his order he further ruled "that it was the intent of this Court at the time of the hearing on March 5, 1984, . . . that the defendants would be entitled to possession of the subject property and to collect all rents beginning with the month of March, 1984." He then ordered plaintiff to file an accounting for the March and April rents and to pay those rents to Southmark. Plaintiff's accounting stated that the two months rent totaled $46,704.88. In appealing the court's order to the Court of Appeals, plaintiff did not file a bond to stay the trial court's order and did not petition for a writ of supersedeas.

In an opinion filed 1 October 1985 our court ruled that plaintiff's appeal was interlocutory and, accordingly, dismissed the appeal. *Rivenbark v. Southmark Corp.*, 77 N.C. App. 225, 334 S.E. 2d 451 (1985). Plaintiff petitioned the Supreme Court for discretionary review which the Court denied on 7 January 1986. *Rivenbark v. Southmark Corp.*, 315 N.C. 391, 338 S.E. 2d 880 (1986).

On 17 February 1986 defendants filed a motion to dismiss plaintiff's complaint because plaintiff had not complied with the

12 June 1984 order directing him to pay Southmark the March and April rents. In addition, defendants also moved that the trial court hold plaintiff in contempt for refusing to pay the rents as ordered. On 17 February 1986 Judge Wood entered a show cause order requiring plaintiff to explain his failure to pay.

After a hearing on both motions on 24 February 1986 and 10 March 1986, Judge Seay entered his order which was filed on 24 March 1986. The order granted defendants' motion to dismiss with prejudice, required plaintiff to pay to the clerk of court $46,704.88, and found plaintiff to be in willful contempt of court and fined plaintiff $100 per day until he paid the monies ordered to the clerk. The court never assessed any fine against plaintiff. Plaintiff paid the clerk of court $46,704.88 on 17 March 1986. The following day, pursuant to North Carolina Rules of Civil Procedure 59(e) and 60(b), plaintiff moved to alter or amend Judge Seay's order. On 28 December 1987 Judge Seay denied plaintiff's motions. Plaintiff appeals.

Tharrington, Smith & Hargrove, by Wade M. Smith, Mark J. Prak, and Randall M. Roden; Kornegay, Lung & Angle, by James W. Lung, for plaintiff-appellant.

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

EAGLES, Judge.

Plaintiff argues on appeal that the trial court erred in dismissing with prejudice his breach of contract suit against defendants and in holding him in contempt for failing to comply with an interlocutory order. Plaintiff also contends that the evidence did not support the trial court's determination that plaintiff had the ability to pay the monies ordered. We hold that Judge Hobgood's 12 June 1984 order commanding plaintiff to pay a contested sum of money to the clerk of court was erroneous and must be reversed. We affirm the order finding plaintiff in contempt of court but hold that under Rule 41(b) of the North Carolina Rules of Civil Procedure the trial court erred in failing to consider whether a sanction less drastic than dismissal with prejudice would have assured plaintiff's compliance with Judge Hobgood's 12 June 1984 order.

We first address plaintiff's argument that the trial court violated his due process rights when he ordered his complaint dismissed

as punishment for contempt. We note that no constitutional issue was raised below. We may not consider constitutional questions for the first time on appeal. *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984).

A

[1] We next address the validity of Judge Hobgood's order compelling plaintiff to pay into court the collected March and April rents. Plaintiff argues that Judge Hobgood was without statutory authority in making his 12 June 1984 order and, therefore, the order is void. Defendants contend that the Supreme Court's decision in *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E. 2d 772 (1987), states that only an order issued by a court without jurisdiction is void. Defendants also argue that, in any event, the 12 June 1984 order is valid under the court's inherent authority to clarify its own orders. We hold that the trial court erroneously entered its 12 June 1984 order and, accordingly, we reverse.

Defendants argue that *Daniels* limits void orders to those issued by a court without jurisdiction. We hold that *Daniels* is not controlling on this issue. *Daniels* addressed whether a plaintiff could collaterally attack an order without having properly preserved an appeal. The Court there stated that under those circumstances a plaintiff could collaterally attack the trial court's order only if the order was void. *Daniels* at 676, 360 S.E. 2d at 776-77. Here plaintiff attempted to appeal Judge Hobgood's order immediately, but this court dismissed the appeal as interlocutory. *Rivenbark v. Southmark Corp.*, 77 N.C. App. 225, 334 S.E. 2d 451 (1985), *disc. rev. denied*, 315 N.C. 391, 338 S.E. 2d 880 (1986). Upon this appeal plaintiff does not attempt to collaterally attack Judge Hobgood's order, but rather he has properly preserved his exception for direct review on appeal.

Since the judgment here "is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court," *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 377, 381 (1950), the grant of dismissal with prejudice was a final judgment. Therefore, we may now address the validity of Judge Hobgood's 12 June 1984 interlocutory order. G.S. 1-278.

Defendants argue that the 12 June 1984 order was properly entered pursuant to Rule 60(a) of the North Carolina Rules of Civil

Procedure, in that it was a clarification of Judge Hobgood's 5 March 1984 order. We disagree. Rule 60(a) does allow the trial court by motion of a party or on its own initiative to correct clerical errors, G.S. 1A-1, Rule 60(a), "but errors of a serious or substantial nature are not intended to be covered." W. Shuford, North Carolina Civil Practice and Procedure, section 60-3 (3d ed. 1988). The issuance of an interlocutory order compelling a party to immediately pay into court almost $50,000 in rents collected is an order of a "serious or substantial nature," particularly when plaintiff's pleadings raise the issue of whether he is entitled to continue collecting rents until the final purchase price is agreed upon and paid.

We further note that G.S. 1-508 provides that

> When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, *is held by him as trustee for another party, or which belongs or is due to another party*, the judge may order it deposited in court, or delivered to such party with or without security, subject to the further direction of the judge. [Emphasis added.]

There is no admission here that plaintiff holds the money as trustee for another party or that the money belongs to another party. In fact, plaintiff contends that these funds belong to him. He argues that under the master lease Southmark's failure to pay the final purchase price when due started an additional lease period during which he could continue to act as landlord and collect rents. Furthermore, plaintiff argues that under the 5 March 1984 order he was not required to terminate his possession of the property until defendant "plac[ed] the letter of credit with the Court." The letter of credit was not filed by defendant until 6 April 1984.

Accordingly, we conclude that Judge Hobgood's order was an erroneous order "rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law." *Wynne v. Conrad*, 220 N.C. 355, 360, 17 S.E. 2d 514, 518 (1941). We reverse Judge Hobgood's 12 June 1984 order.

[2] Having determined that the 12 June 1984 order was erroneous rather than void, we next address the trial court's order finding plaintiff in contempt. An erroneous order is valid until corrected on appeal while a void order binds no one. *State v. Sams*, 317

N.C. 230, 345 S.E. 2d 179 (1986). Because an erroneous order is valid until corrected, plaintiff must comply with the order. *See Daniels* at 677, 360 S.E. 2d at 777. Plaintiff did not pay into court the sums ordered nor did he request a stay or writ of supersedeas. In addition, the evidence presented at the show cause hearing demonstrates plaintiff's financial ability to pay the persons ordered. Accordingly, we affirm the trial court's finding of contempt.

B

[3] Plaintiff next argues that before the trial court may dismiss his complaint it must first consider other, less drastic alternatives. We agree. We first note that Rule 41(b) of our Rules of Civil Procedure states, in part, that "[f]or failure of the plaintiff to prosecute or to comply with these rules *or any order of court*, a defendant may move for dismissal of an action or of any claim therein against him." [Emphasis added.] G.S. 1A-1, Rule 41(b). However, our Supreme Court has ruled that the trial court may invoke less severe sanctions against a party who violates a court order. *Daniels* at 674, 360 S.E. 2d at 776.

In *Harris v. Maready*, 311 N.C. 536, 319 S.E. 2d 912 (1984), the Supreme Court reversed this court's decision holding that the trial court must grant a motion to dismiss for violation of Rule 8(a)(2) of the Rules of Civil Procedure. The Supreme Court determined that a party's motion for dismissal because the opposing party has violated a rule or court order is directed to the trial court's discretion. *Id.* at 550, 319 S.E. 2d at 921. Additionally, the court noted that "[a]lthough an action may be dismissed under Rule 41(b) for a plaintiff's failure to comply with Rule 8(a)(2), this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice." *Id.* at 551, 319 S.E. 2d at 922.

Our court in *Miller v. Ferree*, 84 N.C. App. 135, 351 S.E. 2d 845 (1987), affirmed a trial court's ruling of dismissal without prejudice for a violation of Rule 8(a)(2). There we noted that the trial court found "sanctions less than a dismissal without prejudice are inappropriate in this action." *Id.* at 137, 351 S.E. 2d at 847. We indicated that this finding showed that the trial court had "considered the various sanctions available" and considered dismissal without prejudice the proper sanction. *Id.* We hold that sanctions may not be imposed mechanically. Rather, the circumstances of each case must be carefully weighed so that the sanction properly

takes into account the severity of the party's disobedience. *See also Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 344 S.E. 2d 847 (1986), *reversed in part and affirmed in part*, 320 N.C. 669, 360 S.E. 2d 772 (1987) (in determining whether to dismiss a case for violation of motion in limine trial court must determine the effectiveness of alternative sanctions).

Defendants argue that our Supreme Court's decision in *Daniels* allows the trial court to order whatever sanction, in its discretion, it deems appropriate without first considering alternative sanctions. We disagree. The Supreme Court pointed out that the dismissal in *Daniels* arose "from plaintiff's previous refusal to comply with a lesser sanction, taxing him with costs." *Daniels* at 681, 360 S.E. 2d at 780. It was plaintiff's noncompliance with this lesser sanction which allowed the trial court to then dismiss the case. *Id.*

Here the trial court made no findings of fact or conclusions of law which address whether less drastic sanctions would be effective in ensuring compliance with the court's order or would best serve the interests of justice. Accordingly, we vacate and remand that portion of the court's 10 March 1986 order dismissing plaintiff's complaint.

For the foregoing reasons, we vacate and remand that portion of the trial court's 10 March 1986 order dismissing plaintiff's complaint for additional findings of fact. The 12 June 1984 order compelling plaintiff to pay the collected rents into court is reversed and we affirm that portion of the 10 March 1986 order finding plaintiff in contempt.

Affirmed in part; reversed in part; vacated and remanded in part.

Judges PARKER and LEWIS concur.

GARY WALLACE AND RED ROOF INNS, INC. v. TOWN OF CHAPEL HILL

No. 8815SC576

(Filed 18 April 1989)

1. **Municipal Corporations § 2.2— annexation—property developed for urban purposes—different tests for subareas**

A town could qualify three distinct noncontiguous subareas of an area to be annexed as property "developed for urban purposes" within the meaning of N.C.G.S. § 160A-48(c) by using a different urban purpose test set forth in subsections (1)-(3) of that statute for each subarea.

2. **Municipal Corporations § 2.3— annexation—extension of water service**

The trial court did not err in concluding that a town substantially complied with the provision of N.C.G.S. § 160A-47 pertaining to the extension of water service to an annexed area, although petitioners were required to pay the costs of a twelve-inch water line extension to their property, where petitioners offered no evidence that the twelve-inch extension was a major trunk water main, and the evidence showed that the policy requiring petitioners to pay for the cost of the water line extension to their property was consistent with the policy of water line extensions within the preexisting town limits.

3. **Municipal Corporations § 2.3— annexation—services by water and sewer authority**

A town did not violate N.C.G.S. § 160A-47 provisions pertaining to the extension of water and sewer services to an annexed area because such services were provided by a water and sewer authority rather than by the town.

4. **Municipal Corporations § 2.3— annexation—nonurban areas—necessary land connection not required**

A municipality could annex nonurban property if it met the criteria set forth in N.C.G.S. § 160A-48(d)(1) or (2), and it was not necessary for the municipality also to show that the nonurban area constitutes a necessary land connection between the municipality and an area developed for urban purposes or between two or more areas developed for urban purposes.

APPEAL by petitioners from *Brannon (Anthony M.), Judge.* Judgment entered 31 December 1987 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 December 1988.

Michael B. Brough & Associates, by Michael B. Brough and Robert E. Hagemann, for petitioner-appellants.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by Michael W. Patrick, and Ralph D. Karpinos, for respondent-appellee.

GREENE, Judge.

Pursuant to N.C.G.S. Sec. 160A-50(a) (1987), petitioners filed a petition in superior court requesting review of an annexation ordinance adopted by the Town of Chapel Hill (Town), which ordinance annexed properties of the petitioners. The superior court affirmed the action of the Town, and petitioners pursuant to N.C.G.S. Sec. 160A-50(h) (1987) appeal.

On 14 July 1986, the Town, a municipality with a population exceeding 5,000, adopted an ordinance extending the corporate limits of the Town of Chapel Hill. The area annexed included among other lands a four-acre tract of land owned by the petitioners and three subareas which were identified by the Town as urban areas under N.C.G.S. Sec. 160A-48(c) (1987). The three subareas, Eastowne, Lakeview and a 149.2-acre tract, are not contiguous with each other, while two of the areas are contiguous to the pre-existing town boundary of Chapel Hill. The remainder of the area annexed, including the petitioners' property, lies outside the three subareas claimed by the Town to be urban and was annexed pursuant to N.C.G.S. Sec. 160A-48(d) (1987) as a non-urban area.

The superior court entered the following pertinent findings of fact which have not been excepted to by the petitioners:

> 20. In preparing the annexation report and enacting the Ordinance, the Town studied and qualified each urban subarea . . . as a whole.
>
> . . . .
>
> 26. The Eastowne subarea as defined within the report is developed for urban purposes and meets the standards of . . . N.C.G.S. Sec. 160A-48(c)(3) . . . .
>
> . . . .

34. The Lakeview area is also developed for urban purposes using the standards of . . . N.C.G.S. Sec. 160A-(c)(1) . . . .

. . . .

38. The 149.2-acre tract of land as defined within the report is developed for urban purposes and meets the standards of . . . N.C.G.S. Sec. 160A-(c)(2) . . . .

The trial court entered the following pertinent conclusions of law which were excepted to by the petitioners:

3. The Town of Chapel Hill has substantially complied with the requirements of N.C.G.S. Sec. 160A-48 in determining that Area 1986-C [the total annexed area] is an area eligible for annexation; the standards of N.C.G.S. Sec. 160A-48(c) have been met by the three urban subareas in Area 1986-C;

. . . .

5. The Town of Chapel Hill has substantially complied with the requirements of N.C.G.S. Sec. 160A-48(d) in determining that the nonurban portion of Area 1986-C [the total annexed area] falls within the definition of that section by the General Statutes and qualifies for annexation.

6. The Town of Chapel Hill has substantially complied with all the relevant provisions in N.C.G.S. Sec. 160A-47 and Sec. 160A-49.

. . . .

9. The Petitioners have failed to show a failure on the part of the municipality to substantially comply with any provision of N.C.G.S. Sec. 160A-45 through Sec. 160A-56. The Petitioners have failed to show any irregularity in the proceedings which would materially prejudice the substantive rights of the Petitioners.

. . . .

11. The action of the Town Council of the Town of Chapel Hill in adopting annexation ordinance on the 14th day of July, 1986 should be affirmed.

As annexation proceedings are presumed regular, *In re Annexation Ordinance*, 304 N.C. 549, 551, 284 S.E. 2d 470, 472 (1981), the burden of proof is on the petitioners to "show by competent

and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights." *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E. 2d 599, 601 (1987), *aff'd*, 321 N.C. 589, 364 S.E. 2d 139 (1988); N.C.G.S. Sec. 160A-50(g) (1987). On appeal from the superior court to this court, the findings of fact made by the trial court "are binding on the appellate court if supported by competent evidence, even if there is evidence to the contrary; conclusions of law drawn from the findings of fact are, however, reviewable *de novo*." *Id.*

The petitioners' assignments of error raise the issue of whether the trial court erred in concluding the Town had substantially complied with N.C.G.S. Secs. 160A-47 and 48. Thus, the issues presented for review are: I) whether the annexation of the three subareas was in compliance with N.C.G.S. Sec. 160A-48(c); II) whether the Town failed to provide for the extension of water and sewer service as required by N.C.G.S. Sec. 160A-47(3)(b); and III) assuming the Town's compliance with Section 160A-48(c) and Section 160A-47(3)(b), whether the annexation of petitioners' property complied with Section 160A-48(d).

I

The Town in the process of adopting the questioned annexation ordinance qualified, pursuant to N.C.G.S. Sec. 160A-48(c), three distinct non-contiguous subareas as property "developed for urban purposes." N.C.G.S. Sec. 160A-48, which governs annexation by cities of 5,000 or more, provides in pertinent part as follows:

> (a) A municipal governing board may extend the municipal corporate limits to include any area
>
> (1) Which meets the general standards of subsection (b), and
>
> (2) Every part of which meets the requirements of either subsection (c) or subsection (d).
>
> (b) The total area to be annexed must meet the following standards:
>
> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
>
> (2) At least one-eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.

(3) No part of the area shall be included within the boundary of another incorporated municipality.

(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

(1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; or

(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts five acres or less in size and such that at least sixty-five percent (65%) of the total number of lots and tracts are one acre or less in size; or

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

[1] In the process of qualifying the three distinct non-contiguous subareas as property "developed for urban purposes," the Town did not use the same qualifying standard for each subarea. Instead, each subarea was determined to be "developed for urban purposes" by the use of a different standard, either (c)(1), (c)(2) or (c)(3) of N.C.G.S. Sec. 160A-48. The trial court concluded this procedure "substantially complied with the requirements of N.C.G.S. Sec. 160A-48" and the petitioners had failed to show "any irregularity in the proceedings which would materially prejudice the substantive rights of the petitioners." The petitioners contend the conclusions of the trial court were in error in that the Town was obligated to qualify the three subareas "as a whole" and that any attempt to qualify subareas separately is inconsistent with the statute. Accepting petitioners' argument would have required the Town to

qualify *all* three subareas under *either* (c)(1), (c)(2) or (c)(3) of N.C.G.S. Sec. 160A-48. We reject petitioners' argument.

Our Supreme Court has held that "[c]ities with 5,000 or more people may annex an outlying urban area pursuant to G.S. 160A-48(c) and the intervening undeveloped lands pursuant to G.S. 160A-48(d) so long as the entire area meets the requirements of G.S. 160A-48(b)." *In re Annexation Ordinance*, 300 N.C. 337, 341, 266 S.E. 2d 661, 663 (1980). The petitioners make no argument that the entire annexed area does not meet the requirements of Section 160A-48(b). Their contentions here relate only to N.C.G.S. Sec. 160A-48(c).

Our Supreme Court has set forth the following principles of annexation:

> The urban area that a city seeks to qualify for annexation under one of the urban purposes tests set forth in G.S. 160A-48(c)(1)-(3) must be considered as a whole; i.e., as one area and may not be divided into sub-areas or study areas. This requirement, however, does not preclude annexation of intervening undeveloped land pursuant to G.S. 160A-48(d).

Id. at 342, 266 S.E. 2d at 664.

These principles set forth by our Supreme Court are not read by this court to require that *every* non-contiguous subarea a municipality seeks to qualify as urban property be qualified under the *same* urban purpose test. Instead, *each* such subarea must be considered as a whole and must qualify under *one* of the urban purposes tests set forth in Section 160A-48(c). In this case the trial court found as a fact that the Town "studied and qualified each urban subarea . . . as a whole" and that each subarea met the standards of one of the urban purposes tests set forth in N.C.G.S. Sec. 160A-48(c). Accordingly, the trial court did not err in concluding the Town complied with N.C.G.S. Sec. 160A-48(c) in annexing three non-contiguous subareas using different standards for qualifying each of the three subareas as urban property.

II

[2] The petitioners next contend the Town did not comply with N.C.G.S. Sec. 160A-47(3)(b) in that in order to obtain water they were required to install a twelve-inch water line at their own expense which they contend is a major trunk water main.

N.C.G.S. Sec. 160A-47 requires a municipality to prepare a report prior to the annexation public hearing, setting forth the plans for the extension of water and sewer service to the annexed area. The report must include:

> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> . . . .
>
> b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions . . . .

N.C.G.S. Sec. 160A-47.

The purpose of the statute is to insure that major municipal services are provided to newly annexed areas on a nondiscriminatory basis. *In re Annexation Ordinance*, 304 N.C. at 554, 284 S.E. 2d at 474. The trial court found that water and sewer service within the annexed area and the pre-existing municipal limits was provided by the Orange Water and Sewer Authority (OWASA), *see* N.C.G.S. Sec. 162A-1 et seq. (authorizing water and sewer authorities), and that the policy regarding water and sewer extensions applied equally throughout the annexed area and the property within the pre-existing municipal limits. The trial court also found that the petitioners were required by OWASA policies "to pay the cost of water . . . extensions" to their property and were "entitled under OWASA's policies to reimbursements from OWASA when and if others tap onto the lines in the future."

The petitioners argue the twelve-inch water line they were required to install at their cost was a "major water main." The characterization of a water main as "major" "depends largely upon the size of the municipality or even the number of users within a particular subdivision." *In re Annexation Ordinance*, 303 N.C. 220, 225, 278 S.E. 2d 224, 228 (1981). The petitioners offered no evidence from which the trial court or this court could ascertain in this instance that the twelve-inch water extension was a "major

water main." Furthermore, as the policy requiring these petitioners to pay for the cost of water line extensions to their property was consistent with the policy of water line extensions within the pre-existing municipal limits, the trial court was not in error in concluding the Town had "substantially complied with all the relevant provisions of N.C.G.S. 160A-47."

[3] We likewise reject any contentions of the petitioners that the Town failed to comply with Section 160A-47 in that OWASA, not the Town, provided the water and sewer services. Section 160A-47 requires the Town to provide in the annexed area "each major municipal service performed within the municipality at the time of annexation." N.C.G.S. Sec. 160A-47(3). The municipality may delegate responsibility for the providing of these services to others, such as OWASA. *Moody v. Town of Carrboro*, 301 N.C. 318, 328, 271 S.E. 2d 265, 272 (1980), *reh'g denied*, 301 N.C. 889, 274 S.E. 2d 230 (1981). However, the municipality is not "relieved of its primary duty" to comply with the statute. *In re Annexation Ordinance*, 255 N.C. 633, 646, 122 S.E. 2d 690, 700 (1961); *see also Cockrell v. City of Raleigh*, 306 N.C. 479, 486, 293 S.E. 2d 770, 775 (1982) (annexation report must contain a statement regarding extension of "major municipal service[s] performed within the municipality at the time of annexation . . . whether provided by the City work force, or . . . by an independent authority such as a countywide water-sewer authority"). If such services are not provided, the residents of the annexed area are entitled to a Writ of Mandamus requiring the municipality to live up to its commitments. N.C.G.S. Sec. 160A-49(h).

III

[4] Finally, the petitioners argue the Town was without authority to annex the non-urban property, which includes the petitioners' property. Specifically, the petitioners contend that N.C.G.S. Sec. 160A-48(d) requires all non-urban properties "constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes." We reject this argument.

N.C.G.S. Sec. 160A-48(d) provides as follows:

> (d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area either:

(1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.

In *Southern Glove Mfg. Co. v. City of Newton*, 75 N.C. App. 574, 578, 331 S.E. 2d 180, 183, *disc. rev. denied*, 314 N.C. 669, 336 S.E. 2d 401 (1985), this court held that a municipality may annex non-urban property if such area meets the criteria set forth in (d)(1) or (d)(2). It is not necessary for the municipality to additionally show that the non-urban area constitutes a necessary land connection "between the municipality and areas developed for urban purposes." *Id.*

The Town presented evidence that the non-urban property met the criteria of (d)(2) in that the non-urban property was adjacent on at least sixty percent of its external boundary to a combination of the Town's boundary and the boundary of the area developed for urban purposes. The petitioners offered no evidence to the contrary and the trial court entered a finding consistent with this evidence, to which finding the petitioners did not except. This finding is sufficient to support the trial court's conclusion that the defendant had "substantially complied with the requirements of N.C.G.S. Sec. 160A-48(d)."

Affirmed.

Judges PHILLIPS and COZORT concur.

ANNIE BROWN, PLAINTIFF v. BURLINGTON INDUSTRIES, INC., DEFENDANT

No. 8817SC526

(Filed 18 April 1989)

1. **Master and Servant § 87.1— sexual harassment at work— action for intentional infliction of mental distress—not barred by Workers' Compensation Act**

Plaintiff's claim for intentional infliction of mental distress arising from sexual harassment in the workplace alleged a common law action against plaintiff's employer for its intentional conduct and is not barred by the provisions of the Workers' Compensation Act. N.C.G.S. § 97-10.1.

2. **Trespass § 2— intentional infliction of emotional distress —sexual harassment—directed verdict and judgment notwithstanding verdict properly denied**

The trial court did not err by denying defendant's motions for a directed verdict and judgment n.o.v. in an action arising from the sexual harassment of plaintiff in her workplace where there was sufficient evidence to allow plaintiff's case to be submitted to the jury in that the manager of the plant where plaintiff worked made remarks and gestures toward plaintiff which constituted conduct which could reasonably be found to be sufficiently outrageous to permit plaintiff to recover; the conduct was unquestionably directed toward plaintiff; and evidence presented at trial tended to show that plaintiff became nervous, lost weight, had ulcers, nightmares, diarrhea, and crying spells as a result of the manager's conduct.

3. **Trespass § 2— sexual harassment in the workplace—ratification of plant manager's acts by corporation—directed verdict and judgment n.o.v. properly denied**

The trial court properly denied defendant's motion to dismiss and for judgment n.o.v. on plaintiff's claim for intentional infliction of mental and emotional distress arising from sexual harassment at work where, although the plant manager who was harassing plaintiff was promptly dismissed when the matter was reported to defendant's division manager, defendant's department manager had an explicit duty to rectify the problem and his omission of action was a course of conduct which a jury could conclude reasonably tended to show ratification of the plant manager's acts by defendant.

4. Trespass § 2— intentional infliction of emotional distress —sexual harassment—evidence sufficient for punitive damages

The trial court did not err in an action for intentional infliction of emotional distress arising from sexual harassment in the workplace by denying defendant's motions for a directed verdict and judgment n.o.v. on the claim for punitive damages where plaintiff presented sufficient evidence of an outrageous act to support submission of punitive damages to the jury.

APPEAL by defendant from *Morgan, Melzer A., Jr., Judge.* Judgment entered 18 December 1987 in ROCKINGHAM County Superior Court. Heard in the Court of Appeals 11 January 1989.

Plaintiff is a resident of Rockingham County, North Carolina. Defendant is a corporation which maintains a place of business and its corporate headquarters in Guilford County, North Carolina. Plaintiff was employed by defendant from May 1970 to June 1985 at defendant's Madison, North Carolina plant. Plaintiff was initially employed as a texturing operator. In 1975, plaintiff was promoted to supervisor in texturing, a position she retained until May 1985. In early 1985, the Madison plant underwent a reduction in work force. Plaintiff was given an option of returning to wage status or retiring with severance pay and benefits. Plaintiff chose retirement and after a period of working at wages status, left the employ of defendant in June 1985.

Ernest Whitmore was manager of the Twintex plant in Madison, North Carolina in 1976-1977. From 1977 to March 1985, Whitmore was manager of the other Burlington plant in Madison. From early 1983 until 1985, Ernest Whitmore made sexually suggestive remarks and gestures toward plaintiff. This sexual harassment continued on an ongoing basis two or three times a week for two years. During this period of time, plaintiff complained on numerous occasions to Lewis Bottoms, plaintiff's immediate supervisor and department head, about the sexual harassment. Defendant's open-door policy, as contained in its employee handbook, instructed employees to bring any complaints initially to their supervisor, or if they felt more comfortable in doing so, to their department head or personnel manager. Whitmore's sexual harassment of plaintiff continued despite her complaints to Lewis Bottoms.

In March 1985, defendant's plant personnel manager was informed about Whitmore's actions. After further investigation the

decision was made by defendant on 28 March 1985 to terminate Ernest Whitmore. Whitmore was involuntarily terminated on 1 April 1985.

Plaintiff commenced the present action against defendant and Ernest Whitmore in July 1986, seeking damages for intentional infliction of mental and emotional distress, negligence, and invasion of privacy. Prior to trial, defendant filed motions to dismiss and motions for summary judgment. These motions were denied.

The case came on for trial at the 7 December 1987 civil session of Rockingham County Superior Court. On 8 December 1987, plaintiff voluntarily dismissed the action as to Whitmore. At the end of the trial, the jury answered the following issues against defendant: whether Whitmore's actions were within the scope of his employment and in furtherance of defendant's business; whether defendant ratified the conduct of Whitmore; and whether defendant had negligently retained Whitmore in its employ. The jury answered the issue of contributory negligence against plaintiff. Judgment was entered on 18 December 1987 on a jury verdict awarding plaintiff $10,000 compensatory damages and $50,000 punitive damages. Defendant appealed.

Kennedy, Kennedy, Kennedy and Kennedy, by Harold L. Kennedy, III, Harvey L. Kennedy, and Annie Brown Kennedy, for plaintiff-appellee.

Smith Helms Mulliss & Moore, by McNeill Smith, Michael A. Gilles, and Julie C. Theall, for defendant-appellant.

WELLS, Judge.

Defendant assigns error to the trial court's denial of its motions for directed verdict and judgment notwithstanding the verdict. "The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence." *Hitchcock v. Cullerton*, 82 N.C. App. 296, 346 S.E. 2d 215 (1986). "In passing on a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with inferences which may be drawn therefrom must be resolved in favor of the nonmovant." *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 337 S.E. 2d 94 (1985), *disc. rev. denied*, 316 N.C. 376, 342 S.E. 2d 893 (1986). "The motion should be denied if there is 'any evidence more than a scintilla' sufficient to support plaintiffs'

prima facie case." *Rice v. Wood*, 82 N.C. App. 318, 346 S.E. 2d 205, *disc. rev. denied*, 318 N.C. 417, 349 S.E. 2d 599 (1986) (*quoting Cunningham v. Brown*, 62 N.C. App. 239, 302 S.E. 2d 822, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 754 (1983)). "[A motion for judgment notwithstanding the verdict (JNOV)] . . . is a motion for the trial court to enter judgment in accordance with the movant's earlier motion for directed verdict, notwithstanding the contrary verdict actually returned by the jury." *DeHart, supra*, at 98, 337 S.E. 2d at 98. "The same standard is to be applied by the courts in ruling on a motion for JNOV as is applied in ruling on a motion for a directed verdict." *Smith v. Price*, 315 N.C. 523, 340 S.E. 2d 408 (1986).

Plaintiff alleged intentional infliction of mental and emotional distress as her first cause of action. The constituent elements of this tort which must be established by the evidence are "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *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).

[1] Defendant first argues that the trial court erred in denying its motions because the trial court did not have jurisdiction over plaintiff's claim. Defendant contends that plaintiff's claim is covered by the North Carolina Workers' Compensation Act (the Act) and therefore her "exclusive remedy lies with the Industrial Commission." We explicitly rejected this position in *Hogan*, wherein defendant claimed that N.C. Gen. Stat. § 97-10.1, the exclusivity of remedies provision of the Act, barred plaintiffs' claims for intentional infliction of emotional distress. In determining whether the provisions of the Act barred plaintiff's claims, this Court examined the types of claims and injuries covered by the Act. We noted in *Hogan* that "the Act does not bar a common law action by an employee against his employer for the intentional conduct of the employer." *Id.* at 488, 340 S.E. 2d at 120. We further noted that the plaintiffs in *Hogan* "suffered damages which would be recoverable in a civil action but which are not compensable under the Act." The claims "do not involve an isolated physical injury not compensable under the Act, rather they allege an entire class of civil wrongs which are outside the scope of the Act." *Hogan* at 489, 340 S.E. 2d at 120. In holding that plaintiffs' claims were not barred by the Act, we stated: "The essence of the tort of intentional infliction of emotional distress is non-physical; the injuries alleged by plaintiffs

do not involve physical injuries resulting in disability. Therefore, we conclude that plaintiffs' actions for intentional infliction of mental and emotional distress are not barred by G.S. 97-10.1." *Id.* at 490, 340 S.E. 2d at 121.

The present case presents the same issue concerning the Act as that encountered in *Hogan*. Plaintiff alleges that she suffered "mental and emotional distress" as a result of intentional tortious acts by defendant. Plaintiff's complaint alleges a common law action against defendant's employer for its intentional conduct. Plaintiff seeks recovery for damages which are not compensable under the Act; therefore, plaintiff's claim is not barred by the provisions of the Act. Defendant's assignment of error is overruled.

[2] Defendant next contends the trial court erred in denying its motions because there was no evidence that Ernest Whitmore's remarks and gestures toward plaintiff were extreme and outrageous and intended by Whitmore to cause severe emotional distress which did cause such distress. Examining the evidence in a light most favorable to plaintiff as nonmovant and resolving all inferences in her favor, it is clear that plaintiff established a *prima facie* case of intentional infliction of emotional distress. Plaintiff's evidence at trial tended to show that Ernest Whitmore made sexually suggestive remarks and gestures toward plaintiff. Whitmore asked plaintiff "how tight [she] was," referring to her vagina; indicated that he would like to have plaintiff's "long legs wrapped around his body"; grabbed his penis and said to plaintiff "you just tear me up"; and held plaintiff's paycheck while puckering his lips inferring plaintiff would have to kiss Whitmore to receive her check. Whitmore also implied that if plaintiff would have sex with him, Whitmore would place plaintiff in another position in the plant so as to allow plaintiff to have a job despite a pending layoff and despite a problem with plaintiff's hand. On several occasions, Whitmore asked plaintiff to wait for him so they could go off together. Whitmore's actions were substantially similar to those of Hans Pfeiffer in *Hogan*, wherein the evidence tended to show that Pfeiffer made sexually suggestive remarks to plaintiff Cornatzer, "coaxing her to have sex with him and telling her that he wanted to 'take' her." Pfeiffer also "[brushed] up against [plaintiff], [rubbed] his penis against her buttocks and [touched] her buttocks with his hands." *Id.* In response to defendant's contentions in *Hogan* that Pfeiffer's conduct was not sufficiently outrageous to establish a *prima facie* case, we stated:

> It is a question of law for the court to determine, from the materials before it, whether the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery . . . . However, once conduct is shown which may be reasonably regarded as extreme and outrageous, it is for the jury to determine, upon proper instructions, whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability.

Id. at 491, 340 S.E. 2d at 121. (Citations omitted.) Ernest Whitmore's remarks and gestures toward plaintiff in the present case constituted conduct which could reasonably be found to be sufficiently outrageous to permit plaintiff to recover. The conduct was unquestionably directed toward plaintiff. Evidence presented at trial tended to show, as a result of Whitmore's conduct, that plaintiff became nervous, lost weight, had ulcers, nightmares, diarrhea, and crying spells. There was sufficient evidence to allow plaintiff's case to be submitted to the jury. Defendant's assignment of error is overruled.

[3] Defendant also argues that the trial court erred in denying its motions because there was no evidence Whitmore was acting within the scope of his employment in sexually harassing plaintiff and no evidence defendant ratified Whitmore's conduct toward plaintiff. These contentions concern the issue of whether the defendant, as principal, may be liable for the intentional tortious acts of its agent, Whitmore. We stated in *Hogan*:

> As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal.

Id. For plaintiff to recover in the present case, she must establish that Whitmore's acts and the conduct of defendant fall into one of the aforementioned categories. There is no indication that Whitmore's conduct was expressly authorized by defendant. "To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 365 S.E. 2d 665, *disc. rev. denied*, 322 N.C. 838, 371 S.E. 2d 284 (1988).

"If an employee departs from that purpose to accomplish a purpose of his own, the principal is not liable." *Id.* at 271, 365 S.E. 2d at 668. Defendant contends there was no evidence Whitmore was acting within the scope of his employment and in furtherance of defendant's business in sexually harassing plaintiff. We agree. Intentional tortious acts are rarely considered to be within the scope of an employee's employment. We do not perceive Whitmore's acts in the present case to be within the scope of his employment and in furtherance of defendant's business.

Plaintiff's recovery from defendant must therefore rest upon a showing that defendant ratified the conduct of Whitmore. Defendant argues that there was no evidence it ratified Whitmore's conduct in light of Whitmore's prompt dismissal when the matter was reported to defendant's division manager. "In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act." *Hogan, supra*, at 492, 340 S.E. 2d at 122. "The jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts." *Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E. 2d 252 (1965). Such course of conduct may involve an omission to act. In the present case the evidence at trial tended to show that defendant's company policy advises employees to speak to their supervisor first whenever they had a problem. The company policy further encourages employees to talk to either their personnel manager or department head if they felt more comfortable talking to them rather than to their supervisor. Plaintiff discussed her problem concerning Whitmore with Lewis Bottoms, who was plaintiff's immediate supervisor and department manager. "The designation 'manager' implies general power and permits a reasonable inference that he was vested with the general conduct and control of defendant's business . . ., and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." *Hogan, supra* (*quoting Gillis v. Tea Co.*, 223 N.C. 470, 27 S.E. 2d 283 (1943)). Defendant's division manager testified that the department manager had the obligation to report sexual misconduct to higher authorities within the company when such misconduct is reported by an employee to the manager. Therefore, it was the duty of Lewis

Bottoms to report instances of sexual misconduct to higher authorities. This duty was within the scope of Bottoms' employment as a department manager, a position which gave Bottoms general power over the conduct and control of defendant's business in the department. Where defendant, through Bottoms, had an explicit duty to rectify the problem posed by Whitmore's sexual harassment of plaintiff, Bottoms' omission of action was a course of conduct which a jury could conclude reasonably tends to show ratification of Whitmore's acts by defendant. Defendant's assignment of error is overruled.

[4] Defendant also contends that the trial court erred in denying its motions because the jury's award of punitive damages was improper. "Punitive damages are awarded in addition to compensatory damages for the purpose of punishing the wrongdoer and deferring others from committing similar acts." *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 77 N.C. App. 475, 335 S.E. 2d 335, *disc. rev. denied*, 316 N.C. 193, 341 S.E. 2d 570 (1986). "Punitive damages are recoverable in tort actions only where there are aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and wilful wrong, insult, indignity, or a reckless or wanton disregard of plaintiff's rights." *Burns v. Forsyth Co. Hospital Authority*, 81 N.C. App. 556, 344 S.E. 2d 839 (1986). Such damages "are not recoverable as a matter of right in any case, but only in the discretion of the jury when the evidence warrants." *Hunt v. Hunt*, 86 N.C. App. 323, 357 S.E. 2d 444, *affirmed*, 321 N.C. 294, 362 S.E. 2d 161 (1987). Plaintiff has offered sufficient evidence to establish a *prima facie* case of intentional infliction of emotional distress. One of the constituent elements of that case is an "extreme and outrageous" act by defendant or a third party which is then imputed to defendant as in the present case. As we stated in *Cavin's, Inc. v. Insurance Co.*, 27 N.C. App. 698, 220 S.E. 2d 403 (1975), "Punitive damages are never awarded merely because of a personal injury inflicted nor are they measured by the extent of the injury; they are awarded because of the outrageous nature of the wrongdoer's conduct." Plaintiff has presented sufficient evidence of an outrageous act. The existence of an outrageous act supports submission of an issue pertaining to punitive damages to the jury. The decision to award punitive damages is the discretionary province of the jury. This argument is rejected.

We have examined defendant's other assignments of error and found them to be without merit.

No error.

Judges BECTON and JOHNSON concur.

ROGER D. MESSER AND WILLIAM L. HUNT v. LAUREL HILL ASSOCIATES

No. 8815SC393

(Filed 18 April 1989)

1. **Contracts § 21.3— failure to build road on schedule—anticipatory breach—summary judgment for defendants**

The trial court properly granted summary judgment for defendants in an action for anticipatory breach of contract arising from defendant's failure to build certain roads by the time stated in an agreement for the sale of land because there was no genuine issue of material fact as to anticipatory breach. Even assuming that someone speaking on behalf of defendant did state at some time prior to the filing of plaintiffs' complaint that it was discontinuing development of the land for the time being, that statement was not a positive, distinct, unequivocal, and absolute repudiation of the obligation to build Bayberry Drive by 1 December 1987, almost two years in the future, and does not preclude the possibility that development, even if temporarily discontinued, would resume prior to 1 December 1987.

2. **Deeds § 18— summary judgment for defendant—error**

The trial court erred by granting summary judgment for defendant in an action in which plaintiffs sought to enforce a covenant contained in a deed alleged to require defendant partnership as grantee to construct two roads on the property conveyed by the deed where there was a genuine issue of material fact regarding defendant's liability for breach of the promise to build the road by the date specified. Although the deed was not signed by the grantees, plaintiff presented sufficient evidence of actual assent by defendant in defendant's actions in developing the property and entering into agreements

contemporaneous with or subsequent to the conveyance of that property.

3. **Deeds § 18— conveyance to partnership—effectiveness of conditions in deed**

Plaintiffs were not entitled to summary judgment in an action to enforce a deed covenant requiring defendant partnership to build a road where plaintiffs alleged that defendant promised to build Rhododendron Drive; defendant admits that it began development of the Laurel Hill property; a 13 May 1985 Contract of Sale Modification extending the completion date for Bayberry Drive was signed by W. Randolph Thomas as General Partner for defendant Laurel Hill Associates; W. Randolph Thomas was one of the grantees under the original warranty deed and was one of the individuals who agreed to assume obligations to plaintiffs; and the four individuals designated as "grantee" and "grantees" in the deed are not specifically identified in the complaint as general partners in defendant partnership. To be binding on a partnership, a written instrument must be executed in a partnership name, a plaintiff must show that a defendant was acting on behalf of the partnership, or the plaintiff must show that the partnership ratified the individual's act.

APPEAL by plaintiffs from Judgment of *Henry V. Barnette, Jr., Judge*, entered 29 December 1986 in ORANGE County Superior Court. Heard in the Court of Appeals 1 November 1988.

Lyman & Ash, by Cletus P. Lyman; and Robert H. Smith, for plaintiff appellants.

Moore & Van Allen, by Charles R. Holton and Laura B. Luger, for defendant appellee.

COZORT, Judge.

Plaintiffs instituted causes of action for anticipatory breach of contract and breach of contract in which they sought to enforce a covenant contained in a deed alleged to require defendant partnership, as grantee, to construct two roads on the property conveyed by the deed. The trial court granted summary judgment in defendant's favor on both claims and denied plaintiffs' motion for summary judgment. We affirm the trial court's ruling on the claim for anticipatory breach of contract but vacate the judgment in favor of defendant on the breach of contract claim.

On or about 25 August 1983, plaintiffs entered into a Contract of Sale with James E. Plymire (not a party to this action) wherein plaintiffs agreed to sell, and Plymire to buy, 60.3 acres of land known as Laurel Hill IV and V, located in Chapel Hill, North Carolina. Included in that Contract were provisions that the deed would reserve for plaintiff Hunt an easement for right of way over two roads (Bayberry Drive and Rhododendron Drive) which Plymire agreed to build by 30 December 1985. On 22 September 1983, plaintiffs signed an Agreement with Plymire and four other individuals whereby (1) Plymire assigned his rights involving Laurel Hill IV and V to the four individuals (referred to as "Grantees"), (2) the four individuals assumed Plymire's obligations, and (3) plaintiffs released Plymire from any obligations arising from the 25 August 1983 Contract of Sale. A warranty deed dated 22 September 1983 conveyed Laurel Hill IV and V to those same four individuals. The deed reserved, for plaintiff Hunt's adjacent retained tract of 120 acres, two easements, described by metes and bounds, over proposed streets referred to as Bayberry Drive and Rhododendron Drive. The deed also contained the following covenant:

> Grantees agree for themselves and their heirs, successors, and assigns, that they shall build to Chapel Hill standards both Bayberry Drive (from Arboretum Drive to Rododendron [*sic*] Drive and to the eastern boundary of Laurel Hill IV) and Rododendron [*sic*] Drive by December 30, 1985.

The deed was signed by plaintiff Hunt, the record owner, and plaintiff Messer, who released any rights he had in the property.

In their complaint, plaintiffs allege that defendant, a partnership, agreed to perform the obligations of Plymire in the 25 August 1983 contract.

Thereafter, defendant began development of Laurel Hill IV and V, which were renamed "The Woods," into sites for traditional homes and condominiums. On 13 May 1985 the parties to this action signed a Contract of Sale Modification which purported to modify the 25 August 1983 Contract of Sale between plaintiffs and Plymire and which, *inter alia*, provided as follows:

> Plymire shall build to Chapel Hill standards Bayberry Drive from Arboretum Drive to Rododendron [*sic*] Drive and to the eastern boundary of Laurel Hill IV by *December 1, 1987*. (Emphasis added.)

On 17 December 1985 plaintiff Messer brought an action alleging that defendant was in anticipatory breach of its obligation under the Contract of Sale Modification to build Bayberry Drive. In an amended complaint filed 14 July 1986, Hunt joined the action as a plaintiff, and several additional counts were added to the complaint, including a count for breach of the covenant to build Rhododendron Drive by 30 December 1985, as set forth in the 22 September 1983 warranty deed. The claim for anticipatory breach alleged that defendant had "by its statements and actions, including statements that it is discontinuing development of the Woods for the time being and banking the land, is in anticipatory breach of its obligation to complete Bayberry Drive by December 1, 1987." Plaintiffs requested the court to order specific performance by defendant of its alleged obligation to build Bayberry Drive and Rhododendron Drive, damages, costs, and other appropriate relief.

Defendant filed an Answer admitting its status as a general partnership which had begun development of the Woods but denying other material allegations of the complaint except insofar as such allegations were consistent with the language of the agreements and the deed attached to plaintiffs' complaint.

Both parties moved for summary judgment. The motions came on for hearing before the Honorable Henry V. Barnette, Jr., who, on 29 December 1986, denied plaintiffs' motion and entered summary judgment in favor of defendant, dismissing with prejudice plaintiffs' claims for anticipatory breach and breach of the agreements to build Bayberry Drive and Rhododendron Drive. The parties having voluntarily dismissed their remaining claims and counterclaims in a final judgment entered 10 November 1987, plaintiffs appeal from the trial court's ruling.

A motion for summary judgment should be granted when the evidence presented to the trial court reveals that there is no genuine issue as to any material fact and that either party is entitled to judgment in its favor as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56; *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In considering a motion for summary judgment, the trial court should not undertake to resolve an issue of credibility. *Landrum v. Armbruster*, 28 N.C. App. 250, 220 S.E. 2d 842 (1976). However, to avoid entry of summary judgment against it, a party must come forward with evidence of a dispute as to a material fact such that resolution of that dispute would affect the

result of the action before the court. *Clerk of Superior Court v. Guilford Builders Supply Co.*, 87 N.C. App. 386, 361 S.E. 2d 115 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E. 2d 918 (1988).

[1] When the promisor to an executory agreement for the performance of an act in the future renounces its duty under the agreement and declares its intention not to perform it, the promisee may treat the renunciation as a breach and sue at once for damages. *Pappas v. Crist*, 223 N.C. 265, 25 S.E. 2d 850 (1943). In order to maintain a claim for anticipatory breach, the words or conduct evidencing the renunciation or breach must be a "positive, distinct, unequivocal, and absolute refusal to perform the contract" *when the time fixed for it in the contract arrives. Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917); 4 Corbin, *Contracts* § 973 (1951).

Plaintiffs' claim for anticipatory breach of the agreement to construct Bayberry Drive by 1 December 1987 was based on defendant's alleged statement that it was "discontinuing development of the Woods for the time being and banking the land." Plaintiff has not come forward with any evidence showing when or in what context this statement was made. Defendant submitted no evidence that it did or did not make the statement as alleged. Instead, it presented the affidavit of the project manager for the Woods, who stated that defendant's "current" intention was to continue development of the Woods and not to "bank" the land, and the affidavit of the engineer for the Woods project, who stated that the Town Manager of Chapel Hill had reapproved defendant's subdivision development plan on condition that a portion of Bayberry Drive be realigned to accommodate plans for a parkway approved by the State Department of Transportation. The affiant engineer also stated that, in view of these parkway plans, he "would advise" defendant not to build all of Bayberry Drive until the plans were "firmly established."

We believe this evidence is insufficient to create a genuine issue of *material* fact as to anticipatory breach. Even assuming that someone speaking on behalf of defendant did state at some time prior to the filing of plaintiffs' complaint on 17 December 1985 that it was discontinuing development of the land *for the time being*, that statement was not a "positive, distinct, unequivocal, and absolute" repudiation of the obligation to build Bayberry Drive by 1 December 1987, almost two years in the future. Furthermore,

the statement does not preclude the possibility that development, even if temporarily discontinued, would resume prior to 1 December 1987. If plaintiffs had wanted to ascertain defendant's intentions specifically regarding Bayberry Drive, they could have inquired. They apparently did not do so, and we will not construe defendant's alleged statement to mean what it did not strictly say. *See Edwards*, 173 N.C. at 45, 46, 91 S.E. at 584, 585. Therefore, we affirm the order of summary judgment in defendant's favor on the claim for anticipatory breach.

We express no opinion regarding the effect of the parkway plan on defendant's obligation under the agreement. No impossibility defense based on the parkway plan was raised in defendant's answer, and that issue was not resolved in the trial court's order; nor is its resolution necessary for the purposes of this appeal. Should plaintiff hereafter institute an action for breach of contract, the parties are not collaterally estopped from litigating the validity of that defense at that time. *See King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973).

[2] As for the breach of contract claim involving Rhododendron Drive, we agree that summary judgment for defendant was error. Plaintiffs' complaint alleged that defendant had agreed to build Rhododendron Drive by 30 December 1985 as set forth in the 22 September 1983 warranty deed, and that only a small part of the road had been built. Defendant denied plaintiffs' allegations except insofar as they were consistent with the language of the deed. However, defendant's engineer admitted in his affidavit that the road was not complete on 11 December 1986.

The only argument presented by defendant on appeal is that the 22 September 1983 deed was not signed by the grantees, and thus the promise to build Rhododendron Drive was a "unilateral recital" not binding on the grantees. We do not believe that argument benefits defendant under the facts of this case.

Instruments conveying interests in land are void unless in writing and signed by the grantor or his lawful agent. N.C. Gen. Stat. § 22-2 (1988). The signature of the grantee is not required in order for a deed to constitute a valid conveyance. Rather, it is *presumed* that the grantee accepts a conveyance when it is beneficial to the grantee. *See* Webster's Real Estate Law in North Carolina § 207 (1988). No presumption of acceptance would arise, however, insofar as a covenant in a deed imposes affirmative obliga-

tions on the grantee. *See Beaver v. Ledbetter*, 269 N.C. 142, 152 S.E. 2d 165 (1967).

The covenant in the deed in question imposes upon the grantee the obligation to build Rhododendron Drive by 30 December 1985. As this is an affirmative obligation to be undertaken by the grantee, there can be no presumption of acceptance. The unavailability of a *presumption*, however, is not fatal to plaintiffs' claim, as plaintiffs may prove *actual* assent to accept the deed, and actual assent renders the grantee liable. Webster's Real Estate Law in North Carolina § 207 (citing *Baber v. Hanie*, 163 N.C. 588, 80 S.E. 57 (1913) and *Drake v. Howell*, 133 N.C. 163, 45 S.E. 539 (1903)). Plaintiff presented sufficient evidence of actual assent by defendant's actions in developing the property and entering into agreements contemporaneous with or subsequent to the conveyance of that property. There is no requirement in this State that contracts for services not to be performed within a year be in writing and signed by the party to be charged therewith. *See* N.C. Gen. Stat. § 22-2 (1988); *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E. 2d 1 (1981).

[3] We do not believe, however, that plaintiffs are entitled to summary judgment in this matter. The four individuals designated as "grantee" and "grantees" in the deed are not specifically identified in the complaint as general partners in defendant partnership. In order for a written instrument to be binding on a partnership, it must be executed in the partnership name. *In re Oxford Plastics v. Goodson*, 74 N.C. App. 256, 262, 328 S.E. 2d 7, 11 (1985). Otherwise, a plaintiff must show that the defendant was acting on behalf of the partnership or that the partnership ratified the individual's act. *See Brewer v. Elks*, 260 N.C. 470, 133 S.E. 2d 159 (1963).

Plaintiff alleges that defendant promised to build Rhododendron Drive. Defendant admits that it has begun development of the Laurel Hill property. The 13 May 1985 Contract of Sale Modification extending the completion date for Bayberry Drive was signed by W. Randolph Thomas as General Partner for defendant Laurel Hill Associates. W. Randolph Thomas is one of the grantees under the 22 September 1983 Warranty Deed and was one of the individuals who agreed to assume Plymire's obligations to plaintiffs. Under these facts, we believe there is a genuine issue of material fact regarding defendant's liability for breach of the promise to build Rhododendron Drive by 30 December 1985.

In conclusion, the trial court's order of summary judgment for defendant is affirmed as to the claim of anticipatory breach of the agreement to build Bayberry Drive by 1 December 1987. We vacate that order insofar as it pertains to the count for breach of contract to build Rhododendron Drive by 30 December 1985, and remand for further proceedings not inconsistent with this opinion.

Affirmed in part; vacated and remanded in part.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA EX REL. THAD EURE, SECRETARY OF STATE, AND LACY THORNBURG, ATTORNEY GENERAL, PLAINTIFFS v. FRED R. LAWRENCE, PINEWILD, INC., WOODLAND FINANCIAL CORPORATION, VACATION PLANNERS, LAWWILL CORPORATION, PEOPLES ADVANTAGE CORPORATION, CENTRAL MOORE MANAGEMENT COMPANY, FIRETREE MANAGEMENT CORPORATION, RIDGEFIELD CORPORATION, McIVER, INC., FALL, INC., FOREST RIDGE, INC., BRIARFIELD CORPORATION, BEACHWOOD CORPORATION, RIVERTREE, INC., THE VILLAGE LAKES, INC., SOUTH MOORE CORPORATION, SEVEN LAKES INVESTMENT GROUP, INC., PINEWILD AND ASSOCIATES, MINI-10, VACATION ASSOCIATES, DEFENDANTS

No. 8820SC409

(Filed 18 April 1989)

1. **Uniform Commercial Code § 28— demand note—right to payment**

A bank had the right to be paid in full from the date of a demand note without a formal demand for payment. N.C.G.S. § 25-3-122(1)(b).

2. **Banks and Banking § 13; Receivers § 5.1— appointment of receiver for depositor—bank's right of setoff not nullified**

The appointment of a receiver for a bank depositor did not nullify the mutual obligation between the depositor and the bank as a creditor of the depositor so as to nullify the bank's right to set off money in the depositor's bank accounts to cover his outstanding debts to the bank. Although N.C.G.S. § 1-507.3 made the receiver the legal owner of the bank accounts, the receiver took the accounts subject to existing obligations.

3. Banks and Banking § 13; Receivers § 5.1— bank's agreement with receiver—no waiver of setoff rights

A bank's agreement with a depositor's receiver that the depositor's checking and savings accounts would remain open and that checks or withdrawals would be honored only with the signatures of both the depositor and the receiver did not constitute a waiver of the bank's right to set off money in the depositor's accounts to cover his outstanding debts to the bank.

4. Banks and Banking § 13; Receivers § 5.1— receivership for depositor—bank's right to setoff

Generally, funds deposited before receivership are available for setoff by a bank while funds deposited after receivership with the bank's knowledge that the deposited money belongs to a third person are not available for setoff.

5. Banks and Banking § 13; Receivers § 5.1— receivership for depositor—amount of setoff by bank

A bank was entitled to set off the entire amount of defendant depositor's checking and savings accounts, $58,680, against debts to the bank of $112,572 after a receiver was appointed for defendant where defendant had $118,994 on deposit with the bank on the date the receiver was appointed, and the receiver had paid out $60,314 more than she had deposited from the time of her appointment until the date of setoff.

APPEAL by First Bank from Order of *F. Fetzer Mills, Judge*, entered 11 January 1988 in MOORE County Superior Court. Heard in the Court of Appeals 26 October 1988.

Robinson, Bradshaw & Hinson, P.A., by Peter C. Buck, Everett J. Bowman, and Allain C. Andry, for appellant First Bank.

Eugene J. Cella for appellee, State of North Carolina, North Carolina Securities Division.

Crisp, Davis, Schwentker, Page & Currin, by Diane A. Wallis, for appellee.

COZORT, Judge.

The State of North Carolina filed an action against defendant Fred R. Lawrence and various corporations alleging violations of

State securities laws. A receiver was appointed to preserve and manage the assets of defendants. First Bank, not formally made a party in the State's lawsuit, set off money in defendant Lawrence's bank account to cover his outstanding debts to First Bank. The trial court granted the receiver's motion to direct First Bank to release the funds set off against defendant's loans. First Bank appeals. We reverse. The facts follow.

The action filed by the State alleged that defendant Lawrence and the various corporations had engaged in the illegal sale of securities since 1981. In response to the State's request, a temporary restraining order (T.R.O.) was issued on 5 November 1986 enjoining the sale of securities. In the order the trial court appointed a receiver to preserve and protect the assets of the defendants.

On 7 November 1986, the receiver met with an officer of First Bank, Seven Lakes Branch, and informed the Bank that she had been appointed to manage defendants' assets and that a T.R.O. had been entered against defendants. The receiver reached an agreement with the Bank providing that defendant Lawrence's personal checking and savings accounts were to remain open. No checks or withdrawals were to be honored without the signatures of both defendant Lawrence and the receiver. On 25 November 1986, a preliminary injunction was granted to continue the provisions of the T.R.O.

Over the next eight months the receiver deposited $28,368.00 in defendant Lawrence's checking account, and the Bank paid $1,857.00 in interest into the account. The Bank paid checks drawn on the account according to the agreement with the receiver. Defendant Lawrence's checking account balance declined from $115,978.00 on 5 November 1986 to $55,555.00 on 11 August 1987. At the time of the appointment of the receiver, defendant Lawrence had several debts to First Bank. A summary of defendant Lawrence's debts to First Bank is as follows:

1) a loan for $20,000.00, dated 2 January 1986, executed by defendant Lawrence personally; $14,191.00 was overdue and outstanding on 11 August 1987, the date of setoff;

2) a loan for $48,778.00, dated 29 May 1985, executed by defendant Lawrence and Mary Lawrence; $32,353.00 was overdue and outstanding on the setoff date;

3) a loan for $10,000.00 made to Firetree Management Corporation on 31 January 1985 and personally guaranteed by defendant Lawrence; $1,528.00 was overdue and outstanding on the setoff date; and

4) a demand note for $85,500.00 made in June of 1986.

On 11 August 1987 First Bank set off $58,680.00 in defendant Lawrence's checking and savings accounts against $112,572.00 outstanding and overdue on defendant Lawrence's loans, $64,500.00 of which was overdue on the demand note. After a motion in the cause by the receiver, the trial judge ordered First Bank to pay over to the receiver the amount of setoff plus interest. First Bank appeals that order.

The issue to be decided on appeal is whether First Bank may exercise its right of setoff on defendant Lawrence's accounts after appointment of a receiver where that receiver has used the accounts to manage defendants' assets with the Bank's consent. We hold that First Bank may exercise its setoff rights.

The relationship between defendant Lawrence and First Bank was one in which he was the Bank's creditor for the amount deposited in his accounts, and the Bank was his debtor. *Killette v. Raemell's Sewing Apparel*, 93 N.C. App. 162, 377 S.E. 2d 73 (1989); *Lipe v. Guilford Nat. Bank, Inc.*, 236 N.C. 328, 330-31, 72 S.E. 2d 759, 761 (1952). Defendant Lawrence was a debtor of First Bank on various loans and guarantees. "As debtors of their general depositors banks have long had the right to setoff against the deposits any matured debts the depositors owe them. [Citation omitted.] *Nothing else appearing*, . . . the right may be exercised 'at any time after the debt becomes due,' [citation omitted] . . . ." *Killette*, 93 N.C. App. at 163, 377 S.E. 2d at 74 (emphasis added). The right of setoff is firmly rooted in equity and is, therefore, limited by the maxim: he who seeks equity must do equity. *Stelling v. Wachovia Bank and Trust Co.*, 213 N.C. 324, 327, 197 S.E. 754, 756 (1938); *see also Jefferson Standard Life Ins. Co. v. Guilford County*, 226 N.C. 441, 447, 38 S.E. 2d 519, 524 (1946) (the court stated that the maxim was more than a moral guide; it was an enforceable rule). In this case the Bank's right of setoff was also granted by contract in the promissory notes signed by defendant Lawrence. In record below, we find no evidence that First Bank acted in bad faith or with "unclean hands."

[1] Initially, we dispense with the receiver's argument that since the loans were not mature until after the receivership began, the Bank could not use its right of setoff. The receiver argues that the Bank had not made a demand for payment on the demand note. The Bank, however, had the right to be paid in full from the date of the demand note, 9 July 1986, without a formal demand for payment. N.C. Gen. Stat. § 25-3-122(1)(b) (1986). The demand note's unpaid balance was $64,500.00 at the time of setoff, 11 August 1987. The unpaid balance of the demand note alone exceeded the amount set off, $58,680.00, not to mention the total outstanding on defendant Lawrence's other loans and guarantees. The demand note was, therefore, due and payable before the receiver was appointed on 5 November 1986 and the amount due and payable exceeded the amount set off.

[2] We next consider whether the Bank's right of setoff was lost because there was no mutuality between the receiver as legal owner of the deposits and the Bank as defendant Lawrence's creditor. The receiver contends that mutuality between First Bank and defendant Lawrence was destroyed on 5 November 1986, the date of her appointment as receiver, because N.C. Gen. Stat. § 1-507.3 made her legal owner of the bank accounts. We disagree.

It is well settled that "the receiver takes the property of the insolvent debtor subject to mortgages, judgments, and other liens existing at the time of his appointment." *National Surety Corp. v. Sharpe*, 236 N.C. 35, 50, 72 S.E. 2d 109, 123 (1952). Section 1-507.3 serves as a vehicle to transfer title to and rights in property to the receiver for preservation and management of the debtor's assets. Nothing in that statute suggests that the receiver should take the property free of existing obligations. A related statute, N.C. Gen. Stat. § 1-507.8, allows a court to order the sale of encumbered assets free of encumbrances if litigation is pending and the value of the property will decline pending the litigation. That section further provides that the proceeds of such a sale "remain *subject to the same liens and equities of all parties* in interest as was the property *before* sale." N.C. Gen. Stat. § 1-507.8 (1983) (emphasis added). The appointment of the receiver did not nullify the mutual obligation between the Bank and defendant Lawrence.

[3] We next consider whether the Bank's agreement with the receiver to accept deposits and honor checks constituted a waiver of the Bank's setoff rights. A similar issue was addressed in *Killette*:

> Nor did the Bank waive its setoff right by honoring some of the company's checks after the note became due. A waiver is an intentional and permanent relinquishment of a known right, *Green v. Patriotic Order Sons of America, Inc.*, 242 N.C. 78, 87 S.E. 2d 14 (1955), that usually must be manifested in a clear and unequivocal manner. *Klein v. Avemco Insurance Co.*, 289 N.C. 63, 220 S.E. 2d 595 (1975). The law does not discourage leniency to one's debtors, and in our opinion the mere honoring of a depositor's checks after its note is due manifests only an intention by the bank to accommodate the depositor at that time; it does not indicate an intent to continue doing so in the future. If such indulgences were held to be a permanent waiver of the right of setoff it could only encourage banks to immediately offset their matured notes against the checking account balances of their depositor-debtors, a practice bound to embarrass if not ruin many hard-pressed debtors.

Killette, 93 N.C. App. at 164, 377 S.E. 2d at 74-75.

[4] Having established that the Bank's right of setoff continued after the appointment of the receiver, we now turn to the question of how much the Bank was entitled to set off. Resolution of this issue has been complicated by the commingling of defendant Lawrence's pre-receivership funds with funds deposited by the receiver. Generally, funds deposited before receivership are available for setoff while funds deposited after receivership where the Bank has knowledge that the money deposited belongs to a third person are not available for setoff. *New York Indemnity Co. v. Corporation Commission*, 197 N.C. 562, 565, 150 S.E. 16, 17 (1929).

> It is well settled that if a bank actually knows that sums deposited in the account of one of its debtors belong to a third person, it cannot apply such funds against the debtor's obligation to it. A bank is also denied the right to set off a third person's sums in its debtor's account against the debtor's obligation to it where it lacks actual knowledge or notice that the sums belong to a third person, but has knowledge of circumstances sufficient to necessitate inquiry concerning the sums. These rules have been applied in cases involving a variety of depositors.

Annotation, Bank's Right to Apply Third Person's Funds, Deposited in Debtor's Name, On Debtor's Obligation, 8 A.L.R. 3d 235, 238-39.

In this case an officer of the Bank, Rebecca Gilmore, was notified of the appointment of the receiver two days after the receiver was appointed. Ms. Gilmore stated in an affidavit that she was familiar with defendant Lawrence's business dealings with the Bank. In fact most of the corporations named as defendants in this case were headquartered in the same shopping center as the Bank. Moreover, the Bank agreed with the receiver to retain defendant Lawrence's checking and savings accounts and agreed to honor only those checks signed by both defendant Lawrence and the receiver. A change in the name of the bank account has been held in some jurisdictions to constitute inquiry notice. 10 Am. Jur. 2d *Banks* § 677 at 650 (1963). We believe the Bank had sufficient knowledge to warrant an inquiry that the receiver held legal title to funds deposited in defendant Lawrence's checking account after 7 November 1986. *Cf.*, *New York Indemnity Co.*, 197 N.C. at 565, 150 S.E. at 17. We do not believe the facts below, however, support a ruling prohibiting the Bank from setting off funds deposited by the receiver.

[5] In determining whether the Bank should be allowed to set off funds deposited by the receiver, the record reveals that on the day the receiver was appointed, 5 November 1986, defendant Lawrence had $118,994.00 on deposit with First Bank. The record shows that $30,325.00 was deposited into defendant Lawrence's accounts from January to August 1987. The record is unclear concerning whether the receiver deposited funds before January 1987. The record does reveal, however, that the receiver paid out $90,639.00 from the time of her appointment in November 1986, until the date of setoff, 11 August 1987. Since the receiver paid in only $30,325.00, and since the total paid out was $90,639.00, the receiver paid out $60,314.00 more than she paid in. The balance of defendant Lawrence's checking and savings accounts with First Bank as of the setoff date, 11 August 1987, was $58,680.00. We believe fairness dictates that the Bank should be allowed to set off $58,680.00.

The receiver has attempted to argue on appeal, as a cross assignment of error, that the trial court erred in admitting the affidavits of Ms. Gilmore. In reviewing the record, we find nothing to indicate that the receiver objected to the affidavits below as required by Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. Furthermore, the receiver did not give notice of appeal. *Id.* Rule 3. The receiver's argument is dismissed.

The order of the trial court is reversed.

Reversed.

Judges ARNOLD and WELLS concur.

EDITH A. BROWN, INDIVIDUALLY, AND BERNITA BROWN, A MINOR CHILD, BY AND THROUGH HER GUARDIAN AD LITEM, EDITH A. BROWN, PLAINTIFFS v. CLARRIE BELL LYONS AND ROBERT LYONS, DEFENDANTS

No. 889SC746

(Filed 18 April 1989)

1. **Pleadings § 33.3— automobile accident—motion to amend complaint denied—no abuse of discretion**

The trial court did not abuse its discretion in denying plaintiffs' motion to amend her complaint in an action arising from the collision of plaintiff's moped with defendants' automobile where the motion to allege that either Mr. or Mrs. Lyons negligently operated the automobile was filed seven months after defendants' original answer admitting that Clarrie Lyons owned and was operating the automobile, six months after defendants offered the certificate of title as proof of ownership and requested plaintiffs to admit that Clarrie Lyons owned the automobile; and, although the motion was filed only six weeks after a deposition revealed that a thirteen-year-old witness had seen a man's hat and jacket in the front seat of the automobile but had not seen who was driving, defendant Robert Lyons' motion for summary judgment had already been filed and over three years had passed since the accident without any mention of liability based on Robert Lyons' operation of the vehicle. N.C.G.S. § 1A-1, Rule 15(a).

2. **Automobiles and Other Vehicles § 50— collision of automobile and moped—summary judgment for one defendant—no error**

The trial court did not err in an action arising from the collision of an automobile with a moped by granting defendant Robert Lyons' motion for summary judgment where the materials before the trial court established that Clarrie Lyons owned the automobile and was driving it at the time of the

collision and there was no basis on which to hold Robert Lyons liable for negligence.

3. **Rules of Civil Procedure § 56.4— summary judgment—deposition contradicting admissions in pleadings**

The trial court did not err in an action arising from the collision of an automobile with a moped by refusing to consider a deposition in support of plaintiffs' motion to amend the complaint and in response to one defendant's motion for summary judgment to the extent that that testimony might show that someone other than Clarrie Bell Lyons was driving the automobile. A party may not create a genuine issue of material fact in order to avoid summary judgment by presenting deposition testimony which contradicts prior judicial admissions in his pleadings.

4. **Parent and Child § 5.1— injury to minor child—standing of noncustodial grandmother to bring action**

The trial court did not err in an action arising from the collision of an automobile and a moped by granting summary judgment for defendants on plaintiff Edith Brown's individual claim as parent of the injured Bernita Brown where neither plaintiffs' evidence before the court nor the pleadings establish that Edith Brown had legal custody of Bernita or was responsible for Bernita's medical expenses. Moreover, the court did not err by refusing to grant a continuance to allow plaintiffs to secure from Emanuel Brown a waiver of his right to bring the parental claim, allowing Bernita or her grandmother to bring the claim, since there was no basis in law for the action plaintiffs wished to take.

5. **Automobiles and Other Vehicles § 63.1— collision of automobile with moped—moped crossing road—summary judgment against defendant improper**

The trial court erred in granting summary judgment against Edith Brown as guardian ad litem for Bernita Brown in an action arising from the collision of an automobile driven by Clarrie Lyons with a moped ridden by Bernita Brown where two witnesses estimated that the Lyons' car was traveling around 60 miles per hour; Clarrie Lyons testified that she was driving around 45 miles per hour and applied the brakes when she first saw Bernita; she testified that even though she saw Bernita, she did not have time to blow the car horn;

she remembered pressing hard on the brakes to avoid the collision but there were no skid marks on the road; and she testified that she saw Bernita waiting by the roadside and then the moped "took on off across the road." The evidence presented was sufficient to survive a motion for summary judgment, and whether the presumption that Bernita, age thirteen, was incapable of contributory negligence was rebutted was a question for the jury.

APPEAL by plaintiffs from *Clark (Giles R.)*, and *Barefoot (Napolean B.), Judges*. Orders and judgments entered 25 September 1987 and 7 March 1988 in Superior Court, WARREN County. Heard in the Court of Appeals 15 February 1989.

Plaintiffs' complaint alleges that Bernita Brown, age 13, was injured on 10 March 1984 when her moped collided with a car kept and maintained by defendants Clarrie Bell Lyons and Robert Lyons and driven by Clarrie Bell Lyons. Bernita and her grandmother, Edith A. Brown, seek $500,000.00 in actual damages for injuries to Bernita's legs, wrists and pelvis.

On 25 September 1987, Judge Clark granted Robert Lyons' motion for summary judgment as to all issues arising in the case. On that same date, Judge Clark denied plaintiffs' motion for leave to amend their complaint. On 7 March 1988, Judge Barefoot granted Clarrie Bell Lyons' motion for summary judgment as to all issues in the case. Plaintiffs appeal.

Robert T. Perry for plaintiffs-appellants.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by James H. Johnson III and Marilyn Ann Bair, for defendants-appellees.

LEWIS, Judge.

Plaintiffs bring forward four assignments of error. First, they contend the trial court erred in denying plaintiffs' motion to amend the complaint pursuant to G.S. 1A-1, Rule 15. Plaintiffs' second assignment of error is to the granting of Robert Lyons' motion for summary judgment. Third, plaintiffs assign error to the trial court's refusal to consider a certain deposition in connection with the motion to amend the complaint and in response to Robert Lyons' motion for summary judgment. Finally, plaintiffs contend the trial court erred in granting Clarrie Bell Lyons' motion for

summary judgment. We have reviewed plaintiffs' assignments of error and conclude Judge Barefoot erred in granting summary judgment in favor of Clarrie Bell Lyons with respect to those claims asserted by Edith A. Brown as guardian *ad litem*. Plaintiffs' remaining assignments of error are overruled.

[1] We first address plaintiffs' assignment of error to Judge Clark's denial of plaintiffs' motion to amend their complaint. The original complaint filed on 24 October 1986 alleged that Clarrie Bell Lyons was operating the automobile and that her negligence was imputed to Robert Lyons as owner of the automobile. Defendants' answer admitted that Clarrie Bell Lyons owned the automobile and was operating it at the time of the collision. On 23 July 1987, the parties deposed Jewelyn Battle, a 13-year-old child present at the scene of the collision. Jewelyn testified that she saw a man's hat and jacket in the driver's seat of the car that struck the moped but that she did not see who was driving the automobile. On 4 September 1987, plaintiffs filed a motion for leave to amend the complaint to allege that Robert Lyons or Clarrie Bell Lyons negligently operated the automobile. Determining "that if said motion were allowed that prejudice would result to defendant Robert Lyons," Judge Clark denied the motion.

Leave to amend pursuant to G.S. 1A-1, Rule 15(a) should be "freely given except where the party objecting can show material prejudice by the granting of a motion to amend." *Martin v. Hare*, 78 N.C. App. 358, 360, 337 S.E. 2d 632, 634 (1985). The motion to amend may be denied for "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.* at 361, 337 S.E. 2d at 634. The ruling on a motion to amend is within the trial court's discretion and is not reviewable absent an abuse of discretion. *Id.* In this case, plaintiffs' motion to amend was filed seven months after defendants' original answer admitted that Clarrie Bell Lyons owned and was operating the automobile and nearly six months after defendants offered the certificate of title as proof of ownership and requested plaintiffs to admit that Clarrie Bell Lyons owned the automobile. Despite the fact that plaintiffs' motion was filed only six weeks after Jewelyn's deposition was taken, Robert Lyons' motion for summary judgment had already been filed and over three years had passed since the accident without any mention of liability based on Robert Lyons' operation of the

vehicle. Upon these facts, we cannot say the trial judge abused his discretion in denying the motion. Plaintiffs' first assignment of error is overruled.

[2] Plaintiffs' second assignment of error is to the granting of Robert Lyons' motion for summary judgment. In support of this motion, he cited the allegations of the complaint and answer that Clarrie Bell Lyons was driving the car when it collided with the moped and plaintiffs' response to the request for admissions that Clarrie Bell Lyons owned the automobile. In connection with this assignment of error, plaintiffs contend the response to the request for admissions was not before the trial court at the hearing on the motion. We find no support in the record for this contention. Judge Clark's order granting summary judgment for Robert Lyons specifically states that he relied on the pleadings, defendants' request for admissions, and plaintiffs' response to the request for admissions in making his decision. Additionally, Judge Clark's order settling the record on appeal pursuant to App. R. 11 ordered that plaintiffs' response to the request for admissions be included in the record on appeal. The trial judge's settlement of the record is final and will not be reviewed on appeal. *Millsaps v. Contracting Co.*, 14 N.C. App. 321, 188 S.E. 2d 663, *cert. denied*, 281 N.C. 623, 190 S.E. 2d 466 (1972). The trial judge's settlement of the record on appeal and the judgment contradict plaintiffs' contention that the response to the request for admissions was not introduced at the hearing. Therefore, the question before this Court is whether summary judgment was properly granted in favor of Robert Lyons. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The materials before the trial court establish that Clarrie Bell Lyons owned the automobile and was driving it at the time of the collision. There is no basis on which to hold Robert Lyons liable for negligence. We find no error in the trial court's order granting summary judgment for Robert Lyons.

[3] In a related assignment of error, plaintiffs contend the trial court erred by refusing to consider the deposition of Jewelyn Battle in support of plaintiffs' motion to amend the complaint and in response to Robert Lyons' motion for summary judgment. We disagree. A party is bound by his pleadings and may not take

a contradictory position. *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 284 S.E. 2d 697 (1981). A party may not create a genuine issue of material fact in order to avoid summary judgment by presenting deposition testimony which contradicts prior judicial admissions in his pleadings. *Id.* The trial court did not err in refusing to consider Jewelyn Battle's testimony that she saw a man's hat and coat in the driver's seat before the collision. To the extent this testimony might show that someone other than Clarrie Bell Lyons was driving the automobile, the testimony contradicts plaintiffs' pleadings and was properly excluded. This assignment of error is overruled.

[4] Plaintiffs' final assignment of error is that the trial court erred in granting Clarrie Bell Lyons' motion for summary judgment. We find no error regarding the claims by Edith A. Brown individually. However, we reverse the decision granting summary judgment as to the claims by Edith A. Brown as guardian *ad litem* for Bernita.

When an unemancipated minor child is injured by another party's alleged negligence, two claims arise: (1) a claim on behalf of the child for her losses caused by the injury, and (2) a claim by the parent for loss of services during the child's minority and for medical expenses to treat the injury. *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981). Based on the parental support obligation, the parental claim traditionally has been brought by the father. *Id.* In recent years, our Supreme Court has held that a mother who has custody of a minor child and contributes to its support, including medical expenses, may have standing to bring the parental claim. *Id.* That Court has also held that a father who brings an action for damages as guardian *ad litem* and conducts the case on the basis of the child's right to recover for loss of services and earning capacity before and after the age of majority has treated the child as emancipated and has waived his own right to recover. *Shields v. McKay*, 241 N.C. 37, 84 S.E. 2d 286 (1954).

Plaintiffs contend that summary judgment was improperly granted on Edith A. Brown's parental claim for two reasons. First, they contend the trial court improperly considered the affidavit of Elizabeth Reaves, an employee of Duke University Medical Center. Ms. Reaves' affidavit stated that Bernita's medical bills were originally sent to her father, Emanuel Brown, but were returned by mail to the hospital. Subsequent billing statements were sent to Bernita

at her grandmother's address. Attached to Ms. Reaves' affidavit was a statement of financial responsibility signed by Emanuel Brown. Plaintiffs contend the affidavit should not have been considered as it was not served on plaintiffs' attorney until three days before the summary judgment hearing nor filed with the court until the day of the hearing. We find no prejudice to plaintiffs in the consideration of the affidavit. Neither plaintiffs' evidence before the trial court nor the pleadings established that Edith A. Brown had legal custody of Bernita or was responsible for Bernita's medical expenses. Plaintiffs concede that Emanuel Brown has legal custody of Bernita. Thus, even without considering the evidence in Ms. Reaves' affidavit, plaintiffs have not shown a right of recovery in Edith A. Brown individually.

Plaintiffs' second argument that summary judgment was improperly granted as to Edith A. Brown's individual claims is that the trial court improperly refused to grant a continuance to allow plaintiffs to secure from Emanuel Brown a waiver of his right to bring the parental claim. Plaintiffs reason that had Emanuel Brown waived his right to bring suit, Bernita or her grandmother could bring the parental claim. There is no case law to support plaintiffs' proposition. As noted above, Edith A. Brown has no right to recover under *Flippin v. Jarrell, supra,* as there are no allegations or evidence that the grandmother has custody or provides support for Bernita. *Shields v. McKay, supra,* cited by plaintiffs in support of their position that Bernita could bring the parental claim is also inapplicable. In this case, the father did not bring the suit as guardian *ad litem* alleging Bernita's right to recover for medical expenses and other losses during her minority. The trial court did not err in refusing to grant a continuance since there was no basis in law for the action plaintiffs wished to take. There was no error in the granting of summary judgment against Edith A. Brown individually.

[5] Finally, we reverse the trial court's order allowing summary judgment as to the claims of Edith A. Brown as guardian *ad litem.* We cannot say as a matter of law that the evidence before the trial court was insufficient to show that Clarrie Bell Lyons' negligent operation of her automobile was the proximate cause of Bernita's injuries. Both Craig Battle and Jewelyn Battle, who were present at the scene when the collision occurred, estimated the Lyons' car was travelling around 60 miles per hour. Clarrie Bell Lyons testified that she was driving around 45 miles per hour and applied

the brakes when she first saw Bernita. She also testified that even though she saw Bernita, she did not have time to blow the car horn. She remembers pressing hard on the brakes to avoid the collision but there were no skid marks on the road. The evidence presented is sufficient under G.S. 1A-1, Rule 56 to survive a motion for summary judgment.

Clarrie Bell Lyons testified she saw Bernita waiting by the roadside and then the moped "took on off across the road." To the extent this evidence may show Bernita was negligent, the order granting summary judgment cannot be sustained on the basis of her contributory negligence as a matter of law. "There is . . . a rebuttable presumption that a child between the ages of seven and fourteen is incapable of contributory negligence." *Johnson v. Clay*, 38 N.C. App. 542, 546, 248 S.E. 2d 382, 385 (1978). A child in this age bracket may not be held contributorily negligent as a matter of law. *Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967). Whether the presumption has been rebutted is a question for the jury. *Johnson v. Clay, supra.* The only error was the granting of the motion for summary judgment as to Edith A. Brown's claims as guardian *ad litem.*

Affirmed in part; reversed in part.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. KENNETH MARVIN KNIGHT

No. 8819SC672

(Filed 18 April 1989)

1. Criminal Law § 35— wife's motive to fabricate offenses against daughters—testimony irrelevant

In a prosecution of defendant for first degree sexual offenses involving his stepdaughters, testimony defendant sought to elicit from his wife concerning her financial motive to encourage her daughters to fabricate the sexual incidents in question was not relevant and was properly excluded where the subornation theory was not supported by evidence from other sources; the investigation into allegations of sexual abuse

was initiated by a school counselor to whom one stepdaughter confided because she felt she could not tell her mother; and the evidence against defendant included a diary in which one stepdaughter detailed the incidents of sexual abuse. Even if such evidence was relevant, it was properly excluded because its probative value was substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rules 401 and 403.

2. Criminal Law § 82.2— psychologist-patient relationship— evidence of child sexual abuse

Assuming that a psychologist-patient relationship existed between a clinical psychologist and defendant, testimony by the psychologist that defendant told her he had been seduced by his stepdaughter was admissible under N.C.G.S. § 8-53.3 as evidence regarding the abuse of a child.

APPEAL by defendant from *Davis, James C., Judge.* Judgment entered 5 February 1988 in Superior Court, CABARRUS County. Heard in the Court of Appeals 14 February 1989.

Defendant appeals from his conviction of first-degree sexual offense in violation of G.S. sec. 14-27.4. He was sentenced to life imprisonment.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Alan S. Hirsch, for the State.

H. Edward Knox and Lisa G. Caddell for defendant-appellant.

JOHNSON, Judge.

The evidence presented by the State in this matter revealed that defendant was married to Sharon St. John Knight in 1985. At the time of the marriage, Mrs. Knight had three children from a previous marriage, one son and two daughters. Defendant was charged with two counts of first-degree sexual offense, one committed against each of the daughters. He was convicted of the charge stemming from the 19 September 1987 incident upon the older daughter (daughter number one) who was twelve years old when the crime was allegedly committed, and acquitted of the charge stemming from the 20 October 1987 incident in which the younger daughter (daughter number two), who was ten years old at the time, was the victim. For purposes of this appeal we concern ourselves primarily with the charge for which defendant was con-

victed, the first-degree sexual offense arising from the 19 September 1987 incident.

Daughter number one testified that on Saturday, 19 September 1987, at a little before noon, she went out onto the back porch of her parents' home to ask defendant if he wanted a cold drink. He responded that he wanted a pack of cigarettes and a drink. When she returned with the items she found him behind a door. After giving the items to him, he asked her to "[h]old on a second." He then told her to get on her knees and to "[s]uck my yo-yo [penis] like a lollipop." She placed his penis into her mouth and moved her head over it back and forth as she was instructed to do for a few minutes. Defendant then masturbated in front of the child and she watched as "[w]hite stuff came out" of his penis. She also testified that her brother and sister were outside playing when the incident occurred.

Daughter number one also testified in detail about prior sexual acts between herself and defendant, her stepfather. She stated that defendant would make her "jack him off" by making her "move [her] hand over his penis up and down." She did not remember precisely when these incidents occurred, although she recalled that they happened prior to the 19 September incident. He would also dress in women's underwear and have her perform fellatio or fondle his penis. He also showed daughter number one photos of himself dressed in women's underwear and handcuffed to the bed or tied.

Daughter number one also read an excerpt from her diary which was dated 16 and 17 June 1987. She read the following:

> A. "He's a G.D. a-s-s hole. Instead of rubbing his dick, I rather kick him in the nuts. That'll be the day. If I had the guts I would tell him and let us go to court and testify but I just don't think I can. If I tell her,"—tell Mama—"tell her, she'll tell Ken and he'll get even more madder. I hate to be dishonest to her but it's for her own good. Maybe we, me and Tracy, can go to court and get Ken punished for all the nasty things he has made us do and has done to me. Why me, or something. I'm just so D stupid. How could, how could I let this happen? Why did I have to grow us so fast? Why?"

She described her relationship with her stepfather as bad, meaning that "[h]e just never like me in any other way but—for his own advantage."

The State presented several witnesses to corroborate daughter number one's testimony. Clinton Nobles testified that on the evening of 18 September at around 11:00 he and defendant had an argument which defendant's stepchildren witnessed. Daughter number one had used this incident to pinpoint the date of the incident for which defendant was convicted. She remembered that the incident occurred after the argument on the following day.

Judith Helms, a school counselor, testified that daughter number two, a fifth grader at her school, scheduled an appointment with her for 21 October 1987. When she arrived, the student handed her a note which described the sexual acts which defendant forced her and her sister to perform, such as fellatio. She also stated in the note that she was scared "to go home in the afternoon to see what is going to happen next," that he had her perform these acts in the morning also, and that she had to tell someone older, but not someone in her family. After discussing the matter with her in greater depth, Mrs. Helms excused herself and called a social worker, Carol Renfrow of the Department of Social Services, to ask her advice as to whether she should send the child home, as well as to report the case of possible sexual abuse. This counseling session commenced the investigation into circumstances existing at the Knight home.

Faye Sultan, a clinical psychologist, also testified for the State. She stated that she began treating both the daughters and their mother on 9 November 1987. On 8 November 1987, she received a telephone call from defendant during which he made an appointment for the following week. After her initial visit with the girls and their mother, she recognized a possible conflict of interest and telephoned defendant on 10 November 1987 to suggest other treatment options. She was allowed to testify over objection that during this conversation defendant told her that "he had been seduced by his stepdaughter and that he had been stupid and that he had fallen into a trap."

Defendant testified in his own behalf that since the age of nine or ten he had gained satisfaction from wearing women's underwear. He also testified that he gained sexual pleasure in bondage, which included wearing handcuffs and being blindfolded. He stated that on 19 September 1987, the date of the incident with daughter number one, he worked on remodeling a kitchen from about 8:30 a.m. until about 7:00 or 7:30 p.m. and that he

left once during that day between 10:30 and 11:30 to go to a hardware store to purchase materials. The receipt from the hardware store bore the date of 19 September 1987 and a time of 1:05 p.m. James Rogers, the homeowner for whom defendant had worked that day, basically corroborated defendant's testimony. Defendant also denied ever having any sexual contact with either of his stepdaughters.

By this appeal defendant presents two questions for review. First, he argues that the exclusion of testimony he sought to elicit from his wife concerning her motive to encourage her daughters to fabricate the sexual incidents was error, and second, that the admission of Dr. Faye Sultan's testimony constituted an abuse of discretion.

[1] Defendant sought to introduce testimony to support his theory that his wife devised the scheme involving her daughters in what is essentially a domestic dispute, to rid herself of defendant and to retain the "comfortable life she had come to know as the [d]efendant's wife," including the marital residence he had provided for her. Defendant relies upon *State v. Helms*, 322 N.C. 315, 367 S.E. 2d 644 (1988), to support his contention that the evidence concerning motive was relevant and should have been admitted. We are not convinced.

In *Helms*, defendant was charged with committing sexual offenses upon two of her stepsons. At trial she was not allowed to introduce evidence that approximately two weeks before the accusation of the sexual offenses was brought by the children's natural mother, defendant and her husband, along with one of the stepsons, consulted an attorney for the purpose of seeking to obtain legal custody of the boys. Our Supreme Court accepted defendant's argument that the evidence was relevant within the meaning of G.S. sec. 8C-1, Rule 401 because it tended to establish why the boys' natural mother may have suborned their testimony. The Court concluded that its exclusion unfairly prejudiced defendant's case resulting in error since "there [was] a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *Helms* at 319, 367 S.E. 2d at 647, *quoting* G.S. sec. 15A-1443(a).

In reaching this conclusion, the Court reasoned that

> [t]his evidence tends to support and make more plausible defendant's evidence that Diane Rogers [the natural mother] suborned the boys' testimony. Whatever antipathy might naturally exist between a natural mother and a stepmother would be exacerbated when the stepmother threatens the natural mother with loss of her children's custody.
>
> . . . .
>
> . . . The defense in this case was premised largely on the theory that Diane Rogers caused her sons to make up false charges against defendant. Such a theory, divorced from evidence that defendant and Richard Helms [the boys' father] were planning to institute a custody action against Diane Rogers, is not nearly so plausible as it would be in the presence of such evidence.

Helms at 319, 367 S.E. 2d at 647.

We find *Helms* distinguishable from the facts in the case *sub judice*. First, unlike the defendant in *Helms*, defendant's defense did not rest primarily upon the subornation theory. In *Helms*, several witnesses, including the boys' father, paternal grandfather, and their social worker, testified that on several separate occasions both boys stated that their natural mother had convinced them to fabricate these accusations. We have no such testimony in the case *sub judice* which would have raised the issue of subornation. In *Helms*, this theory was supported by evidence from other sources rather than from defendant alone, as in the instant case. Second, it is crucial to note that in the case at bar the investigation into the allegations of sexual abuse was initiated by a school counselor to whom daughter number two confided because she felt that she could not tell her mother, who had, according to defendant, planned the entire scheme. This fact alone is key in refuting defendant's theory and in rendering the evidence submitted in support thereof irrelevant. By contrast, in *Helms*, the natural mother initiated the investigation, thus rendering the theory more tenable and the evidence submitted in support thereof, relevant. Lastly, the evidence in the case *sub judice*, on the charge for which defendant was ultimately convicted, included a diary written by daughter number one several months earlier detailing the incidents of sexual abuse. The evidence in the instant case was more substantial than that in *Helms* and did not depend solely upon "which witnesses the jury [chose] to believe." *Id.*

Had the evidence met the G.S. sec. 8C-1, Rule 401 test of relevance, which we have concluded it did not, the directive of G.S. sec. 8C-1, Rule 403 would still have precluded its introduction. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues, or misleading the jury,* . . ." G.S. sec. 8C-1, Rule 403 (emphasis added). We believe that the evidence defendant sought to introduce, which primarily involved the couple's dispute over their marital property would only have muddled the evidence worthy of the jury's consideration. Therefore, for all the aforementioned reasons, we conclude that the trial court committed no error in precluding the introduction of evidence regarding defendant's theory that the victims' mother devised this scheme for her financial benefit.

[2] By his second and last Assignment of Error, defendant challenges the trial court's admission of Dr. Sultan's testimony and contends that it was protected by the psychologist-patient privilege. We disagree.

Defendant telephoned Dr. Sultan, a clinical psychologist, and made an appointment. When she recognized a conflict of interest because she was also treating defendant's wife and stepdaughters, she telephoned defendant to refer him to another psychologist. Defendant then stated to her that he had been seduced by his stepdaughter. The trial court allowed this testimony and compelled disclosure over defendant's objection on the basis that it was "necessary to [the] proper administration of justice" as allowed by G.S. sec. 8-53.3.

While we are not at all convinced that the psychologist-patient relationship existed at this point, *see State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979); and *State v. Wade*, 197 N.C. 571, 150 S.E. 32 (1929), we are convinced that the trial court properly admitted the evidence. The second paragraph of G.S. sec. 8-53.3 (1988 Cum. Supp.), effective 8 June 1987, governs this case. It states the following:

> Notwithstanding the provisions of this section, the psychologist-client privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 44 of Chapter 7A of the General Statutes.

Therefore, the privilege, though properly overruled by the trial court, did not even exist as a proper ground for excluding the testimony. In fact, had the trial court excluded the evidence for this reason, it would have amounted to error.

It is for all the foregoing reasons that in the trial of defendant's case we find

No error.

Judges ARNOLD and PHILLIPS concur.

McCOY BRIMLEY, ALLEGED SON; DAVID LEE BRIMLEY, ALLEGED SON; SHIRLEY MARIE BRIMLEY, ALLEGED DAUGHTER; FEBBIE BISHOP GRAY, ALLEGED MOTHER; CORA JONES, ALLEGED WIDOW; MARGARET KNIGHT, ALLEGED SISTER; BRICY DEVREAUX, ALLEGED BROTHER OF JAMES ARTHUR BELFIELD, DECEASED, EMPLOYEE; PLAINTIFFS v. ERNEST PAIT LOGGING, EMPLOYER, AND SELF-INSURER, (HEWITT-COLEMAN AND ASSOCIATES), DEFENDANT

No. 8810IC822

(Filed 18 April 1989)

Master and Servant § 79.3— workers' compensation—illegitimate children of deceased employee—showing required to receive benefits

Adult illegitimate children of a deceased employee who are not dependents of deceased and who cannot establish paternity by deceased in accordance with N.C.G.S. § 29-19 are not "next of kin" who are entitled under N.C.G.S. § 97-40 to receive workers' compensation benefits resulting from the death of the employee.

APPEAL by claimants from the Industrial Commission. Opinion and award filed 16 May 1988. Heard in the Court of Appeals 14 March 1989.

On 12 December 1985, James Arthur Belfield, an employee of Ernest Pait Logging, suffered a fatal injury by accident arising out of and in the course of his employment. An action was brought to recover workers' compensation benefits, and the sole issue for hearing was the determination of the person or persons entitled

to receive the compensation benefits that became due as a result of Mr. Belfield's death.

The case was heard before Deputy Commissioner John C. Rush on 17 September 1986. In his opinion and award filed 26 October 1987 the deputy commissioner found as fact that:

> McCoy Brimley, David Lee Brimley and Shirley Marie Brimley are the adult acknowledged illegitimate children of the deceased. They are the next-of-kin of the deceased and they are entitled to all compensation due as a result of the death of the deceased, share and share alike.

The Full Commission reversed. Its findings of fact and conclusions of law which are pertinent to this appeal are set out below:

FINDINGS OF FACT

1. The deceased was the son of Febbie Bishop Gray. He was born on February 15, 1925. When the deceased was in elementary school, Febbie B. Gray left the plaintiff with David and Sally Belfield. They raised the deceased but never adopted him. The deceased took the Belfield name. Plaintiff Febbie Bishop Gray abandoned the deceased.

2. The deceased and Louise Brimley entered into a relationship and had three children; McCoy Brimley, who is now in excess of 25 years old; David Lee Brimley, who is now in excess of 24 years old; and Shirley Marie Brimley, who is now in excess of 22 years old. Said children are the illegitimate children of the deceased plaintiff, but are not in any way dependent upon the plaintiff nor were they dependent upon him at the time of his death or at any time prior thereto.

3. The deceased plaintiff never married anyone . . . .

4. No one was wholly dependent or partially dependent upon the deceased at the time of his injury and death on December 12, 1985.

* * * *

6. Among others, Margaret Knight and Bricy Devreaux are the sister and brother of the plaintiff respectively. There are other brothers and sisters of the deceased plaintiff although their identity is unclear from the record.

* * * *

CONCLUSIONS OF LAW

* * * *

3. McCoy Brimley, David Lee Brimley and Shirley Marie Brimley are the adult acknowledged illegitimate children of the deceased, however, at the time of the deceased plaintiff's death, they were not in any way wholly or partially dependent upon the deceased. Consequently, these named individuals are not children within the meaning of the Workers' Compensation Statute, North Carolina General Statutes § 97-2(12). They are, therefore, not entitled to compensation herein. North Carolina General Statutes § 97-38, 97-39, and 97-40.

* * * *

5. Febbie Bishop Gray, although the natural mother of the deceased plaintiff, abandoned the deceased plaintiff at a young age and never resumed the parental relationship. Her willful abandonment of the deceased plaintiff excludes her from benefits under the North Carolina Workers' Compensation Act. North Carolina General Statutes § 97-40.

6. Margaret Knight and Bricy Devreaux are the sister and brother of the deceased plaintiff respectively and as such are along with any other brothers and sisters the next of kin of the deceased and are entitled to all the compensation owed in this case. North Carolina General Statutes § 97-38, 97-40, 29-15 and 29-16.

The Brimleys appeal from the decision of the Full Commission.

Leahy and Moore, by Charles A. Moore, for appellee Febbie Bishop Gray.

Gene Collinson Smith for appellees Ernest Pait Logging and Hewitt, Coleman & Associates, Inc.

Pritchett, Cooke & Burch, by David J. Irvine, Jr. and William W. Pritchett, Jr., for appellants.

ARNOLD, Judge.

At the outset we note that claimants' brief is not in the form required by N.C. Rule Appellate Procedure § 28(b)(1):

> An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) . . .
>
> (1) A table of contents and table of authorities required by Rule 26(g).

N.C. Rule Appellate Procedure 26(g) reads in pertinent part:

> All documents presented to either appellate court other than records on appeal . . . shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

These rules enable this Court to work efficiently in its effort to meet the demands of all litigants. Though we waive the requirements of these rules in this instance, we fully expect counsel to comply in the future.

The sole question for decision is whether adult illegitimate children, who cannot show compliance with the requirements of N.C.G.S. § 29-19 of the intestate succession act, are "next of kin" as defined in N.C.G.S. § 97-40. We hold that they are not.

When reviewing an order of the Industrial Commission this Court is "limited to questions of law, whether there was competent evidence before the Commission to support its findings of fact and whether such findings justify the legal conclusions and decisions of the Commission." *Carpenter v. Tony Hawley, Contractors*, 53 N.C. App. 715, 717-18, 281 S.E. 2d 783, 785, *disc. rev. denied*, 304 N.C. 587, 289 S.E. 2d 564 (1981). In its Conclusion of Law numbered (3) the Full Commission found that the Brimley children were acknowledged illegitimates, but relied on the definition of child in N.C.G.S. § 97-2(12) and determined that the Brimleys "were not in any way wholly or partially dependent upon the deceased. Consequently these named individuals are not children within the Workers' Compensation Statutes." We find sufficient evidence to support the Commission's finding that the Brimleys were the acknowledged illegitimate children of the decedent. Though we affirm the opinion and award of the Full Commission, we do not agree that the question of dependency is controlling here.

N.C.G.S. § 97-40 sets out who shall receive payment of compensation in the *absence* of dependents. The Commission's reliance on N.C.G.S. § 97-2(12) to interpret who shall take payment of compensation in the absence of dependents as set out in N.C.G.S. § 97-40 is misplaced. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). In that case the Supreme Court found that the General Assembly intended "to remove requirements of dependency, age and marital status from the definition of next of kin" in N.C.G.S. § 97-40. *Id.* at 303-04, 188 S.E. 2d at 283. Therefore, the question of dependency is entirely irrelevant to the question of who takes under N.C.G.S. § 97-40.

This case is also unlike *Carpenter*, which resolved when a minor, dependent, illegitimate may take under N.C.G.S. § 97-2(12). When construing a case which involves dependents we said:

> [F]or the limited purpose of establishing who is entitled to the compensation payable under North Carolina's Workers' Compensation Act, the Industrial Commission has the authority to make a determination as to the paternity of an illegitimate child.

Carpenter at 718, 281 S.E. 2d at 785. In *Carpenter*, the question presented was whether the illegitimate minor daughter was "acknowledged" within the meaning of N.C.G.S. § 97-2(12). In that case it was argued that "[b]y using the word 'acknowledged' . . . the legislature intended to require that an illegitimate child's status be established in a written instrument or judicial proceeding." *Id.* at 720, 281 S.E. 2d at 786. The *Carpenter* court disagreed, concluding that in "paternity actions, the term 'acknowledgment' generally has been held to mean the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts, and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted." *Id.*

However, for purposes of N.C.G.S. § 97-40 the status of an illegitimate child, who is not a dependent, must be established by the more formal means required by the intestacy statute.

In pertinent part N.C.G.S. § 97-40 reads:

> [I]f the deceased employee leaves neither whole nor partial dependents, then the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin

> as herein defined. For purposes of this section and G.S. 97-38, *"next of kin" shall include only child, father, mother, brother or sister of the deceased employee, including adult children* or adult brothers or adult sisters of the deceased, but excluding a parent who has willfully abandoned the care and maintenance of his or her child and who has not resumed its care . . . . For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, *the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate.* (Emphasis added.)

This last, emphasized, portion of the statute is controlling. In this instance, where there is an *absence of dependents*, the legislature has commanded that "the order of priority . . . shall be governed by the *general law applicable*" to intestate estates. We interpret this broad phrase to encompass not only the shares and priority of distribution outlined in N.C.G.S. §§ 29-15, 29-16, but also the mandates of N.C.G.S. § 29-19:

> (b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:
>
> (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

The Brimleys have not shown evidence of compliance with N.C.G.S. § 29-19, therefore for purposes of N.C.G.S. § 97-40 they are not "next of kin."

We are not unsympathetic to the Brimleys' position, however the statute leaves us no choice but to conclude that the opinion and award of the Full Commission must be

Affirmed.

Judges JOHNSON and PHILLIPS concur.

IN THE MATTER OF: THE ESTATE OF WILLIAM L. STURMAN, DECEASED

No. 8826DC635

(Filed 18 April 1989)

1. **Infants § 9— revocation of letters testamentary—appointment of guardian ad litem for deceased's children—no error**

The Clerk of Superior Court had statutory authority to appoint a guardian ad litem for the minor heirs of the Sturman estate in a proceeding for the revocation of the letters testamentary of the administratrix. A revocation hearing should be characterized as a special proceeding for the purposes of applying N.C.G.S. § 1A-1, Rule 17 because the hearing is initiated by filing notice instead of a complaint and summons and is prosecuted without regular pleadings; Rule 17 provides for the appointment of a guardian ad litem in actions or special proceedings where a party is either a plaintiff or defendant. The minor heirs clearly had a vested interest in who administered the estate of their deceased father and were entitled under N.C.G.S. § 28A-9-1 to appeal the decision of the Clerk on the revocation issue.

2. **Attorneys at Law § 7.5— guardian ad litem—attorney fee taxed to estate—no error**

The Clerk of Superior Court did not err by taxing the costs of the guardian ad litem's attorney fee to the estate where the Clerk upon his own motion sought to have the administratrix of the estate removed; the minor heirs clearly had a vested interest and the right of appeal from the Clerk's determination; and the Clerk took the appropriate and proper step of appointing a guardian ad litem to protect their interests.

APPEAL by administratrix-appellant from *Boner (Richard D.), Judge.* Order entered 13 January 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 December 1988.

On 20 December 1984, Janis H. Sturman was appointed administratrix of her husband's estate. During the course of her administration, Mrs. Sturman received an order from the Assistant Clerk to appear and show cause why she should not be removed as the administratrix. This proceeding was initiated by the Clerk *ex mero motu.*

On 6 April 1987, John F. Rudisill, a licensed attorney, was appointed by the Clerk of Court as guardian ad litem of the minor heirs of the Sturman estate. He was appointed for the purpose of representing their interests at the hearing and subsequent appeal involving the petition to remove the administratrix. Rudisill replaced another attorney who had been the minor heirs' guardian ad litem for the purpose of the sale of the estate's real property. *See* G.S. 28A-9-1 (1984).

The Assistant Clerk of Superior Court issued an order on 22 June 1987 revoking the letters testamentary of the administratrix pursuant to G.S. 28A-9-1. The matter was appealed to Superior Court where the Clerk's order was reversed.

On 9 October 1987, Rudisill filed a petition for legal fees as guardian ad litem in the amount of $3,917.85. On 14 October 1987, the Assistant Clerk of Superior Court entered an order allowing the fees. The administratrix filed exceptions to this order which was affirmed by the Superior Court.

The administratrix claims on appeal that the Clerk of Superior Court did not have the power to appoint a guardian ad litem in a probate matter. Further, the administratrix claims that even if the Clerk did have the authority to appoint a guardian ad litem, the Clerk did not have the power to order the administratrix to pay the attorney's fees out of the decedent's estate.

James, McElroy & Diehl, P.A., by Robert H. Sheppard and P. Kevin Carwile, for administratrix-appellant.

John F. Rudisill, Guardian Ad Litem for William L. Sturman, Jr. and Mary Lura Sturman, Minor Heirs of the Estate of William L. Sturman.

ORR, Judge.

I.

[1] The first consideration for this Court is whether the procedure for the revocation of the letters testamentary of an administratrix

as set forth in G.S. 28A-9-1 is an "action" or "special proceeding." *See* G.S. 1A-1, Rule 17 (1983). If the revocation matter is an "action" or "special proceeding" under G.S. 1A-1, Rule 17(b), then the Clerk had statutory authority to appoint the guardian ad litem.

Rule 17 provides for the appointment of a guardian ad litem "in actions or special proceedings" where a party is either a plaintiff or a defendant. *See* G.S. 1A-1, Rule 17(b)(1) and (b)(2). In G.S. 1A-1, Rule 17(b)(3), the rule allows the appointment of a guardian ad litem "notwithstanding the provisions of (b)(1) and (b)(2) . . . in any case when it is deemed by the Court in which the action is pending expedient to have the infant . . . so represented . . . ."

The administratrix argues for a narrow construction of this rule on the grounds that the minor heirs were not "parties" to the revocation procedure and that it was neither an action nor special proceeding as required by Rule 17. We decline to adopt the administratrix' position and hold that the Clerk was authorized under Rule 17 to appoint a guardian ad litem in this matter. Clearly, the minor heirs had a vested interest in who administered the estate of their deceased father and were entitled under G.S. 28A-9-1 to appeal the decision of the Clerk on the revocation issue. This is sufficient in our view to bring the matter within the purview of Rule 17 providing it is an "action or special proceeding."

Relying on the authority of *Phil Mechanic Construction Co. v. Haywood*, 72 N.C. App. 318, 325 S.E. 2d 1 (1985), we further conclude that the revocation hearing constitutes a special proceeding. In *Mechanic*, the plaintiffs contended that an action brought under G.S. 45-21.1 *et seq.* dealing with foreclosure was neither a court action nor a special proceeding.

Our Court noted:

> 'Actions include those proceedings which are instituted and prosecuted according to the ordinary rules and provisions relative to actions at law or suits in equity . . . special proceedings include those proceedings which are not ordinary in this sense, but are instituted and prosecuted according to some special mode, as in the case of proceedings commenced without a summons, and prosecuted without regular pleadings, which are characteristic of ordinary actions.'

Id. at 321, 325 S.E. 2d at 2 (quoting 1 C.J.S., Actions, Section 42 (1936—Supp. 1984)).

The Court in *Mechanic* concluded that since the rights sought to be enforced under G.S. 45-21.1 *et seq.* were instituted by filing a notice instead of a complaint and summons and were prosecuted without regular pleadings, they were properly characterized as "special" proceedings.

Likewise, in the case *sub judice*, a revocation hearing pursuant to G.S. 28A-9-1 is instituted by filing notice instead of a complaint and summons, and is prosecuted without regular pleadings. We also conclude that this procedure should be characterized as a "special proceeding" for the purpose of applying Rule 17. We therefore affirm the Clerk's action in appointing a guardian ad litem.

II.

[2] We turn now to the issue of the Clerk's authority to tax the costs of the guardian ad litem's attorney fee to the estate. The administratrix contends that there is no authority for such action. We disagree for the reasons set forth below and affirm the trial court's decision.

As noted in the case of *In re NCNB*, 52 N.C. App. 353, 278 S.E. 2d 330, *disc. rev. denied*, 303 N.C. 544, 281 S.E. 2d 393 (1981), counsel fees are not recoverable as a part of costs except where provided by law which means either by statutory authority *or* by virtue of case law sanctioning such recovery.

Under both G.S. 7A-306 governing "Costs in special proceedings" and G.S. 7A-307 governing "Costs in administration of estates," the court is authorized to tax as costs both counsel fees and fees for a guardian ad litem "as provided by law." Under G.S. 7A-103(11) dealing with the powers of a clerk of superior court, a clerk can "[a]ward costs . . . as prescribed by law, to be paid . . . out of the estate . . . in any proceeding before him." Therefore, there is ample authority for the Clerk's action in the case *sub judice* if such action is authorized either by statute or by case law.

Since there is no specific statutory authority for either counsel fees or guardian ad litem fees in this type of case to be taxed as costs, we must rely on prior decisions of our courts. To this extent, we can find authority for the Clerk's action in *In re Stone*, 176 N.C. 336, 97 S.E. 216 (1918), where the issue before the Court was an award of attorney's fees due to the attorney hired by the minor's "next friend." The Court noted:

> The *prochein ami*, or next friend, is appointed by the court to protect the infant's rights. It is essential that he have the assistance of counsel learned in the law. The infant has no power to contract as to fees, and in most cases is too young to understand such matters. Referring to the duty of the court in respect to infants, in *Tate v. Mott*, 96 N.C. 23, Judge Merrimon says: 'The infant is in an important sense under the protection of the court; it is careful of his rights, and will in a proper case interfere in his behalf and take, and direct to be taken, all proper steps in the course of the action for the protection of his rights and interests.'
>
> It would be very singular that the Courts should assume the duty of seeing that all steps are taken to protect the infant's rights and yet deny to themselves the power to compel the payment of the necessary expenses out of the infant's estate recovered in the cause.

Id. at 338, 97 S.E. at 217.

Additional authority for this proposition can be found in *In Re Will of Howell*, 204 N.C. 437, 168 S.E. 671 (1933).

> It is true, that in the exercise of chancery powers, or by express statute, the court may make an allowance for attorney's fees as reasonable expenses incurred by a personal representative, trustee, or person appointed by the court for a particular purpose, as next friend or guardian *ad litem* for an infant or insane person. In such cases the amount to be paid does not depend upon the agreement of the parties, but is within the control of the court.

Id. at 438, 168 S.E. at 672.

In the case before us, the Clerk upon his own motion, sought to have the administratrix of the estate removed. Since the minor heirs clearly had a vested interest and the right of appeal from the Clerk's determination, the Clerk took the appropriate and proper step of appointing a guardian ad litem to protect their interests. To say as in *Stone* that the Clerk properly assumed the duty of seeing that all steps were taken to protect the minors' rights, but was powerless to compel the payment of the necessary expenses from the estate to which the heirs would potentially benefit, would indeed be "singular" and a detriment to the proper administration of justice and the protection of minors.

The decision of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

ALEXVALE FURNITURE, INC., PLAINTIFF v. ALEXANDER & ALEXANDER OF THE CAROLINAS, FORMERLY ALEXANDER & ALEXANDER, A CORPORATION, AND INDUSTRIAL RISK INSURERS, AN UNINCORPORATED ASSOCIATION, DEFENDANTS

No. 8826SC837

(Filed 18 April 1989)

1. **Rules of Civil Procedure §§ 15.1, 34— refusal to compel discovery—sanctions for abuse—denial of motion to amend**

The trial court's order refusing to compel discovery, sanctioning plaintiff's counsel for abusing discovery, and denying plaintiff's motion to amend the complaint and to reconsider previous orders denying amendment was supported by unchallenged findings that plaintiff's motion to compel discovery sought the production of the same documents sought by a prior motion which had been denied by another judge; plaintiff's second set of interrogatories and third request to produce were beyond the scope of permissible discovery; and plaintiff's motion to amend had been ruled upon twice, was not offered in good faith, and would serve primarily to delay the actions and prejudiced defendants.

2. **Unfair Competition § 1— unfair insurance business practice—insufficiency of complaint**

Plaintiff's complaint was insufficient to state a claim under N.C.G.S. § 58-54.4(11) for unfair or deceptive acts or practices in the business of insurance where it alleged only that defendants "knowingly misrepresented the plaintiff's insurance coverage and failed to act with reasonable promptness in response to plaintiff's claim" but failed to allege that the act complained of was done with such frequency as to indicate a general business practice.

APPEAL by plaintiff from *Snepp, Judge*. Order entered 25 March 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 March 1989.

This action for breach of contract and other relief and a declaratory judgment action brought by defendant Industrial Risk Insurers concern an insurance policy it sold plaintiff through Alexander & Alexander of the Carolinas. The policy insured certain of plaintiff's manufacturing plants against property damage and business interruption loss due to fire. One of the plants caught on fire on 8 June 1984 and the property damage claim, amounting to $439,463.13, was paid within a few weeks but the claim for business interruption loss is still unresolved. Initially submitted in March 1985 for $618,107.78, defendant paid $194,165.80 on the claim in April 1985, and plaintiff increased it to $1,024,289.55 in February 1986. Defendant IRI's declaratory judgment action to establish its further liability if any was filed on 6 June 1986 and this action to recover plaintiff's claimed loss and other damages was brought a week later. Plaintiff alleged six claims for relief, including breach of contract, fraud, and unfair or deceptive acts or practices in the business of insurance under G.S. 58-54.4(11). Defendants denied all the claims and both sides in both cases have taken extensive pre-trial steps, some of which have not been concluded, though the record now runs to more than 700 pages. Plaintiff's appeal concerns the dismissal of its unfair or deceptive insurance business practices claim, the refusal of the court to permit plaintiff to amend the complaint to replead that claim, and several rulings in regard to discovery. The following developments led to the appeal:

On 25 February 1987 Judge Allen entered an order which denied plaintiff's motion to compel the production of various documents requested "without prejudice to . . . seeking a further production . . . within reasonable limits, and with more specificity"; denied plaintiff's motion to compel answers to certain interrogatories and required defendants to more fully answer two others; and granted defendant IRI's motion to dismiss plaintiff's sixth claim based upon unfair or deceptive insurance business practices. On 5 October 1987 plaintiffs moved to amend the complaint by adding a redrafted sixth claim for unfair or deceptive insurance business practices under G.S. 58-54.4(11). On 20 October 1987 plaintiff moved to compel IRI to produce certain documents. On 6 November 1987 plaintiff directed a second set of interrogatories and a third re-

quest for production of documents to both defendants and on 9 December 1987 IRI moved for a protective order. On 12 November 1987 Judge Snepp, noting that the "purported claim" for unfair or deceptive business practices was dismissed from the original complaint by Judge Allen, entered an order denying plaintiff's motions to amend the complaint and to compel IRI to produce documents. On 22 January 1988 plaintiff moved to compel responses to the second set of interrogatories and third request to produce against IRI. On an unstated date in January 1988 plaintiff moved to compel defendant A&A to comply with its first and second sets of interrogatories and second request for production. On 10 February 1988 defendant A&A moved to dismiss plaintiff's sixth claim to the extent that it had not been dismissed by prior orders of Judge Snepp and Judge Allen. On 1 March 1988 plaintiff again moved to amend the complaint to allege an unfair or deceptive insurance business claim under G.S. 58-54.4(11) and for a rehearing of the prior orders of Judge Allen and Judge Snepp with respect thereto. On 25 March 1988 Judge Snepp entered the order appealed from; it denied plaintiff's motion to compel answers to interrogatories and produce documents; denied plaintiff's motion to amend the complaint and for a rehearing on the orders previously entered; sanctioned plaintiff's counsel for abusing discovery; entered a protective order; and dismissed plaintiff's sixth claim against A&A if it had not been dismissed by Judge Allen's order dismissing that claim as to IRI.

Anderson, Cox, Collier & Ennis, by Henry L. Anderson, Jr., for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Jack A. Gardner, III and Scott C. Lovejoy, for defendant appellee Alexander & Alexander of the Carolinas.

Rodney A. Dean and Robins, Kaplan, Miller & Ciresi, Atlanta, Georgia, by A. James Anderson and Lori D. Zack, for defendant appellee Industrial Risk Insurers.

PHILLIPS, Judge.

Correctly recognizing that the order appealed from is interlocutory and its appealability questionable, G.S. 1-277, G.S. 7A-27(d), plaintiff also filed a petition for *certiorari* which we have granted. Not because the appeal has merit, though, for it has none; but because the appeal cannot ever be won and the ends of justice,

as well as judicial economy, require that it be disposed of now, rather than a year or two from now after this process is repeated to the inconvenience of parties and courts alike.

[1] As plaintiff has recognized, all but one of the court's actions addressed by this appeal—refusing to compel discovery and sanctioning for its abuse; refusing to permit plaintiff to amend the complaint and to rehear and reconsider the previous orders—were *discretionary. American Telephone and Telegraph Co. v. Griffin*, 39 N.C. App. 721, 251 S.E. 2d 885, *disc. rev. denied*, 297 N.C. 304, 254 S.E. 2d 921 (1979); *Williams v. State Farm Mutual Automobile Insurance Co*, 67 N.C. App. 271, 312 S.E. 2d 905 (1984); Rule 60(b), N.C. Rules of Civil Procedure; *Burwell v. Wilkerson*, 30 N.C. App. 110, 226 S.E. 2d 220 (1976). To upset such an act clear abuse must be shown. *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). Judicial action supported by reason is not an abuse of discretion. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). It is also the law that a trial court's unchallenged findings of fact are binding upon appeal, *In re Sterling*, 63 N.C. App. 562, 305 S.E. 2d 769 (1983), and the order appealed from contains unchallenged findings of fact and conclusions of law that clearly support all the discretionary rulings made. Among the findings plaintiff has not assailed, and that are now unassailable, are that plaintiff's motion to produce "sought the production of the very documents" Judge Allen had denied by a prior order; that plaintiff's second set of interrogatories and third request to produce to IRI were "beyond the scope of permissible discovery" and were "not reasonably calculated to lead to discoverable matters"; that plaintiff's motion to amend the complaint had been considered and ruled upon twice and was not "offered in good faith" and would serve "primarily to delay these actions and prejudice the defendants." These and other facts which support the order having been judicially established as a matter of law, plaintiff's arguments that the court's actions constituted an abuse of discretion have no foundation.

Though we have addressed the correctness of the court's discretionary rulings and will address the correctness of the ruling that was not, these questions were not really raised by plaintiff's appeal. Since the court's findings of fact and conclusions of law were not challenged in any authorized way, the only questions that plaintiff's appeal really raised are whether the facts found support the order, and whether error of law appears on the face of the order, *Motor Inn Management, Inc. v. Irvin-Fuller Develop-*

ment Co., Inc., 46 N.C. App. 707, 266 S.E. 2d 368, *disc. rev. denied, appeal dismissed*, 301 N.C. 93, 273 S.E. 2d 299 (1980); questions that have already been answered adverse to the appellant. In getting the appeal underway plaintiff merely wrote numbered exceptions next to findings of fact and other parts of the order, not one of which, though, was followed by an assignment of error stating that a finding of fact or conclusion of law was invalid for any reason whatever. Writing in a numbered exception next to a finding of fact or conclusion of law does not raise a legal issue as to its validity; to raise a legal issue on appeal as to the validity of a finding of fact or conclusion of law, in addition to excepting to it it is also necessary to state by an assignment of error why the finding or conclusion is claimed to be erroneous. Rule 10(c), N.C. Rules of Appellate Procedure. Furthermore, plaintiff has not argued in the brief that any of the findings were invalid, or that the findings do not support the conclusions and order, but has argued that the various actions of the court were erroneous or an abuse of discretion for reasons irrelevant to the foundation upon which the actions rest.

[2] The court's one nondiscretionary action—dismissing the unfair or deceptive practice claim against Alexander & Alexander—was entirely proper. For even if the claim was not dismissed by Judge Allen's order dismissing that claim against IRI, as it arguably was since the claim against both defendants was stated in the same three paragraphs, and Judge Allen ruled that the allegations failed to "state a claim . . . upon which relief may be granted," Judge Snepp did not err in dismissing it. Because a necessary element of a claim for unfair or deceptive practices in the business of insurance, which must be alleged according to *Marshburn v. Associated Indemnity Corp.*, 84 N.C. App. 365, 354 S.E. 2d 752, *disc. rev. denied*, 319 N.C. 673, 356 S.E. 2d 779 (1987), is that the forbidden act complained of was done "with such frequency as to indicate a general business practice," G.S. 58-54.4(11); and the only factual allegation bearing thereon in this claim was that defendants "knowingly misrepresented the plaintiff's insurance coverage and failed to act with reasonable promptness in response to plaintiff's claim."

Affirmed.

Judges JOHNSON and COZORT concur.

CHARLES E. FLOWERREE AND WIFE, JANE FLOWERREE v. CITY OF CONCORD, NORTH CAROLINA AND THE CONCORD BOARD OF ADJUSTMENT

No. 8819SC386

(Filed 18 April 1989)

1. **Municipal Corporations § 30.19— apartments—vacant between tenants and during renovations—not a cessation of nonconforming use**

The trial court properly concluded that there was no cessation of plaintiffs' nonconforming use and reversed the City Board of Adjustment's denial of a certificate of occupancy for plaintiffs' duplex apartment where the undisputed facts showed that plaintiffs lost their tenants in January or February and were unable to re-lease the second apartment in the duplex until July; however, during the period of unoccupancy plaintiffs continued to seek renters and made repairs and renovations in an effort to attract new tenants.

2. **Municipal Corporations § 31.2— superior court review of Board of Adjustment decision—no error**

The trial court did not improperly substitute its judgment for that of the City's Board of Adjustment or improperly conclude based on insufficient findings of fact that there had been no cessation of plaintiffs' nonconforming use where the facts were not in dispute and whether there was a cessation of use was a question of law. The language in the court's order that the "non-occupancy resulted from factors beyond petitioners [*sic*] control" merely explained the court's opinion and did not constitute an additional finding of fact.

APPEAL by respondents from the Order of *Judge William Z. Wood* entered 20 November 1987 in CABARRUS County Superior Court. Heard in the Court of Appeals 29 November 1988.

Michael B. Brough & Associates, by Michael B. Brough and Frayda S. Bluestein, for petitioner appellees.

Ford, Parrott & Hudson, by John T. Hudson; and Johnson, Belo & Plummer, by Gordon Belo, for defendant appellant.

COZORT, Judge.

The question before us is whether the City of Concord properly denied plaintiffs' application for an occupancy permit based on a finding that there was a "cessation" of a nonconforming use when plaintiffs' duplex apartments were unoccupied by tenants for a period in excess of three consecutive months. We hold that there was not a cessation of use within the meaning of the applicable zoning ordinance and therefore affirm the trial court's order reversing the City's denial of the permit.

In August of 1986, plaintiffs purchased real property on North Union Street in Concord, North Carolina, which included a single-family home, an unattached garage with an apartment, and a duplex building containing two apartments. The entire property was located in an historic district zoned "R-1 Residential," in which only single-family residences, not duplexes, were allowed. At the time plaintiffs purchased the property, however, the duplex was maintained as a lawful nonconforming use under the City's zoning ordinance.

In December of 1986, plaintiffs installed a gas furnace in the duplex and had gas lines installed, which interfered with use of the driveway to the duplex until early spring. In late January or early February, the tenants occupying each of the duplex apartments vacated, and electrical service to both apartments was disconnected. In March electrical service to one of the apartments was reconnected. For two weeks in March plaintiffs advertised in a local newspaper for renters. The property was also listed with a local real estate company. Having no success obtaining tenants, plaintiffs undertook repairs and renovations in an effort to attract new renters. In early July 1987, one of the apartments was rented to tenants and became occupied. At that time, a tenant was also found for the second apartment. However, when plaintiffs sought a certificate of occupancy for the second apartment, the City Planning Director denied their request on the ground that there had been a cessation of use of the building as a duplex apartment building for more than three consecutive months, thus triggering the forfeiture provision of the City's zoning ordinance.

Plaintiffs appealed to the Board of Adjustment, which, after holding a public hearing, affirmed the denial of a certificate of occupancy in accordance with the Planning Director's decision. Pursuant to N.C. Gen. Stat. § 160A-388, plaintiffs petitioned for writ of certiorari to the Superior Court of Cabarrus County. The writ

was allowed and, after a hearing, the Honorable William Z. Wood entered an order reversing the Board and ordering the City to issue a certificate of occupancy to plaintiffs. The City appealed. We affirm.

[1] Zoning ordinances should be interpreted to achieve a "fair balance" between a city's effort to preserve the character of a neighborhood by restricting and excluding new uses and structures and eliminating existing uses and structures which are prejudicial to the character of a neighborhood, and the rights of the property owner whose interests are affected by the ordinance. *In re O'Neal*, 243 N.C. 714, 721, 92 S.E. 2d 189, 194 (1956). Section 604.22 of the Concord Zoning Ordinance provides that a nonconforming use shall not be "reused after cessation of use for three (3) consecutive months . . . ." We believe a fair balance of the interests of the city and property owners would not be achieved if the ordinance is interpreted as equating unoccupancy by tenants with cessation of the nonconforming use so as to preclude consideration of other relevant attendant circumstances.

The undisputed facts show that plaintiffs lost their tenants in January or February and were unable to re-lease the second apartment in the duplex until July. During the period of unoccupancy, however, plaintiffs continued to seek renters and made repairs and renovations in an effort to attract new tenants. We hold that under these facts the trial court properly concluded that there was no cessation of plaintiffs' nonconforming use. *See Southern Equipment Co. v. Winstead*, 80 N.C. App. 526, 342 S.E. 2d 524 (1986).

[2] The City's remaining assignments of error are that (1) the trial court improperly substituted its judgment for that of the Board, and (2) the trial court's conclusion of law that there was no cessation of use was not based on sufficient findings of fact. As for the second argument, the rule is that in proceedings to review a city's zoning decision, the superior court is not the trier of fact, which is the function of the Board, but sits as an appellate court to review the record for errors of law and to insure that proper procedures were followed and that the Board's decision was supported by competent, material, and substantial evidence. *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E. 2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980).

In the instant case the trial court set forth its reasoning as follows:

> The Court is persuaded that section 604.22, which provides that a non-conforming use may not be resumed after there has been a "cessation of use" for three consecutive months, does not support the denial of the certificate of Occupancy for the duplex under the facts of this case where, even though the duplex remained unoccupied for a period in excess of three months, the non-occupancy resulted from factors beyond petitioners [*sic*] control and during the period of non-occupancy Petitioners continued to repair and renovate the units and continued to seek new tenants for the duplex. Therefore, while there was an interruption in occupancy, there was no "cessation of use within" the meaning of Section 604.22 of the Concord Zoning Ordinance.

The trial court recited the facts of the case as found by the Board that the duplex remained unoccupied for more than three months and that during the period of unoccupancy plaintiffs repaired and renovated the apartments and sought tenants. Since the facts were not in dispute, whether there was a cessation of use was a question of law. *See In re Tadlock*, 261 N.C. 120, 124, 134 S.E. 2d 177, 180 (1964). On the undisputed facts before it, the trial court properly concluded that there was no cessation of use.

The language in the court's order that "the non-occupancy resulted from factors beyond petitioners [*sic*] control" did not constitute an additional finding of fact. In our view, that statement merely explained the court's opinion that there was not a cessation of use because the unoccupancy was due to not having found a tenant despite the owners' efforts to do so.

Although we affirm the trial court's ruling, we note that there is an inconsistency in the record as to which apartment was denied the occupancy permit. The evidence before the Board and in plaintiffs' petition for certiorari indicates that the apartment in dispute was the one located at 133 North Union Street, whereas the Superior Court entered an order to issue a certificate of occupancy for the apartment located at 135 North Union Street. We therefore remand to the Clerk of Superior Court of Cabarrus County with an instruction to correct the order to refer to the appropriate apartment.

Affirmed.

Remanded for correction of judgment.

Judges ARNOLD and WELLS concur.

WHITAKER'S INC. OF SUMTER v. NICOL ARMS, A NORTH CAROLINA LIMITED PARTNERSHIP; ALMONT E. LINDSEY, GENERAL PARTNER; AND GEORGE MOROSANI, GENERAL PARTNER

No. 8830SC766

(Filed 18 April 1989)

1. **Pleadings § 37.1— existence of contract—establishment by pleadings**

The existence of a contract between the parties was established by the parties' pleadings where defendant asserted counterclaims against plaintiff alleging that a contract existed between them and that the contract was breached, and plaintiff judicially admitted entering into a contract with defendant in its reply to the counterclaims.

2. **Rules of Civil Procedure § 41.2— voluntary dismissal after parties rested—manifest unjustness**

It would be manifestly unjust to permit defendant to voluntarily dismiss its counterclaims and thereby raise anew the settled issue of the existence of a contract after the parties had rested and the trial judge had implicitly ruled against defendant on its counterclaims by denying defendant's motions for directed verdict.

3. **Partnership § 4— purchase order by partner—liability of partnership**

A limited partnership was bound by a purchase order signed by a general partner where the uncontradicted evidence showed that the partner signed on behalf of the partnership and had authority to do so, and where the partnership effectively ratified the contract by bringing suit on it.

APPEAL by defendants from *Marlene Hyatt, Judge.* Judgment entered 10 December 1987 in Superior Court, JACKSON County. Heard in the Court of Appeals 16 February 1989.

Dees, Giles, Tedder, Tate & Gaylord, by T. M. Gaylord, Jr., for plaintiff-appellee.

Haire & Bridgers, P.A., by R. Phillip Haire, for defendant-appellants.

BECTON, Judge.

This breach of contract action was brought by plaintiff Whitaker's, Inc., a supplier of kitchen and bathroom cabinets ("the supplier"), against defendant Nicol Arms Limited Partnership ("Nicol Arms"), the owner of the apartment complex in which the cabinets were to be installed, and against defendants Almont Lindsey and George Morosani, former and present general partners of Nicol Arms, respectively. Nicol Arms counterclaimed for breach of contract, unfair trade practices, and breach of express and implied warranties. Defendants offered no evidence at trial. A directed verdict was granted in favor of the supplier on the issues of the existence of a contract and damages. The trial judge awarded the supplier $18,155 in damages, and the jury awarded the supplier $4,500 for lost profits.

Defendants' primary contention on appeal is that Mr. Lindsey's signature on the supplier's purchase order form did not form a contract with Nicol Arms because that signature did not indicate that Mr. Lindsey was signing in a representative capacity. Defendants contend that the trial judge erred by: (1) denying defendants' directed verdict motions; (2) directing a verdict in the supplier's favor; and (3) denying defendants' motions for judgment notwithstanding the verdict and a new trial. Defendants do not challenge the amount of damages awarded. We affirm the judgment.

I

Defendants contend that when Mr. Lindsey signed the purchase order in his own name, he acted either individually or as president of A.C.R.S., Ltd. (the entity responsible for construction of the apartment complex), and not as general partner of Nicol Arms. Thus, defendants argue Nicol Arms was not a party to the contract with the supplier, and, as a result, defendants were entitled to a directed verdict as a matter of law. We disagree.

A. *Contract Established by Pleadings*

[1] In our view, the question whether Mr. Lindsey entered into a contract with the supplier on behalf of Nicol Arms was settled by the parties' pleadings.

In its Answer, Nicol Arms asserted counterclaims against the supplier, alleging that a contract existed between them, and that the contract was breached. We adopt the settled view that " '[a] party is bound by [its] pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive against the pleader. [A party] cannot subsequently take a position contradictory to [its] pleadings.' " *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 329, 330 S.E. 2d 664, 667 (1985) (quoting *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E. 2d 33, 34 (1964)). *Accord Rollins v. Junior Miller Roofing Co.*, 55 N.C. App. 158, 161-62, 284 S.E. 2d 697, 700 (1981); *Neff v. Queen City Coach Co.*, 16 N.C. App. 466, 472, 192 S.E. 2d 587, 591 (1972).

In addition, in the supplier's Reply to the counterclaims, the supplier admitted entering into a contract with Nicol Arms. "The effect of a judicial admission is to establish the fact for the purposes of the case and to eliminate it entirely from the issues to be tried." *Rollins*, 55 N.C. App. at 162, 284 S.E. 2d at 700; *accord Champion v. Waller*, 268 N.C. 426, 428, 150 S.E. 2d 783, 785 (1966); *Hedgecock Builders Supply Co. v. White*, 92 N.C. App. 535, 544, 375 S.E. 2d 164, 170 (1989). Thus, we hold that the question whether a contract existed between Nicol Arms and the supplier was not an issue to be resolved at trial.

[2] Although neither party raises the point, Nicol Arms' motion to voluntarily dismiss the counterclaims, made after the parties rested, does not change the result in this case. First, it is not clear from the record whether the trial judge ever ruled on that motion. *See* N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 41(a), (c) (1983) (counterclaim may be voluntarily dismissed after party rests only with leave of court). Second, the trial judge had already implicitly ruled against Nicol Arms on its counterclaim by denying defendants' motions for directed verdict.

In our view, it would be manifestly unjust to permit defendants at that late hour in the trial to withdraw the allegations in the counterclaims, thereby raising anew the settled issue of the existence of a contract. We believe that the judicial reluctance to

allow a plaintiff to withdraw at the last stages of litigation should extend as well to a defendant who wishes to withdraw its counterclaims. *See id.* (rules regarding dismissal of plaintiff's claim apply to dismissal of defendant's counterclaim); *cf. McCarley v. McCarley*, 289 N.C. 109, 113, 221 S.E. 2d 490, 493 (1976) (". . . it would be manifestly unjust to allow a plaintiff, who comes into court upon solemn allegations, which, if true, entitle defendant to some affirmative relief against the plaintiff, to withdraw, *ex parte*, the allegations after defendant has demanded the relief to which they entitle him"); N.C. Gen. Stat. Sec. 1A-1, *comment* to R. Civ. P. 41 (prior to enactment of Rule 41, permitting the plaintiff to dismiss its case "just as the court was about to direct a verdict for defendant," after defendant had already incurred great expense in preparing for trial, "was an outrageous imposition not only on the defendant but also on the court"). We conclude that Nicol Arms' counterclaims established the existence of the contract.

B. *Partnership Obligation*

[3] We additionally conclude that under the principles of partnership liability Nicol Arms was bound by the purchase order signed by Mr. Lindsey.

This court explained in *Hedgecock* that "[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.' " 92 N.C. App. at 543-44, 375 S.E. 2d at 170 (quoting *Brewer v. Elks*, 260 N.C. 470, 472-73, 133 S.E. 2d 159, 162 (1963)) (emphasis supplied). Both conditions were satisfied here.

First, the uncontradicted evidence adduced at trial established that Mr. Lindsey signed on behalf of Nicol Arms. Witnesses for the supplier testified that Mr. Lindsey represented that he acted on behalf of the Nicol Arms partnership, and that he had authority to do so. Furthermore, the order form indicated that the cabinets were being purchased for and delivered to the Nicol Arms apartments. Defendants presented no evidence to the contrary and raised no challenge to the credibility of the supplier's witnesses.

Second, the Nicol Arms partnership effectively ratified the contract by bringing suit on it. "One of the most unequivocal methods of showing ratification of an agent's . . . act is by bringing an

action . . . on the . . . act with full knowledge of the material facts." *Patterson v. Lynch*, 266 N.C. 489, 493, 146 S.E. 2d 390, 393 (1966) (citation omitted).

Viewing the evidence presented in a light most favorable to the supplier, *see, e.g., Farmer v. Chaney*, 292 N.C. 451, 453, 233 S.E. 2d 582, 584 (1977), we conclude that the trial judge properly denied defendants' motions for a directed verdict.

This assignment of error is overruled.

II

We have already held there was no question for the jury to resolve regarding the existence of the contract between Nicol Arms and the supplier. Thus, the supplier was entitled to a directed verdict as a matter of law, and defendants were not entitled to judgment notwithstanding the verdict or to a new trial. Accordingly, we overrule defendants' remaining assignments of error.

We hold that the trial below was without error.

Affirmed.

Judges PARKER and GREENE concur.

XAVER FRANZ FRIEDLMEIER AND WIFE, MATHILDE FRIEDLMEIER v. GARDNER ALTMAN, JR., ASKATRAL INTERNATIONAL, LTD. AND KELGARASH, LTD.

No. 884SC797

(Filed 18 April 1989)

Mortgages and Deeds of Trust § 2— settlement agreement between attorney and client—agreement to purchase real property—purchase money instruments

The trial court correctly concluded that a deed of trust and promissory note were purchase money instruments and that plaintiffs were not entitled to a deficiency judgment in an action arising from the settlement of a dispute between plaintiff clients and defendant attorney in which defendant

agreed to purchase real property from plaintiffs where plaintiffs, residents of Germany, had employed defendant to represent them in the purchase of real property; a dispute arose over defendant's representation; the parties entered a settlement agreement wherein defendant agreed to purchase the real property from plaintiffs; under the agreement, defendant agreed to pay plaintiffs $225,000 in cash at closing and a $330,000 promissory note to be secured by a deed of trust conveying a second lien; defendant paid at closing $225,000 in cash and plaintiff conveyed the property to a corporation owned by the individual defendant, Askatral International, Ltd.; Askatral delivered to plaintiffs a promissory note and deed of trust, both of which stated that they were purchase money instruments, for $330,000; another corporation owned by the individual defendant subsequently purchased the $850,000 note and first deed of trust from Southern National Bank; Askatral failed to make any payments due to plaintiffs on the note; defendant's second corporation, Kelgarash, commenced foreclosure and was successful bidder at the foreclosure sale, paying $850,000 plus any interest that was due to Southern National Bank for the note and deed of trust; plaintiffs sued for $330,000 together with interest, punitive damages, attorney's fees and the imposition of a constructive trust relating to the real property; and the judge, trying the case without a jury, found that defendant Altman fulfilled the obligations imposed upon him by the agreement, that the note and second deed of trust were purchase money instruments, that plaintiffs' remedy was limited to the foreclosure action and that they were not entitled to a deficiency judgment. Defendant Altman satisfied his obligations under the land sale portion of the settlement agreement when the parties closed the transaction and he paid the plaintiffs $225,000 in cash and his corporation executed a promissory note for the remaining $330,000, and the parties' rights and liabilities thereafter arose from the promissory note and deed of trust, not from the settlement agreement. Both the note and deed of trust recited on their faces that they were for the balance of purchase money for real estate as required by N.C.G.S. § 45-21.38; furthermore, plaintiffs' counsel testified that he explained to Mr. Friedlmeier that "the only money [he] could count on getting in this settlement was . . . [the] $225,000 that was to be paid at closing" because it was a purchase money transaction.

FRIEDLMEIER v. ALTMAN

[93 N.C. App. 491 (1989)]

APPEAL by plaintiffs from *Phillips, Herbert O., III, Judge.* Judgment entered 10 February 1988 in ONSLOW County Superior Court. Heard in the Court of Appeals 13 March 1989.

Plaintiffs, residents of Germany, employed defendant Altman, an attorney licensed to practice law in North Carolina, to represent them in the purchase of real property. A dispute arose over defendant Altman's representation, and plaintiffs brought a civil action against Altman and others seeking damages flowing from the real estate transaction. The parties entered a settlement agreement wherein Altman agreed to purchase the real property from plaintiffs and plaintiffs promised to dismiss their action against him and not to file misconduct charges against him.

Under the agreement defendant Altman agreed to pay plaintiffs $555,000 for the property: $225,000 to be paid in cash at closing and a $330,000 promissory note to be secured by a deed of trust conveying a second lien. The property was subject to a prior deed of trust in favor of Southern National Bank in the amount of $850,000. The agreement also dealt with the disbursement of escrow funds, contained options to lease and to purchase farm equipment, granted plaintiffs the right to rent a portion of the property, and contained mutual release provisions.

At the closing of the land sale transaction on 21 December 1985 defendant Altman paid plaintiffs $225,000 in cash, and plaintiffs conveyed the property to a corporation owned by Altman, Askatral International, Ltd. Defendant Askatral delivered to plaintiffs a promissory note and deed of trust, both of which stated that they were purchase money instruments, in the amount of $330,000. Another corporation owned by Altman, Kelgarash, Ltd., subsequently purchased the $850,000 note and deed of trust from Southern National Bank. Askatral, which had no assets at the time of the closing, failed to make any payments due to plaintiffs on the note and failed to make the payments due to Kelgarash. Kelgarash commenced foreclosure and was the successful bidder at the foreclosure sale. It paid $850,000 plus any interest that was due Southern National Bank for the note and deed of trust.

Plaintiffs sued defendants seeking $330,000 together with interest, punitive damages, attorney's fees, and the imposition of a constructive trust relating to the real property. The case was tried before Judge Phillips without a jury. The trial court found that defendant Altman fulfilled the obligations imposed upon him

by the agreement and was not indebted to plaintiffs. It found that the note and second deed of trust were purchase money instruments within the meaning of the anti-deficiency judgment statute, N.C. Gen. Stat. § 45-21.38 (1984). The trial court concluded that plaintiffs' remedy, consequently, was limited to the foreclosure action and that they were not entitled to a deficiency judgment. The court concluded further that defendants did not defraud plaintiffs, and that neither defendant Altman nor Kelgarash had been unjustly enriched. The court entered judgment for defendants and plaintiffs appealed.

Clifton & Singer, by Benjamin F. Clifton, Jr., for plaintiff-appellants.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams and John D. Martin, for defendant-appellees Gardner Altman, Jr., and Askatral International, Ltd. Farris and Farris, P.A., by Robert A. Farris, Jr. and Thomas J. Farris, for defendant-appellee Kelgarash, Ltd.

WELLS, Judge.

Plaintiffs contend that the trial court erroneously categorized their action as being based on the promissory note, rather than as an action for breach of the settlement agreement, fraud, and declaration of a constructive trust. At the outset we emphasize, however, that defendant Altman satisfied his obligations under the land sale portion of the settlement agreement when the parties closed the transaction on 21 December 1985; he paid plaintiffs $225,000 in cash and his corporation executed a promissory note for the remaining $330,000. Thereafter the parties' rights and liabilities with respect to the land sale arose from the promissory note and deed of trust, not from the settlement agreement.

Plaintiffs further contend that the note and deed of trust were not purchase money instruments, and consequently the anti-deficiency judgment statute, N.C. Gen. Stat. § 45-21.38 (1984), does not apply. "[A] deed of trust is a purchase money deed of trust only if it is made as a part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price." *Dobias v. White*, 239 N.C. 409, 80 S.E. 2d 23 (1954). Because the entire transaction was more than simply a sale of land, as reflected by the various provisions of

the settlement agreement, plaintiffs contend that it did not satisfy the "same transaction" test.

We believe, however, that the fact that the land sale transaction occurred as part of an agreement settling a dispute between the parties does not prevent its categorization as a purchase money transaction in this case. This is not a situation where the deed of trust covered land *other* than that purchased by the debtor buyer from the seller, *see Dobias, supra,* nor did the deed of trust secure money borrowed from a *third party* to pay the seller for the land, *see Childers v. Parker's Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968). "[S]o long as the debt of the purchaser of property is secured by a deed of trust on the property or part of it given by the purchaser to secure payment of the purchase price the deed of trust is a purchase money deed of trust." *Burnette Industries v. Danbar of Winston-Salem*, 80 N.C. App. 318, 341 S.E. 2d 754, *disc. rev. denied*, 317 N.C. 701, 347 S.E. 2d 37 (1986). The existence of additional promises not directly arising out of the land sale transaction does not remove this deed of trust and promissory note from the definition of a purchase money instrument.

The trial court did not err, as plaintiffs contend, in concluding that the settlement agreement was ambiguous and in admitting extrinsic evidence to clarify its terms. We also reject plaintiffs' contention that the instruments are not purchase money instruments because the settlement agreement did not specifically state on its face that this was to be a purchase money transaction. Plaintiffs were carefully advised by their attorney, who testified that the parties anticipated that the note and deed of trust would contain purchase money instrument language.

The anti-deficiency judgment statute provides:

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

chase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

N.C. Gen. Stat. § 45-21.38 (1984).

Both the note and deed of trust recited on their faces that they were for the balance of purchase money for real estate, as required by the statute. Plaintiffs' counsel, furthermore, testified that he explained to Mr. Friedlmeier that because it was a purchase money transaction, "the only money [he] could count on getting in this settlement was . . . [the] $225,000 that was to be paid at closing." We hold that the trial court correctly concluded that the deed of trust and promissory note were purchase money instruments, and that pursuant to N.C. Gen. Stat. § 45-21.38 (1984) plaintiffs were not entitled to a deficiency judgment.

The judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. WALTER HARRISON

No. 8821SC731

(Filed 18 April 1989)

Narcotics § 4.3— constructive possession with intent to sell—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant had constructive possession of cocaine with intent to sell where it tended to show that defendant was found in a closed room about three feet from a table which had cocaine and paraphernalia commonly used in mixing and packaging cocaine on it; defendant was next to a window under

circumstances from which the jury could infer that it had just been broken; and a jury could infer from the evidence that defendant was either attempting to escape from the premises so that he would not be caught in actual possession of the cocaine or that he was preparing to dispose of the drugs through the broken window for the same reason.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 4 May 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 February 1989.

Defendant Walter Harrison was tried and convicted of possession of cocaine with intent to sell, a violation of G.S. 90-95(a)(1). After finding aggravating factors and determining that they outweighed any mitigating factors, the trial court sentenced defendant to the statutory maximum term of ten years imprisonment. From the judgment entered, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General John R. Corne, for the State.

David F. Tamer for defendant-appellant.

EAGLES, Judge.

This case involves constructive possession of cocaine. Defendant assigns as error the trial court's denial of his motion to dismiss made at the close of the State's evidence and at the close of all the evidence. We find no error.

In reviewing defendant's motion to dismiss we must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Brown,* 310 N.C. 563, 313 S.E. 2d 585 (1984). The State's evidence tended to show the following. On 11 November 1987 at about 8:00 p.m. Winston-Salem Police Department Detectives Sam Slater (Slater) and J. D. Cook (Cook) executed a search warrant in northeast Winston-Salem at 2316 Woodland Avenue. Slater knocked on the front door, announced that he was a police officer and that he had a search warrant. Cook positioned himself at the rear of the house. No one responded to Slater's announcement. Upon hearing people yelling and running inside the house, Slater kicked the front door open and entered.

While moving toward the center of the house Slater saw a closed door and heard glass breaking on the other side of the closed door. Slater kicked the door open and saw defendant and one other person, a woman, in the room. Defendant was standing near a broken window where there was glass on the floor. The woman was near the center of the room. On a table about three feet from the defendant there were a number of items including eleven glassine packets of different sizes containing a white powder, later identified as cocaine, and various paraphernalia commonly associated with mixing cocaine. No cocaine or other controlled substances were found on defendant's person. Other than defendant and the woman, there was only one other person found in the house.

Cook testified that while positioned in the back yard he heard glass breaking, went toward the sound, and saw a black man standing next to the broken window. He then saw Slater enter the room. Cook further testified that he saw no one leave the house. Defendant presented no evidence.

To overcome defendant's motion the State must have provided substantial evidence that defendant possessed the cocaine, actually or constructively, and that he possessed it with the intent to sell or deliver. *State v. Williams*, 307 N.C. 452, 455, 298 S.E. 2d 372, 374 (1983). Since defendant did not have actual possession of the controlled substance, the State bases its case upon the doctrine of constructive possession. Our courts have ruled that 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). Proof of constructive possession sufficient to overcome a motion to dismiss or directed verdict is shown when the State places the defendant "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession." *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E. 2d 706, 714 (1972).

On the other hand, defendant contends that our decision in *State v. James*, 81 N.C. App. 91, 344 S.E. 2d 77 (1986), controls here. We disagree. In *James* we said that "[t]he fact that a person is present in a room where drugs are located, nothing else appearing, does not mean that person has constructive possession of the drugs. If possession of the premises is non-exclusive, there must

be evidence of other incriminating circumstances to support constructive possession." [Citations omitted.] *Id.* at 93, 344 S.E. 2d at 79. In the instant case there are "other incriminating circumstances."

Here defendant was found in a closed room about three feet from a table which had cocaine and paraphernalia used to mix cocaine on it. In addition, defendant was next to a window under circumstances from which the jury could infer that it had just been broken. From this evidence a jury could infer that either defendant was attempting to escape from the premises so that he would not be caught in actual possession of the drugs or that he was preparing to dispose of the drugs through the broken window for the same reason. Giving the State the benefit of every reasonable inference from this evidence, we hold that the State presented substantial evidence that defendant constructively possessed the cocaine on the table.

Intent to sell or deliver may be shown through circumstantial evidence such as the presence of material, paraphernalia, or cutting agents normally associated with packaging controlled substances. *Williams*, 307 N.C. at 456, 298 S.E. 2d at 375. Here the State presented evidence showing that a sifter, several glassine packets of varying sizes, and other equipment commonly used in packaging cocaine were also found on the table. This is substantial evidence of defendant's intent to sell or deliver. We overrule this assignment of error.

We note that, in his brief, defendant expressly abandoned his remaining assignment of error. Accordingly, we need not address that issue. For the foregoing reasons we hold that defendant received a fair trial free from prejudicial error.

No error.

Judges COZORT and GREENE concur.

LOMAN GARRETT, INC. v. TIMCO MECHANICAL, INC.

No. 8818SC484

(Filed 18 April 1989)

Rules of Civil Procedure § 24— motion to intervene in garnishment— denied—no error

The trial court did not err in a proceeding to determine plaintiff's right to property garnished from defendant's account debtor by denying a third party bank's motion to intervene for lack of timeliness where the bank sought to intervene at the time of a hearing at which the trial court was ready to resolve the matter before it based on the pleadings and affidavits submitted by the parties; plaintiff's second complaint had been filed and served on counsel for defendant in October of 1987; the same counsel had been representing the interests of the bank and the bank's debtor since before 3 June 1987 and was at all times since that date aware of the attachment proceedings; and counsel for the bank had ample opportunity to intervene at any time after the filing of plaintiff's complaint.

APPEAL by Intervenor Texas Commerce Bank National Association from Order of *Judge James A. Beaty, Jr.*, entered 4 February 1988 in GUILFORD County Superior Court. Heard in the Court of Appeals 30 November 1988.

Tuggle Duggins Meschan & Elrod, P.A., by Robert C. Cone and Harold A. Lloyd, for plaintiff appellee.

Poyner & Spruill, by Louis B. Meyer, III, David M. Barnes and Mary Beth Johnston, for intervenor appellant.

COZORT, Judge.

Unsuccessful intervenor appeals from the trial court's denial of its motion to intervene in a proceeding to determine plaintiff's right to property garnished from defendant's account debtor. We affirm the trial court's ruling.

Plaintiff first filed suit against defendant in January of 1987. That action resulted in a voluntary dismissal, although, ancillary to that action, plaintiff had garnished a $20,576.60 debt owed defendant by a Virginia corporation. Those garnished funds were being held by the Clerk of Superior Court for Guilford County

when plaintiff filed a second action on 14 October 1987. As before, plaintiff sought to recover $29,330.90 owed for heating and air conditioning equipment purchased by defendant on an open account with plaintiff. Plaintiff further sought, as it had before, an order of attachment based on defendant's status as a foreign corporation and defendant's intention to remove its assets from this State. Defendant filed answer on 4 December 1987. Later that month plaintiff made a motion for summary judgment; hearing on that motion was set for 1 February 1988.

On 29 January 1988, Texas Commerce Bank National Association, a Texas corporation (hereinafter "the Bank" or "appellant"), filed a Motion to Intervene and Dissolve Garnishment and Levy. The Bank alleged that it had a perfected security interest in defendant's accounts, including the account represented by the garnished funds being held by the Clerk of Superior Court; that the security interest in defendant's accounts had been given by defendant as collateral for a $600,000.00 loan; and that defendant was in default of that loan in the amount of $239,070.36. The Bank did not serve plaintiff with a copy of its motion in advance of the hearing on plaintiff's motion for summary judgment. However, counsel for plaintiff consented to the Bank's motion being heard. Noting that the Bank was represented by the same counsel as represented defendant, the court denied the motion for lack of timeliness. The Bank appeals. We affirm.

The rule on intervention is as follows:

> (a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) When a statute confers an unconditional right to intervene . . . .

N.C. Gen. Stat. § 1A-1 (1988), Rule 24. The Bank argues that it had an unconditional right to intervene by virtue of the following provision of the statute on attachment:

> Any person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property, whether such lien or interest is acquired prior to or subsequent to the attachment, may

> (1) Apply to the court to have the attachment order dissolved or modified, or to have the bond increased, upon the same conditions and by the same methods as are available to the defendant, or
>
> (2) Intervene and secure possession of the property in the same manner and under the same conditions as is provided for intervention in claim and delivery proceedings.

N.C. Gen. Stat. § 1-440.43 (1988).

With respect to subsection (1), a defendant who seeks to dissolve an order of attachment may do so "at any time before judgment in the principal action." *See* N.C. Gen. Stat. § 1-440.36 (1988). With respect to subsection (2), the language of Rule 24 would govern, and the third party's motion to intervene must be made "upon timely application." We believe the latter standard controls the resolution of the appeal before us for the following reasons.

Section 1-440.43 allows a third party to apply to have the attachment order dissolved *or* to intervene and secure possession of the property. In the instant action, the relief ultimately sought by appellant was not to dissolve the attachment but to intervene for the purpose of claiming the attached funds for itself.

The statute further states that a third party may seek to dissolve an attachment order "upon the same conditions and by the same methods as are available to the defendant." N.C. Gen. Stat. § 1-440.43. The attachment of property owned by a defendant is proper when the plaintiff seeks a money judgment in the principal action and shows a need for a prejudgment remedy in order to insure that funds will be available to satisfy that judgment. *See* N.C. Gen. Stat. §§ 1-440.2, -440.3 (1988). The Bank, however, has made no allegations that the order of attachment was invalid on its face or otherwise. *See* N.C. Gen. Stat. § 1-440.36. Although a secured party's interest continues in property that has been attached, *see* N.C. Gen. Stat. § 25-9-306(2), the existence of a security interest does not insulate a debtor's property from state attachment proceedings. *See* N.C. Gen. Stat. § 25-9-311 (1988). There being no basis alleged by appellant for dissolving the attachment order, we therefore turn to the issue of timeliness under Rule 24.

While motions to intervene made prior to trial are seldom denied, whether such motions are timely is a question addressed to

the sound discretion of the trial court. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E. 2d 645, 648 (1985). The trial court is to consider the status of the case, the unfairness or prejudice to the existing parties, the reason for the delay, the resulting prejudice to the applicant if the motion is denied, and any unusual circumstances. *Id.*

In the case before us, the Bank sought to intervene at the time of the hearing at which the trial court was ready to resolve the matter before it based on the pleadings and affidavits submitted by the parties. Plaintiff's second complaint had been filed and served on counsel for defendant in October. The record affirmatively discloses that the same counsel had been representing the interests of the Bank, as well as those of the Bank's debtor, since before 3 June 1987 and was at all times since that date aware of the attachment proceedings. Counsel for the Bank had ample opportunity to intervene at any time after the filing of plaintiff's complaint. We hold that, based on the circumstances involved in the matter before it, the trial court did not abuse its discretion in denying the Bank's motion to intervene.

Affirmed.

Judges ARNOLD and WELLS concur.

GUY J. NICHOLS AND EDNA B. NICHOLS, PLAINTIFFS/APPELLEES v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY, DEFENDANT/APPELLANT

No. 883DC939

(Filed 18 April 1989)

Contracts § 21.1— breach of contract—demand for payment not required

Where defendant breached its contract to pay plaintiffs $2,000 upon plaintiffs' conveyance of a utility easement to defendant, the time when plaintiffs first made a demand for payment was of no legal significance, since defendant was required by law, without any prompting from plaintiffs, to pay the $2,000 along with interest thereon from the date of the breach.

APPEAL by defendant from *Ragan, Judge.* Judgment entered 21 April 1988 in District Court, PITT County. Heard in the Court of Appeals 22 March 1989.

Willis A. Talton for plaintiff appellees.

Senior Attorney Robert Carl Voigt for defendant appellant.

PHILLIPS, Judge.

Defendant's appeal is from an order of summary judgment holding that plaintiffs are entitled to recover of it $2,000 along with interest thereon from 19 September 1985 and their costs. The appeal is groundless, as were the defenses asserted in the trial court, and a motion by plaintiffs pursuant to G.S. 6-21.5 would seem to be warranted.

The record establishes the following without contradiction: Defendant, desiring to obtain the permanent use of a 20 by 25 foot tract of land in or near Greenville on which to erect a service building, had its agent, Medlin, approach plaintiffs on 19 September 1985 about acquiring a perpetual easement over land conveyed to them in 1974 by a deed recorded in Book G-42, at page 712, in the Office of the Pitt County Register of Deeds. After various negotiations between them it was agreed that plaintiffs would convey the requested easement, that defendant would pay them $2,000 for it, and that the easement would be conveyed and payment made in defendant's Greenville office four days later. On 23 September 1985, at the designated time, plaintiffs went to defendant's office, were submitted an utility easement on defendant's printed form, and were told by Medlin that the check was in the other room and would be given to them after they signed the easement. But after plaintiffs signed the easement before a notary public and gave it to Medlin he claimed, after going into the other office, that due to a misunderstanding the check was not ready but would be in a few days, and he promised in writing to deliver the check by 4 October 1985. During the months that followed plaintiffs went to defendant's office and telephoned many times without obtaining the check; and it was not until 6 June 1986 that defendant offered to pay $2,000, which plaintiffs refused to accept, contending that they were entitled to interest from the time that the easement was given. Defendant refused to pay more than $2,000, contending that it was not obligated to pay anything because their title lawyer could not certify that the land described

in plaintiffs' deed was the identical land described in earlier deeds in plaintiffs' chain of title, and that its offer to pay $2,000 was a good will gesture.

After being sued for $2,000 and interest for its breach of contract, in its answer defendant admitted that the understanding was that plaintiffs "would be paid $2,000 in consideration of the grant of easement," that the described easement was granted and received, and that payment had not been made. But instead of acknowledging, as was obvious, that its failure to pay the promised $2,000 was a breach of contract that entitled plaintiffs to payment and interest from the date of the breach, *Noland Company, Inc. v. Poovey*, 58 N.C. App. 800, 295 S.E. 2d 238 (1982), defendant filed answer arguing that no contract existed and irrelevantly and groundlessly asserted as affirmative defenses: That the oral agreement to pay the $2,000 was not enforceable because of the statute of frauds; that a mutual mistake was made because *its intent and usual practice* was to obtain an easement with a marketable title (which the agreement it prepared and recorded did not mention); that its title lawyer (for the reasons earlier stated) would not certify the marketability of the title; and that the agent who obtained the easement (which defendant recorded and holds) only had authority to obtain easements on land to which there was a marketable title! Based upon nothing but these obvious legal absurdities and irrelevancies defendant not only prayed in its answer for the dismissal of the action but for attorney's fees, and at the same time also moved for summary judgment. When the motion was heard the court denied it and *ex mero motu* entered summary judgment for plaintiffs.

The only assignment of error defendant brought forward in the brief—the others based upon the groundless defenses above referred to having been abandoned—is that the pleadings, affidavits, and other materials before the court raise a material question of fact as to when plaintiffs "first made a demand for payment." Why this question is thought to have legal significance to this appeal is not stated in either the assignment or the brief. In an attempt to support the assignment defendant did cite the well known rule of law that "parties to a contract may enlarge the time for payment, thereby avoiding default," 60 Am. Jur. 2d *Payment* Sec. 16 (1987); but it pointed to no evidence indicating that any such enlargement was agreed to and did not even argue that it had. Under the circumstances when if ever plaintiffs first de-

manded payment is of no legal significance whatever; for having breached its contract to pay plaintiffs $2,000 upon receiving the requested easement, defendant was required by the law, without any prompting from the plaintiffs or anyone else, to pay the $2,000 along with interest thereon from the date of the breach. There is one minor mistake in the judgment—allowing interest from 19 September when the agreement was made rather than 23 September when the easement was delivered; but since the mistake is not cited as error the judgment is affirmed as written.

Affirmed.

Judge COZORT concurs.

Judge PARKER concurs in the result.

MARY K. BAILEY, PLAINTIFF v. JACK PICKARD IMPORTS, INC., DEFENDANT

No. 8821SC858

(Filed 18 April 1989)

Negligence § 47.1— slip and fall—handicap ramp—summary judgment for defendant—proper

The trial court properly entered summary judgment for defendant in a negligence action arising from plaintiff's slip and fall on a handicap ramp on defendant's premises where plaintiff was an invitee on defendant's premises; she was visiting the premises for the third time in eleven months; she was aware of the ramp and walked down it as she exited the building; she then walked back into the building another way; she walked beside the ramp as she left the building a second time; she attempted to cut across the bottom of the ramp and slipped and fell on its raised edge; and plaintiff wore low-heeled shoes and the premises were dry and lighted.

APPEAL by plaintiff from *Seay (Thomas W., Jr.), Judge*. Order entered 10 May 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 February 1989.

Plaintiff seeks to recover for injuries sustained when she slipped and fell on the raised edge of defendant's handicap ramp. Defendant answered alleging that plaintiff's own negligence caused her injury. The trial court granted defendant's motion for summary judgment. Plaintiff appeals.

Garry Whitaker for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and James R. Morgan, Jr., for defendant-appellee.

LEWIS, Judge.

The only issue presented is whether the trial court erred in granting summary judgment for defendant. We have reviewed the record on appeal and affirm the judgment entered.

Plaintiff was an invitee on defendant's premises. She was visiting the premises for the third time in eleven months. On the day of her injury, she was aware of the ramp and walked down it as she exited the building. Then she walked back into the building another way. When she left the building the second time, she walked beside the ramp. She attempted to cut across the bottom of the ramp and slipped and fell on its raised edge. The premises were dry and lighted, and plaintiff wore low-heeled shoes.

Summary judgment is proper even in a negligence case where the forecast of evidence fails to show defendant's negligence or establishes plaintiff's contributory negligence as a matter of law or where it is established that defendant's alleged negligence was not the proximate cause of plaintiff's injury. *Hale v. Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265, *cert. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1985). Plaintiff contends summary judgment for defendant was improper because the premises were unsafe and defendant knew or should have known of the condition. Plaintiff contends the condition was dangerous because of an inconsistently sloped edge or drop-off along the ramp which "swelled down" around the edge. Defendant contends summary judgment was appropriate because the condition of the ramp's edge was obvious and that even if the edge of the ramp was a dangerous condition, defendant had no duty to warn plaintiff because it had no knowledge of the danger.

It is settled law in North Carolina that " '[t]he mere fact that a step up or down, or a flight of steps up or down, is maintained

at the entrance or exit of a building is no evidence of negligence if the step is in good repair and in plain view.' " *Garner v. Greyhound Corp.*, 250 N.C. 151, 159, 108 S.E. 2d 461, 467 (1959), *quoting Tyler v. Woolworth Co.*, 181 Wash. 125, 126-27, 41 P. 2d 1093, 1094 (1935). Further, " 'if the step is properly constructed and well lighted so that it can be seen by one entering or leaving the [building], by the exercise of reasonable care, then there is no liability.' " *Id.* at 159, 108 S.E. 2d at 467, *quoting Tyler v. Woolworth Co., supra.*

Plaintiff had seen the ramp and had walked on it safely. Upon these facts, summary judgment for defendant was proper.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

GRACE WYRICK v. K-MART APPAREL FASHIONS CORP.

No. 8823SC971

(Filed 18 April 1989)

Negligence § 58— fall over water hose in store—contributory negligence

Summary judgment was properly entered for defendant in plaintiff's action to recover for injuries sustained when she caught her foot on a water hose lying across the aisle in the garden shop of defendant's store and fell to the cement floor where plaintiff presented evidence that she saw the hose and attempted to step over it and that she could have gone around the area where the hose was located to reach her destination.

APPEAL by plaintiff from *Rousseau (Julius A., Jr.), Judge.* Order entered 20 June 1988 in Superior Court, YADKIN County. Heard in the Court of Appeals 23 March 1989.

Plaintiff seeks to recover for injuries sustained when she caught her foot on a water hose lying across the aisle in the garden shop in defendant's store and fell to the cement floor. The trial court granted summary judgment for defendant. Plaintiff appeals.

Franklin Smith for plaintiff-appellant.

Finger, Watson, di Santi & McGee, by Anthony S. di Santi, for defendant-appellee.

LEWIS, Judge.

Plaintiff was an invitee at K-Mart. She went to the store's garden shop to purchase a plant and some potting soil. As she started walking toward a display, she saw "this garden hose where they water down . . . the flowers, and I started over it, which I thought I could have made it." Plaintiff caught her foot in the garden hose and fell. She testified that instead of walking across the garden hose, she could have gone "all the way back around and went the long way" to reach her destination.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). Even in a negligence action, summary judgment is proper if the forecast of evidence fails to show defendant's negligence, establishes plaintiff's contributory negligence or shows defendant's alleged negligence was not the proximate cause of plaintiff's injury. *Hale v. Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265, *cert. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979). In affirming summary judgment for the defendant in *Jacobs v. Hill's Food Stores, Inc.*, 88 N.C. App. 730, 364 S.E. 2d 692 (1988), this Court stated:

> This evidence shows that the concrete block was an obvious condition and that plaintiff either knew or should have known of the location of the concrete block on the walkway. Defendant had no duty to warn plaintiff of an obvious condition. Thus, plaintiff's own evidence establishes that defendant did not breach any duty owed to plaintiff. Moreover, plaintiff's own testimony demonstrates her own negligence in failing to watch where she was walking.

Id. at 733, 364 S.E. 2d at 694. When an invitee sees an obstacle not hidden or concealed and proceeds with full knowledge and awareness, there can be no recovery. *Stansfield v. Mahowsky*, 46 N.C. App. 829, 266 S.E. 2d 28, *disc. rev. denied*, 301 N.C. 96, 273 S.E. 2d 442 (1980).

Summary judgment was properly entered.

Affirmed.

Judges ARNOLD and GREENE concur.

STATE OF NORTH CAROLINA v. JERRY LYNN WILLIAMS

No. 884SC756

(Filed 18 April 1989)

Narcotics § 5— possession of marijuana—increased sentence for prior conviction—necessity for supplemental indictment

The trial court erred in increasing defendant's sentence for possession of marijuana under N.C.G.S. § 90-95(e)(7) based on a prior conviction for possession of marijuana where the State filed no supplemental indictment alleging the prior conviction as required by N.C.G.S. § 15A-928.

APPEAL by defendant from *Currin (Samuel T.), Judge.* Judgment entered 16 February 1988 in Superior Court, ONSLOW County. Heard in the Court of Appeals 20 February 1989.

Attorney General Lacy H. Thornburg, by Associate Attorney General Patricia F. Padgett, for the State.

Lanier & Fountain, by Charles S. Lanier and Charles R. Briggs, for defendant-appellant.

LEWIS, Judge.

Defendant was indicted for felonious sale and delivery of a controlled substance, marijuana, and felonious possession with intent to sell and deliver a controlled substance, marijuana. The jury found defendant not guilty of both counts but guilty of simple possession of marijuana. The trial court sentenced defendant to six months active term and a $500.00 fine. Defendant's motion for appropriate relief was denied. Defendant appeals.

Defendant brings forward two assignments of error. First he contends the trial court erred in sentencing him pursuant to G.S. 90-95(e)(7). For the same reasons, he also assigns error to the denial

of his motion for appropriate relief. We have reviewed defendant's assignments of error and conclude the sentence imposed must be vacated.

At the sentencing hearing, the State and defendant's attorney admitted defendant had been convicted of simple possession of marijuana in 1984. The sentence in this case was imposed pursuant to G.S. 90-95(e)(7) which provides:

> If any person commits an offense under this Article for which the prescribed punishment requires that any sentence of imprisonment be suspended, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars ($500.00), or both in the discretion of the court.

Defendant contends the trial judge erred in increasing his sentence under this statute because the indictment does not allege a prior offense. We agree. In *State v. Moore*, 27 N.C. App. 245, 218 S.E. 2d 496 (1975), the trial court imposed a greater sentence under a now repealed statute which allowed an increased sentence if a defendant had a previous conviction punishable as a felony under the drug Article. This Court vacated the judgment and remanded the case noting that "[t]he indictment did not charge defendant with a conviction for a prior offense and the State did not prove a prior conviction. *Both* are required before the higher penalty can be imposed." *Id.* at 246, 218 S.E. 2d at 497 (emphasis added). In this case, the original felony charges did not include any reference to previous convictions. Of these charges, only the lesser included offense of simple possession of marijuana, a misdemeanor, requires a supplemental indictment.

G.S. 15A-928 seems to require extensive paper work for a misdemeanor conviction to be aggravated whereas only proof of previous convictions (punishable by more than 60 days) is required to aggravate the charged felonies and allow greater punishment. Notwithstanding, we note the provisions of G.S. 15A-928 which outline the procedure for filing an indictment when a defendant's previous conviction of an offense raises an offense of lower grade to one of higher grade.

The present state of the law requires that this sentence be vacated and the case remanded for a new sentencing hearing.

Vacated and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 APRIL 1989

BURNETT v. MOORE No. 882SC1146	Martin (85CVS291)	Affirmed
CALHOUN v. GADDY No. 8830SC805	Haywood (86CVS342)	No Error
CHAND v. A-QUALITY REALTY No. 8821DC1044	Forsyth (87CVD4403)	Affirmed
GALLOWAY v. SNYDER No. 8828DC1043	Buncombe (87CVD3779)	Dismissed
HOOD v. HOOD No. 8810DC1163	Wake (88CVD1508)	Affirmed
IN RE LONG No. 8822DC597	Davidson (84J135)	Affirmed
JACKSON v. JONES No. 886SC937	Halifax (86CVS908)	No Error
LAMPE ENTERPRISES v. MARITIME DEV. & CONSTR. CO. No. 883DC819	Carteret (87CVD763)	Affirmed
N.C. BAPTIST HOSP. v. FORSYTH CO. DEPT. OF SOCIAL SERV. No. 8821SC683	Forsyth (87CVS3756)	Affirmed
NELSON v. PINEHURST ENTERPRISES, INC. No. 8820DC801	Moore (85CVD761)	Affirmed
PATEL v. MID SOUTHWEST ELECTRIC No. 8828SC754	Buncombe (85CVS3258) (86CVS3098)	No Error
PETROLEUM WORLD v. THOMAS PETROLEUM No. 8827SC695	Cleveland (86CVS1428)	Reversed & Remanded
PUCKETT v. PUCKETT No. 8811DC842	Johnston (86CVD1660)	Affirmed
STATE v. BROWN No. 887SC1135	Edgecombe (86CRS10033) (86CRS10417)	No Error
STATE v. CALDWELL No. 8826SC1167	Mecklenburg (86CRS96653)	Affirmed

STATE v. COOK No. 8818SC1110	Guilford (87CRS58118) (87CRS58119)	No Error
STATE v. CURRY No. 8822SC1143	Davidson (87CRS4320) (87CRS4321)	No Error
STATE v. HOLLOMAN No. 887SC897	Edgecombe (87CRS8920)	Appeal Dismissed
STATE v. HORNE No. 8826SC1169	Mecklenburg (87CRS04318)	No Error
STATE v. JOHNSON No. 8826SC726	Mecklenburg (87CRS61837)	Affirmed
STATE v. JONES No. 882SC1015	Beaufort (87CRS2063) (87CRS2064) (87CRS2065)	Appeal Dismissed
STATE v. KEARNEY No. 887SC1286	Wilson (87CRS5941)	No Error
STATE v. McCANTS No. 8810SC1103	Wake (87CRS23801)	No Error
STATE v. McWHORTER No. 8820SC1141	Union (87CRS008640) (87CRS008638) (87CRS008637) (87CRS008641)	No Error
STATE v. PENNINGTON No. 8810SC584	Wake (87CRS34974)	No Error
STATE v. SIMMONS No. 8817SC586	Stokes (87CRS323)	No error in trial; remanded for correction of clerical error.
STATE v. WEBB No. 8826SC530	Mecklenburg (87CRS26861) (87CRS26866)	No error. Remand for correction of judgment.
STATE EX REL. RHODES v. HORNE No. 8812SC663	Cumberland (87CVS4505)	Reversed & Remanded
THOMPSON v. THOMPSON No. 8814DC749	Durham (86CVD1387)	Affirmed
TIMMERMAN v. TIMMERMAN No. 889DC1151	Franklin (84CVD277)	Affirmed

REBECCA FOARD v. WAYNE JARMAN, M.D.

No. 8822SC587

(Filed 2 May 1989)

1. **Physicians, Surgeons, and Allied Professions § 13— medical malpractice—statute of limitations—summary judgment inappropriate**

The trial court erred in entering summary judgment for defendant surgeon on the basis of the statute of limitations in plaintiff's medical malpractice action based on lack of informed consent for gastric reduction surgery where (1) defendant presented no evidence of when plaintiff discovered or should have discovered she was injured by defendant's alleged failure to obtain her informed consent and thus failed to show that plaintiff was not entitled to the one year from discovery extension of the primary three year statute of limitations established by N.C.G.S. § 1-15(c) for injuries which are not readily apparent, and (2) the action was filed within the four year statute of repose set forth in that statute.

2. **Physicians, Surgeons, and Allied Professions § 17.1— medical malpractice—informed consent—summary judgment inappropriate**

The trial court erred in entering summary judgment for defendant surgeon on the issue of informed consent in a malpractice action where there was no evidence that defendant's procurement of plaintiff's consent for gastric reduction surgery was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities, and there was no determination as to whether a reasonable person would have undergone the surgery if properly advised of its risks. N.C.G.S. § 90-21.13(a)(1)-(3).

3. **Limitation of Actions § 8.3; Physicians, Surgeons, and Allied Professions § 17.1— medical malpractice—consent to surgery—fraud—statute of limitations**

The trial court properly entered summary judgment for defendant surgeon on the issue of whether plaintiff's written consent for gastric reduction surgery was obtained by defendant's fraudulent misrepresentations as to his experience with

this type of surgery where plaintiff's evidence showed that her action was filed more than three years after she learned of defendant's alleged misrepresentations and thus was barred by the three year statute of limitations of N.C.G.S. § 1-52(9).

4. Physicians, Surgeons, and Allied Professions § 17— medical malpractice—surgery and care—summary judgment for defendant

Summary judgment was properly entered for defendant surgeon in a medical malpractice action based on negligence in the performance of gastric reduction surgery on plaintiff and care of plaintiff after surgery where defendant offered evidence through the affidavit of another physician that he had in all respects complied with the standard of care in the community in rendering professional services to plaintiff, and plaintiff came forward with no evidence to refute defendant's showing.

5. Physicians, Surgeons, and Allied Professions § 16— medical malpractice—res ipsa loquitur inapplicable

Plaintiff failed to show that the doctrine of *res ipsa loquitur* applied to preclude summary judgment for defendant surgeon in a medical malpractice claim based on negligence where plaintiff failed to present a forecast of expert testimony to show that her injuries were of a type that do not ordinarily occur in the absence of a negligent act or omission, and common experience and knowledge would not be sufficient to evaluate whether the injuries would ordinarily occur in the absence of negligence.

6. Physicians, Surgeons, and Allied Professions § 18— leaving needle in patient's body—insufficient evidence—summary judgment

Summary judgment was properly entered for defendant surgeon in a medical malpractice claim based on leaving a needle inside plaintiff's body where there was evidence that a nurse notified defendant during surgery that the needle count was incorrect, but there was no evidence that a needle was found in plaintiff's body.

Judge COZORT concurring in part and dissenting in part.

APPEAL by plaintiff from *Collier (Robert A., Jr.), Judge.* Order entered 5 January 1988 in Superior Court, IREDELL County. Heard in the Court of Appeals 9 December 1988.

Hall and Brooks, by John E. Hall and W. Andrew Jennings, for plaintiff-appellant.

Wade and Carmichael, by R. C. Carmichael, Jr., for defendant-appellee.

GREENE, Judge.

Plaintiff filed this medical malpractice action to recover damages for alleged lack of informed consent, fraud, and negligence. The trial court granted defendant's motion for summary judgment. Plaintiff appeals.

The undisputed evidence at the hearing on the summary judgment motion tends to show: Plaintiff, Rebecca Foard, went to see defendant, Dr. Wayne Jarman, about her weight problem. Plaintiff and defendant discussed the possibility of plaintiff undergoing gastric reduction surgery, a procedure which causes weight loss by limiting the amount of food a person can consume at one time. Gastric reduction surgery involves creating a small one-ounce pouch in the stomach with a staple gun. Defendant gave plaintiff a booklet on the procedure and the risks involved in the surgery and asked her to take it home and read it. Plaintiff decided to have the surgery and signed a consent form on 12 August 1982 stating she completely understood the nature and consequences of the surgery.

Two days following the first surgery, which occurred on 13 August 1982, plaintiff developed a fever and went into shock. Defendant performed a second operation on 17 August 1982 and discovered a perforation near the staple line which in defendant's opinion was the cause of her illness. Concurrent with the second operation, defendant discovered plaintiff had renal failure and thereafter transferred plaintiff to Baptist Hospital because the defendant anticipated plaintiff might need a dialysis machine which was not then available at Iredell Memorial Hospital.

During the second operation, a nurse notified defendant that the needle count was incorrect. The wound was still open and defendant inspected the abdomen but did not find a needle. Defendant

and the nurses also searched the immediate area but no needle was found. After the wound was closed, an x-ray was taken which failed to show a needle in the plaintiff.

Following her discharge from the hospital after the second surgery, plaintiff began gaining weight. Plaintiff continued to see the defendant at his office until which time defendant did an upper gastro intestinal x-ray series. This procedure showed that the staple line had become disrupted and that there was no longer a functioning pouch present.

The issues presented for review are whether the trial court erred in granting defendant's motion for summary judgment I) on the issue of lack of informed consent; II) on the issue of fraud; and III) on the issue of negligence.

A party is entitled to summary judgment if he can show "through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that he is entitled to judgment as a matter of law." *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E. 2d 228, 231 (1987). The burden of establishing the lack of a genuine issue of material fact lies upon the movant. *Boyce v. Meade*, 71 N.C. App. 592, 593, 322 S.E. 2d 605, 607 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 390 (1985). The movant may meet this burden "by showing the nonexistence of an essential element of the plaintiff's cause of action or by showing, through discovery, that plaintiff cannot provide evidence to support an essential element." *Durham v. Vine*, 40 N.C. App. 564, 566, 253 S.E. 2d 316, 318 (1979). All the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought. *Id.* at 566, 253 S.E. 2d at 318-19. If the moving party meets his burden, the non-moving party "must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not so doing." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E. 2d 190, 193 (1980). "If the moving party fails in his showing, summary judgment is not proper regardless of whether the opponent responds." *Id.; Caldwell v. Deese*, 288 N.C. 375, 379, 218 S.E. 2d 379, 381-82 (1975) (non-movant not required to introduce evidence at summary judgment unless "movant's forecast, considered alone . . . [is] such as to establish his right to judgment as a matter of law").

I

Plaintiff alleged in her complaint defendant was negligent in that he "failed to warn the plaintiff of the seriousness of the surgical procedure." Plaintiff's claim is an action for malpractice and is "based upon the alleged failure of defendants to reasonably disclose to her the various choices with respect to the proposed treatment and the dangers inherently and potentially involved in the treatment." *Nelson v. Patrick*, 58 N.C. App. 546, 548-49, 293 S.E. 2d 829, 831 (1982). This tort is commonly referred to as "lack of informed consent" and plaintiff "must first prove that the doctor breached a duty properly to inform the patient of the risks and benefits of a proposed procedure and must then prove that the negligence of the doctor was a proximate cause of the injury to the patient." *Dixon v. Peters*, 63 N.C. App. 592, 596, 306 S.E. 2d 477, 480 (1983). Because plaintiff's cause of action is one for professional malpractice, the applicable statute of limitations is found in N.C.G.S. Sec. 1-15(c) (1983). *Black v. Littlejohn*, 312 N.C. 626, 628, 325 S.E. 2d 469, 472 (1985).

A

[1] We first determine if the claim based on lack of informed consent is barred by the statute of limitations, as was pled by the defendant.

On 13 August 1982, defendant performed the first surgery on the plaintiff pursuant to a written authorization signed by the plaintiff on 12 August 1982. This action for medical malpractice based on lack of informed consent was filed on 12 August 1986, within four years after the surgery.

The question presented is whether the plaintiff qualifies under N.C.G.S. Sec. 1-15(c) (1983) for a one-year extension of the primary three-year statute of limitations established by the statute.

N.C.G.S. Sec. 1-15(c) (1983) provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which

> originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

N.C.G.S. Sec. 1-15(c) provides for a minimum three-year statute of limitations. *Black*, 312 N.C. at 634, 325 S.E. 2d at 475. The statute affords two exceptions to the three-year statute of limitations. *Id.* at 635, 325 S.E. 2d at 475.

> [(1)] an additional one-year-from-discovery period for injuries "not readily apparent" subject to a four-year period of repose commencing with defendant's last act giving rise to the cause of action; and
>
> [(2)] an additional one-year-from-discovery period for foreign objects subject to a ten-year period of repose again commencing with the last act of defendant giving rise to the cause of action.

Id. at 634, 325 S.E. 2d at 475.

As the alleged injury here is not one of a foreign object left in plaintiff's body, to qualify for the "one-year-from-discovery" extension, plaintiff's injury must have been "not readily apparent." Injuries allegedly sustained by virtue of the "lack of informed consent" are "not readily apparent" until plaintiff discovers or "in the exercise of reasonable care, should [discover] . . . that [she] . . . was injured as a result of defendant's wrongdoing." *Id.* at

642, 325 S.E. 2d at 480. Discovery of the injury does not occur in a legal sense, "[u]ntil plaintiff discovers the wrongful conduct of the defendant." *Black* at 639, 325 S.E. 2d at 478. When the evidence is not conclusive or is conflicting, the question of when the plaintiff first discovered or should have discovered that she was injured as a result of the defendant's alleged negligence in failing to properly inform the plaintiff of the risks involved in the surgery is one of fact for the jury and summary judgment is inappropriate. *See Ballenger v. Crowell*, 38 N.C. App. 50, 60, 247 S.E. 2d 287, 295 (1978) (question of whether injury was "readily apparent" was question for the jury and not one for summary judgment).

While the record does show the plaintiff learned just after her second surgery in 1982 that she "was pretty much messed up inside," as a result of her first surgery, this knowledge is unrelated to the issue of the lack of informed consent. At the summary judgment hearing, the defendant, who had the burden of proof, offered no evidence on the issue of when plaintiff discovered or should have discovered she was injured as a result of defendant's alleged act of negligently informing plaintiff of the risks of the surgery and accordingly the plaintiff was not obligated to come forward with any evidence. *See Thomasville*, 300 N.C. at 654, 268 S.E. 2d at 193 (if moving party fails in his burden, summary judgment is inappropriate regardless of whether opponent responds). Furthermore, as the surgery of 13 August 1982 was the last act giving rise to this cause of action for lack of informed consent, the action was filed within the four-year statute of repose. *See Black*, 312 at 629, 325 S.E. 2d at 472 (statute of repose begins to run on "lack of informed consent" action from date of surgery). Accordingly, summary judgment cannot be granted based on this evidence for plaintiff's failure to comply with the statute of limitations.

B

N.C.G.S. Sec. 90-21.13 (1985) governs causes of action based upon lack of informed consent. That statute provides in pertinent part:

> (a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the

patient's spouse, parent, guardian, neareast relative or other person authorized to give consent for the patient where:

(1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and

(2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact.

This statute codifies the standard of care required of health care providers as it relates to disclosure to patients of the various choices of treatment and the dangers and risks involved in the treatment. *Azzolino v. Dingfelder*, 315 N.C. 103, 123, 337 S.E. 2d 528, 540 (1985) (Martin, J., concurring in part and dissenting in part), *cert. denied*, 479 U.S. 835, 107 S.Ct. 131, 93 L.Ed. 2d 75 (1986), *reh'g denied*, 319 N.C. 227, 353 S.E. 2d 401 (1987); *see also Nelson v. Patrick*, 73 N.C. App. 1, 12, 326 S.E. 2d 45, 52 (1985) (where common law of informed consent is inconsistent with language and purpose of N.C.G.S. Sec. 90-21.13, the statute prevails).

Consistent with N.C.G.S. Sec. 90-21.13, plaintiff must prove at trial that defendant did not obtain her informed consent by

"showing either that he failed to comply with G.S. 90-21.13(a)(1) or that he failed to comply with G.S. 90-21.13(a)(2)." *Nelson*, 73 N.C. App. at 13, 326 S.E. 2d at 53. Plaintiff must then prove, pursuant to N.C.G.S. Sec. 90-21.13(a)(3), that if adequately informed, a "reasonable person" "would have foregone treatment." *Dixon*, 63 N.C. App. at 596, 306 S.E. 2d at 480.

However, as this matter comes before the court on defendant's motion for summary judgment, it is immaterial that plaintiff would have the burden of proof at trial, as "upon a motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law." *Whitley v. Cubberly*, 24 N.C. App. 204, 206, 210 S.E. 2d 289, 291 (1974) (quoting *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 51, 191 S.E. 2d 683, 688 (1972). Only after the moving party, here the defendant, meets his burden, does the burden shift to the plaintiff to rebut the validity of the consent. *Id.* In order to obtain summary judgment the defendant must establish in accordance with N.C.G.S. Sec. 90-21.13 one of the following: (1) that his actions in obtaining the consent of the plaintiff were "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities," N.C.G.S. Sec. 90-21.13(a)(1), *and* that "[a] reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities," N.C.G.S. Sec. 90-21.13(a)(2), *or* (2) that assuming no compliance with (a)(1) and (a)(2), "[a] reasonable person, under all the surrounding circumstances, [nonetheless] would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivision (1) and (2) . . . ." N.C.G.S. Sec. 90-21.13(a)(3); *see also Estrada v. Jaques*, 70 N.C. App. 627, 645, 321 S.E. 2d 240, 251-52 (1984) (discussion of what must be established for defendant to obtain summary judgment in a lack of informed consent case).

[2] In this record, there is no evidence that the action of the defendant in obtaining the consent of the plaintiff was "in accordance with the standards of practice among members of the same

health care profession with similar training and experience situated in the same or similar communities." Furthermore, there has been no determination as to what a reasonable person would have done had he been advised in accordance with the statute. *See Estrada*, 70 N.C. App. at 645, 321 S.E. 2d at 252 (questions of reasonableness must ordinarily go to the jury). Accordingly, the defendant has failed to meet his burden of proof and the trial court therefore was in error in granting defendant's motion for summary judgment on the issue of informed consent. *See id.* (defendant must show community standard for obtaining consent).

II

[3] Plaintiff next contends the written consent authorizing the surgery, even if obtained in compliance with N.C.G.S. Sec. 90-21.13(a), was nonetheless invalid because it was procured by fraud and misrepresentations of the defendant. N.C.G.S. Sec. 90-21.13(b) (presumption of validity of written consent obtained in compliance with Section 90-21.13(a) "subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact"). Specifically, the plaintiff argues the doctor misrepresented his prior medical experience as it related to his performance of this type of surgery. In response, defendant argued that plaintiff's claim to avoid the written consent because of fraud was barred by the statute of limitations.

N.C.G.S. Sec. 1-52(9) (1983) establishes a three-year statute of limitations for claims based on fraud and that period begins to run upon "the discovery by the aggrieved party of the facts constituting the fraud . . .," N.C.G.S. Sec. 1-52(9), or "from the time it should have been discovered in the exercise of reasonable diligence." *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 7, 149 S.E. 2d 570, 575 (1966). Once the statute is pled, the burden is on the aggrieved party to show he instituted his fraud claim within the allotted time. *Id.* at 8, 149 S.E. 2d at 575. However, as this defendant moved for summary judgment, the burden was on the defendant at the summary judgment hearing to show plaintiff's claim was barred by the statute of limitations. *Thomasville*, 300 N.C. at 654, 268 S.E. 2d at 193.

The evidence presented at the summary judgment hearing included the deposition of the plaintiff. In that deposition she testified she first learned in "mid" 1983, when she first started gaining weight, that the defendant "had not done a gastroplasty procedure in Iredell County." In response to another question in the deposi-

tion, the plaintiff testified that in April 1983 and subsequent to her gaining weight after the second operation, the defendant x-rayed her and determined the "staples had pulled out." This evidence taken in the light most favorable to plaintiff is adequate proof that plaintiff learned in April 1983 of the alleged misrepresentations of the defendant relating to his medical experience. This action was not filed until 12 August 1986, more than three years after first learning of the facts giving rise to the alleged misrepresentation. Therefore, the trial court did not err in entering summary judgment as to the plaintiff's claim based on fraud. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E. 2d 350, 353 (1985) (when statute of limitations is pled, summary judgment is appropriate if facts as to time of discovery are not in conflict).

III

Plaintiff also claims the defendant was negligent in that he generally failed to exercise the care a physician in the Statesville area would have exercised in a similar situation. Specifically, the plaintiff claims (A) defendant left perforations in the plaintiff's body, failed to properly staple the plaintiff's body, waited until plaintiff went into shock and was near death before he undertook a second surgical operation, performed the first operation without the assistance of another doctor; and (B) during the second operation defendant negligently left a needle inside her body.

Defendant asserts plaintiff's negligence claims are barred by the statute of limitations because they were filed more than three years from the dates of the first and second operations. Because plaintiff's claims are for professional malpractice, the applicable statute of limitations is found in N.C.G.S. Sec. 1-15(c) (1983).

A

Plaintiff contends the alleged negligent perforation on the inside of her body, the improper staple line, the delay before the second surgery, and the performance of the first operation without the assistance of another doctor are all injuries of the type which would be "not readily apparent," therefore entitling her to the benefit of the one-year extension of the three-year minimum statute of limitations.

Injuries allegedly sustained in the surgery were "not readily apparent," until plaintiff discovered or "in the exercise of reason-

able care, should have discovered, that [she] was injured as a result of defendant's wrongdoing." *Black*, 312 N.C. at 642, 325 S.E. 2d at 480. As the defendant has not met his burden of showing conclusively when plaintiff became aware or should have become aware of the negligent conduct, the question is one of fact for the jury. *Hiatt v. Burlington Industries, Inc.*, 55 N.C. App. 523, 526, 286 S.E. 2d 566, 568 (1982). Furthermore, this action has been filed within the four-year statute of repose, as the last acts giving rise to these claims for relief occurred on 13 August 1982 and 17 August 1982, the dates of the first and second surgeries.

[4] Nonetheless, the defendant offered evidence through the affidavit of another physician that the defendant had in all respects complied with the standard of care in the community in rendering professional services to the plaintiff in August 1982. As plaintiff came forward with no evidence of negligence to refute defendant's showing, summary judgment was appropriately entered for the defendant. *See Thomasville*, 300 N.C. at 654, 268 S.E. 2d at 193 (if moving party meets his summary judgment burden "nonmoving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so").

[5] Plaintiff argues that the doctrine of *res ipsa loquitur* applies to these negligence claims thereby precluding summary judgment and eliminating the need for her to present expert medical testimony to refute that presented by the defendant. When the doctrine of *res ipsa loquitur* is applied, an inference of negligence is created which will preclude summary judgment "even though the defendant presents evidence tending to establish the absence of negligence." *Schaffner v. Cumberland Co. Hosp. System*, 77 N.C. App. 689, 691-92, 336 S.E. 2d 116, 118 (1985), *disc. rev. denied*, 316 N.C. 195, 341 S.E. 2d 578-79 (1986). The doctrine of *res ipsa loquitur* applies when "the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission," "direct proof of the cause of an injury is not available," and "the instrumentality involved in the accident is under the defendant's control." *Parks v. Perry*, 68 N.C. App. 202, 205, 314 S.E. 2d 287, 289, *disc. rev. denied*, 311 N.C. 761, 321 S.E. 2d 142-43 (1984).

We find plaintiff's forecast of evidence insufficient to show "the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission" and accordingly the doctrine of *res ipsa loquitur* does not apply to the facts of this case. Plaintiff

is correct in her argument that failure to present a forecast of expert testimony is not always fatal. *See Schaffner*, 77 N.C. App. at 692, 336 S.E. 2d at 118. When "facts can be evaluated based on common experience and knowledge, expert testimony is not required." *Id.* However, because of the nature of this case, we conclude "common experience and knowledge" would not be sufficient to evaluate whether the injuries alleged would "not ordinarily occur in the absence of" negligence. Therefore, as plaintiff has presented insufficient evidence on this element of *res ipsa loquitur*, discussion of the remaining elements of *res ipsa loquitur* is unnecessary.

B

[6] On the claim relating to the needle allegedly left inside the plaintiff's body, the plaintiff is permitted by Section 1-15(c) to commence an action "within one year after discovery thereof . . . but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action." N.C.G.S. Sec. 1-15(c) (1983). As there is no evidence in the record that a needle was found in plaintiff's body, no genuine issue of material fact exists, and accordingly, summary judgment was appropriately entered in favor of the defendant on this claim.

IV

In summary, we vacate the summary judgment of the trial court in dismissing the plaintiff's claim for relief as it relates to lack of informed consent. We affirm the trial court on the entry of summary judgment as to the other issues in the complaint.

Affirmed in part, vacated in part and remanded.

Judge PHILLIPS concurs.

Judge COZORT concurs in part, dissents in part.

Judge COZORT concurring in part and dissenting in part.

I concur with all of the majority opinion except for that portion which vacates the trial court's order of summary judgment for relief as it relates to lack of informed consent. In my opinion, the trial court was correct in granting summary judgment for the defendant on that issue.

The majority holds there is no evidence that the action of defendant in obtaining the consent of plaintiff was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities. I disagree.

Defendant testified in his deposition that he provided plaintiff, prior to the operation, with a booklet entitled, "What You and Your Family Should Know About Gastric Operations For the Treatment of Obesity." That booklet described the development of the procedure, how it works, and, among other things, the risks involved with the surgery. Plaintiff testified in her deposition that she received the book from defendant, read it, discussed it with her family, and made the decision to have the surgery with awareness of the risks involved in the procedure. In his deposition, defendant testified that he was of the opinion that his treatment and care of plaintiff in the performance of the first surgical procedure was consistent with the standard of practice of the specialty of general surgery in Iredell County. I believe this evidence is sufficient to meet defendant's burden, on summary judgment, that his actions in obtaining the consent of plaintiff were in accordance with the standards of practice of the same health care profession with similar training and experience in the same or similar communities. With plaintiff offering no evidence to the contrary, I believe the trial court was correct in granting summary judgment for defendant on that issue.

PHILIP E. WALKER v. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF RALEIGH AND HOWARD S. KOHN, SUBSTITUTE TRUSTEE

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY PHILIP E. WALKER AND WIFE, LAURA P. WALKER DATED JULY 1, 1983 AND RECORDED IN BOOK 426, PAGE 299, IN THE ORANGE COUNTY REGISTRY BY HOWARD S. KOHN, SUBSTITUTE TRUSTEE

No. 8815SC888

(Filed 2 May 1989)

1. Mortgages and Deeds of Trust § 9— mortgage—release agreement—no application to unilateral release of property

In a declaratory judgment action to determine the rights of parties involved in a note, deed of trust, and release agree-

ment, the trial court correctly concluded that the release agreement had no application to a voluntary release where, according to the clear and unambiguous language of the release agreement and plaintiff's own testimony, the release agreement did not apply to the unilateral release of property.

2. Mortgages and Deeds of Trust § 9— unilateral release—application of N.C.G.S. § 45-45.1(4)

The trial court in a declaratory judgment action to determine the rights of parties to a note, deed of trust, and release agreement, correctly concluded that N.C.G.S. § 45-45.1(4) did not operate to reduce plaintiff's indebtedness under the note, that plaintiff had no right of redemption as mortgagor, that the statute did not apply because Walker was a junior mortgagee or lienholder on a portion of the property and had no indebtedness to reduce, and that plaintiff's only right of redemption was as subsequent owner of the other portion of the property. N.C.G.S. § 45-45.1 contemplates a sale or transfer of encumbered property to a grantee who does not assume the mortgage, and a release of the secured property by the mortgagee along with an attempt to hold the mortgagor personally liable on the note.

APPEAL by plaintiff from *Battle, F. Gordon, Judge.* Judgment and order entered 26 May 1988 in Superior Court, ORANGE County. Heard in the Court of Appeals 11 January 1989.

Northen, Blue, Little, Rooks, Thibaut & Anderson, by John A. Northen and Jo Ann Ragazzo Woods, for plaintiff-appellant.

Petree Stockton & Robinson, by Kenneth S. Broun and Gary K. Joyner, for defendant-appellee First Federal Savings and Loan Association of Raleigh.

JOHNSON, Judge.

This is an appeal from a judgment decreeing that plaintiff is not entitled to a reduction in the principal due and owing on a note, and an order allowing foreclosure of the property securing the note to proceed.

The following real estate transactions form the basis for the action underlying this appeal. On 1 July 1983, plaintiff, Philip E. Walker, executed a purchase money promissory note (Bennett Note)

for $308,500 to Harvey D. Bennett, Mildred B. Blackwood, Lucille B. Ray and Placid B. Highfill as part of the purchase price for 36.79 acres of real property. The promissory note was secured by 31.79 acres of the tract, leaving five acres of the tract unencumbered by the Bennett Note. The parties also executed a release agreement which specified the method by which the seller would release portions of the tract from the note as the buyer reduced the outstanding principal.

On 1 October 1984, plaintiff transferred the entire tract to the Martin Development Group, Inc. (MDG). As part of the purchase price, MDG granted a promissory note (Escrow Note) for $144,245 to certain escrow agents secured by a purchase money deed of trust on the entire 36.79 acre tract. This Escrow Note then became the second lien on 31.79 acres of the tract and a first lien on the five acres unencumbered by the Bennett Note. A second purchase money promissory note for $355,000 (Walker Note) was granted to plaintiff Walker and was secured by a purchase money deed of trust on the entire tract. Thus, the Walker deed of trust became a third lien on 31.79 acres of the tract and a second lien on the five acres unencumbered by the Bennett Note. The Bennett release agreement which provided for the release of property from the note as the principal was reduced was incorporated into both the Walker and Escrow deeds of trust.

Sometime in December 1984, MDG and defendant, First Federal Savings and Loan entered into a loan agreement whereby MDG would borrow money for development of the property. To secure the future advances, MDG executed a note and deed of trust encumbering 11.045 acres of the tract, including the five acres unencumbered by the Bennett Note and the 6.045 acres which adjoined them, to First Federal. This 11.045 acre tract was then released from both the Escrow and Walker deeds of trust, resulting in the elevation of defendant First Federal to first lienholder on the five acres exempted from the Bennett Note, and second lienholder on the remaining 6.045 acres, second to the Bennett Note.

Defendant First Federal began to make advances as per the loan agreement with MDG, advancing at least $326,000 between December 1984 and January 1988. Defendant then became insecure concerning the repayment of the loan, recognizing that the amount which it had already advanced was the total value of the entire 11.045 acre tract, for which it held a first lien on only five acres.

This initial insecurity was compounded by the fact that MDG had not met its obligation to pay $79,380.13 due under the Bennett Note on 31 December 1987. This note was the first lien on 6.045 acres of the 11.045 acre tract which was used to secure the advances made by defendant First Federal, although no foreclosure action was instituted by the Bennetts, et al.

In an attempt to insure repayment, defendant purchased the Bennett Note which it received by assignment on 5 January 1988. Then on 27 January 1988, in full satisfaction of the development loan to MDG, defendant had MDG convey the 11.045 acre tract to defendant's wholly owned subsidiary, First Tricorp, Inc. Then, as new holder of the Bennett Note, and owner of the 11.045 acre tract through its subsidiary, defendant released 6.045 acres from the note. The property released was the portion of the entire tract which secured the development loan which was subject to the Bennett Note.

As a result of the transactions, First Federal, through its subsidiary, became the owner of 11.045 acres of the original tract; the $326,000 development loan to MDG was satisfied, and the Bennett Note, now held by First Federal, encumbered 25 acres of the original 36 acre tract. Also, as a result of these transactions, plaintiff's interest in the entire tract amounted to that of junior lienholder on a note secured by 25.75 acres of the tract now owned by Walker's corporation (MDG). He held no equity of redemption in the 11.045 acres owned by defendant's subsidiary.

On 2 February 1988, defendant notified plaintiff that the Bennett Note was in default, and that the entire debt was accelerated, and demanded payment of the entire amount within five days. After payment was not received as demanded, defendant, through its substitute trustee, instituted foreclosure proceedings, seeking foreclosure of the 25 acre tract secured by the Bennett Note. Defendant obtained an order allowing the foreclosure to proceed.

Plaintiff then commenced a civil action seeking a declaratory judgment declaring the rights, status and relations of the parties concerning the Bennett Note, deed of trust and the release agreement. The court determined, *inter alia*, that the release agreement did not apply to First Federal's voluntary release of the 6.045 acres from the Bennett Note; that G.S. sec. 45-45.1 did not operate to reduce the indebtedness under the Bennett Note; that defendant First Federal was entitled to a declaratory judgment against plain-

tiff, and that plaintiff could redeem the property and terminate the foreclosure by paying the entire balance of the principal and other applicable fees; and that the injunction halting the foreclosure should be dissolved. The court then entered an order allowing foreclosure to proceed pursuant to G.S. sec. 45-21.16(d). From the judgment and order, plaintiff appeals.

Plaintiff brings forward three questions for this Court's review, all of which are based upon the effect of First Federal's unilateral release of 6.045 acres of real property from the Bennett Note which it had purchased. The first contention is that the release of the property from the note should have resulted in a reduction in plaintiff's indebtedness on the Bennett Note. He next argues that the trial court erred by not applying G.S. sec. 45-45.1 to reduce the amount required to exercise his right of redemption by an amount equal to the value of the property unilaterally released. The third argument is that the trial court erred by allowing foreclosure to proceed, as any default on his part should have been cured or waived by defendant's unilateral release. We rule against plaintiff on all issues.

We note at the outset that the applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings. *In re Norris*, 65 N.C. App. 269, 310 S.E. 2d 25 (1983), *cert. denied*, 310 N.C. 744, 315 S.E. 2d 703 (1984). Therefore, we consider plaintiff's questions with this directive in mind.

[1] The release agreement which was included in the original Bennett Note and was allegedly violated by defendant's unilateral release of property appears, in pertinent part, as follows:

RELEASE AGREEMENT

THIS AGREEMENT, dated July 1, 1983, and made and entered into by and between Harvey D. Bennett, Placid B. Highfill, Mildred B. Blackwood, and Lucille B. Ray, hereinafter referred to as "Sellers," and Philip E. Walker, hereinafter referred to as "Buyer";

WHEREAS, Seller has agreed to sell and Buyer has agreed to buy certain tracts or parcels of land, containing a total of 36.787 acres, more or less, portions of which shall be made subject to a Purchase Money Deed of Trust of even date here-

with, securing a Purchase Money Promissory Note of even date herewith in the original principal amount of $308,500.00; . . .

. . . .

1. The Purchase Money Deed of Trust shall initially be a lien upon that certain 7.948 acre tract of land designated as Tract D, and that certain 23.839 acre tract of land designated as Tract F, as shown on plat entitled "Property of Harvey D. Bennett," dated June 28, 1983, and revised July 12, 1983, and prepared by Ayers and Edgerton, Surveyors.

2. At request of Buyer, and from time to time, and upon the condition that all accrued interest due under the note has been paid as of the date of the release, Seller shall release portions of said tracts upon the reduction of the then outstanding principal amount of said Note by an amount equal to the amount of principal then owed on the portions to be released, calculated by dividing the then outstanding principal balance by the aggregate acreage then subject to said Deed of Trust, and applied to the acreage of the respective tract(s) to be released. For the purposes of this paragraph, for the first three years of this note and as called for in the note, interest accruing shall be added to principal annually and deemed principal thereafter.

. . . .

5. Any regular installment of principal and interest or any partial prepayment shall be applied first to any outstanding interest then accrued, but not added to principal, and then to reduction of the outstanding principal balance. Any reduction in principal arising or occurring from any regular installment of principal and interest shall be applied to and shall be available for Buyer's next following request release(s) until same be expended as set forth above, without the requirement of additional payment.

6. Buyer shall not be entitled to any release of property unless Buyer is not in default and is in full compliance with all of the terms and provisions of the Note, the Deed of Trust, and this Release Agreement.

. . . .

8. This agreement shall be construed in accordance with the terms and conditions of the Note, and the Deed of Trust referenced above, and shall be binding upon the heirs, successors, personal representatives, or assigns of the parties hereto.

A careful review of this agreement reveals that it contains no provision for the unilateral or voluntary release of property from the note by the seller or his assignee, First Federal. This agreement designates the procedure by which the seller or his assignee is required to release portions of the property at the buyer's request as the buyer reduces the principal by making regular installments. This assessment was confirmed by plaintiff on cross-examination.

Q. . . . Paragraph 2 of the, of the agreement which dealt with the release of property upon the the [sic] payment of certain sums was put in to permit certain parcels to be released upon the payment of certain specified sums. Is that right?

A. That's right.

Q. And they, that paragraph dealt with the question of the, under what terms the mortgagee would be required to release terms, to release land under the agreement. Isn't that correct?

A. That's right.

Q. Doesn't deal with the question of, of whether the, the mortgagee would be releasing property unilaterally, does it, doesn't say anything about the mortgagee releasing property unilaterally does it?

A. No, it doesn't.

. . . .

Q. Nor in paragraph 4 is there any provision that deals with the mortgagee releasing property unilaterally does it?

A. No.

Q. All right. Indeed there's nothing in the release agreement, Plaintiff's Exhibit 4, that deals with the question of the grantee releasing property, isn't that correct, with the mortgagor releasing property, if I can correct the question?

A. That's right.

Q. There were no discussions prior to the adoption of the release agreement with regard to the possibility that the mortgagee, that is the Bennetts might unilaterally release property?

A. No.

Q. There were no discussions that anybody to whom they might assign the notes might unilaterally release property. Isn't that right?

A. That's right.

Therefore, according to the clear and unambiguous language of the release agreement, as well as plaintiff's own testimony, we hold that the release agreement does not apply to the unilateral release of property. The trial court correctly concluded, based upon the findings of fact, that the release agreement had no application to the voluntary release and did not reduce plaintiff's indebtedness under the Bennett Note and Deed of Trust. *Norris, supra.*

[2] Our attention now shifts to the cases and statutes governing this transaction, since plaintiff may not rely upon the release agreement to challenge defendant's unilateral release of the 6.045 acres.

Plaintiff cites G.S. sec. 45-45.1(4) in support of his position that he is entitled to a reduction in his indebtedness on the Bennett Note because of the unilateral release. It provides that

> [w]henever real property which is encumbered by a mortgage or deed of trust is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume the same, and thereafter the mortgagee or secured creditor under the deed of trust, or trustee acting in his behalf, releases any of the real property included in the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property released, which shall be the value at the time of the release or at the time an action is commenced on the obligation secured by the mortgage or deed of trust, whichever value is the greater.

The trial court concluded that the statute did not operate to reduce Walker's indebtedness under the Bennett Note; that Walker had no right of redemption as mortgagor; that G.S. sec. 45-45.1 does not apply in this situation because Walker was a junior mortgagee or lienholder of a note on the 6.045 acre tract and had no indebtedness to reduce; and finally that plaintiff's only right of re-

demption was as subsequent owner of the 25.75 acre tract, due to a transfer of the property from MDG to Walker effected long after First Federal's unilateral release of the 6.045 acres from the Bennett Note.

We find that these conclusions were proper in light of the trial court's findings which had ample support from the evidence. *Norris, supra.* Paragraph (4) of G.S. sec. 45-45.1 contemplates a sale or transfer of encumbered property to a grantee who does not assume the mortgage, and a release of the secured property by the mortgagee along with an attempt to hold the mortgagor personally liable on the note. *See Barnaby v. Boardman*, 313 N.C. 565, 330 S.E. 2d 600 (1985); *Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977); Smith, *Survey of North Carolina Case Law, Credit Transactions*, 44 N.C.L. Rev. 956 (1965-66).

The statute has no application to the transaction in the case at bar where MDG, the mortgagor, transferred encumbered property (11.045 acres) to the grantee (First Federal's subsidiary), and the mortgagee (First Federal) released the 6.045 acres of the tract which were encumbered from the note. The grantee and the mortgagee were subsidiary and parent corporation, respectively. By virtue of the initial transfer by MDG, plaintiff Walker lost any and all interest in the property at the heart of the dispute. He owned no equity of redemption in the property and neither did MDG which transferred the property to First Federal's subsidiary to satisfy a debt owed to First Federal. If any party suffered an impairment of rights by the release, the party was First Federal, the holder of the Bennett Note which originally encumbered 31.79 acres of the tract before its unilateral release of 6.045 acres.

Therefore, because G.S. sec. 45-45.1 is inapplicable to the facts of this case, and plaintiff's authority from other jurisdictions is unpersuasive on the arguments set forth, we hold that the trial court committed no error by refusing to reduce plaintiff's indebtedness under the Bennett Note encumbering the remaining 25.75 acres, and by refusing to conclude that plaintiff's default on the Bennett Note was cured by defendant's unilateral release of property.

Affirmed.

Judges WELLS and BECTON concur.

C. WILLIAM BARKER, PLAINTIFF v. EDWARD C. AGEE, JAMES R. MABE, BRADFORD K. ROOT, FRANK E. WALL, VELPO D. WARD, JR. AND WARD AND COMPANY, P.A., DEFENDANTS/THIRD-PARTY PLAINTIFFS v. CITIZENS NATIONAL BANK, THIRD-PARTY DEFENDANT

No. 8818SC696

(Filed 2 May 1989)

1. **Appeal and Error § 6.2— summary judgment—third party action—separate appeal—appeal not dismissed**

An appeal from a summary judgment was not dismissed even though the summary judgment order did not resolve defendants' third party action and was therefore not a final judgment where the third party defendant advised the court that a final judgment had been entered by the trial court, the issues involved in the main claim were separate and distinct from those involved in the third party action, and no useful purpose would be served by dismissing this appeal.

2. **Waiver § 1— note—acceptance of late payments—no waiver**

A noteholder did not waive his right to accelerate the debt where the note provided that payments were due on the first of the month and that the debt might be accelerated upon a default for fifteen or more days; all payments were made prior to the expiration of the fifteen-day grace period until August 1986, when a payment was not made until 22 August 1986; plaintiff accepted the payment without notifying defendants or the bank, which was to have made the payments automatically, that it had been late; the next default in payment occurred in 1987 when no payment was made; the next payment was made on 2 March 1987; plaintiff accepted that payment without notifying the other parties of its lateness; no additional payment was made before 15 March 1987; and plaintiff notified defendants of his intention to accelerate on 17 March 1987. No waiver results from isolated instances of acceptance of late payments; only a consistent course of accepting past due installments will preclude the noteholder from exercising the right to accelerate the debt.

3. **Estoppel § 4.2— note—acceptance of prior late payments—no estoppel of acceleration**

A noteholder's acceptance of prior late payments did not operate as an estoppel to his enforcement of the acceleration

clause in the note even though plaintiff did not alert defendants to the default because plaintiff took no affirmative action to mislead defendants. Mere silence will not operate to create an estoppel in the absence of a real or apparent duty to speak.

4. **Bills and Notes § 15— payment by wire transfer—failure of bank to transfer funds—plaintiff not precluded from accelerating**

A noteholder was not precluded from enforcing the acceleration clause in a note because the default was the result of a bank's error in not transferring funds by wire as agreed where the parties had agreed to payment by wire transfer to avoid disputes and contact between the parties; the defendants arranged with the bank to have the transfers made automatically on the first of each month and defendants received no notice of the transfers beyond monthly account statements; defendants had sufficient funds in the account to provide for transfers; and, upon being notified of the missing payment, the bank immediately tendered to plaintiff a cashier's check in the amount of the installment plus interest. Although plaintiff agreed to the method of payment, defendants were solely responsible for the arrangements with the bank to provide for the monthly payments and chose to delegate all responsibility for insuring prompt payment to the bank, even though they had notice of the bank's prior failures in this regard.

5. **Attorneys at Law § 7.4— collection of note—attorneys' fees—evidence sufficient**

The evidence was sufficient to support an award of attorney fees in an action to collect amounts due under a promissory note where the award was supported by the affidavit of plaintiff's attorney and billing statements showing the actual work performed and the attorneys' hourly rates, and the trial court made findings of fact as to the reasonable amount of time required for the services and the reasonableness of the hourly rates.

APPEAL by defendants from *Walker (Russell G., Jr.), Judge.* Order entered 23 March 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 January 1989.

Plaintiff instituted this action to recover amounts due under the terms of a promissory note. The note was executed on 9 November 1983 by the individual defendants and defendant Ward

& Company, P.A. The terms of the note provided the following: Defendants would pay to plaintiff $700,000.00 without interest in 101 monthly installments of $6,862.00. Each installment was due on the first day of the month beginning 1 December 1984. Upon default in the payment of an installment for fifteen or more days, the holder had the right to declare the entire unpaid balance due and, upon doing so, was entitled to interest on the balance due from the date of default. The note further provided that the holder was entitled to reasonable attorney's fees in an action to enforce the terms of the note. The makers of the note expressly waived presentment, demand, protest, notice of default, or any other conditions on their liability.

The parties agreed that the monthly payments would be made by wire transfer to plaintiff's account with Merrill, Lynch, Pierce, Fenner & Smith, Inc. Defendants arranged to have the transfers made from an account with third-party defendant Citizens National Bank (hereinafter "Bank"). Pursuant to that arrangement, the Bank would automatically transfer the funds each month. Through an oversight, the Bank failed to transfer the required payment for the month of February 1987. The Bank made the next transfer on 2 March 1987. On 17 March 1987, plaintiff notified defendants of his intention to accelerate the note. On 19 March 1987, the Bank tendered to plaintiff a cashier's check in the amount of the missing payment plus interest. Plaintiff rejected that check and subsequent payments tendered by defendants. Plaintiff then filed the complaint in this action.

Defendants filed an answer, counterclaim, and third-party complaint, asserting several defenses based upon plaintiff's conduct in accepting late payments prior to his decision to accelerate the note. They also asserted as a defense that the Bank was solely responsible for any default, and they alleged in their third-party complaint that the Bank would be liable for any amount recovered from defendants by plaintiff. All parties moved for summary judgment. The trial court entered an order granting plaintiff's motion for summary judgment and awarding plaintiff the unpaid principal due on the note ($514,726.00), interest on that amount from 16 March 1987 to 15 March 1988 ($43,285.76), and attorney's fees in the amount of $24,308.00. Defendants and the third-party defendant Bank appeal.

Smith, Helms, Mulliss & Moore, by Robert A. Wicker and Linda S. Bellows, for plaintiff-appellee.

Hendrick, Zotian, Cocklereece & Robinson, by T. Paul Hendrick and William A. Blancato, for defendant/third-party plaintiff-appellants.

Bell, Davis & Pitt, by Walter W. Pitt, Jr. and J. Dennis Bailey; and Poyner & Spruill, by J. Phil Carlton, Susan K. Nichols, and Mary Beth Johnston, for third-party defendant-appellant.

PARKER, Judge.

[1] At the outset, we note that the order which is the subject of this appeal did not resolve defendants' third-party action against the Bank. Therefore, the order was not a final judgment as to all claims and parties. Because the trial court did not make a finding that there was no just reason for delay under Rule 54(b) of the N.C. Rules of Civil Procedure, this appeal is interlocutory and normally would be subject to dismissal unless the order affected a substantial right as provided by G.S. 1-277 and G.S. 7A-27(d). *Sportcycle Co. v. Schroader*, 53 N.C. App. 354, 356, 280 S.E. 2d 799, 800-01 (1981).

In this case, however, the Bank has alerted this Court to the fact that it has filed a separate appeal from a subsequent judgment entered in favor of defendants on their third-party claim. Although the subsequent judgment is not included in the record on this appeal, this Court may take judicial notice of our own records in related proceedings. *See State v. Hill*, 266 N.C. 107, 110, 145 S.E. 2d 349, 351 (1965). Because a final judgment has been entered by the trial court and the issues involved in the main claim are separate and distinct from those involved in the third-party action, no useful purpose would be served by dismissing defendants' appeal. *See Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 375 S.E. 2d 161 (1989) (per curiam). However, since the order which is the subject of this appeal did not determine the Bank's liability and did not affect the Bank's rights, the Bank does not have standing to appeal from this order as an aggrieved party pursuant to G.S. 1-271. *Coburn v. Timber Corporation*, 260 N.C. 173, 132 S.E. 2d 340 (1963). Therefore, the Bank's appeal is dismissed. *Id.*

[2] Summary judgment is appropriate when there is no genuine issue of material fact and any party is entitled to judgment as a

matter of law. Rule 56(c), N.C. Rules Civ. Proc. It is not disputed in this case that a default occurred and plaintiff was entitled to accelerate the debt under the terms of the note. Defendants contend that plaintiff may not enforce the terms of the note under the facts of this case.

Defendants first contend that plaintiff either waived his right to accelerate the debt or is equitably estopped from doing so because he previously accepted late payments. We disagree. The note provides that payments are due on the first of the month and the debt may be accelerated upon a default for fifteen or more days. The record shows that all payments were made prior to the expiration of the fifteen-day grace period until August 1986, when a payment was not made until 22 August 1986. Plaintiff accepted the payment without notifying defendants or the Bank that it had been late. The next default in payment occurred in February 1987 when no payment was made. The next payment was made on 2 March 1987. Plaintiff also accepted that payment without notifying the other parties of its lateness. No additional payment was made before 15 March 1987, and plaintiff notified defendants of his intention to accelerate on 17 March 1987.

A noteholder who repeatedly accepts late installments will be held to have waived the right to accelerate the debt on that ground unless the payor is first notified that prompt payment will be required in the future. *Driftwood Manor Investors v. City Federal Savings & Loan*, 63 N.C. App. 459, 464, 305 S.E. 2d 204, 207 (1983). In the present case, however, plaintiff had accepted only two late installments before he elected to accelerate the debt. *Cf. Driftwood Manor Investors v. City Federal Savings & Loan*, 63 N.C. App. at 461, 305 S.E. 2d at 205 (late payments continuously accepted from April 1979 through March 1980). Generally, no waiver results from isolated instances of acceptance of late payments; only a consistent course of accepting past-due installments will preclude the noteholder from exercising the right to accelerate the debt. G. Nelson & D. Whitman, Real Estate Finance Law § 7.7 at 491 (2d ed. 1985); Annotation, *Acceptance of Past-Due Interest as Waiver of Acceleration Clause in Note or Mortgage*, 97 A.L.R. 2d 997 (1964). In the absence of a consistent course of conduct, acceptance of late payments precludes the noteholder from accelerating for the past defaults but does not waive the option to accelerate for future defaults. *First Fed. Sav. & Loan Ass'n of Phoenix v. Ram*, 135 Ariz. 178, 659 P. 2d 1323 (Ariz. Ct. App. 1983); *McGowan v. Pasol*, 605 S.W.

2d 728, 732 (Tex. Civ. App. 1980). Therefore, plaintiff in this case did not waive his right to accelerate the debt for the default in March 1987.

[3] Plaintiff's acceptance of the prior late payments also did not operate as an estoppel to his enforcement of the acceleration clause in the note. Through the Bank's oversight, no payment was made in February 1987. Defendants contend that, having accepted a payment on 2 March 1987, plaintiff knew a second payment would not be made before 15 March 1987 and he merely waited until the grace period expired so that he could accelerate the debt. They argue that plaintiff is estopped from exercising his rights under the note because defendants would have provided the missing payment if plaintiff had notified them of the deficiency.

Although plaintiff's conduct in this case may have been less than exemplary, it does not provide a basis for equitable relief under the facts of this case. Plaintiff took no affirmative action to mislead defendants, but merely did not alert them to the default. Mere silence will not operate to create an estoppel in the absence of a real or apparent duty to speak. *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 164, 356 S.E. 2d 912, 916, *disc. rev. denied*, 320 N.C. 794, 361 S.E. 2d 80 (1987). Defendants having executed a note which expressly waived any right to notice of default, they cannot now obtain such a right under the doctrine of equitable estoppel. A right must exist before equity will enforce it. *Sappenfield v. Goodman*, 215 N.C. 417, 421, 2 S.E. 2d 13, 16 (1939). Furthermore, a note which provides for acceleration of the debt upon a default in payment imposes no duty upon the noteholder to exercise the right to accelerate in good faith. *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 631, 224 S.E. 2d 580, 588 (1976); *In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 662, 266 S.E. 2d 686, 690, *disc. rev. denied and appeal dismissed*, 301 N.C. 90 (1980). Thus, plaintiff's conduct does not preclude him from enforcing this unsecured, interest free note according to its terms.

[4] Defendants next contend that plaintiff is precluded from enforcing the acceleration clause in the note because the default was the result of the Bank's error and plaintiff assumed the risk of such an error by agreeing to receive the payments by wire transfer. We disagree.

It is not disputed that the default was caused by the Bank's oversight. The parties have stipulated that plaintiff and defend-

ants agreed to payment by wire transfer in order to avoid disputes and contact between the parties. The record shows that defendants arranged with the Bank to have the transfers made automatically on the first of each month and that defendants received no notice of the transfers beyond monthly account statements. Defendants had sufficient funds in the account to provide for transfers in both February and March of 1987. Upon being notified of the missing payment, the Bank immediately tendered to plaintiff a cashier's check in the amount of the installment plus interest from 1 February 1987 to 19 March 1987, which plaintiff rejected.

Defendants rely on cases from other jurisdictions holding that a noteholder may not accelerate the debt when the parties have agreed to payment by mail and a promptly posted payment has been lost in the mail. *O'Neal v. Horne*, 127 Ariz. 330, 620 P. 2d 709 (Ariz. Ct. App. 1980); *Kerin v. Udolf*, 165 Conn. 264, 334 A. 2d 434 (1973); *Hoch v. Hitchens*, 122 Mich. App. 142, 332 N.W. 2d 440 (1982). Although our courts have not previously considered the question of a noteholder's right to accelerate when an installment on a note is lost in the mail, our Supreme Court has held that an insurance company may not cancel a policy when it agrees to accept premiums by mail and a payment is promptly mailed but lost in transit. *Hollowell v. Insurance Co.*, 126 N.C. 398, 35 S.E. 616 (1900). Defendants contend that the reasoning of the above-cited cases is not limited to situations where payment is made by mail. They argue that the same principles must apply to the wire transfers in this case which were made through the Federal Reserve System and governed by federal regulations. 12 C.F.R. §§ 210.25-210.38 (1988).

Under the facts of this case, we find it unnecessary to decide whether policy requires that payment by wire transfer be governed by the same rules as payment by mail. Although plaintiff agreed to the method of payment, defendants were solely responsible for the arrangements with the Bank to provide for monthly payments. Defendants had expressly waived notice of default and they knew that plaintiff had the unqualified right to accelerate the debt if a payment was not received by the fifteenth of the month. Nevertheless, they made no arrangement with the Bank for notification of payment or any other procedure to ensure prompt payment. The monthly account statements would not be received in time to enable defendants to cure a default. Moreover, the Bank had previously failed to make timely transfers and in one instance did

not make the transfer until after the grace period had expired. Defendants had constructive notice of these failures from the account statements.

The present case is, therefore, distinguishable from the cases involving payment by mail. Once a letter is mailed, the sender has no control over its delivery and cannot be held liable for events beyond his control. Defendants in this case could have personally ordered each monthly transfer or requested immediate verification of the transfers. Instead, they chose to delegate all responsibility for ensuring prompt payment to the Bank, even though they had notice of the Bank's prior failures in this regard. Defendants were ultimately responsible for making payments under the terms of the note, and they could not avoid that responsibility by delegating it to a third party. Accordingly, we hold that the trial court properly granted plaintiff's motion for summary judgment.

[5] Defendants also contend that there was insufficient evidence to support the trial court's award of $24,308.00 in attorney's fees to plaintiff. The note provided for reasonable fees "but not more than such attorneys' usual hourly charges for the time actually expended." By statute, this provision would have permitted the trial court to award up to fifteen percent of the balance due on the note. G.S. 6-21.2(1). The actual award was far less than fifteen percent of the balance due.

An award of attorneys' fees under G.S. 6-21.2 must be supported by evidence and findings of fact showing the reasonableness of the award. *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 226, 319 S.E. 2d 650, 655, *disc. rev. denied*, 312 N.C. 621, 323 S.E. 2d 922 (1984). The amount of an award within the permissible limit is a matter within the trial court's discretion. *Id.* In this case, the award was supported by the affidavit of plaintiff's attorney and billing statements showing the actual work performed and the attorneys' hourly rates. The trial court made findings of fact as to the reasonable amount of time required for the services and the reasonableness of the hourly rates. The evidence and findings of fact are sufficient to support the amount of the award, and we find no abuse of the trial court's discretion.

For the foregoing reasons, the trial court's order granting plaintiff's motion for summary judgment and awarding attorney's fees to plaintiff is affirmed.

Affirmed.

Judges EAGLES and LEWIS concur.

SANDRA A. BULLOCK, PLAINTIFF v. WILLIAM H. NEWMAN, M.D.; WILLIAM H. NEWMAN, M.D., P.A.; AND CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., DEFENDANTS

No. 8812SC662

(Filed 2 May 1989)

1. **Physicians, Surgeons, and Allied Professions § 17— medical malpractice—failure to notify plaintiff of cancer—physical pain—compensable injury**

In a medical malpractice action based upon defendant doctor's alleged failure to notify plaintiff that she had breast cancer for 87 days after he became aware of her condition, plaintiff's evidence on motion for summary judgment established a compensable injury where she presented evidence that during the 87-day interval she continued to experience physical pain which could have been eliminated or at least treated had she been notified of her cancerous condition.

2. **Physicians, Surgeons, and Allied Professions § 17— medical malpractice—failure to notify plaintiff of cancer—allegation of compensable injury**

Plaintiff alleged the existence of a compensable injury by stating that she suffers from cancerophobia, i.e., the fear that cancer has spread to her whole body and will recur at some later date, because defendant failed for nearly three months to notify her that she had breast cancer and thus allowed her body to remain cancerous for nearly three additional months beyond the time within which the problem could have been arrested.

3. **Appeal and Error § 16— appeal by one defendant—jurisdiction to hear second defendant's summary judgment motion**

The trial court retained jurisdiction in a medical malpractice case to hear defendant hospital's motion for summary judgment after plaintiff had taken an appeal from the court's

order granting the individual defendant's motion for summary judgment. N.C.G.S. § 1-294.

4. Hospitals § 3— medical malpractice—failure to notify plaintiff of cancer—summary judgment for hospital

The trial court properly entered summary judgment for defendant hospital in a medical malpractice action based on the failure to notify plaintiff that she had breast cancer for nearly three months after having become aware of her condition where the evidence showed that plaintiff's doctor received the results of a biopsy performed on plaintiff at defendant hospital eighteen days after the test was performed; there was no evidence indicating that this reporting procedure constituted any breach of duty or that there was any irregularity in the manner in which the lab work was performed; and the injury of which defendant complains occurred between the time plaintiff's doctor received the results from defendant hospital and the date he communicated them to plaintiff.

APPEAL by plaintiff from *Johnson, E. Lynn, Judge.* Orders entered 20 January 1988 and 28 March 1988 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 January 1989.

This is an action for medical malpractice based upon the allegation that defendants negligently failed to notify plaintiff that she had breast cancer nearly three months after having become aware of her condition.

David H. Rogers for plaintiff-appellant.

Anderson, Broadfoot, Johnson & Pittman, by Hal W. Broadfoot, for defendant-appellee Newman.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons, Jr., for defendant-appellee Cumberland County Hospital System, Inc.

JOHNSON, Judge.

The physician-patient relationship between plaintiff and defendant Newman commenced in 1975 when plaintiff went to Dr. Newman to have a lump in her right breast examined. A biopsy was performed which revealed that the lump was benign. Several years passed without event until 6 January 1982 when defendant exam-

ined plaintiff because she had noticed bleeding from the nipple of her left breast. Defendant Newman then scheduled a mammogram for 19 January 1982 which was to be performed at defendant hospital. Plaintiff was told by defendant Newman that the mammogram results were negative. Plaintiff then informed defendant Newman that her breast continued to bleed between the 6 January appointment and the 19 January mammogram. He then reexamined the breast, told plaintiff that nothing was wrong, and asked her to schedule another appointment if the bleeding continued.

Plaintiff again experienced bleeding from the same breast about two months later on 28 March 1982. This time the bleeding was accompanied by soreness and swelling. She then telephoned defendant Newman and was given an appointment for 26 April 1982. During the office visit plaintiff persuaded defendant Newman to perform a second biopsy in spite of his professional opinion that such a procedure was unnecessary. The continued pain caused plaintiff to insist on the surgery despite attempts by defendant Newman to reassure her.

Plaintiff was admitted into defendant hospital and defendant Newman performed the biopsy on 30 April 1982. A follow-up visit was made on 6 May 1982. Plaintiff's stitches were removed and she was informed, after inquiry, that the biopsy results had not been received from the hospital. After this visit plaintiff made numerous telephone calls to ask about the test results and was informed that she would be notified as soon as the results became available. She was never telephoned by defendant Newman and informed of the test results, although he received the results of the biopsy on 18 May 1982.

Plaintiff's pain persisted and she telephoned defendant Newman on 11 August 1982 after awaking in severe pain and noticing that her left breast was swollen. She was told that no appointments were available so she scheduled an appointment for 16 August 1982 with Dr. James Beyer, a physician who sometimes "covered" for defendant Newman. Plaintiff was unable to wait until the scheduled visit because the pain had become so severe. For that reason she telephoned defendant Newman on 13 August and insisted on seeing him them. She went to the office on this date and was told that she had cancer of her left breast and that a mastectomy would need to be performed at once, within one week.

A period of nearly three months elapsed between the time defendant Newman received the results of the second biopsy and the time he informed plaintiff that her left breast was cancerous. Defendant Newman admitted that he received the test results on 18 May 1982 and that plaintiff "learned the test results on 13 August 1982." On 24 August 1982 Dr. James Beyer performed a modified radical mastectomy on plaintiff's left breast. Plaintiff specifically requested that Dr. Beyer and not defendant Newman perform the surgery.

Plaintiff instituted this civil action on 9 April 1986 to recover for damages she sustained as a result of the delay in being notified that she had breast cancer. Defendant Newman filed a motion for summary judgment which was granted on 20 January 1988 dismissing plaintiff's action with prejudice. Defendant Cumberland County Hospital's motion for summary judgment was also granted, by order filed on 28 March 1988. From entry of these orders plaintiff appeals.

On appeal plaintiff presents four questions for this Court's review, two of which merit discussion and provide the grounds for our decision in this case. Plaintiff first argues that the trial court erred by granting defendant Newman's motion for summary judgment. We believe that it did.

It is well established that the standard for reviewing a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, and admissions on file, along with the affidavits submitted in support thereof show the absence of a genuine issue of any material fact, and that a party is entitled to judgment as a matter of law. *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 337 S.E. 2d 644 (1985). In negligence cases, there is a presumption against granting summary judgment. *Wilson Brothers v. Mobil Oil*, 63 N.C. App. 334, 305 S.E. 2d 40 (1983). Where the pleadings establish a valid cause of action, summary judgment should be cautiously granted in a negligence action, since it is ordinarily better left to the jury to apply a standard of care to the facts of the case. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E. 2d 2 (1988). Thus, we evaluate this case in light of these familiar principles.

The four essential elements of a claim for relief based upon negligence are (1) a duty to conform to a certain standard of conduct; (2) a breach of that duty; (3) proximate cause; and (4) injury or damages. *Jenkins v. Theaters, Inc.*, 41 N.C. App. 262, 254

S.E. 2d 776 (1979). Where it is shown by materials outside the pleadings that any one of the elements is absent, such as a compensable injury, summary judgment is proper. *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885 (1971).

[1] Defendant Newman contends that in this case plaintiff has failed to demonstrate that the delay in notification was the proximate cause of any alleged injury she may have suffered. The crucial question in his estimation is "whether a delay of 87 days between the time plaintiff was informed of the initial pathology results and the surgery elected by plaintiff resulted in either a detrimental change in plaintiff's overall condition or eliminated or restricted her treatment options." In our view, however, the more accurate question is whether an 87 day delay between the time defendant Newman learned of plaintiff's cancerous condition and notified her of the same so that the treatment process could begin and the severe pain occasioned thereby could be eliminated, amounts to a compensable injury. Although defendant Newman states that plaintiff has failed to show proximate cause, his argument in reality is that plaintiff has failed to demonstrate a compensable injury.

We agree with defendant Newman that there is insufficient evidence to indicate that the delay eliminated any treatment options which would have been available to plaintiff when he first became aware of her condition. However, this is where our agreement ends. There is evidence to support plaintiff's claim that during the 87 day interval she continued to experience severe physical pain which could have been eliminated or at least treated had she been notified of her cancerous condition and the treatment process commenced. During this time, plaintiff's pain remained unexplained and uncorrected. She was apprised of no available options except to continue suffering. We believe that this injury is compensable.

The recovery for personal injury proximately caused by the negligence of another includes "a reasonable satisfaction (if he be entitled to recover at all) for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury." *Ledford v. Lumber Co.*, 183 N.C. 657, 659-60, 112 S.E. 421, 423 (1922). *See also King v. Britt*, 267 N.C. 594, 148 S.E. 2d 594 (1966); *Mitchem v. Sims*, 55 N.C. App. 459, 285 S.E. 2d 839 (1982); and *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E. 2d 231 (1980).

[2] We also believe that plaintiff has alleged the existence of a compensable injury by stating that because her condition was allowed to persist throughout the delay in notification she now suffers from "cancerophobia," i.e., the fear that the cancer has spread throughout her body and will recur at some later date in the future.

> [I]t has been held or recognized in a great majority of cases that anxiety or worry about a possible future disease or condition may constitute a proper element of damages, as a component of that mental anguish accompanying physical injury generally recognized as an item for which damages are recoverable, at least if such disease or condition might reasonably be apprehended to result from the injury for which the wrongdoer is assumed to be liable.

Annotation, *Damages—Anxiety—Future Condition*, 71 A.L.R. 2d 338, 341 (1960).

Our Supreme Court has recognized such an injury as compensable in *Alley v. Pipe Co.*, 159 N.C. 327, 74 S.E. 885 (1912), where plaintiff was seriously burned by the explosion of a defectively made core which was used in his employment as a pipe molder at defendant foundry. Plaintiff's physician was allowed to testify "that the character of plaintiff's wound was such that a sarcoma, or eating cancer, was liable to ensue." *Alley* at 330, 74 S.E. at 886. The Court stated that "[w]e think the evidence competent also as tending to prove acute mental suffering accompanying a physical injury. The liability to cancer must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles, he knows not when it will fall." *Id.* at 331, 74 S.E. at 886.

We find that *Alley* is conclusive on the issue of whether plaintiff's allegation that she experiences "cancerophobia" because defendant Newman allowed her body to remain cancerous for nearly three additional months beyond the time within which the problem could have been arrested, is a compensable injury. (See 71 A.L.R. 2d 338, *supra*, and 71 A.L.R. 2d Later Case Service 338-347 (1984) and Supp. (1988) for further discussion on the issue. *See also* Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. Rev. 435 (1979-80).) The reasonableness or unreasonableness of her fears is a determination which the jury should make. It is for the aforementioned reasons that we hold that the trial court committed reversible error in dismissing plaintiff's claim pursuant to defendant Newman's motion for summary judgment.

[3] By Assignment of Error number three plaintiff argues that the trial court was without jurisdiction to hear defendant hospital's motion for summary judgment, and in the alternative, that the motion was improvidently granted. We disagree on both counts.

G.S. sec. 1-294 states the following:

> [w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; *but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.* . . .

(Emphasis added.) The statutory language is quite clear and its interpretation by this Court reflects that clarity. In *Jenkins v. Wheeler*, 72 N.C. App. 363, 325 S.E. 2d 4 (1985), this Court held that the trial court committed no error in granting defendant Nationwide's motion to dismiss after plaintiff had appealed from an order granting defendant Wilson's motion to dismiss. The Court further ruled that the first order of dismissal concerned whether plaintiff had stated a cause of action against defendant Wilson only, and the second order ruled upon the sufficiency of the complaint against defendant Nationwide.

Similarly, in the case *sub judice*, the two motions to dismiss made by defendants Newman and Cumberland County Hospital were not interdependent. The court retained jurisdiction to hear defendant hospital's motion after plaintiff had taken the appeal from the order granting defendant Newman's motion for summary judgment as it was "not affected by the judgment appealed from." G.S. sec. 1-294.

[4] Having found that the court had jurisdiction to hear defendant hospital's motion, our attention shifts to the substance of the motion. The evidence before us indicates that plaintiff's biopsy was performed at defendant hospital on 30 April 1982, and that defendant Newman received the test results from the hospital on 18 May 1982, eighteen days later. No evidence before us indicates that this reporting procedure constituted any breach of duty or that there was any irregularity in the manner that the lab tests were performed. The injury of which plaintiff complains occurred between the time defendant Newman received the results from the hospital and communicated the information to plaintiff. De-

fendant hospital was uninvolved during this period and the trial court was correct in ruling that as to the hospital plaintiff has demonstrated no genuine issue of material fact.

It is for the foregoing reasons that we reverse the trial court's order as to defendants Newman, i.e., William H. Newman, M.D. and William H. Newman, M.D., P.A., and affirm the trial court's order as to defendant Cumberland County Hospital.

Affirmed in part; reversed in part.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. CLIFFORD CARLTON REYNOLDS

No. 8813SC829

(Filed 2 May 1989)

1. **Witnesses § 1— competence to testify—voir dire after testimony—no error**

   There was no prejudicial error in a prosecution for attempted first degree rape from allowing a ten-year-old witness to testify without first inquiring into her competence where the witness was correctly determined to be competent at a voir dire examination held after her testimony. The better practice would be to conduct the voir dire examination and determine competency prior to the witness's testimony.

2. **Witnesses § 1.2— ten-year-old witness—competency to distinguish truth from non-truth—no error**

   The trial court did not err in a prosecution for attempted first degree rape by finding that the ten-year-old prosecuting witness was competent to distinguish truth from non-truth where the witness's responses to the court's questions sufficiently supported the court's determination that she was competent to testify.

3. **Indictment and Warrant § 9.11— attempted rape—time of offense—summer of 1986—sufficient**

   The State complied with the requirements of N.C.G.S. § 15A-924(a)(4) (1988) in a prosecution for attempted first degree

rape by stating that the offense occurred during the summer of 1986.

4. Rape and Allied Offenses § 18.1— attempted first degree rape —irrelevant evidence—no prejudice

There was no prejudice in a prosecution for attempted first degree rape from the trial court's failure to strike portions of testimony which were non-responsive and irrelevant and admitting testimony from the prosecuting witness's mother that she had taken her daughter to the doctor during August of 1986 for stomach problems.

5. Witnesses § 1.2— competency of eleven-year-old witness—no error

The trial court did not err in a prosecution for attempted rape by permitting the prosecuting witness's eleven-year-old cousin to testify even though the trial judge did not question the witness himself where her responses to the prosecutor's questions provided sufficient evidence to support the implicit finding that she was competent to testify.

6. Rape and Allied Offenses § 18.1— attempted rape—questioning of prosecutrix's cousin—relevant

The trial court did not err in a prosecution for the attempted rape of a nine-year-old child by asking the prosecutrix's cousin whether she had ever stayed with defendant by herself where the testimony was relevant to rebut the suggestion made by questions posed earlier by defense counsel that the witness and her mother did not fear the defendant.

7. Criminal Law § 89.4— attempted rape of nine-year-old child— prior inconsistent statement admitted—no error

The trial court did not err in a prosecution for the attempted rape of nine-year-old child by allowing the investigating detective to read the statement he took from the prosecuting witness into evidence at trial even though it contained additional information beyond her testimony because the detective's testimony merely corroborated that of the prosecuting witness. Although the detective's account contained additional information, it bolstered the witness's credibility and added weight to her testimony and was admissible as corroborative evidence.

8. **Criminal Law § 73.5— attempted rape of nine-year-old child—testimony of examining physician—statements made to him by victim and her mother**

The trial court did not err in a prosecution for the attempted rape of a nine-year-old child by allowing the physician who examined the prosecuting witness nearly a year after the incident to testify as to statements made to him by the girl and her mother. Defendant's contention that the statements were not necessary for purposes of medical treatment was rejected.

9. **Rape and Allied Offenses § 18.2— attempted first degree rape of nine-year-old child—evidence sufficient**

The evidence was sufficient to submit the charge of attempted first degree rape of a nine-year-old child to the jury where the prosecuting witness testified that defendant removed her clothing and put her on top of him, that she could feel something between her legs, and that defendant let her go only when her aunt drove into the driveway.

APPEAL by defendant from *Clark, Giles R., Judge.* Judgment entered 13 April 1988 in COLUMBUS County Superior Court. Heard in the Court of Appeals 20 March 1989.

Defendant was found guilty in a jury trial of attempted first degree rape and was sentenced to the presumptive term of six years' imprisonment. The prosecuting witness, who was nine years old at the time of the alleged offense and ten years old when the trial occurred, testified that during a previous summer she had spent a Friday night with her cousin. The cousin and her mother lived with defendant. The following morning she and her cousin went into the garage to play when defendant called the prosecuting witness' name. Both girls ran out of the garage, apparently frightened because the defendant had been drinking, but the prosecuting witness tripped and fell. Defendant picked her up and carried her back into the garage, where he removed her clothing and then his own. She testified that he then lay down and put her on top of him, and that she could feel something moving between her legs where her "cooter" was. She explained that her "cooter" was what "I pee out of." She also stated that she did not feel anything inside of her "cooter."

Defendant objected to the introduction of this testimony on the basis that the trial court made no inquiry into the child's competence to testify, but these objections were overruled. During cross-examination the trial court conducted a *voir dire* examination of the prosecuting witness outside the jury's presence and found her to be competent to testify. Portions of this examination appear as follows:

Q. And do you know when something—when you're telling the truth and do you know when you're telling a lie?

A. (NO ANSWER.)

Q. Do you know that?

A. Yes, sir.

Q. Do you know what happens if you don't tell the truth . . .?

A. (NO ANSWER.)

Q. You put your hand on the Bible there, and you say, "I swear I'll tell the truth," and you don't do it, do you know what happens then?

A. (PAUSE.) Yes, sir.

Q. What would happen then?

A. I'd go to the Devil.

Q. You'd go to the Devil. All right. Now, do you understand and know that—how important it is for you to tell the truth in this—at this time?

A. Yes, sir.

Q. And you know that it would be a bad thing for you not to do that?

A. (NODS HEAD UP AND DOWN.)

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

T. Craig Wright for defendant-appellant.

WELLS, Judge.

[1] Defendant assigns error to the trial court's denial of its request for an inquiry into the prosecuting witness' competence to testify and in allowing her to testify without first determining her to be capable of distinguishing truth from non-truth. N.C. Gen. Stat. § 8C-1, Rule 601 of the North Carolina Rules of Evidence provides:

> (a) *General rule.*—Every person is competent to be a witness except as otherwise provided in these rules.
>
> (b) *Disqualification of witness in general.*—A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

A court "may resort to any examination which will tend to disclose [the proposed witness'] capacity and intelligence as well as his understanding of the obligations of an oath." *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978) (*quoting Wheeler v. United States*, 159 U.S. 523 (1895)).

The statement that "[c]ompetency is to be determined at the time the witness is called to testify" appears a number of times in the North Carolina case law, *see, e.g., Artesani v. Gritton*, 252 N.C. 463, 113 S.E. 2d 895 (1960), but no prior decision addresses the question of whether this means that the examination must occur before the witness testifies. The trial court made clear in the present case prior to its *voir dire* examination that the prosecuting witness "certainly has testified in a fashion that the Court finds would indicate without question that she is capable of expressing herself." An accurate determination of a child's competency to testify emanating from his moral sensitivity "can be made by the trial judge through his personal observation while the child is being questioned." *State v. Harvell*, 45 N.C. App. 243, 262 S.E. 2d 850, *disc. rev. denied and appeal dismissed*, 300 N.C. 200, 269 S.E. 2d 626 (1980).

Following its *voir dire* examination, the trial court found that the witness was capable of understanding her duty to tell the truth. The record clearly supports this determination. Although the better practice would be to conduct the *voir dire* examination

and determine competency prior to the witness' testimony, in order to avoid possible mistrial or prejudice from the admission of testimony by a witness later found incompetent, we hold that this witness having been correctly determined to be competent during her testimony, the timing of the competency finding was not prejudicial error. We overrule this assignment of error.

[2] Defendant also assigns error to the trial court's finding that the prosecuting witness was competent to distinguish truth from non-truth. The trial court questioned the witness regarding her knowledge of the difference between truth and non-truth and the consequences of lying under oath. Her responses sufficiently support the trial court's determination that she was competent to testify. *See State v. Thomas, supra.* We overrule this assignment of error.

[3] Defendant next assigns error to the failure to establish a specific time during which the offense occurred; evidence presented at trial indicated only that it took place during the summer of 1986. The State is not required to establish a specific date; however, in its criminal pleading the State must only provide a statement of the approximate date or *period of time* during which the alleged offense occurred. N.C. Gen. Stat. § 15A-924(a)(4) (1988). We hold that the State complied with the statutory requirement by stating the period of time during which the alleged offense occurred: the summer of 1986. We overrule this assignment of error.

[4] Defendant next assigns error to the trial court's failure to strike portions of testimony on the ground that they were nonresponsive. When asked whether she had known if anyone was in the garage when she first went inside it, the prosecuting witness replied, "[w]e didn't know if anybody was in there or not, because Clifford never did come home that night." Although we agree that the latter portion of this statement was irrelevant, its admission was not so prejudicial as to constitute reversible error. Likewise, the prosecuting witness' mother's testimony that she had taken her daughter to the doctor during August 1986 for stomach problems, her complaints of which continued for two or three months, did not so unfairly prejudice defendant that a different result would have been reached at trial had the evidence been excluded. N.C. Gen. Stat. § 15A-1443(a) (1988). We overrule this assignment of error.

[5] Defendant next assigns error to the trial court's permitting the prosecuting witness' eleven-year-old cousin to testify. The

prosecuting attorney asked this witness whether she knew the difference between truth and non-truth and whether she understood that she had to tell the truth. Although the trial judge did not question the witness himself, her responses to the prosecutor's questions provided sufficient evidence to support the trial court's implicit finding that she was competent to testify. *See State v. Gordon*, 316 N.C. 497, 342 S.E. 2d 509 (1986). We overrule this assignment of error.

[6] Defendant also assigns error to the trial court for overruling its objection to the following question, asked of the prosecuting witness' cousin by the prosecuting attorney during redirect: "[y]ou don't ever stay with Clifford by yourself, though, do you?" Defendant contends that this question was irrelevant and highly prejudicial. This testimony was relevant to rebut the suggestion made by questions posed earlier by defense counsel that the witness and her mother did not fear the defendant.

[7] In another argument defendant contends that the trial court erred in allowing the investigating detective to read the statement he took from the prosecuting witness into evidence at trial, because it was inconsistent with her own prior testimony. The written statement included the victim's prior declaration that defendant "put his thing in me" and told her that "he was going to get me pregnant, and that if I told anyone what had happened, that he would hurt me." Defendant contends that this statement was inadmissible hearsay. We disagree.

"[I]f a prior statement of the witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce the 'new' evidence under a claim of corroboration." *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976). The court in *Warren* granted the defendant a new trial where a law enforcement agent testified that a witness told him that the defendant stated that he planned to rob and kill the victim, because the witness himself testified that the defendant said he only planned to rob the victim. The agent's testimony went far beyond corroboration, the court held; it flatly contradicted that of the witness.

In *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986), however, the Court held that a statement is corroborative even though it contains information additional to the witness' testimony in court, so long as it tends to add weight or credibility to that testimony.

We hold that the detective's testimony merely corroborated that of the prosecuting witness; although his account contained additional information, it bolstered her credibility and added weight to her testimony. The statement was admissible to corroborate the prosecuting witness' prior testimony. We overrule this assignment of error.

[8] Defendant also assigns error to the trial court for allowing the physician who examined the prosecuting witness to testify to statements made to him by the girl and her mother. He testified that he was given a history that a Clifford Reynolds "took her clothes off and inserted his penis more than one time into the vaginal area. And she stated that he threatened to hurt her if she told anyone . . . ." Defendant contends that these statements are inadmissible hearsay because they were not necessary for purposes of medical treatment. The incident was brought to light in April 1987 and the examination occurred on 27 May 1987, almost a year after the incident took place. Trial commenced on 12 April 1988.

We hold that the trial court did not err in admitting this testimony, for the statements were made for purposes of medical diagnosis and treatment. Statements as to the perpetrator's identity in a child sexual abuse case are pertinent to diagnosis of any resulting psychological problems. *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986). Apart from their pertinence to diagnosis, these statements were pertinent to medical treatment as well, given the nature of the perpetrator's relationship to the victim's aunt and cousin. Although the child did not reside in the defendant's home, she spent the night there with her cousin and the information would be reasonably pertinent to a course of treatment that included advising her not to return to the defendant's home. *See Aguallo, supra.*

The remaining portions of the statements were relevant to providing the physician with information needed to properly examine the victim to determine whether a rape had occurred. They "suggested to Dr. [Thigpen] the nature of the problem, which, in turn, dictated the type of examination [he] performed for diagnostic purposes." *Id.*

In addition, these statements meet the two-pronged confrontation clause test, for their introduction was necessary in order to show that the victim had sought medical treatment for sexual

abuse, and such statements, when made for the purpose of diagnosis or treatment, have circumstantial guarantees of trustworthiness. *State v. Gregory*, 78 N.C. App. 565, 338 S.E. 2d 110 (1985), *disc. rev. denied and appeal dismissed*, 316 N.C. 382, 342 S.E. 2d 901 (1986). We overrule this assignment of error.

[9] Defendant also contends that the evidence was insufficient to submit the charge of attempted first degree rape to the jury. The standard for evaluating the sufficiency of the evidence on a motion to dismiss is whether, considered in the light most favorable to the State, there was substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

> In order to prove attempted first degree rape under the circumstances of this case, the State must show that the victim was twelve years old or less, that the defendant was at least twelve years old and at least four years older than the victim, that the defendant had the intent to engage in vaginal intercourse with the victim, and that the defendant committed an act that goes beyond mere preparation but falls short of actual commission of intercourse.

Gregory, supra.

The prosecuting witness testified that defendant removed her clothing, put her on top of him, and that she could feel something moving between her legs. Defendant let her go only when her aunt, the woman with whom he lived, drove into the driveway. We hold that the trial court correctly determined that the State met its burden of presenting substantial evidence on each element of the offense.

We have examined defendant's remaining assignments of error, find them to have no merit, and overrule them.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. ROBERT LEE KITE AND JAMIE R. TAYLOR

No. 883SC1091

(Filed 2 May 1989)

1. **Narcotics § 4.3— possession of cocaine—conspiracies—sufficiency of evidence**

Evidence of defendant's possession of cocaine and his participation in conspiracies involving cocaine was sufficient to support defendant's conviction of various narcotics offenses where it tended to show that a buyer told defendant that he wanted to purchase four ounces of cocaine; the buyer later met defendant and the codefendant at a parking lot; defendant and the codefendant arrived in a pickup truck driven by defendant; the codefendant got the cocaine from the truck and gave it to the buyer; and the buyer later delivered money for the cocaine to the codefendant.

2. **Narcotics § 4— conspiracies involving cocaine—sufficiency of evidence**

The State's evidence was sufficient to support one defendant's convictions of conspiracies to possess with intent to sell or deliver, to sell, to deliver, and to transport in excess of 28 grams of cocaine.

3. **Criminal Law § 92.1— two defendants—joinder of narcotics offenses for trial**

Defendants were not prejudiced by the trial court's allowance of the State's motion to join various narcotics charges against them for trial where defendants were charged with identical crimes emanating from the same instance of wrongdoing; the offenses were so connected in time and place that the evidence presented at trial was admissible against both defendants; and the trial court instructed the jury that each defendant's case should be considered separate and apart from the other defendant's case.

4. **Criminal Law § 69— PEN register—admission not prejudicial**

Defendants were not prejudiced by the admission of evidence concerning a PEN register, an instrument which records and prints out all telephone numbers dialed on the line to which it is connected and the date and time of dialing, where such evidence merely corroborated testimony by a witness

that he had telephoned both defendants about a drug transaction, and where the evidence showed that both defendants met the witness in a public place to deliver cocaine to him.

5. **Conspiracy § 8— guilt of one conspiracy—multiple convictions—consolidated minimum sentence—vacation of convictions unnecessary**

Assuming that the trial court erred in imposing judgments upon defendants for four conspiracies when the evidence revealed only one agreement, vacation of the three excessive convictions was unnecessary where the trial court consolidated the cases for judgment and imposed the mandatory minimum sentence required by N.C.G.S. § 90-95.

APPEAL by defendants from *Fountain, Judge*. Judgments entered 6 May 1988 in Superior Court, PITT County. Heard in the Court of Appeals 12 April 1989.

Defendants were charged in proper bills of indictment with conspiracy to possess with intent to sell or deliver in excess of 28 grams of cocaine, conspiracy to deliver in excess of 28 grams of cocaine, conspiracy to transport in excess of 28 grams of cocaine, conspiracy to sell in excess of 28 grams of cocaine, possession with intent to sell or deliver in excess of 28 grams of cocaine, delivering in excess of 28 grams of cocaine, selling in excess of 28 grams of cocaine, and transporting in excess of 28 grams of cocaine, all in violation of G.S. 90-95.

The evidence at trial tends to show the following:

On 8 May 1986, Eddie Davenport was contacted by Ray Jackson, an undercover agent for the State Bureau of Investigation. Jackson told Davenport that he wanted to buy four ounces of cocaine. After speaking with Jackson, Davenport telephoned the residence of defendant Kite and the residence and business of defendant Taylor. After unsuccessfully trying to reach both defendants by phone, Davenport located defendant Kite near defendant Taylor's home and informed him that he (Davenport) wanted four ounces of cocaine. Davenport was told that defendant Kite would have to talk to defendant Taylor about the cocaine. Defendant Kite also set up a meeting with Davenport for that afternoon at Pitt Motor Parts. Thereafter, Davenport told Jackson that he was to meet with defendant Kite and defendant Taylor. Davenport then drove to the parking lot of Pitt Motor Parts. Defendants arrived a few

minutes later in a yellow pick-up truck driven by defendant Kite. Defendant Taylor got out of the truck, approached Davenport's truck, and asked Davenport if he knew what he was doing. Davenport replied, "[Y]eah, I know what I am doing. I want four ounces of the cocaine. . . ." Defendant Taylor went back to the yellow truck, retrieved four bags of cocaine wrapped in paper towels and returned with them to Davenport's truck. Davenport took the cocaine and delivered it to Jackson in exchange for $8,000.00. Later that evening, Davenport delivered $6,800.00 to defendant Taylor at defendant Taylor's residence.

Defendants were found guilty as charged and appealed from sentences imposing on each of them seven years for the consolidated offenses of possession with intent to sell and deliver, delivering, selling and transporting in excess of 28 grams of cocaine, and seven years for the consolidated conspiracy offenses.

Attorney General Lacy H. Thornburg, by Associate Attorney General David M. Parker, for the State.

Hardee Hardee & Harper, by G. Wayne Hardee and Charles R. Hardee, for defendant Kite, appellant.

Purser, Cheshire, Parker, Hughes & Manning, by Joseph B. Cheshire, V, for defendant Taylor, appellant.

HEDRICK, Chief Judge.

[1] Defendant Kite first argues the trial court committed reversible error by failing to grant his motion to dismiss the charges against him and by denying his motion to set aside the verdict. Essentially, defendant argues that the evidence as to his possession of cocaine and engagement in the conspiracies was so slight as to necessitate dismissal. We disagree.

In reviewing a denial of a motion to dismiss, the evidence adduced at trial must be examined in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. *State v. McKinnon*, 306 N.C. 288, 293 S.E. 2d 118 (1982). "Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element exists." *Id.* at 298, 293 S.E. 2d at 125. Discrepancies and contradictions found in the evidence are disregarded, and the State is entitled to every inference of fact which may be rea-

sonably deduced therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977).

In a prosecution for possession of a controlled substance, the State is not required to prove actual physical possession of the contraband. "Proof of constructive possession is sufficient and that possession need not always be exclusive." *State v. Perry*, 316 N.C. 87, 96, 340 S.E. 2d 450, 456 (1986). This Court has stated that "[a] person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing. As with other questions of intent, proof of constructive possession usually involves proof by circumstantial evidence." *State v. Narcisse*, 90 N.C. App. 414, 419, 368 S.E. 2d 654, 657, *disc. rev. denied*, 323 N.C. 368, 373 S.E. 2d 553 (1988), *quoting State v. Beaver*, 317 N.C. 643, 648, 346 S.E. 2d 476, 480 (1986).

A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means. *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 466 (1969), *cert. denied*, 398 U.S. 959 (1970). This conspiracy need not be proved by direct testimony but may be established by circumstantial evidence from which it may be legitimately inferred. *Id.*

In the present case, the record discloses plenary evidence that defendant Kite had the intent and capability to maintain control and dominion over the cocaine. Both defendants came to the Pitt Motor Parts parking lot after Davenport met with defendant Kite and told him he wanted to buy four ounces of cocaine. Defendant Kite drove the truck in which the cocaine was transported. He was in the truck when defendant Taylor got the cocaine from the truck and then gave it to Davenport. We hold that the evidence was "substantial" as to each and every element of the crimes charged. The trial court did not err in denying defendant Kite's motion to dismiss and motion to set aside the verdict.

[2] Defendant Taylor argues the trial court committed reversible error in denying his motion to dismiss all of the conspiracy charges against him "as the evidence was insufficient to convince a rational trier of fact of his guilt beyond a reasonable doubt."

As stated above, the State is entitled to have its evidence viewed in the light most favorable to it on a motion to dismiss,

and the State is entitled to every inference of fact which may reasonably be deduced from its evidence. *See State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). There is ample evidence in the record from which it may reasonably be deduced that defendant Taylor, defendant Kite and Davenport conspired to possess with intent to sell or deliver, sell, deliver, and transport in excess of 28 grams of cocaine. We can find no error in the trial court's denial of defendant Taylor's motion to dismiss.

[3] Both defendants contend the trial court erred in allowing the State's motion to join the trials of defendant Kite and defendant Taylor. Defendant Kite argues that he was prejudiced because the majority of the State's evidence only related to defendant Taylor. Defendant Taylor argues that he was prejudiced by the joinder and that "separate trials were necessary due to the likelihood that substantial evidence, inadmissible as to him, would be paraded before the jury. . . ."

G.S. 15A-926(b)(2) states:

> Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or
>
> 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Our Supreme Court, in *State v. Brower*, 289 N.C. 644, 658-59, 224 S.E. 2d 551, 561-62 (1976), stated:

> Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. As a general rule, whether defendants who are jointly indicted should be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that appellant

> has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal. (Citations omitted.)

Generally, severance should only be granted to avoid an evidentiary contest between the defendants. *State v. Green*, 321 N.C. 594, 365 S.E. 2d 587, *cert. denied*, --- U.S. ---, 109 S.Ct. 247, 102 L.Ed. 2d 235 (1988). The burden is on the defendant to show not only that error exists, but that there is a reasonable possibility that the outcome of the trial would have been different had such error not been committed. G.S. 15A-1443(a); *State v. Short*, 322 N.C. 783, 370 S.E. 2d 351 (1988).

In the present case, defendants were charged with identical crimes emanating from the same instance of wrongdoing. The offenses charged were so connected in time and place that the evidence presented at trial was competent and admissible to both defendants. The trial court instructed the jury that each defendant's case should be considered separate and apart from the other defendant's case. Defendants have shown absolutely no prejudice resulting from the court's failure to sever their trials. As we can find no abuse of discretion by the trial court, these assignments of error must be overruled.

[4] Defendants next argue the trial court erred by denying their motions *in limine* and admitting evidence, over their objections, concerning the PEN register. A PEN register, also known as a dial number recorder, is an instrument that records and prints out on paper all telephone numbers dialed on the line to which it is connected, as well as the date and time of the dialing. Defendants argue that the PEN register evidence admitted at trial was improperly admitted because no foundation was laid, and the reliability of the machine was not established. Defendants further argue that they were denied their constitutional rights to a fair trial, due process of law, and the confrontation of witnesses against them.

Under G.S. 15A-1443(a), "[e]vidence erroneously admitted is prejudicial, or reversible, error if 'there is a reasonable possibility that, had the error . . . not been committed, a different result would have been reached at trial.' " *State v. Wood*, 306 N.C. 510, 517, 294 S.E. 2d 310, 314 (1982). The defendant carries the burden of showing that such a possibility exists. *Id.*

We need not reach the question of the admissibility of the PEN register evidence in the case *sub judice*. The evidence produced by the PEN register merely corroborated Davenport's previous testimony that he had telephoned defendant Kite and defendant Taylor about the drug transaction. Defendants have shown no conceivable prejudice in light of the additional evidence in the record, including the rendezvous by both defendants with Davenport in a public place to deliver the cocaine. Defendants have not shown, assuming *arguendo* there was error, that absent the admission of the disputed evidence, there was a reasonable possibility that the jury would have reached a different result.

[5] Defendants, in their final argument, contend the trial court committed reversible error in imposing judgments upon defendants for multiple conspiracies when the evidence revealed only one agreement, thereby denying defendants their constitutional rights under the double jeopardy provision.

At the sentencing hearing, the trial judge consolidated the four conspiracy offenses against each defendant and imposed the mandatory minimum term of seven years imprisonment. Therefore, we need not determine whether there was more than one agreement between defendants and Davenport. Assuming, *arguendo*, that defendants are correct in their contention that the only conspiracy was the distribution of cocaine, vacation of the other consolidated conspiracy convictions is unnecessary because of the mandatory minimum sentence required by G.S. 90-95 and imposed by the trial court. *Cf. State v. Agudelo*, 89 N.C. App. 640, 366 S.E. 2d 921, *disc. rev. denied*, 323 N.C. 176 (1988) (remand unnecessary where conspiracy sentences ran concurrently).

Defendants had a fair trial free from prejudicial error.

No error.

Judges WELLS and EAGLES concur.

JAMES E. LOWERY v. JAMES F. LOVE, III, LOWERY CHEVROLET, INC., ELMER MOORE CHEVROLET, INC.

No. 8820SC750

(Filed 2 May 1989)

1. **Evidence § 15— breach of employment contract—evidence relevant—prejudicial**

The trial court did not err in an action for breach of an employment contract by refusing to admit evidence regarding the details of plaintiff's 1987 plea of no contest to a charge of possession of a stolen vehicle and statements of what particular vehicles he owned during that time because, although the details may have had some relevance to plaintiff's financial circumstances or for impeaching plaintiff's credibility, they were clearly inadmissible under N.C.G.S. § 8C-1, Rule 403 because their tendency to create unfair prejudice in the minds of the jurors and confusion of the issues clearly outweighed the probative value.

2. **Master and Servant § 10.2— modification of employment contract—issue not submitted—no error**

The trial court did not err in an action for breach of an employment contract by not submitting an issue as to whether there had been a modification of plaintiff's employment contract where defendants contended that a letter from defendants to plaintiff requesting his resignation and plaintiff's reply agreeing to resign and asking that his group insurance be temporarily kept in force effectively modified the employment contract. Plaintiff was resigning merely because he was being forced to do so; assuming that sufficient evidence of modification existed, there was no error in the lack of an instruction because the first question presented to the jury was whether plaintiff voluntarily resigned and the underlying premise of defendants' modification argument is that plaintiff voluntarily resigned.

APPEAL by defendants from *Helms, William H., Judge*. Judgment entered 19 February 1988 in Superior Court, UNION County. Heard in the Court of Appeals 16 February 1989.

Perry and Bundy, by H. Ligon Bundy, for plaintiff-appellee.

DeArmon, Burris, Martin & Bryant, by Christian R. Troy and Elizabeth T. Hodges, for defendant-appellants.

JOHNSON, Judge.

This civil action was instituted by plaintiff-employee, James E. Lowery, on 16 December 1985 seeking damages for the alleged breach of his employment contract by defendant-employers James F. Love, III (Love), Lowery Chevrolet, Inc. (Lowery Chevrolet), and Elmer Moore Chevrolet, Inc. (Elmer Moore Chevrolet). Defendants answered on 5 February 1986 and moved the court to dismiss plaintiff's action for failure to state a claim pursuant to G.S. sec. 1A-1, Rule 12(b)(6). On 20 February, defendants amended their answer to assert a counterclaim against plaintiff for his alleged use of corporate assets. Defendant denied the allegations of the counterclaim in his reply of 3 March.

At the close of all the evidence at the jury trial of this matter, the parties stipulated that the defendants were entitled to recover $1,145.00 on their counterclaim.

These issues were submitted to the jury and answered as follows:

1. Did the Plaintiff voluntarily resign from his employment?

ANSWER: No.

2. Was the discharge of James E. Lowery by Elmer Moore Chevrolet, Inc. without just cause?

ANSWER: Yes.

3. What amount of damages, if any, is James E. Lowery entitled to recover?

ANSWER: $38,872.00.

The damage figure arrived at by the jury credited defendants for amounts already paid under the contract and amounts earned by plaintiff in mitigation of his damages. Judgment was entered on the verdict on 19 February 1988 for $37,727.00, taking into account defendants' counterclaim and interest on the judgment. Defendants gave notice of appeal in open court.

In 1985, plaintiff owned twenty-five percent of the stock in defendant Lowery Chevrolet, an automobile dealership, and also personally held the General Motors franchise. This franchise gave plaintiff the exclusive right to purchase new General Motors products in the area. The remaining seventy-five percent of Lowery Chevrolet was owned by plaintiff's father-in-law, Frank LaPointe. When plaintiff and his wife separated, LaPointe withdrew his financial support and plaintiff found it necessary to seek another investor to purchase Lowery Chevrolet. This need was met when defendant Love purchased LaPointe's interest in the corporation. Plaintiff and defendants, Love and Lowery Chevrolet, also entered into a separate contract on 8 March 1985, which is the subject of this action. In this agreement plaintiff agreed to transfer his twenty-five percent interest in the corporation to Love, and further to resign as owner of the General Motors franchise. In consideration, defendant Love agreed, as majority stockholder, to cause the corporation to hire plaintiff as general manager for a term of eighteen months at a salary of $4,000.00 per month. Subsequent to the signing of this agreement, ownership of the corporation was transferred to Elmer Moore who renamed the dealership Elmer Moore Chevrolet. Elmer Moore Chevrolet admitted in its answer that it assumed the employment contract in question.

Plaintiff testified that he worked as general manager of the car dealership under his employment contract with no problems until 16 July 1985. After that date, transfer of the corporation to Elmer Moore was complete, and plaintiff's relation with him became strained. The new owner made changes in the management of the dealership and, although plaintiff received no complaints on his job performance, he soon found himself stripped of his authority and the duties which he had previously performed as general manager.

In September of 1985, plaintiff received a letter from defendants' attorney terminating his employment with the dealership and requesting a letter of resignation from plaintiff. Plaintiff ignored this letter, but received a second such letter dated 9 October 1985. After this letter, Elmer Moore personally told plaintiff to clear out his desk and leave. Plaintiff did so and upon reaching his home, wrote the following letter dated 24 October 1985 to defendants Love and Elmer Moore Chevrolet:

> Reference to a letter dated October 9, 1985, asking for my letter terminating my employment with your corporation, I

> hereby do said. I do, however, feel that I was not given the chance to perform as to the agreement. I would request that my group insurance be kept enforced [sic] until such time as I can acquire coverage for myself and my family.

Moore informed the plaintiff that the above-quoted letter was unacceptable, and presented plaintiff with a document which purported to completely release defendants from liability. Plaintiff refused to sign the release. He received his last salary payment pursuant to his employment agreement on 15 October 1985 and brought this action for breach of the remainder of his contract.

[1] By their first Assignment of Error, defendants contend that the trial court erred in refusing to admit evidence regarding plaintiff's assets which they argue related to mitigation of damages and loss of income. Specifically, defendants refer to statements made by plaintiff on *voir dire* concerning details surrounding his 1987 plea of no contest to a charge of possession of a stolen vehicle and also statements of what particular vehicles he owned during that time. All this information was held inadmissible by the trial court. The fact of plaintiff's conviction of the charge, however, was elicited from him by defense counsel in the presence of the jury.

Defendants are correct in asserting that if an employment contract is breached by an employer, the maximum amount recoverable by the wronged employee is the difference between the amount to be paid under the contract and the amount the employee earned or by reasonable effort could have earned during the period of the contract. *Thomas v. College*, 248 N.C. 609, 104 S.E. 2d 175 (1958). However, the burden is upon the defendant to prove the plaintiff has failed to mitigate his damages. *Distributing Corp. v. Seawell*, 205 N.C. 359, 171 S.E. 354 (1933).

At trial of this matter, plaintiff testified on direct at great length about the businesses at which he sought employment after discharge by the defendants, stating specifically the names of the establishments and the dates on which he applied to them. He also stated the exact amounts of the small sums he earned during the unexpired term of his contract and the approximate amount of unemployment insurance he collected. Plaintiff also explained in detail how he borrowed money on various lines of credit in order to meet his living expenses.

Defense counsel was permitted to cross-examine plaintiff at length about his education, work history, and efforts to minimize his

damages by seeking other employment. Nonetheless, defendants argue that they were deprived of their right to fully cross-examine plaintiff concerning his mitigation of damages and also for purposes of impeaching his credibility by the exclusion of the details surrounding his 1987 conviction. We do not agree.

Not all relevant evidence is admissible. *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154 (1985). Although the details may have had some relevance to plaintiff's financial circumstances, or for impeaching plaintiff's credibility, they were clearly inadmissible under G.S. sec. 8C-1, Rule 403 of the North Carolina Rules of Evidence because their tendency to create unfair prejudice in the minds of the jurors and confusion of the issues clearly outweighed their probative value. Rule 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The details underlying the 1987 charge had nothing to do with plaintiff's dealings with the defendant corporation or with any of the issues in the case *sub judice*. However, there was a distinct possibility that the jury could have understood those details as constituting a criminal act against the corporation, which, under plaintiff's employment contract, would have been grounds for discharging him. In fact, in discussing exclusion of this evidence with the court at trial, defense counsel stated in the presence of the jury, "well, your Honor, I think it is a criminal act against the corporation." Defendants have not pursued this argument on appeal. The excluded evidence would also have had the obvious tendency to prejudice the jurors against plaintiff for acts he committed which were irrelevant to the issues before them.

The decision to exclude evidence pursuant to Rule 403 is a question committed to the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). On review, that decision will be reversed for abuse of discretion only if defendants demonstrate that the ruling was "manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E. 2d 55, 59 (1986) (citations omitted). We agree with the court's ruling and find no abuse of discretion. This assignment of error is overruled.

[2] Next, defendants argue that the trial court erred in refusing to submit an issue as to whether there had been a modification of plaintiff's employment contract. Defendants contend that their letter of 9 October 1985, requesting that plaintiff tender his resignation, together with plaintiff's above-quoted 24 October 1985 letter, in which plaintiff agreed to resign and asked that his group insurance be temporarily kept in force, effectively modified the employment contract. Defendants did in fact extend plaintiff's insurance which they claim served as consideration for modification. They further argue that if the modification issue had been presented to the jury, it could have concluded that, in modifying the contract, plaintiff voluntarily resigned. In so concluding, defendants argue, the jury could have determined that, pursuant to the original contract, plaintiff would be entitled only to four months' severance pay for voluntary resignation rather than damages for breach. This argument is wholly without merit.

It is well-settled that the trial court must submit to the jury "such issues as are necessary to settle the material controversies raised in the pleadings." *Link v. Link*, 278 N.C. 181, 190, 179 S.E. 2d 697, 702 (1971) (citations omitted). G.S. sec. 1A-1, Rule 49(b) requires that "[i]ssues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues." Further, "[t]he number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Uniform Service v. Bynum International, Inc.*, 304 N.C. 174, 177, 282 S.E. 2d 426, 428 (1981), *quoting Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E. 2d 505, 507 (1967).

In the case at bar, we do not see sufficient evidence of modification to go to the jury, it appearing from the record that plaintiff, in his letter of 24 October 1985, was merely resigning as he was being forced to do. However, assuming *arguendo*, that sufficient evidence of modification did exist, we still find no error in the lack of an instruction since the underlying premise of defendants' modification argument is that the plaintiff voluntarily resigned. That is precisely the first question that was presented to the jury: "Did the Plaintiff voluntarily resign from his employment?" This question was answered in the negative. In responding to the inter-

rogatory, the jury was free to consider the two letters which defendants claim modified the contract.

The issue presented by the trial court was concise, direct, and covered the controversy in question. In answering that the plaintiff did not voluntarily resign, the jury also discounted the notion of an alleged modification of the contract since plaintiff's voluntary resignation was necessarily at the heart of any modification.

We find no error in the judge's refusal to submit an issue dealing specifically with modification, nor do we see any prejudice flowing to defendants as a result.

We find defendants' third Assignment of Error to be meritless and therefore we do not address it.

For all the foregoing reasons, we hold that defendants received a fair trial and we find

No error.

Judges ARNOLD and PHILLIPS concur.

MARTHA W. COCHRAN v. JAY NOEL COCHRAN

No. 8826DC729

(Filed 2 May 1989)

1. **Appeal and Error § 6.9— deposition appearance and attorney fees—order not immediately appealable**

An order requiring a nonparty witness to appear for a deposition and requiring the witness and her attorney to pay the plaintiff's attorney fees for a motion to compel appearance was not immediately appealable.

2. **Rules of Civil Procedure §§ 37, 45— deposition subpoena—county of issuance—justified opposition—attorney fees**

A subpoena issued from Mecklenburg County was insufficient to compel the attendance of a nonparty witness for a deposition in Wake County since a subpoena to compel the deposition testimony of a nonparty witness must be issued

from the county in which the deposition is to be taken. Accordingly, the witness and her attorney were substantially justified in opposing the discovery sought pursuant to the subpoena, and the trial court's imposition of attorney fees on them under Rule 37(a)(4) was error. N.C.G.S. § 1A-1, Rules 37(a)(4) and 45(d)(1).

APPEAL by a nonparty deponent and her counsel from *Fulton, Judge*. Order entered 12 May 1988 in District Court, MECKLENBURG County. Heard in the Court of Appeals 15 February 1989.

This is an appeal from an order of the trial court taxing a nonparty deponent and her counsel with attorney fees for failure to comply with a subpoena to appear for deposition and to produce documents.

This case arose out of a divorce and equitable distribution proceeding between the Cochrans. Plaintiff, Mrs. Cochran, and the minor child of the marriage reside in Mecklenburg County, where the proceeding was filed. Defendant, Mr. Cochran, was alleged to be a resident of Wake County. Ms. Mary Lou Willey, the nonparty deponent, was alleged to be a resident of Wake County. During the discovery process of the divorce proceeding, Mrs. Cochran's attorney caused a subpoena to be issued from Mecklenburg County directing Ms. Willey to be present at a certain location in Wake County at a certain time on 6 May 1988, in order to be deposed in relation to the Cochran divorce. A request for the production of documents was included in the notice of deposition and subpoena. The subpoena was signed by Mrs. Cochran's attorney and served on Ms. Willey on 16 March 1988 while she was in Mecklenburg County to testify at a hearing in the Cochran case.

On 8 April 1988, Ms. Willey's attorney (Mr. Ponton) advised Mrs. Cochran's attorney that the deposition subpoena was ineffective to compel her attendance at the deposition. After an exchange of letters between the attorneys, counsel for the plaintiff filed a motion to compel the nonparty, Ms. Willey, to appear and produce documents. The motion was filed in the District Court of Mecklenburg County on 29 April 1988. A memorandum of law in opposition to plaintiff's motion was filed on behalf of Ms. Willey by Mr. Ponton. The memorandum asserted that the subpoena was ineffective to compel Ms. Willey's attendance because it was not signed by the Clerk of Court of Wake County as provided in Rule

45(d)(1) of the North Carolina Rules of Civil Procedure. After a hearing, the trial court found that Ms. Willey had not filed either a motion to quash the subpoena or an objection to the subpoena. The court also found that Ms. Willey's failure to appear was "intentional and occurred at the instance of Mr. Ponton [her attorney]." The court concluded that the request for documents and the subpoena for deposition addressed to Ms. Willey were properly issued and served and that "[a]n attorney may sign a subpoena compelling production of documents and commanding the attendance of a witness with those documents at a deposition." The trial court taxed Ms. Willey and Mr. Ponton, jointly and severally, with plaintiff's attorney fees and ordered Ms. Willey to attend a deposition (at a future date to be set by Mrs. Cochran's attorney) and to produce the documents requested. The trial court set the amount of attorney fees to be paid by Ms. Willey and Mr. Ponton at $2,000.00 and stated that "[f]ailure to make such payment in a timely fashion may subject Ms. Willey and Mr. Ponton, or either or both of them to further sanctions by way of contempt." Ms. Willey and Mr. Ponton appeal the entry of this order.

James, McElroy and Diehl, by William K. Diehl, Jr. and Judith E. Egan, for plaintiff-appellee.

Wyrick, Robbins, Yates and Ponton, by Robert A. Ponton, Jr., and L. Diane Tindall, for appellants.

EAGLES, Judge.

As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment. *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E. 2d 806, 807, *disc. rev. denied*, 318 N.C. 505, 349 S.E. 2d 859 (1986). However, our courts have held where a party is found in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable since it affects a substantial right under G.S. 1-277 and 7A-27(d)(1). *See Willis v. Duke Power Co.*, 291 N.C. 19, 30, 229 S.E. 2d 191, 198 (1976) (when civil litigant adjudged in contempt for failure to comply with discovery order, the order is immediately appealable); *Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E. 2d 190, 192, *disc. rev. denied*, 309 N.C. 319, 307 S.E. 2d 162 (1983) (striking defendant's answer and counterclaim for

failure to appear for deposition affected a substantial right and was immediately appealable).

[1] The order from which appellants appeal contained no enforcement sanctions. It only ordered appellant Willey to appear for deposition and to produce documents. The portion of the order requiring appellants to pay the attorney fees of plaintiff is authorized by G.S. 1A-1, Rule 37(a)(4). The order granting attorney fees is interlocutory, as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order. *See Benfield v. Benfield*, 89 N.C. App. 415, 419, 366 S.E. 2d 500, 502-503 (1988). *But see Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F. 2d 492 (9th Cir. 1983) (orders imposing sanctions on nonparties for failure to comply with discovery are considered final for purposes of appeal). Nevertheless, we have elected in our discretion to treat the purported appeal as a petition for writ of certiorari and address the merits. N.C. Rule App. Pro. 21(a)(1); G.S. 7A-32(c). *See Industrotech Constructors, Inc. v. Duke University*, 67 N.C. App. 741, 742-43, 314 S.E. 2d 272, 274 (1984).

[2] The appellants list three assignments of error in the record on appeal. First, appellants argue that the trial court erred in granting plaintiff's motion to compel discovery. Second, they argue that the trial court erred in awarding attorney fees to the plaintiff under Rule 37(a)(4). Finally, appellants argue that the trial court erred in ordering Ms. Willey to appear for deposition pursuant to the subpoena previously served. We hold that the trial court erred in concluding that the subpoena served on Ms. Willey was sufficient to compel her attendance for deposition. Therefore, the appellants were substantially justified in opposing the discovery sought. Accordingly, the court erred when it imposed attorney fees on appellants under Rule 37(a)(4).

Rule 45 of the North Carolina Rules of Civil Procedure contains the statutory provisions applicable to subpoenas. G.S. 1A-1, Rule 45. The particular provision that relates to subpoenas for taking depositions states that

> [p]roof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the superior court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein.

G.S. 1A-1, Rule 45(d)(1). The comment to the statute sets out the distinctions among the different sections of Rule 45 and states that

> [i]n sections (a) and (c), it is contemplated that the subpoena will issue from the court where the action is to be tried wherever the witness is likely to be found, while in section (d) the idea is that the subpoena shall issue from the court of the county where the deposition is to be taken.

Accord Shuford, N.C. Civ. Pract. & Proc. (3rd Ed.), Section 45-6 ("Rule 45(d)(1) authorizes only the clerk of the superior court in which the deposition is to be taken to issue a subpoena for a deposition witness and only then upon proof of service of a notice to take the deposition under Rules 30(a) or 31(a).").

Other statutory provisions that relate to the discovery process provide for different treatment of nonparty deposition witnesses as opposed to parties. For example,

> [i]f a deponent fails to be sworn or to answer a question after being directed to do so by a judge of the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

G.S. 1A-1, Rule 37(b)(1). However,

> [i]f a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) [to testify for a corporation, partnership, association or government agency] or 31(a) [to answer by deposition upon written questions] to testify on behalf of a party fails to obey an order to provide or permit discovery, . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just.

G.S. 1A-1, Rule 37(b)(2).

Based on these statutory provisions, we hold that in order to compel the deposition testimony of a nonparty, a subpoena must be issued from the county in which the deposition is to be taken. In this case, a proper subpoena should have been issued from the Clerk of Superior Court of Wake County. Accordingly, appellants were substantially justified in opposing the discovery sought pursuant to the subpoena issued from Mecklenburg County and the trial court's imposition of attorney fees under Rule 37(a)(4) was error.

For the reasons stated, the order compelling the nonparty deponent to appear and provide documents is vacated and the judgment entered against appellants is reversed.

Order vacated and judgment reversed.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. CHARLES BUFORD CALLAHAN

No. 8816SC893

(Filed 2 May 1989)

1. **Constitutional Law § 46— appointed counsel—denial of motion for new appointed counsel and for continuance to obtain retained counsel—no error**

The trial court did not err in a prosecution for second degree sexual offense by denying defendant's motions for new appointed counsel and for a continuance to obtain retained counsel. Defendant never asserted ineffectiveness of counsel and the record shows that counsel for defendant rendered thoughtful, intelligent and professional representation. An indigent defendant has a fundamental right to appointed counsel but does not have the right to appointed counsel of his choice.

2. **Criminal Law § 98.3— restraint and removal of defendant—no error**

The trial court did not err in a prosecution for second degree sexual offense by restraining and removing defendant from the courtroom where the restraint of defendant before the jury was quite brief and the record indicates that the judge stated for the record in the presence of defendant and his attorney but out of the presence of the jury the reasons for the restraint and gave defendant an opportunity to object; the court's final instructions to the jury included a charge not to consider defendant's restraint in weighing the evidence or in determining guilt or innocence; the trial judge warned defendant out of the presence of the jury that he would be removed from the courtroom if his disruptive behavior continued; the judge entered into the record his reasons for the

removal; and the court informed defendant that he could return to the courtroom upon his assurance of good behavior and that if he chose not to return, he would be given an opportunity to confer with his attorney. N.C.G.S. § 15A-1031, N.C.G.S. § 15A-1032.

3. Criminal Law § 98.3— removal of defendant from courtroom— instructions—no error

The trial court did not err in a prosecution for second degree sexual offense in which defendant was removed from the courtroom by instructing the jury on defendant's removal from the proceedings rather than his "absence from the courtroom." N.C.G.S. § 15A-1032(b)(2) requires the judge to instruct the jury that it is not to consider a defendant's removal in its deliberations.

APPEAL by defendant from *Helms (William H.), Judge.* Judgment entered 30 March 1988 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 21 March 1989.

Defendant was indicted for first degree rape, first degree sex offense and first degree kidnapping. He was found guilty by a jury of second degree rape, second degree sex offense and second degree kidnapping. On a previous appeal, the rape and kidnapping convictions were affirmed, but a new trial was ordered in the sex offense case. At the second trial, defendant was found guilty by a jury of second degree sex offense and sentenced to a twelve year term to run consecutively to the rape and kidnapping sentences. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Clarence J. DelForge, III, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

LEWIS, Judge.

On the afternoon before the case was set for trial, defendant asked for another appointed lawyer. He told the court there was a "lack of representing" and that he felt his present counsel was not capable of showing any interest in his case and could not help him. His motion for new appointed counsel was denied. The next morning before jury selection, defendant moved for a continuance

for three months so that he could employ private counsel. Appointed counsel stated he was prepared for trial, and the district attorney opposed the motion due to the witnesses who were present for trial that day. The trial court denied the motion for a continuance, and defendant began to shout and attempted to leave the courtroom. The trial judge ordered the officers to restrain defendant and return him to the courtroom. When he was returned to the courtroom, defendant began to shout and use profanity. The trial judge ordered that defendant be restrained during the trial and warned him that he would be removed from the courtroom if he continued to disrupt proceedings. The matters described above occurred in open court but in the absence of the jury.

When the jury venire returned to the courtroom, defendant again became disruptive. The court sent the jurors out of the courtroom and proceeded as follows:

> THE COURT: Mr. Callahan. Mr. Callahan, you care to be present during the trial of this action or not?
>
> Let the record indicate that the defendant has chosen to not address the Court. Fact is, he is looking away, staring at his attorney, while I'm addressing him; that he yelled at his lawyer at the time the jury came in, saying that he had nothing to say to his lawyer.
>
> The Court finds that this defendant has wilfully (sic) chosen to disrupt the orderly proceedings of this Courtroom after being prior warned by the Court.
>
> The Court finds that this trial cannot proceed in an orderly manner due to his disruptive conduct and, therefore, he is to be removed from the Courtroom during the trial of these proceedings.

The judge further informed defendant that he could return to the courtroom upon his assurance of good behavior. Defendant offered no assurance, and the judge directed his removal from the courtroom. Prior to jury selection, the judge instructed the jurors as follows:

> I want to tell you at this time, you have probably noticed that the defendant has been removed from the Courtroom. I'm going to instruct all of you at this time that his removal is not to be considered by you in weighing the evidence in

this case, or in determining the issue of guilt or innocence of the defendant. So, you are not to let the fact that he's been removed have any affect on your consideration of the matters in this case whatsoever.

During the presentation of the State's case, defendant was brought back into the courtroom. In the presence of the jury, defendant said "No. I don't want to be tried. No." He was again removed and the judge instructed the jury that defendant had removed himself from the courtroom and that they were not to consider that fact in weighing the evidence or in determining guilt or innocence.

The trial proceeded after defendant's removal. The State's evidence tended to show that defendant entered the female victim's automobile with a knife and without invitation and forced her to drive him to a remote area. Defendant struck the victim with his fist and a flashlight, forcefully removed her clothing, and forced entry with his penis into her anal, vaginal and oral cavities. Medical and physical evidence was admitted. Defendant presented no evidence. The court's instructions to the jury included a charge on the jury's duty not to consider the defendant's restraint and removal from the courtroom in weighing the evidence or in determining guilt or innocence.

[1] Defendant assigns error to the denial of his motions for new appointed counsel and for a continuance to obtain retained counsel. It is a fundamental right that an indigent defendant have appointed counsel. However, such a defendant does not have the right to appointed counsel of his choice. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980). A defendant is entitled to have effective assistance but effectiveness is not an issue here. Defendant never asserted ineffectiveness of counsel at any time in the proceedings below or on appeal. Indeed, the record shows that far from being ineffective, counsel for defendant rendered thoughtful, intelligent and professional representation. Disagreement over trial tactics and communication problems generally do not make the assistance of counsel ineffective. *Id.* Our examination of the record leads us to conclude defendant had effective representation. Defendant's motions for other appointed counsel and for a continuance to seek retained counsel were properly denied.

[2] Defendant also assigns error to his restraint and removal from the courtroom. Defendant was entitled to a fair trial before an

impartial jury which could hear the evidence, be instructed as to the applicable law and render a verdict. The judge must ensure that the courtroom provides the proper setting for these rights to be accorded.

Restraint of defendant before the jury was quite brief though he was removed for most of the trial. The trial judge followed G.S. 15A-1031 as to restraint of a defendant. G.S. 15A-1031 provides that a defendant may be restrained if "reasonably necessary to maintain order" provided the trial judge: enters his reasons for restraint into the record in the presence of defendant and his counsel but out of the presence of the jury; gives the defendant an opportunity to object; and instructs the jury not to consider the restraint in weighing the evidence. The record indicates the judge stated for the record in the presence of defendant and his attorney but out of the presence of the jury the reasons for the restraint and gave defendant an opportunity to object; the court's final instructions to the jury included a charge not to consider defendant's restraint in weighing the evidence or in determining guilt or innocence.

G.S. 15A-1032 governs removal of a disruptive defendant. That section provides:

> (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.
>
> (b) If the judge orders a defendant removed from the courtroom, he must:
>
> (1) Enter in the record the reasons for his action; and
>
> (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.
>
> A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior.

The trial judge did warn defendant out of the presence of the jury that he would be removed from the courtroom if his disruptive behavior continued. The judge also entered into the record his reasons for the removal. The court informed defendant that he could return to the courtroom upon his assurance of good behavior and that if he chose not to return he would be given an opportunity to confer with his attorney. We find no error in the trial court's decision to restrain defendant or to remove him from the courtroom.

[3] Defendant's next assignment of error is to the trial court's instructions on defendant's removal from the courtroom. Defendant contends the trial judge should have instructed on his "absence" from the courtroom rather than on his "removal" from the proceedings. We disagree. G.S. 15A-1032(b)(2) requires the judge to instruct the jury that it is not to consider a defendant's "removal" in its deliberation. We cannot say that the instructions prejudiced defendant in any way. This assignment of error is overruled.

Defendant's final assignment of error is to the denial of his motion for a mistrial. The grounds for this assignment of error are the same as those presented by the previous assignments of error. Having determined there was no prejudicial error in defendant's trial, we find no error in the court's refusal to grant a mistrial.

Having considered the entire record, we find defendant created the issues before this Court by his own behavior. The State's evidence, almost unchallenged, is overwhelming in indicating a brutal crime. Defendant received a fair trial, free of prejudicial error.

No error.

Judges ARNOLD and GREENE concur.

ROBERT E. LEE v. JOYCE S. LEE

No. 881DC786

(Filed 2 May 1989)

1. **Husband and Wife § 12.1— separation agreement—loan as asset—failure to disclose—material breach**

Plaintiff's loan of $102,000 to a corporation in which he had a controlling interest was an asset which he was required by

the terms of a separation agreement to disclose to defendant even if the corporation is in financial difficulty and the loan is uncollectible, and his failure to do so constituted a material breach of the agreement. Therefore, defendant may elect to rescind the separation agreement so that it would not bar defendant's claim for equitable distribution and alimony.

2. **Evidence § 40— testimony beyond personal knowledge of witness—inadmissibility**

Plaintiff's testimony that defendant was familiar with a corporation's books and should have known about a loan to the corporation violated N.C.G.S. § 8C-1, Rule 602, which bars a witness from testifying to a fact of which he has no personal knowledge.

APPEAL by defendant from *Chaffin, Judge*. Order entered 22 March 1988 in District Court, CHOWAN County. Heard in the Court of Appeals 17 February 1989.

Plaintiff-husband and defendant-wife were married on 4 May 1957. They separated and entered into a separation agreement on 18 October 1985. The separation agreement distributed the parties' property and, further, recited that the parties "expressly releases and waives any claims" to equitable distribution under G.S. 50-20.

On 15 January 1987 plaintiff filed a complaint stating that the parties had been living separate and apart for more than one year. Plaintiff requested an absolute divorce and alleged that a separation agreement had been signed by the parties which would bar any equitable distribution proceeding. Defendant answered and counterclaimed for an absolute divorce, alimony, and equitable distribution. She maintained that plaintiff had breached the separation agreement by failing to disclose a loan of $102,000 made by him to Edenton Broadcasting Corporation (Edenton). Plaintiff owned 51% of the Edenton stock. Defendant concluded that plaintiff's breach rendered the separation agreement void. The trial court allowed plaintiff's motion to sever plaintiff's plea in bar from defendant's equitable distribution and alimony claims for a separate trial. Prior to the trial court's hearing the case on plaintiff's plea in bar, the parties were divorced.

On 22 March 1988 the trial court ruled that plaintiff had not breached the separation agreement and that the separation agree-

ment barred defendant's claim for equitable distribution and alimony. From the judgment entered, defendant appeals.

W. T. Culpepper, III for plaintiff-appellee.

D. Keith Teague, by Joseph H. Forbes, Jr., for defendant-appellant.

EAGLES, Judge.

Defendant appeals the trial court's ruling that the parties' separation agreement bars her claim for equitable distribution and alimony. We hold that plaintiff breached the separation agreement and, accordingly, we reverse and remand for trial.

[1] Defendant first assigns as error the trial court's finding of fact that the plaintiff's loan of $102,000 to Edenton was not an asset owned by plaintiff. We hold that the monies owed plaintiff pursuant to his loan to Edenton was an asset which he was obligated, under the separation agreement, to disclose to defendant.

Pursuant to G.S. 50-20(d) parties may agree in a separation agreement to distribute their property in any fashion they desire without resorting to litigation for equitable distribution. The separation agreement, however, must comply with G.S. 52-10. *See Hagler v. Hagler*, 319 N.C. 287, 354 S.E. 2d 228 (1987). A validly drawn separation agreement which distributes all of the parties' property and complies with G.S. 52-10 bars an equitable distribution claim. *Knight v. Knight*, 76 N.C. App. 395, 333 S.E. 2d 331 (1985). Here defendant does not deny the existence of the separation agreement, but she argues that because plaintiff breached the agreement's terms, it is now void.

In construing separation agreements we are bound by the rules which apply in interpreting any other contract. *Blount v. Blount*, 72 N.C. App. 193, 323 S.E. 2d 738 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 389 (1985). When a contract is unambiguous, our courts will "determine the legal effect and enforce it as written by the parties." *Id.* at 195, 323 S.E. 2d at 739. Paragraph 7 of the separation agreement states, in part,

> The Husband and Wife acknowledge and affirm that the assets listed herein and on the financial statement prepared by Husband attached hereto as Exhibit "A" constitute all of the real property and all of the items of personal property having a

value of $100.00 or more per item owned by them, either separately or together, and that neither party has an interest in any real property or in any personal property having a value of more than $100.00 per item which has not been disclosed to the other. The Husband and Wife further acknowledged [sic] and affirm that they have relied upon the disclosure of assets as set forth above. The parties further acknowledge, understand and agree that the failure to disclose property shall constitute a material breach of this Agreement and give rise to whatever remedies at law or in equity may be available to either.

Paragraph 7 imposed upon each party an unambiguous obligation to disclose *all* assets whose values are $100 or more. The trial court found that the $102,000 loan "did not constitute an asset owned by the [p]laintiff at the time of his preparation of his financial statement." We disagree. Edenton carried the loan on its corporate books as a liability. Furthermore, upon cross-examination plaintiff admitted that he never intended the transfer of monies to be a gift. He argues that because the corporation's liabilities now exceed its assets the loan is uncollectible and, therefore, worthless. We reject this argument. Even if the loan is uncollectible, as a bad debt the loan could still have certain tax consequences that defendant would need to know in order to properly evaluate the distribution of marital property.

[2] Defendant next argues that the trial court erred in finding that defendant was familiar with the corporation's financial records and should have known about the $102,000 loan. Defendant contends that plaintiff's testimony in this regard violates Rule 602 of the North Carolina Rules of Evidence that a witness may only testify as to matters of which he has personal knowledge. We agree. Plaintiff may testify only about those events to which he has personal knowledge. The evidence presented here does not support the finding that defendant was familiar with the corporation's books.

Defendant's final assignment of error is that the trial court erred in concluding as a matter of law that plaintiff had not committed a material breach of the separation agreement when he failed to disclose the loan to Edenton on his financial statement. We disagree with the trial court. If defendant shows that plaintiff substantially failed to perform those duties required of him pursuant to the separation agreement, the separation agreement may

be rescinded. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E. 2d 240 (1964); *see also Cator v. Cator*, 70 N.C. App. 719, 321 S.E. 2d 36 (1984).

Here the essence of the separation agreement was that the parties must fully disclose all of their assets worth $100 or more. Plaintiff failed to disclose a loan of $102,000 to a corporation in which he held a controlling interest. We hold that plaintiff's failure to disclose the loan, notwithstanding the corporation's current financial condition, constituted a material breach of the separation agreement. Therefore, defendant may elect to rescind the separation agreement. Accordingly, we reverse the trial court's order and remand for further proceedings.

Reversed and remanded.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. RODNEY KEMP JETER, AKA AHIAH AHI ISREAL

No. 8810SC681

(Filed 2 May 1989)

1. **Criminal Law § 34— other crimes—no direct evidence of defendant's participation—inadmissibility to show identity**

The trial court erred in admitting evidence of a similar rape and burglary purportedly committed by defendant to prove his identity as the perpetrator of the rape and burglary in question where there was no direct evidence of defendant's participation in the similar crimes, all such evidence being circumstantial. N.C.G.S. § 8C-1, Rule 404(b).

2. **Burglary and Unlawful Breakings § 3— first degree burglary—indictment—sufficient allegation of nighttime**

An indictment for first degree burglary which alleged that the offense occurred "during the nighttime about the hour of 12:00 and 1:00 am" was not deficient because the hour of 12:00 was not expressly stated to be the one that comes in the middle of the night since the indictment cannot be understood as referring to the hour of 12:00 that comes in the middle of the day.

APPEAL by defendant from *Fountain, Judge.* Judgments entered 27 January 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 14 February 1989.

Defendant was convicted of first degree rape in violation of G.S. 14-27.2 and first degree burglary in violation of G.S. 14-51. The State's evidence indicating that defendant committed these offenses was entirely circumstantial and to the effect that: During the night of 20 May 1987 Mrs. Lynn Cole Atahan was alone in her house; the doors were locked, the bedroom and kitchen windows were open, and the window screens were in place; she was awakened by a man lying on top of her; he held a knife to her face, told her to be quiet, and pushed her face into a pillow to prevent her from seeing his face; she never got a good look at his face and could not identify him but did notice that he was black and in his 20's or 30's; he forced her to have intercourse with him, asked if she had money or a gun in the house and after learning that she did not, forced her to walk in front of him as he left through a side door; she discovered that one of her large butcher knives was missing and that the kitchen screen window was knocked out; the police found defendant's palm print on the kitchen window and several of his fingerprints on the window screen; and three weeks later, on 11 June 1987, he was arrested after being observed in the general vicinity of the Atahan home peeking into the windows of two apartments.

Attorney General Thornburg, by Associate Attorney General Donald W. Laton, for the State.

John T. Hall for defendant appellant.

PHILLIPS, Judge.

[1] In seeking a new trial defendant's main contention is that the court erred to his prejudice in receiving evidence of a similar offense purportedly committed by him to prove his identity as the offender in this case. Under G.S. 8C-1, Rule 404(b), N.C. Rules of Evidence, as it was long before this rule was enacted, evidence as to other crimes is admissible to prove several things, including the defendant's identity. This long time exception to the general rule against receiving evidence of other crimes is best enunciated in the landmark case of *State v. McClain*, 240 N.C. 171, 175, 81 S.E. 2d 365, 367 (1954) as follows:

> 4. Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged.

But, as defendant correctly maintains, for such evidence to be admissible it must *directly* indicate that he committed the other offense; and in *State v. Breeden*, 306 N.C. 533, 293 S.E. 2d 788 (1982), a new trial was ordered because the evidence as to the defendant's participation in the similar crime was not direct, but circumstantial. The objectionable evidence here was of the same caliber and had the same prejudicial effect.

Presented by Deborah Gwen Douglas and a police officer experienced in comparing fingerprints, the evidence that defendant committed the other crime was as follows: Ms. Douglas, in her apartment bedroom, was awakened at about 3:00 a.m. on 10 December 1986 by a man who held a knife to her face, turned her over onto her stomach, pushed her face into a pillow, repeatedly told her to be quiet, pulled down her underwear, and had intercourse with her; she did not see the assailant well enough to identify him, but saw that he was a short black man of medium build; her apartment was entered through a living room window, one of her kitchen knives was missing, and fingerprints found on her address book matched those of defendant. The similarity of this evidence to that presented in *Breeden* is obvious; and since it is entirely circumstantial, evidence of the Douglas crime was not admissible to prove that defendant is the one who attacked Mrs. Atahan.

[2] Defendant also contends that the indictment for first degree burglary, which charges that the offense occurred "during the nighttime about the hour of 12:00 and 1:00 am," was deficient since the hour of 12:00 referred to was not expressly stated to be the one that comes in the middle of the night. The contention has no basis. The indictment expressly charges that the offense occurred at night and the hour of 12:00 stated therein cannot be understood as being the hour that comes in the middle of the day.

Defendant's other contentions have not been considered as they concern matters not likely to recur when the case is retried.

New trial.

Judges ARNOLD and JOHNSON concur.

OBERIA S. MULLIS v. THE PANTRY, INC.

No. 8811SC745

(Filed 2 May 1989)

1. **Master and Servant § 10.2— wrongful discharge—summary judgment for defendant—proper**

The trial court properly granted summary judgment for defendant on a wrongful discharge claim where plaintiff admitted in her deposition that she was at no time discharged; she testified that her supervisor told her that she would no longer be the manager of store #331 in Sanford and that she would be put on a week's vacation and transferred to another store; she admitted that in all later conversations with corporate officials she was told she would be transferred to a store in another district; plaintiff was contacted by her zone manager several times and asked if she would be willing to transfer to another store in Sanford; plaintiff answered each time that she would only return to her original store; the zone manager called plaintiff to discuss a leave of absence after approximately one month and plaintiff terminated the conversation; plaintiff thereafter received a registered letter from the zone manager stating that plaintiff should give him notice of her decision whether or not to transfer by 9 July 1984; and plaintiff responded through her attorney that she wanted to return to her original store.

2. **Trespass § 2— wrongful discharge—intentional infliction of emotional distress—summary judgment for defendant—proper**

The trial court properly granted summary judgment for defendant in a claim for intentional infliction of emotional distress arising from an alleged wrongful discharge where no construction of the forecast of evidence gives rise to an issue as to whether defendant's conduct was intended to inflict emotional distress or was done with reckless indifference to the likelihood that emotional distress could result.

APPEAL by plaintiff from *Barnette, Judge.* Order entered 10 March 1987 in Superior Court, LEE County. Heard in the Court of Appeals 10 April 1989.

This is a civil action wherein plaintiff alleges in her complaint that she was wrongfully discharged while working as a manager for defendant. She also alleges intentional infliction of emotional distress caused by the extreme and outrageous conduct of defendant. Defendant filed a motion for summary judgment which was partially granted by the trial court on 10 March 1987. Plaintiff appealed.

Edelstein and Payne, by M. Travis Payne, for plaintiff, appellant.

Spears, Barnes, Baker, Hoof & Wainio, by Cynthia Harrison Ruiz and J. Bruce Hoof, for defendant, appellee.

HEDRICK, Chief Judge.

[1] Plaintiff first argues the trial court erred in granting summary judgment in the wrongful discharge claim because the materials before the court raised genuine issues of material fact. Plaintiff contends she was discharged by defendant and that "subsequent non-specific offers [by defendant] of employment at another store were made as offers of settlement."

The remedy of summary judgment is a drastic one and should be used with caution. *Billings v. Harris Co.*, 27 N.C. App. 689, 220 S.E. 2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E. 2d 321 (1976). The party moving for summary judgment must show that no genuine issue of material fact exists and that, as a result, the movant is entitled to judgment as a matter of law. *Watts v. Cumberland County Hosp. System*, 317 N.C. 321, 345 S.E. 2d 201 (1986). Review of summary judgment on appeal is limited to whether the trial court's conclusions are correct as to the questions of whether there is a genuine issue of material fact and whether the movant is entitled to judgment. *Ellis v. Williams*, 319 N.C. 413, 355 S.E. 2d 479 (1987).

In the present case, we must find the trial court's conclusions were correct as to summary judgment on the wrongful discharge claim. By her own testimony in her deposition, plaintiff admits that she was at no time discharged. She testified that her supervisor, the district manager, told her on 31 May 1984 that she would no longer be the manager of store #331 located in Sanford.

He told her she would be put on a week's vacation and transferred to another store. She further admits in all later conversations with corporate officials she was told she would be transferred to a store in another district. Plaintiff was contacted by her zone manager, Eddie Garmon, several times and asked if she would be willing to transfer to another store in Sanford. Each time, plaintiff answered that she would only return to her original store. After approximately one month, Garmon called plaintiff to discuss a leave of absence. Plaintiff testified that she stated, "Eddie, I have nothing more to say to you," and plaintiff terminated the conversation. Thereafter, plaintiff received a registered letter from Garmon which stated that plaintiff should give him notice of her decision whether or not to transfer by 9 July 1984. Plaintiff responded to the letter through her attorney, notifying defendant that she wanted to return to her original store.

We hold there is no genuine issue of material fact presented by plaintiff. Plaintiff has brought forth no evidence of a discharge by defendant, wrongful or otherwise. Therefore, defendant was entitled to judgment as a matter of law. Summary judgment for defendant on the claim of wrongful discharge is affirmed.

[2] Plaintiff next argues the trial court erred in granting defendant's motion for summary judgment on her claim for intentional infliction of emotional distress. Plaintiff asserts that there are substantial issues of fact raised by the evidence presented to the trial court.

The tort of intentional infliction of emotional distress was first recognized by our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). There the Court stated that liability arises under this tort when a defendant's "conduct exceeds all bounds usually tolerated by decent society" and, the conduct "causes mental distress of a very serious kind." *Id.* at 196, 254 S.E. 2d at 622, *quoting* Prosser, *The Law of Torts* Sec. 12, p. 56 (4th ed. 1971). In *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981), our Supreme Court held that intentional infliction of emotional distress consists of: 1) extreme and outrageous conduct, 2) which is intended to cause emotional distress or is done with reckless indifference to the likelihood that emotional distress may result, and 3) severe emotional distress does result.

We have carefully examined plaintiff's allegations regarding her claim for intentional infliction of emotional distress. We hold

that no construction of the forecast of evidence gives rise to an issue as to whether defendant's conduct was intended to inflict emotional distress or was done with reckless indifference to the likelihood that emotional distress may result. Summary judgment for defendant on this claim, like the other, is affirmed.

Affirmed.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. STEPHEN HESTER

No. 8815SC1109

(Filed 2 May 1989)

Criminal Law § 146.5 — appeal from guilty plea — treated as petition for certiorari — denied

A defendant was not entitled to appeal as a matter of right from the judgment entered on his plea of guilty to the misdemeanor of hunting deer with dogs in Alamance County. The Court of Appeals treated defendant's attempted appeal as a petition for a writ of certiorari challenging the constitutionality of the law under which he was charged, and denied the writ. N.C.G.S. § 15A-1444(e) (1988).

APPEAL by defendant from *Stephens, Donald W., Judge*. Judgment entered 4 August 1988 in ALAMANCE County Superior Court. Heard in the Court of Appeals 12 April 1989.

Defendant was charged with the misdemeanor of hunting deer with dogs in Alamance County in violation of Section 2, Chapter 825 of the 1979 Session Laws of the State of North Carolina. On 28 January 1987, the charge against defendant was dismissed in Alamance County District Court on the basis that the District Court of Alamance County had previously ruled that the statute under which defendant was charged was unconstitutional. The State appealed this ruling to the Superior Court which reinstated the charge.

On 28 May 1987, defendant was convicted in the District Court and appealed to the Superior Court. On 1 December 1987, the Su-

perior Court, Brewer, Judge presiding, denied defendant's motion to dismiss on constitutional grounds. At the 4 August 1988 session of Superior Court, defendant entered a plea of guilty, upon which judgment was entered ordering defendant to pay a fine of $50.00, plus court costs. From that judgment, defendant has appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Melissa L. Trippe, for the State.

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

WELLS, Judge.

Although the State has not raised the question, we must consider the appealability of this case. N.C. Gen. Stat. § 15A-1444(e) (1988), in pertinent part, provides:

> Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

None of the exceptions mentioned in G.S. § 15A-1444(e) apply in this case, and defendant is therefore not entitled to appeal as a matter of right from the judgment entered on his plea of guilty.

In his attempted appeal, defendant has challenged the constitutionality of the law under which he was charged. Treating defendant's attempted appeal as a petition for writ of certiorari, we are not persuaded that defendant has raised a serious constitutional question and in our discretion we deny the writ in this case.

Certiorari denied; appeal dismissed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. ROBERT LEE STYLES, JR.

No. 8822SC654

(Filed 16 May 1989)

1. **Criminal Law § 22— absence of arraignment—defendant not prejudiced**

Defendant was not prejudiced by the absence of a formal arraignment where he failed to object at trial to this omission, and there is no doubt that defendant was fully aware of the charges against him since the charges were summarized and his not guilty plea stated to the jury during *voir dire* jury instructions while defendant was in the courtroom.

2. **Criminal Law § 91.9— right not to be tried week of arraignment—waiver**

Defendant waived his statutory right not to be tried in the week of arraignment by failing to seek a continuance of his trial. N.C.G.S. § 15A-943(b) (1988).

3. **Burglary and Unlawful Breakings § 5— sufficient evidence of breaking**

There was sufficient evidence of a breaking to support defendant's conviction of first degree burglary where the victim testified that screens on her windows were all in place when she went to bed the night in question; she supposed the four doors leading into her house were closed because "we usually shut them"; the last time she saw the doors that night was at 9:00 p.m. when her nephew and his son left her home; and the nephew usually shuts the door when he leaves.

4. **Rape and Allied Offenses § 5— rape and sexual offense—defendant as perpetrator—sufficiency of evidence**

Circumstantial evidence presented by the State was sufficient for the jury to find that defendant was the perpetrator of a rape and a sexual offense, although the victim was unable to identify defendant as the perpetrator, where it tended to show that hairs found at the crime scene were microscopically consistent with those of defendant and could have originated from defendant; a bloodhound trained in tracking human beings followed a path from the victim's house to a culvert and then to the trailer where defendant was staying; and shoe prints in the sand by the culvert and in the dust on the hard-

wood floor of the victim's bedroom matched the treads of defendant's shoes.

5. **Robbery § 4.2— common law robbery—sufficiency of evidence**

The State's evidence was sufficient for the jury to find that money was taken by defendant from the presence of the victim by violence or by putting her in fear so as to support defendant's conviction of common law robbery where it tended to show that the victim had a ten-dollar bill in a brown envelope with her name on it inside her bra that was hanging on a chair near her bed; the bra and brown envelope were found in a culvert near defendant's trailer; the ten-dollar bill was not in the envelope; shoe prints matching the tread on defendant's shoes were found near the culvert and in the victim's bedroom; and the money was taken after defendant had forced the victim to have vaginal and anal intercourse and to perform fellatio, threatened to kill her, and hit her several times.

6. **Criminal Law § 138.24— first degree burglary—victim's old age improper aggravating factor**

The trial court erred in finding old age of the ninety-two-year-old victim as an aggravating factor for first degree burglary where there was no evidence that the victim's home was targeted for burglary because of her old age and the victim was asleep during the entire burglary.

7. **Criminal Law § 111.1— court's remarks to prospective jurors—charges against defendant**

The trial judge is required to inform the prospective jurors of the charges against defendant and not the elements of each crime charged. N.C.G.S. §§ 15A-1213 and 15A-1221(a)(2).

8. **Criminal Law § 102.6— jury argument—personal beliefs—no gross impropriety**

Alleged expressions of personal beliefs by the prosecutor in his jury argument were not so grossly improper as to require the trial court to intervene *ex mero motu.*

9. **Criminal Law § 102.8— jury argument—defendant's failure to testify—veiled reference—no gross impropriety**

The prosecutor's closing argument that the jury should compare certain characteristics to the defendant and to a State's witness "who you got to see up there; to hear from" was at

most only a veiled reference to defendant's failure to testify and did not amount to a gross impropriety which required the trial court to intervene *ex mero motu.*

10. Criminal Law § 96— evidence of defendant's criminal record— instruction to disregard—failure to request further instruction

Any impropriety in an officer's testimony referring to defendant's prior criminal record is presumed cured by the trial court's instruction to "disregard that, ladies and gentlemen," and it was not error for the court to fail to instruct the jury that a prior conviction cannot be used as evidence of defendant's guilt absent a request for such an instruction.

11. Criminal Law § 43.1— photographs of defendant—admission for illustrative purposes

Photographs taken of defendant at the time of his arrest were properly admitted for the purpose of illustrating testimony about defendant's appearance where the victim testified that her assailant had a moustache and was not clean shaven but had no beard.

Judge PHILLIPS concurs in the result.

Judge COZORT concurring in part and dissenting in part.

APPEAL by defendant from *Ross (Thomas W.), Judge.* Judgments entered 26 January 1988 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 24 January 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

Daniel R. Greene, Jr. for defendant-appellant.

GREENE, Judge.

In this criminal action, defendant was found guilty by a jury for first-degree burglary, N.C.G.S. Sec. 14-51 (1986), second-degree sexual offense, N.C.G.S. Sec. 14-27.5 (1986), second-degree rape, N.C.G.S. Sec. 14-27.3 (1986), and common-law robbery, N.C.G.S. Sec. 14-87.1 (1986). Defendant was sentenced to terms of fifty years, twenty years, twenty years, and ten years respectively, all to be served consecutively. Defendant appeals.

The evidence at trial tended to show: On 31 May 1987, Cora Lillian Jolly, age seventy-four, was living with her ninety-three

year old invalid sister Allie Jolly Isenhour in Mrs. Isenhour's house near Mecimore Trailer Park. On the night of 31 May, Ms. Jolly put Mrs. Isenhour to bed and then went to bed herself at approximately 11:00 p.m. The two women slept in separate bedrooms. Ms. Jolly was awakened when a man put one hand on her head and the other one over her mouth. The man was right over her at the side of the bed and told her to be quiet and not to make any sound or he would kill her. The man then crawled up on her bed and proceeded to have vaginal and anal intercourse with Ms. Jolly and forced her to perform fellatio. During this time, he called Ms. Jolly "a little bitch a time or two," took her foot and jerked her around on the bed, grabbed her breast and told her he would cut it off, and hit her on her face, shoulder and hip. At one point he threatened to kill Ms. Jolly and her sister and Ms. Jolly asked him to please not hurt her sister because she was an invalid. The man told Ms. Jolly he wanted some guns and money. She told him she had none although in actuality she had a ten dollar bill in a brown envelope with her name on it inside her bra. Her bra was hanging on a chair two or three feet from her bed. Ms. Jolly testified she knew the man had gotten the money because she heard him "a 'rambling around in there."

When the man left her house he told her to lie on the other side of the bed and stay there for fifteen minutes. She heard banging around in the kitchen and then heard the back door shut. She did not hear a car start up. She tried to telephone for help but discovered the phone did not work. She went out on her porch around 5:00 a.m. to get some air and a little later saw Jerry Isenhour coming down the road to the barn. Ms. Jolly told Jerry Isenhour what had happened. The Sheriff's Department was called and an officer arrived shortly thereafter.

Although Ms. Jolly was unable to identify the defendant, she described the perpetrator as a white, small male, in his early twenties wearing a cap, tan shorts, a sweat shirt and tennis shoes. He did not have any body fat and was not clean shaven but had no beard although he did have a moustache.

On 31 May 1987, two bloodhounds detected a track leading from the back of the Jolly residence to a culvert at Mecimore Trailer Park and then to the front door of James Workman's trailer where Robert Lee Styles, Jr. (hereinafter the "defendant") was staying. Inside the trailer, defendant was found lying on the bed

in the first bedroom wearing a pair of jeans. An agent with the State Bureau of Investigation observed a pair of running shoes and a pair of socks sitting next to a chair by the front door. The shoes were taken as evidence. At that time the defendant had a sparse beard and a moustache.

What appeared to be blood was observed on the bed in Ms. Jolly's bedroom. In addition, shoe prints were found in the dust on the hardwood floor of the bedroom. Shoe prints were also discovered by the culvert near the entrance of the Mecimore Trailer Park. Expert testimony rendered in the form of an opinion revealed that defendant's tennis shoes seized from the trailer made the prints in Ms. Jolly's bedroom and the prints by the culvert. Additional expert testimony revealed that the hairs found on the floor and bed in the bedroom were microscopically consistent with those of defendant and could have originated from the defendant.

A shovel was found in the culvert at the entrance of Mecimore Trailer Park near where the shoe prints were discovered. A woman's bra, a phone cord, an envelope with the name "Lillian" on it, and some napkins were pulled out of the culvert with the shovel.

Defendant was arrested on 3 June 1987.

The following issues are presented for review: Did the trial court err I) in allowing the defendant to be tried without being formally arraigned; II) in failing to dismiss the charge of first-degree burglary for insufficient evidence; III) in failing to dismiss the charges of second-degree rape and second-degree sexual offense for insufficient evidence; IV) in failing to dismiss the charge of common-law robbery for insufficient evidence; V) by imposing a sentence in excess of the presumptive sentence for first-degree burglary; VI) in understating the elements of the offenses for which the defendant was charged during the trial court's opening remarks to the jury; VII) in allowing the district attorney to exceed the bounds of propriety in his closing argument to the jury without following said impropriety with an admonishment to the jury or correcting instructions; VIII) by allowing the district attorney to comment to the jury during closing arguments on defendant's failure to testify and by not following said comment with an admonishment to the jury or correcting instructions; IX) in failing to admonish the jury or provide correcting instructions after a law enforcement officer made a reference to defendant's prior criminal record while

testifying; and X) in failing to sustain defendant's objection to the introduction into evidence of two photographs of defendant taken the day he was arrested.

I

[1] For his first assignment of error, defendant contends the trial court erred in allowing the defendant to be tried when he had never been arraigned. We find this assignment of error to be without merit.

"An arraignment is a proceeding whereby a defendant is brought before a judge having jurisdiction to try the offense, so that the defendant may be formally appraised of the charges pending against him and directed to plead to them." *State v. Riddle*, 66 N.C. App. 60, 62-63, 310 S.E. 2d 396, 397, *aff'd*, 311 N.C. 734, 319 S.E. 2d 250 (1984). At the arraignment "[t]he prosecutor must read the charges or fairly summarize them to the defendant" and should the defendant thereafter fail to plead, "the court must record that fact, and the defendant must be tried as if he had pleaded not guilty." N.C.G.S. Sec. 15A-941 (1988). Failure to conduct a formal arraignment is not in itself prejudicial error "unless defendant objects and states that he is not properly informed of the charges." *State v. Brown*, 306 N.C. 151, 174, 293 S.E. 2d 569, 584, *cert. denied*, 459 U.S. 1080, 103 S.Ct. 503, 74 L.Ed. 2d 642 (1982). Furthermore, "[w]here there is no doubt that a defendant is fully aware of the charge[s] against him, or is in no way prejudiced by the omission of formal arraignment . . .," the omission is not reversible error. *Riddle*, 66 N.C. App. at 63, 310 S.E. 2d at 397-98 (*quoting State v. Smith*, 300 N.C. 71, 73, 265 S.E. 2d 164, 166 (1980)).

Although as defendant contends, the record is silent as to a formal arraignment, the defendant here never objected before the trial to this omission. Furthermore, as the charges against the defendant were summarized to the jury and his plea of not guilty stated to the jury during *voir dire* jury instructions while the defendant was in the courtroom, there is no doubt defendant was fully aware of the charges against him and that he suffered no prejudice by not being formally advised of the pending charges at an arraignment. *See Riddle*, 66 N.C. App. at 63, 310 S.E. 2d at 398.

Defendant also argues that it does not appear he was ever advised of his right to counsel pursuant to Section 15A-942 which provides for such advisement at the arraignment if defendant appears without counsel. N.C.G.S. Sec. 15A-942 (1988). As it is clear

from the record that defendant was represented by counsel, he cannot now claim he was prejudiced by not being informed of such right.

[2] Defendant also contends that because there was no formal arraignment, it cannot be ascertained whether he was "tried without his consent in the week in which he . . . [was] arraigned" in violation of Section 15A-943(b). N.C.G.S. Sec. 15A-943(b) (1988). We find no merit to this argument. As the defendant failed to assert this right in the trial court by seeking a continuance of his trial, he waived his statutory right not to be tried the week in which he was arraigned. *State v. Davis*, 38 N.C. App. 672, 675, 248 S.E. 2d 883, 885-86 (1978).

II

[3] Defendant next assigns as error the trial court's denial of his motion to dismiss the charge of first-degree burglary. We find no merit to this assignment of error.

On a motion to dismiss, the evidence must be viewed in the light most favorable to the State "with inconsistencies and contradictions therein disregarded." *State v. Davis*, 92 N.C. App. 627, 633, 376 S.E. 2d 37, 41, *temp. stay allowed*, 324 N.C. 249, 377 S.E. 2d 247 (1989). When the evidence is viewed in such light, if there is substantial evidence to support each essential element of the crime charged, the judge must overrule the motion and submit the case to the jury. *Id.*

First-degree burglary is defined as "the unlawful breaking and entering of an occupied dwelling or sleeping apartment in the nighttime with the intent to commit a felony therein." *State v. Sweezy*, 291 N.C. 366, 383, 230 S.E. 2d 524, 535 (1976). The defendant contends there was insufficient evidence that a "breaking" occurred. Entry through an open window or door does not constitute a breaking although the mere pushing or pulling of an unlocked door does. *State v. McCoy*, 79 N.C. App. 273, 275, 339 S.E. 2d 419, 421 (1986); *Sweezy*, 291 N.C. at 383, 230 S.E. 2d at 535.

The victim here testified that on 31 May she had screens on her windows and they were in place when she went to bed that night. There are four doors that lead from her house to the outside and although she did not know definitely whether her doors were closed when she went to bed the night of 30 May, she supposed the doors were shut because "we usually shut them." The

last time the victim saw the doors was approximately 9:00 p.m. when her nephew and his son left her home. Her nephew usually shuts the door when he leaves. When viewed in the light most favorable to the State, there is substantial evidence to show the doors and windows to the victim's house were closed and to support a charge of breaking and entering. Therefore, the court properly refused the defendant's motion to dismiss this charge.

III

[4] The defendant next assigns as error the court's failure to dismiss the charges of second-degree rape and second-degree sexual offense on the ground there was insufficient evidence to show the defendant was the perpetrator of the offenses. We find no merit to this assignment of error.

Although defendant admits there was evidence which tended to link the defendant to the crimes, he argues that because the victim was not able to identify the defendant as the perpetrator, the evidence was insufficient on the charges. In order for evidence to be sufficient to withstand a motion to dismiss, it must give rise to a reasonable inference of defendant's guilt based on the circumstances. *State v. Jones*, 303 N.C. 500, 504, 279 S.E. 2d 835, 838 (1981); *State v. Nelson*, 69 N.C. App. 455, 459, 317 S.E. 2d 70, 73, *disc. rev. denied*, 312 N.C. 88, 321 S.E. 2d 905 (1984). "[I]t is for the members of the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt." *Jones*, 303 N.C. at 504, 279 S.E. 2d at 838. This test applies when the evidence is circumstantial, direct, or both. *Id.*

Here, the circumstantial evidence shows that hairs found at the scene of the crime were microscopically consistent with those of defendant and could have originated from the defendant. *See State v. Pratt*, 306 N.C. 673, 678-79, 295 S.E. 2d 462, 466 (1982) (expert testimony that hairs taken from the scene of the crime were microscopically consistent with those of defendant and could have come from defendant satisfied accepted legal standard for relevancy and was admissible, notwithstanding objection that because agent could not positively identify defendant from hair comparison, testimony was inadmissible). Additionally, a bloodhound specially trained in tracking human beings led a path from the front of the victim's house to the culvert where shoe prints were found and then to the trailer where the defendant was staying. The shoe prints found in the sand by the culvert and in the dust on

the hardwood floor in the victim's bedroom matched the treads of the defendant's shoes. *See Pratt*, 306 N.C. at 678, 295 S.E. 2d at 466 (footprint evidence taken within hours of commission of crime admissible as some evidence of perpetrator's identity).

Notwithstanding the fact there is no direct evidence, this evidence when taken in the light most favorable to the State is sufficient to give rise to a reasonable inference of defendant's guilt. *Jones*, 303 N.C. at 504, 279 S.E. 2d at 838. Accordingly, the court acted properly in denying defendant's motion to dismiss these two charges.

IV

[5] Defendant's next assignment of error is the trial court's denial of his motion to dismiss the charge of common-law robbery based on insufficiency of the evidence.

Common-law robbery is "the taking and carrying away [of] personal property of another from his person or presence without his consent by violence or by putting him in fear and with the intent to deprive him of its use permanently, the taker knowing that he was not entitled to take it." *State v. McCullough*, 79 N.C. App. 541, 544, 340 S.E. 2d 132, 135, *disc. rev. denied*, 316 N.C. 556, 344 S.E. 2d 13 (1986). The defendant specifically contends there was insufficient evidence that any money was taken by the defendant or anyone else and insufficient evidence the money allegedly stolen was taken from the person or presence of the alleged victim.

The victim testified that when she went to bed on 30 May she had a ten dollar bill in a brown envelope with her name on it and that the envelope was inside her bra that was hanging on the chair in her bedroom. The chair was two or three feet from her bed. The perpetrator asked the victim did she have any money and she replied no. The victim testified she knew the defendant had gotten the ten dollars because she heard him "a 'rambling around in there." The bra and the brown envelope with the victim's name on it were found in the culvert near the defendant's trailer. The ten dollar bill was not inside the envelope. As stated above, shoe prints matching those found in the victim's bedroom and matching the treads on defendant's shoes were found near the culvert. We conclude this evidence is sufficient to give rise to a reasonable inference that defendant took and carried away the ten dollar bill. *See Jones*, 303 N.C. at 504, 279 S.E. 2d at 838 (evidence is sufficient

to withstand a motion to dismiss if it gives rise to a reasonable inference of defendant's guilt based on the circumstances).

There is likewise sufficient evidence the money was taken from the presence of the victim. "The word 'presence' must be interpreted broadly," *State v. Clemmons*, 35 N.C. App. 192, 196, 241 S.E. 2d 116, 118-19, *disc. rev. denied*, 294 N.C. 737, 244 S.E. 2d 155 (1978), with due consideration given to the element of the crime that requires the property to be taken "by violence or by putting him [the victim] in fear." *McCullough*, 79 N.C. App. at 544, 340 S.E. 2d at 135; *see Clemmons*, 35 N.C. App. at 196, 241 S.E. 2d at 119 ("presence" in the statutory definition of "robbery with firearms" "must be interpreted . . . with due consideration to the main element of the crime—intimidation or force by the threatened use of firearms"); *State v. Stewart*, 255 N.C. 571, 572, 122 S.E. 2d 355, 356 (1961) (robbery with firearms creates no new offense but provides for more severe punishment if firearms are used in a robbery). Here, the taking of money from the chair near the victim's bed occurred after the defendant had forced the victim to have vaginal and anal intercourse, forced her to perform fellatio, threatened to kill her, threatened to cut off her breast, and had hit her several times. This evidence is sufficient to show a taking from the presence of the victim through violence or by putting her in fear. Accordingly, this assignment of error is without merit.

V

[6] The defendant next contends the trial court erred by imposing a sentence in excess of the presumptive sentence for first-degree burglary. Defendant was sentenced to an active term of imprisonment for fifty years, which is in excess of the presumptive term of fourteen years. N.C.G.S. Sec. 14-52 (1986) (a person convicted of first-degree burglary shall receive a sentence of at least fourteen years). The trial judge found two aggravating factors to justify the sentence: (1) the defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement, N.C.G.S. Sec. 15A-1340.4(1)(o), and (2) the victim, Mrs. Isenhour, who is a resident of and was in the dwelling house at the time of the burglary, was very old. N.C.G.S. Sec. 15A-1340.4(1)(j).

The defendant concedes the trial judge was proper in finding an aggravating factor concerning defendant's prior record. The defendant bases his assignment of error instead on his assertion that for age to be an aggravating factor "there must be a showing

that the victim's aged condition was a factor in the crime being committed or that the harm was worsened because of that fact." Defendant argues that Mrs. Isenhour, age 92, was asleep the entire time the burglary was going on, was not awakened and did not know anything about the burglary at the time it was committed. Therefore, he contends Mrs. Isenhour's aged condition was not a factor in the crime nor was the harm worsened because of her old age.

The underlying purpose of N.C.G.S. Sec. 15A-1340.4(a)(1)(j) is to "discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity." *State v. Thompson*, 318 N.C. 395, 398, 348 S.E. 2d 798, 800 (1986) (citations omitted).

> There are at least two ways in which a defendant may take advantage of the age of his victim. First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself.

Id. Vulnerability is the concern addressed by this aggravating factor. *State v. Wheeler*, 70 N.C. App. 191, 197, 319 S.E. 2d 631, 635, *disc. rev. denied*, 312 N.C. 624, 323 S.E. 2d 925 (1984), *cert. denied*, 316 N.C. 201, 341 S.E. 2d 583 (1986). A victim's age causes the victim to be more vulnerable where "age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized." *State v. Hines*, 314 N.C. 522, 525, 335 S.E. 2d 6, 8 (1985).

The State is correct in arguing that old age can be an appropriate aggravating factor in the crime of burglary. In *Thompson*, a case in which the defendant tied the victim up before taking money and personal property, a finding that old age was an aggravating factor in burglary was upheld by our Supreme Court. *Id.* at 396, 400, 348 S.E. 2d at 799, 801. In that case there was evidence that defendant was aware the victim was an "old lady" before he broke into her house and evidence that defendant was aware of the victim's old age during the actual commission of the crime. *Id.* at 399, 348 S.E. 2d at 801. The Court concluded that the

victim's old age impeded her from fleeing or defending herself or her property. *Id.*

Here, the finding that old age was an aggravating factor of burglary was inappropriate. There is no evidence tending to show Mrs. Isenhour's home was targeted for burglary because of her old age. In fact, there is no evidence at all that defendant knew the age of the occupants of the house before he broke into it. Furthermore, there is no evidence in the record that Mrs. Isenhour, because of her old age, was more vulnerable to having her home burglarized than anyone else, or that she had a more difficult time recovering from the effects of the crime. Mrs. Isenhour was not taken advantage of during the actual commission of the crime as there was evidence she was asleep during the entire burglary. We therefore conclude that the victim's old age was improperly found as an aggravating factor for the crime of first-degree burglary. Accordingly, we remand for resentencing as to the crime of first-degree burglary. *See State v. Daniel*, 319 N.C. 308, 315, 354 S.E. 2d 216, 220 (1987) (defendant given new sentencing hearing where court imposed a sentence in excess of presumptive term and failed to properly find a statutory mitigating circumstance).

VI

[7] Defendant next argues the court denied defendant "an opportunity for a fair and impartial trial by understating the elements of the offenses for which the defendant was charged during the trial court's opening remarks to the jury panel before trial."

N.C.G.S. Sec. 15A-1221(a)(2) provides that before trial, the trial judge must inform the prospective jurors of the case in accordance with N.C.G.S. Sec. 15A-1213. N.C.G.S. Sec. 15A-1213 provides as follows:

> Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense . . . . [T]he judge may not read the pleadings to the jury.

Id.

Defendant alleges that in informing the jury the trial judge failed to present every element of each crime charged and there-

fore the jury was misinformed as to the nature of the charges and what the State must prove in order to support convictions. A careful reading of the transcript of the judge's pre-trial remarks reveals that the judge complied with N.C.G.S. Sec. 15A-1213. The judge began his remarks by informing the jury of the five charges against defendant and how defendant pled to each one of them. The judge identified the parties and their counsel and then proceeded to relate to the jury the date of the alleged offenses and the name of the victim of each alleged offense where applicable. The judge then instructed the jury on the presumption of innocence and the burden of proof. The trial judge did not state every element the State would be required to prove during trial. This, however, is not error as defendant contends. N.C.G.S. Sec. 15A-1213 does not require the judge to inform the jury of the elements of each crime. Such instruction is required during the final jury instructions. R. Price, *North Carolina Criminal Trial Practice* Sec. 24-1, p. 504 (1985). N.C.G.S. Sec. 15A-1213 only requires the jury be informed of the charges pending against the defendant, not the elements thereof. Here, as the trial judge complied with the statute, we find no error.

VII

[8] The defendant next contends the trial judge erred in allowing the district attorney "to exceed the bounds of propriety in his closing argument to the jury and not following said impropriety with an admonishment to the jury or correcting instructions."

The following statements made by the district attorney in his closing are those defendant refers to as exceeding the "bounds of propriety":

> Let me tell you right now I don't want you to convict because I might scream and shout. One reason is because I've got a sore throat, and another is because of this Courtroom, and, third, it makes me just a little bit mad because this woman went through this in this county; but I want you to convict this man right here in this Courtroom for doing those things to Ms. Jolly on that, on the evidence . . .
>
> . . . and if that is not enough to convict somebody in this county, then you tell me it is not enough to convict somebody in this county. . . .

> There is no doubt in anybody's mind who did this, but I tell you one thing, when you go back to that Jury Room and talk about this case after you hear the law the Judge has given you, if there is a doubt in your mind, it is not reasonable . . .
>
> Give her [Ms. Jolly] some justice for her seventy-four years on this earth. . . .
>
> I'm asking you to convict that man on the facts, not because I might have screamed a time or two in my argument, but because the facts are there . . .

Defendant contends these statements violated the statutory limitations on jury argument set out by N.C.G.S. Sec. 15A-1230(a) because they express the district attorney's personal belief and opinions. N.C.G.S. Sec. 15A-1230(a) provides in pertinent part:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

Id.

The defendant is required to object to improper jury argument and failure to do so ordinarily constitutes a waiver. *State v. Hickey*, 317 N.C. 457, 472, 346 S.E. 2d 646, 656 (1986). Here, the defendant failed to object and therefore our review is limited to whether the district attorney's argument was so grossly improper as to require the trial court to intervene *ex mero motu* and instruct the jury to ignore the district attorney's comments. *Id.* at 473, 346 S.E. 2d at 656; *State v. Jones*, 317 N.C. 487, 500, 346 S.E. 2d 657, 664-65 (1986). We conclude the district attorney's comments "do not rise to the level of gross impropriety" and therefore find no error. *Hickey*, 317 N.C. at 473, 346 S.E. 2d at 656.

VIII

[9] The defendant similarly argues that the trial court erred in failing to intervene *ex mero motu* to admonish the jury or provide any correcting instructions for a comment the district attorney made during closing argument which defendant contends was "at least a veiled reference to the failure of the defendant to testify."

Although the defendant failed to object at trial, he contends the following comment is so grossly improper that the trial judge should have intervened: "Now, you compare those characteristics I just read out to this man seated right here [referring to defendant] and compare them to Mr. Workman, who you got to see up there; to hear from." The district attorney made this comment after making some points about the characteristics of the perpetrator. Mr. Workman was a State witness and on cross-examination of him, the defendant attempted to show that he could have been the perpetrator. As stated in Section VII, failure to object to the district attorney's argument at trial ordinarily constitutes a waiver. *See Hickey*, 317 N.C. at 472, 346 S.E. 2d at 656. However, in the absence of an objection, the trial judge is required to intervene *ex mero motu* at trial for argument that is grossly improper. *State v. Young*, 317 N.C. 396, 415, 346 S.E. 2d 626, 637 (1986). Failure of a judge to intervene under these circumstances constitutes reversible error.

Section 8-54 provides that failure of a defendant to testify does not create any presumption against him. N.C.G.S. Sec. 8-54 (1986). This statute has been interpreted as "prohibiting the prosecution, the defense, or the trial judge from commenting upon the defendant's failure to testify." *State v. Randolph*, 312 N.C. 198, 206, 321 S.E. 2d 864, 869 (1984). The purpose of "the rule prohibiting comment on the failure to testify is that *extended reference* by the court or counsel concerning this would nullify the policy that the failure to testify should not create a presumption against the defendant." *Id.* (emphasis added). Here, any reference by the district attorney of defendant's failure to testify is at the most "a veiled reference," "so brief and indirect as to make improbable any contention that the jury inferred guilt from the failure of the defendant[ ] to testify." *Id.* As there is no gross impropriety here, we find the trial judge did not err in failing to intervene *ex mero motu.* Furthermore, whatever error there may have been was cured by the judge's instructions to the jury. *See State v. Wilson*, 311 N.C. 117, 130, 316 S.E. 2d 46, 55 (1984). The judge specifically instructed the jury that the defendant had the privilege of not testifying and that his decision created no presumption against him. The trial judge further instructed the jury that defendant's silence was not to influence them in any way. This assignment of error is without merit.

IX

[10] Defendant next contends the trial court erred in "failing to properly admonish the jury or provide correcting instructions after

a law enforcement officer testifying for the State made a reference to the defendant's prior criminal record."

During his testimony for the State, S.B.I. Agent Bueker related to the jury a statement he took from the defendant on the morning after the alleged offense occurred. In relating this statement, Agent Bueker told the jury "Mr. Styles stated he had been in trouble with the law previously for breaking or entering." At that point, the defendant objected and the objection was sustained. The trial judge instructed the jury to "disregard that, ladies and gentlemen." The defendant contends the admonishment was insufficient under the circumstances and had the effect of denying defendant a fair and impartial trial. Defendant asserts it was error for the judge to fail to instruct the jury that a prior conviction cannot be used as evidence of defendant's guilt in the present case. However, as the defendant did not specifically request such a curative instruction, the issue is deemed waived on appeal. *State v. Griffin*, 57 N.C. App. 684, 687, 292 S.E. 2d 156, 158, *cert. denied*, 306 N.C. 560, 295 S.E. 2d 477 (1982). Furthermore, as there is nothing in the record that indicates the jury disregarded the court's timely curative instruction to "disregard that, ladies and gentlemen," it is presumed the impropriety was cured. *State v. Rozier*, 69 N.C. App. 38, 59, 316 S.E. 2d 893, 906, *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984). This assignment of error is overruled.

X

[11] Defendant finally argues that the trial court erred in failing to sustain his objection to the introduction into evidence of State's Exhibits Nos. 62 and 63 which were photographs of the defendant taken on 3 June 1987 at the time of his arrest. This argument is without merit.

The photographs were identified by Chief Deputy Ray Warren as those made by him of defendant with a Polaroid camera on the day of his arrest. Warren testified the photographs were a fair and accurate representation of what defendant looked like on the day defendant was arrested and that the photographs could be used by Warren to illustrate his testimony about the appearance of the defendant. Defendant contends these photographs are irrelevant because the victim never identified him as the perpetrator. We disagree.

As the victim testified that the perpetrator had a moustache and was not clean shaven but had no beard, we find it relevant

whether defendant had a moustache or a heavy beard at the time he was arrested. Assuming *arguendo* the admission of the photographs was error, the defendant has not shown "a different result would have been reached at the trial" had such error not occurred. N.C.G.S. Sec. 15A-1443 (1988). Accordingly, we find no merit to this assignment of error.

We find no error in the trial, but we remand the first-degree burglary conviction for a new sentencing hearing consistent with this opinion.

Remanded.

Judge PHILLIPS concurs in the result.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I concur with all of the majority opinion, except for that portion which remands the case for resentencing as to the crime of first-degree burglary.

In my opinion the trial court properly found as an aggravating factor that the victim, Mrs. Isenhour, was very old. I believe the majority has misread the standard as established by the Supreme Court opinions. In *State v. Hines*, 314 N.C. 522, 335 S.E. 2d 6 (1985), the Supreme Court remanded for resentencing in a burglary case where the aggravating factor of the victim being very old was based solely on evidence that the victim was 62 years old. The Supreme Court said:

> Stewart's age, by itself, does not demonstrate that he was more vulnerable to the assault at issue in this case than a younger person would have been. Many sixty-two-year-old men lead robust, active lives. Paul Stewart was a brickmason until the five years preceding his death. In those years he maintained a lively business selling drinks. He occasionally went fishing. There was no evidence he was in poor health or disabled. . . . In short, we do not believe the mere fact that Paul Stewart was sixty-two years old would support finding in this case as an aggravating factor that he was "very old."

Id. at 526, 335 S.E. 2d at 8. The Supreme Court further stated:

> In cases . . . involving victims near the *beginning or end of the age spectrum*, the prosecution may establish vulnerability merely by relating the victim's age and the crime committed.

Id. (emphasis supplied).

The facts below make this case obviously distinguishable from *Hines*. There is quite a difference between a 62-year-old healthy man and a 92-year-old invalid woman.

Furthermore, in *State v. Thompson*, 318 N.C. 395, 348 S.E. 2d 798 (1986), the Supreme Court stated:

> Neither *Hines* nor *Barts* [*State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986)] was meant to restrict the aggravation of crimes to those where the victim was targeted because of age. Where the age of the victim is taken advantage of by the defendant during the commission of the crime—by whatever means—the defendant's culpability is increased. It is this increased culpability that leads to a more severe punishment.

Id. at 398-99, 348 S.E. 2d at 801.

In the case below, the victim to which the trial court referred in the aggravating factor was a 92-year-old invalid. Common sense dictates that she was more vulnerable than an ordinary, younger victim would have been and that she was more easily taken advantage of by defendant during the commission of the crime. A court of law is not required to ignore that which is common knowledge or common sense.

I find no error in either the trial or the sentencing of defendant.

SHELBY H. SMALL, PLAINTIFF v. ALBERT B. SMALL, DEFENDANT

ALBERT B. SMALL, PLAINTIFF v. SHELBY H. SMALL, DEFENDANT AND THIRD PARTY PLAINTIFF v. ALJO ENTERPRISES, INC., THIRD PARTY DEFENDANT

Nos. 8826DC441
8826DC442

(Filed 16 May 1989)

1. **Appeal and Error § 6.2— dismissal of equitable distribution claim—interlocutory appeal—substantial right affected**

Defendant could appeal the dismissal of her equitable distribution counterclaim as a matter of right even though it would otherwise be interlocutory since a substantial right would be affected in that there were factual issues overlapping the equitable distribution counterclaim which was dismissed by the court and the third party claim against her husband's corporation, which the court declined to determine. N.C.G.S. § 1-277(a), N.C.G.S. § 7A-27(d).

2. **Divorce and Alimony § 30; Husband and Wife § 11.2— postnuptial agreement—release of equitable distribution rights—analyzed under property settlement rules**

In an action in which the parties signed a postnuptial contract and subsequent separation agreements, defendant's purported release of equitable distribution rights must be analyzed with reference to property settlement rules rather than separation agreement rules where defendant's postnuptial release of all rights to plaintiff's property was part of a complete property settlement and other provisions of the postnuptial agreement releasing alimony rights were clearly severable from the property division.

3. **Divorce and Alimony § 21.9— agreement releasing equitable distribution rights—prior to adoption of Equitable Distribution Act—valid**

Defendant's release of property rights under a 1980 postnuptial contract did not violate public policy simply because it was executed prior to the adoption of N.C.G.S. § 50-20(d). The Court of Appeals has consistently ruled that otherwise valid marital agreements releasing all spousal property rights will bar claims for equitable distribution even if those set-

tlements were executed prior to the adoption of the Equitable Distribution Act.

4. **Husband and Wife § 12— separation agreement and property settlement—resumption of marital relations—property settlement not rescinded**

The trial court properly granted plaintiff's motion for summary judgment denying defendant's claims for equitable distribution where defendant's release of her equitable distribution rights was not rescinded simply because the parties continued or resumed sexual relations after their execution of a postnuptial contract and the first and second Separation/Property Settlement Agreements. Defendant's waiver of equitable distribution in the postnuptial contract was executed long before the parties agreed to separate and neither the express language of any of the agreements nor any summary judgment materials support the notion that defendant's release of her property rights in general and her right to equitable distribution in particular depended on the parties living separate and apart.

5. **Husband and Wife § 10— separation agreement—notarized by plaintiff's attorney**

The Court of Appeals rejected defendant's contention that plaintiff's attorney, who was a notary, could not acknowledge a postnuptial agreement and two separation agreements; N.C.G.S. § 52-10(b) merely provides that persons acknowledging a marital contract must not be a party to the contract.

CONSOLIDATED appeal by defendant-third party plaintiff from *Cantrell (Daphene L.), Judge.* Judgment entered 27 January 1988 and 28 January 1988 in District Court, MECKLENBURG County. Heard in the Court of Appeals 29 November 1988.

William G. Robinson for plaintiff-third party defendant-appellee.

Palmer, Miller, Campbell & Martin, P.A., by Joe T. Millsaps, for defendant-third party plaintiff-appellant.

GREENE, Judge.

This appeal arises from a suit for divorce by Albert Small ("plaintiff") against his wife ("defendant") and defendant's counterclaim for equitable distribution and alimony. In her counterclaim, defendant also sued a third-party defendant, Aljo Enterprises, Inc.

("Aljo"), a corporation wholly owned by plaintiff. The evidence before the district court tends to show the following: plaintiff and defendant were married on 11 May 1978. Plaintiff had previously been married and had children from that previous marriage. Defendant had also been previously married. On 11 August 1978, defendant executed a contract with Aljo which provided that defendant would lend Aljo funds from her separate estate to aid its purchase of certain real estate. On 30 October 1980, plaintiff and defendant also executed a post-nuptial contract (the "Post-Nuptial Contract") which specified how the parties' property would be divided in the event of their divorce or death. Under the Post-Nuptial Contract, each party waived alimony and released all rights in the real and personal property then owned and afterwards acquired by the other party.

After marital difficulties, both parties conferred with an attorney and subsequently executed an agreement (the "First Separation/Property Settlement Agreement") on 4 September 1985. That agreement stated the parties' desire to live separate and apart but to continue the terms of the Post-Nuptial Contract. The agreement also listed certain properties acquired by the parties after the execution of the Post-Nuptial Contract. Having engaged in certain isolated sexual relations with each other after executing the First Separation/Property Settlement Agreement, the parties executed an identical agreement (the "Second Separation/Property Settlement Agreement) on 12 September 1985. Both parties concede that on certain occasions before their divorce they again engaged in sexual relations after executing the Second Separation/Property Settlement Agreement.

Upon plaintiff's filing for divorce, defendant counterclaimed for equitable distribution and alimony. Defendant's counterclaim included a third-party claim against Aljo arising from her 1978 real estate loan. As defendant contended Aljo was plaintiff's alter ego, she requested recovery against both Aljo assets and plaintiff's separate assets in the event her counterclaim for equitable distribution was denied. Plaintiff responded that equitable distribution and alimony were barred by defendant's execution of the Post-Nuptial Contract and the Second Separation/Property Settlement Agreement. After discovery was completed and certain affidavits introduced, the trial court granted plaintiff's motion for summary judgment denying defendant's claims for alimony and equitable

distribution, but denied summary judgment on defendant's contract claim against Aljo. Plaintiff's petition for divorce was granted.

As defendant's brief contains no assignment of error nor any argument concerning the dismissal of her claim for alimony, any assignment of error to that determination is deemed abandoned. N.C.R. App. 28(b)(5). Thus, we only address defendant's appeal from the dismissal of her counterclaim for equitable distribution arising from Case No. 8826DC442.

These facts present the following issues: I) as the trial court's summary judgment did not determine defendant's contract claim against Aljo, whether the court's dismissal of defendant's equitable distribution claim was an appealable interlocutory order; and II) whether (A) the Post-Nuptial Contract was a valid property settlement releasing defendant's right to equitable distribution even though (B) the Post-Nuptial Contract was executed prior to enactment of the Equitable Distribution Act and (C) the parties engaged in sexual relations after its execution.

I

[1] Although the trial court dismissed defendant's claims for alimony and equitable distribution, the trial court specifically refused to dismiss defendant's claim for reimbursement or payment arising from her loan contract with Aljo. The trial court's dismissal of defendant's equitable distribution claim is interlocutory since it does "not dispose of the case, but leaves it for further action for the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E. 2d 377, 381 (1950); *see generally Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 376 S.E. 2d 488, 490-92 (1989). Since the trial court did not certify there was no just reason to delay the appeal from its summary judgment, there can be no appeal as a matter of right under Rule 54(b) of our Rules of Civil Procedure. N.C.G.S. Sec. 1A-1, Rule 54(b) (1983).

However, defendant may also appeal if the record shows a substantial right would be prejudiced by delaying the appeal. N.C.G.S. Sec. 1-277(a) (1983); N.C.G.S. Sec. 7A-27(d) (1986). We note there are factual issues overlapping the equitable distribution counterclaim dismissed by the court and the third-party claim against Aljo which the court declined to determine. Specifically, the factual issue whether

Aljo is plaintiff's alter ego may determine defendant's legal or equitable interest in Aljo's assets in either an equitable distribution proceeding with plaintiff or in defendant's contract action against Aljo. Defendant also contends the Aljo contract and the Post-Nuptial Contract evidence a single financial transaction between plaintiff and defendant. Given the factual issues overlapping the Aljo contract claim retained by the court and the equitable distribution counterclaim it dismissed, defendant may appeal the dismissal of the equitable distribution counterclaim as a matter of right since a substantial right will otherwise be affected under Section 1-277(a) and Section 7A-27(d). *Davidson*, 93 N.C. App. at ---, 376 S.E. 2d at 491-92 (substantial right affected if factual issues overlap claim retained and claim determined).

II

[2] Based on the waiver of equitable distribution allegedly evidenced by the Post-Nuptial Contract, and the First and Second Separation/Property Settlement Agreements, the trial court granted summary judgment against defendant's counterclaim for equitable distribution. Entry of summary judgment is appropriate if the summary judgment materials show that there is no genuine issue of material fact requiring a trial and one party is entitled to the judgment as a matter of law. *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E. 2d 228, 231 (1987). The movant has the burden of establishing the lack of a genuine issue of material fact. *Boyce v. Mead*, 71 N.C. App. 592, 593, 322 S.E. 2d 605, 607 (1984).

The summary judgment materials in the record show that the 1980 Post-Nuptial Contract states in part that:

> . . .
>
> WHEREAS, each of the parties hereto, prior to marriage between them, had accumulated substantial assets which each still owns, respectively, in his or her individual name; and
>
> WHEREAS, [the parties], each desiring to be just and fair to the other party to this Contract, have mutually agreed with each other as hereinafter set forth.
>
> NOW THEREFORE, in consideration of the recent marriage between the parties hereto . . . and for other valuable considerations . . . the parties hereto do hereby covenant, contract and agree as follows:

1. Each party acknowledges by the execution of this agreement that said party has been fully informed by the other party of the financial situation, including the amount of assets, liabilities and net income of the other party.

. . .

3. Each party hereby releases and relinquishes all right to dissent from the Will of the other. Excepting only for the right hereinabove reserved for each party to take under the Last Will and Testament of the other party, each party does hereby release, relinquish, and quitclaim unto the other party all of the following rights, whether vested, contingent or inchoate:

(a) in and to any and all real estate and personal property now owned or hereafter acquired by the other party;

. . .

(d) any right or claim for alimony from the other, either pendente lite or permanent.

. . .

5. In the event of the divorce of the parties hereto, any and all property, real or personal, jointly acquired by them during their marriage, shall at the time of such divorce be divided between them, or sold and the proceeds of such sale divided in the event that a physical division of the property itself is impractical, in accordance with the relative percentages of ownership of each party therein as established by the books and records of the parties.

. . .

In their First Separation/Property Settlement Agreement, the parties agreed they would live separate and apart, but specifically stated their desire to continue the provisions of their earlier Post-Nuptial Contract which they deemed "fair and equitable." The parties reiterated their release of all rights in each other's estate "whether such rights arise under any *statute of distribution* or by virtue of any right of election or otherwise . . ." (Emphasis added.) The First Separation/Property Settlement Agreement furthermore listed the property jointly acquired after the Post-Nuptial Contract was executed. On the advice of counsel, the parties exe-

cuted a Second Separation/Property Settlement Agreement on 12 September 1985 since the parties had sexual relations after executing the First Separation/Property Settlement Agreement. Both parties concede that, before their divorce, they occasionally engaged in sexual relations even after the execution of the Second Separation/Property Settlement Agreement.

On appeal, defendant primarily contends that any release of equitable distribution rights is void since (1) the Post-Nuptial Contract was void as against public policy in 1980 and (2) the parties resumed sexual relations after executing the First and Second Separation/Property Settlement Agreements.

A. *Post-Nuptial Contract: Distinction Between Property Settlements and Separation Agreements*

Marital contracts are "ordinarily determined by the same rules which govern the interpretation of contracts." *Lane v. Scarborough*, 284 N.C. 407, 409, 200 S.E. 2d 622, 624 (1973). In determining the meaning and effect of such agreements, the court is "guided by the language of the agreement as it reflects the intentions of the parties" and by the "presum[ption] the parties intended what the language used clearly expresses and . . . mean[s] what on its face it purports to mean." *Hagler*, 319 N.C. at 291, 294, 354 S.E. 2d at 232, 234. Furthermore, it is particularly necessary to distinguish between "property settlements" and "separation agreements" in determining the intended effects of marital agreements:

> Throughout the development of law defining and enforcing marital contracts, courts and advocates have repeatedly confused the terms "separation agreement" and "property settlement" . . . A separation agreement is a contract between spouses providing for marital support rights and is executed while the parties are separated or are planning to separate immediately. A property settlement provides for a division of real and personal property held by the spouses. The parties may enter a property settlement at any time, regardless of whether they contemplate separation or divorce. . . . Usually the parties will refer to the entire document as a "separation agreement," even though its provisions cover both support rights and property rights.

Note, *Property Settlement or Separation Agreement: Perpetuating the Confusion—Buffington v. Buffington*, 63 N.C.L. Rev. 1166,

1169-70 (1985). Our Supreme Court has often noted the differing purposes underlying property settlements and separation agreements as defined above. Thus, the Court has stated that, "the heart of a separation agreement is the parties' intention and agreement to live separate and apart forever . . ." *In re Adamee*, 291 N.C. 386, 391, 230 S.E. 2d 541, 545 (1976). However, a property settlement "contains provisions . . . which might with equal propriety have been made had no separation been contemplated . . ." *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E. 2d 547, 549 (1955); *see also Shoaf v. Shoaf*, 282 N.C. 287, 291-92, 192 S.E. 2d 299, 303 (1972) (property division was "separable" from alimony provisions since "[t]here is a clear distinction between a property settlement and the discharge of the obligation to support"). It is true that contract provisions covering both support duties and property rights are usually included in a single document which the parties refer to as a "separation agreement." *See* 2 R. Lee, *North Carolina Family Law* Sec. 187 at 461-62 (1980). However, noting the label attached to a provision of a marital agreement is no substitute for analyzing the provision's intended effect in light of the agreement's express language and purposes.

The Post-Nuptial Contract and subsequent agreements purportedly evidence defendant's release of her right to equitable distribution. The right to equitable distribution does not arise from the parties' common law rights and obligations as spouses, but is a statutory property right which may be waived by a complete property settlement. *See Hagler*, 319 N.C. at 290, 354 S.E. 2d at 232; *Wilson v. Wilson*, 73 N.C. App. 96, 99, 325 S.E. 2d 668, 670 (1985). The right to equitable distribution may be released even if it is not specifically enumerated in a general release of spousal property rights. *Hagler*, 319 N.C. at 295, 354 S.E. 2d at 235; *see also Blankenship v. Blankenship*, 234 N.C. 162, 164, 66 S.E. 2d 680, 682 (1951) (general release waived curtesy rights although not specifically named).

Applying the above principles to the Post-Nuptial Contract reveals that defendant's 1980 release of all rights in plaintiff's property is part of a complete property settlement. Although other provisions of the Post-Nuptial Contract released defendant's alimony rights, the alimony provisions of the Post-Nuptial Contract are clearly separable from the property division and are thus irrelevant to this appeal since defendant does not appeal the dismissal of her claim for alimony. *See Shoaf*, 282 N.C. at 291-92, 192 S.E. 2d at 303; *see also* Note, *Contractual Agreements as a Means of*

Avoiding Equitable Distribution, 21 Wake L. Rev. 213, 221 (1985) (validity of property settlement is not affected by fact parties also consider ultimate separation). Accordingly, defendant's purported release of equitable distribution in the Post-Nuptial Contract and subsequent agreements must be analyzed with reference to those rules which pertain to property settlements rather than separation agreements.

[3] B. *Validity of Release of Property Rights Executed Prior to Adoption of Equitable Distribution Act*

Effective 1 October 1981, our Legislature enacted the Equitable Distribution Act (the "Act") which provides in part that "before, during or after marriage the parties may by written agreement, *duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1* . . . provide for distribution of the *marital* property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties." N.C.G.S. Sec. 50-20(d) (1987) (emphasis added). Since Section 50-20(d) was not enacted until after defendant's execution of the Post-Nuptial Contract in 1980, defendant contends any waiver of equitable distribution arising from that contract violated public policy in 1980 and was therefore void.

Defendant's public policy argument fails to distinguish between the historical treatment of property settlements and separation agreements. This court has often stated the Act did not purport to affect the general validity of existing marital agreements which divided the parties' property. *E.g.*, *McArthur v. McArthur*, 68 N.C. App. 484, 487, 315 S.E. 2d 344, 346 (1984); *Case v. Case*, 73 N.C. App. 76, 81, 325 S.E. 2d 661, 665, *disc. rev. denied*, 313 N.C. 597, 330 S.E. 2d 606 (1985). On the contrary, Section 50-20(d) specifically incorporates Section 52-10 which, long before the Act, permitted spouses to release their marital rights in each other's property:

> [C]ontracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married *and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released.*

N.C.G.S. Sec. 52-10(a) (1984) (emphasis added). Section 52-10 authorizes contracts which completely settle property rights arising out of marriage. *Blount v. Blount*, 72 N.C. App. 193, 323 S.E. 2d 738, *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 389 (1985). Substantially identical predecessors to the present version of Section 52-10(a) have existed for over one hundred years. *E.g.*, Sess. L. 1871-72, c. 193, s. 28 (if complied with examination statutes, married persons could release dower, curtesy, "and all other rights which they might respectfully acquire or may have acquired by marriage in the property of each other").

Thus, Section 50-20(d) did not reverse a prior public policy against agreements releasing spousal property rights. By incorporating Section 52-10, it instead mandated, among other things, that the policy favoring property settlements continue so that a prior settlement of spousal property rights would also constitute a plea in bar to the equitable distribution of "marital" property under Section 50-20. *See Hagler*, 319 N.C. at 290, 354 S.E. 2d at 232 (valid agreement under Section 52-10 will be honored as bar to equitable distribution); *Blount*, 72 N.C. App. at 195, 323 S.E. 2d at 740. This court has consistently ruled that otherwise valid marital agreements releasing all spousal property rights will bar claims for equitable distribution—even if those settlements were executed prior to the adoption of equitable distribution under the Act. *E.g., Case*, 73 N.C. App. at 81, 325 S.E. 2d at 665; *McArthur*, 68 N.C. App. at 486-87, 315 S.E. 2d at 345; *see also Blount*, 72 N.C. App. at 195, 323 S.E. 2d at 740. Defendant's release of her property rights under the Post-Nuptial Contract as incorporated in the subsequent agreements is as complete as the general releases upheld in *Hagler*, *McArthur*, and *Blount*. In light of those decisions, we reject defendant's contention that her release of property rights under the 1980 Post-Nuptial Contract violated public policy simply because it was executed prior to the adoption of Section 50-20(d).

C. *Validity of Equitable Distribution Waiver After Sexual Relations*

[4] Defendant also contends the parties' admitted resumption of sexual relations after execution of the First and Second Separation/Property Settlement Agreements necessarily rescinded or voided any equitable distribution waivers they contained insofar as the agreements were executory at the time the parties engaged in

sexual relations. This is incorrect. Irrespective of how often the parties engaged in sexual relations, such relations are only relevant insofar as they may demonstrate the parties have reconciled and are not "living separate and apart." *See, e.g., Higgins v. Higgins*, 321 N.C. 482, 364 S.E. 2d 426 (1988); *see also* N.C.G.S. Sec. 52-10.2 (1988 Supp.) (effective 1 October 1987) (isolated sexual relations do not constitute renewal of husband and wife relationship). Thus, whether or not a valid property settlement is fully executed at the time the parties engage in sexual relations, their sexual relations will impliedly rescind the release of property rights under that settlement *only* if the release necessarily depended on the parties living separate and apart. Defendant's mistaken contention again arises from her failure to distinguish property settlements from separation agreements:

> When the contract contains provisions . . . which *might* with equal propriety have been made had no separation been contemplated, and others which would have otherwise been idle, the coming together again of the parties and their conduct may be such as to show an intention to avoid the latter and not the former. *So where the agreement for separation includes a division of property which might have been made if no separation had taken place, the reconciliation does not abrogate this division* . . . If an agreement between husband and wife providing for their separation goes beyond the terms of a mere separation deed and is in effect a good voluntary settlement of the husband on his wife, a subsequent reconciliation between the parties cannot affect the agreement so far as it constitutes a settlement. Hence, the settlement must stand notwithstanding the reconciliation.

Jones, 243 N.C. at 261-62, 90 S.E. 2d at 549-50 (emphasis added); *see also* S. Sharpe, *Divorce and the Third Party: Spousal Support, Private Agreements and the State*, 59 N.C.L. Rev. 819, 839 (1981) (property settlement normally not affected by marital relations since living apart furnishes no part of consideration). As one commentator has stated:

> Gradually, North Carolina courts have developed rules distinguishing between the support provisions and the property settlement provisions found in most . . . agreements. These distinctions have been particularly important with regard to issues of . . . reconciliation . . . Reconciliation and resumed

> cohabitation of parties will rescind executory provisions of a separation agreement but will have no effect on property settlements.

Note, 63 N.C.L. Rev. at 1170 n.44 (text and note); *accord* Note, 21 Wake L. Rev. at 222 n.75.

Although all of the property provisions in *Jones* had been executed before the parties' reconciliation, the *Jones* Court's analysis quoted above applies equally whether or not the provisions of the property settlement have been fully executed. *Cf. Jones*, 243 N.C. at 261, 90 S.E. 2d at 549 ("*Regardless* of what the rule may be as to a settlement with executory provisions," executed property settlement not affected by reconciliation); *see also Love v. Mewborn*, 79 N.C. App. 465, 339 S.E. 2d 487, *disc. rev. denied*, 317 N.C. 704, 347 S.E. 2d 43 (1986) (upholding cash payments as part of property settlement even though obligation executory when parties resumed sexual relations). We especially note that both the majority and the dissenters in *Higgins* specifically approved the holding of this Court in *Love* that "property settlements may be executed before, during or after marriage and are not necessarily terminated by reconciliation." 79 N.C. App. at 466, 339 S.E. 2d at 488; *compare Higgins*, 321 N.C. at 485, 364 S.E. 2d at 428-29 (majority approvingly stated its holding was consistent with *Love*) *with id.* at 491, 364 S.E. 2d at 432 (Whichard, J., dissenting) (approving holding in *Love* that property settlements not necessarily terminated by reconciliation). As one commentator has summarized:

> Logically, courts should make no distinction between executory and executed provisions of property settlements. Although a reconciliation of the parties demonstrates the failure of consideration to support a separation agreement . . . resumption of cohabitation does not result in a failure of consideration and is not inconsistent with the continued validity of property rights. Even when a husband and wife have not separated, they may make an executory property settlement that bears no relationship to cohabitation.

Note, *Voiding Separation Agreements*, 16 Wake L. Rev. 137, 143 (1980).

Thus, under *Jones*, the resumption of relations does not necessarily rescind a property settlement "which might with equal propriety have been made had no separation been contemplated"

since there is no presumption that a division of property rights is necessarily founded on the parties' desire to separate and live apart. Conversely, where a provision of a marital contract *is* necessarily founded on the parties' agreement to live separate and apart, the parties' resumption of the marital relationship does rescind the provision insofar as the provision is executory: "It is well-settled in our law that a *separation agreement* between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation . . . The heart of a separation agreement is the parties' intention and agreement to live separate and apart forever . . . Therefore, they void the separation agreement if they re-establish their matrimonial home." *Adamee*, 291 N.C. at 391, 230 S.E. 2d at 545. Finally, since the parties' express intent in the agreement is the touchstone for construing the agreement, there may certainly be hybrid agreements which expressly condition property settlement provisions on the parties' living separate and apart. *E.g., Higgins*, 321 N.C. at 484, 364 S.E. 2d at 428 (enforcing parties' express agreement to convey land only if they lived separate and apart for one year).

Applying these principles to the instant case, we note defendant's waiver of equitable distribution in the 1980 Post-Nuptial Contract was executed long before the parties agreed to separate in 1985. Neither the express language of any of the agreements nor any summary judgment materials support the notion that defendant's release of her property rights in general and her right to equitable distribution in particular depended on the parties' living separate and apart. Thus, the parties' continuation of sexual relations after executing the Post-Nuptial Contract did not imply any rescission of defendant's release of her property rights. *See Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984). Likewise, the parties' resumption of sexual relations after the First and Second Separation/Property Settlement Agreements did not rescind those agreements' incorporation of the Post-Nuptial Contract: the specific waiver of equitable distribution in the First and Second Separation/Property Settlement Agreements in 1985 simply continued and reiterated defendant's 1980 release of property rights and thus constituted a division of property which, as in *Jones*, might have been made if no separation had taken place. Accordingly, defendant's release of her property right to equitable distribution was not rescinded simply because the parties continued or resumed sexual relations after their execution of the Post-Nuptial

Contract and the First and Second Separation/Property Settlement Agreements.

[5] In passing, we also reject defendant's contention that plaintiff's attorney (who was a notary) could not acknowledge these agreements under Section 52-10(b). N.C.G.S. Sec. 52-10(b) (1984). Section 52-10(b) merely provides that persons acknowledging the marital contract "must not be a *party* to the contract." (Emphasis added.) Defendant also complains she was not adequately represented by counsel at the time she executed the First and Second Separation/Property Settlement Agreements in 1985; however, we do not address this contention since it would not invalidate her original release of property rights including equitable distribution under the 1980 Post-Nuptial Contract.

Affirmed.

Judges BECTON and EAGLES concur.

STATE OF NORTH CAROLINA v. HECTOR ROSARIO, A/K/A HECTOR L. ROSARION, DEFENDANT

No. 8812SC621

(Filed 16 May 1989)

1. **Searches and Seizures § 21— search warrant—tip from confidential informant relayed by another officer—use not precluded**

   The fact that an affidavit supporting a search warrant in a narcotics case contained information from a confidential informant which was relayed by another officer did not preclude its use to establish probable cause where the affidavit stated that the other agent found that the informant had been reliable in the past, which entitled the affiant to rely on the informant's information.

2. **Searches and Seizures § 23— narcotics—affidavit supporting search warrant—probable cause**

   An affidavit supporting a search warrant in a narcotics prosecution was sufficient to establish probable cause where the affidavit directly implicated the premises as the delivery

point for drugs being transported from Florida; an accomplice who was assisting officers in the hope of obtaining a reduced sentence knew the defendant's phone number, knew the location of defendant's house, and was able to describe the house; police checked the accomplice's information before proceeding with the delivery and found it to be accurate; and the officers observed the accomplice enter the residence with a package of cocaine. Although the courier's credibility may be questioned because of his involvement in the crime and his cooperation with the police, he provided accurate and detailed information which was entirely consistent with information supplied by a confidential informant, and the fact that the package was supplied by the police does not affect the validity of the search because the package was merely a duplicate of the original.

3. Narcotics § 4— possession of cocaine supplied by law officers— evidence sufficient

The trial court did not err by denying defendant's motion to dismiss cocaine trafficking charges where police in Florida intercepted an accomplice with a gift-wrapped box containing a kilogram of cocaine, the box was retained in Florida as evidence in that prosecution, the accomplice returned to North Carolina with DEA agents and delivered an identical box supplied by the SBI to defendant, and police officers searched defendant's house, finding the duplicate package, two other plastic bags of cocaine, a cocaine grinder, scales, and several documents.

4. Conspiracy § 6— narcotics—conspirator assisting police—evidence sufficient

There was sufficient evidence of conspiracy to traffic in cocaine by delivery where defendant's accomplice went to Florida to obtain cocaine; was arrested in Florida with a gift-wrapped box containing a kilo of cocaine; agreed to assist officers in hope of obtaining a reduced sentence; told officers that he was to deliver the cocaine to defendant's house; the original box of cocaine remained in Florida as evidence in that prosecution; the accomplice was flown back to North Carolina with a DEA agent and supplied with a duplicate box containing cocaine by the SBI; and the accomplice delivered the cocaine to defendant's house.

5. Narcotics § 4.3— constructive possession—evidence sufficient

The evidence was sufficient to show defendant's actual or constructive possession of cocaine found in his house where defendant took a delivered package containing cocaine from a courier and placed it in his freezer, then removed it from the freezer and put it in the garbage can outside the house when he learned that police were in the area; smaller bags of cocaine were discovered between the mattresses of a bed being used by the son of a woman who lived with defendant; the woman testified that she had witnessed defendant sell cocaine in the house on numerous occasions; that she had often found cocaine in the house; that she had seen defendant use a cocaine grinder and scales; and that the cocaine found in her son's bed did not belong to her.

6. Narcotics § 1.1— maintaining dwelling for selling controlled substance—evidence sufficient

There was sufficient evidence to support the charge of intentionally maintaining a dwelling for the purpose of keeping and selling a controlled substance where it was not disputed that defendant maintained the house as his residence; and there was testimony concerning the delivery of a package of cocaine to the house, the discovery of other cocaine, a cocaine grinder, and scales in the house, and testimony from a woman who lived in the house concerning defendant's prior drug dealing. N.C.G.S. § 90-108(a)(7) and (b).

7. Criminal Law § 34.8— trafficking in cocaine—prior criminal acts—admissible

The trial court did not err in a prosecution involving trafficking in cocaine by admitting evidence concerning defendant's selling and using cocaine in his house and testimony from a witness who had previously sold cocaine for defendant where part of the testimony was clearly relevant to the charge of maintaining a dwelling for the purpose of keeping and selling a controlled substance and the testimony by defendant's dealer was admissible to prove intent, plan or knowledge. N.C.G.S. § 8C-1, Rule 404(b).

APPEAL by defendant from *Herring (D. B., Jr.), Judge.* Judgments entered 14 December 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 24 January 1989.

Defendant was tried and convicted of conspiracy to traffic in cocaine by delivery, trafficking in cocaine by possession of 400 grams or more, trafficking in cocaine by possession of at least 28 but less than 200 grams, and intentionally maintaining a dwelling for the purpose of keeping or selling a controlled substance. The trial court consolidated the charges of trafficking by possession of more than 28 grams and maintaining a dwelling for keeping and selling a controlled substance for judgment and imposed a sentence of seven years thereon. For the other trafficking charge and the conspiracy charge the judgments imposed two concurrent sentences of thirty-five years beginning at the expiration of the seven-year term. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, for the State.

Jones & McGlothlin, by Larry J. McGlothlin, for defendant-appellant.

PARKER, Judge.

Defendant contends that the trial court erred in denying his motion to suppress the evidence seized during the search of his house, in denying his motion to dismiss the charges against him, in admitting certain evidence over his objections, and in refusing to instruct the jury on the defense of entrapment.

The State's evidence tended to show the following: On 13 January 1987, Eduardo Stewart discussed obtaining a kilogram of cocaine with defendant, Antonio Suarez, and Guillermo Gomez. The discussion took place in defendant's house in Fayetteville. On 18 January 1987, Stewart flew from Fayetteville to Miami, Florida to pick up the kilogram of cocaine. In Miami, Stewart met Guillermo Gomez and his brother, who were to supply the cocaine. The next day, the Gomez brothers procured the cocaine and gave it to Stewart in exchange for $12,000.00. The cocaine was packaged in a box and the box was gift wrapped. On the morning of 20 January 1987, the Gomez brothers drove Stewart to a train station where he boarded a train to Fayetteville. Upon boarding the train, Stewart was approached by two police officers who asked to search his baggage. Stewart consented to the search, and the officers arrested him upon discovering the cocaine.

Stewart agreed to assist the officers in the hope of obtaining a reduced sentence. He told the officers that he was to deliver the

cocaine to defendant's house. Stewart was flown back to Fayetteville in the company of a DEA agent. In Fayetteville, officers gave him a box wrapped exactly like the one that had been confiscated in Florida. The original box and its contents had been retained by the Florida police. The duplicate box contained approximately 900 grams of white powder containing cocaine in a concentration of approximately two percent. The cocaine in the duplicate box had been supplied by the SBI lab in Raleigh.

Police officers in Fayetteville placed a hidden microphone on Stewart's body and drove him to defendant's house in a cab. Stewart entered defendant's house with the duplicate package. Already in the house were defendant, Antonio Suarez, Kisha Fraizer, and Cathy Hendry. They were surprised to see Stewart because they had heard that he had been arrested. Stewart told Kisha Fraizer, who was his sister-in-law, that she should leave. He then gave the package to defendant, who put it in a freezer. Kisha Fraizer left with Suarez. Defendant then received a phone call by which he was informed that police had been seen in the area. Defendant removed the package from the freezer and placed it in a garbage can outside the house. About fifteen minutes after Suarez left, police officers came to the door. Defendant let them in the house and the officers searched the house pursuant to a warrant. In the course of the search, the officers found and seized the duplicate package, two other plastic bags containing cocaine, a cocaine grinder, scales, and several documents. Defendant, Stewart, and Cathy Hendry were all arrested. Defendant did not testify at trial, but he presented several witnesses who testified concerning his good character and reputation in the community.

I

[1] We first consider defendant's contentions concerning the motion to suppress. The police searched defendant's house pursuant to a warrant which recited that there was probable cause to believe that "papers, handwritings, receipts, travel tickets showing names of Rosario, Gomes [sic], Suarez, and [S]tewart and related items showing activities related to a plan to facilitate, transfer of narcotics, and controlled substances, cocaine" would be found on the premises. Defendant moved to suppress the evidence obtained pursuant to the warrant on the grounds that the affidavits in support of the warrant were insufficient to establish probable cause. The warrant was supported by two affidavits sworn to by Sergeant

Maxwell of the Cumberland County Sheriff's Department. The first affidavit contains information supplied by a confidential informant and relayed to Sergeant Maxwell by an agent of the Fort Bragg Drug Suppression Team. The second affidavit contains information supplied by Eduardo Stewart and relates the events leading up to Stewart's entry into defendant's house with the duplicate package.

Affidavits in support of search warrants sufficiently establish probable cause if they provide reasonable grounds to believe that the objects sought will be found on the premises to be searched and will aid in the apprehension or conviction of the offender. *State v. Rook*, 304 N.C. 201, 220, 283 S.E. 2d 732, 744 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed. 2d 155 (1982). Whether probable cause exists for the issuance of a warrant depends upon a practical assessment of the relevant circumstances in each particular case. *Id.*

The fact that the first affidavit contains information from a confidential informant that was relayed by another officer does not preclude its use to establish probable cause. *See State v. Estep*, 61 N.C. App. 495, 498, 301 S.E. 2d 398, 400, *disc. rev. denied*, 309 N.C. 463, 307 S.E. 2d 368 (1983). The affidavit states that the other agent found that the informant had been reliable in the past, which entitled the affiant to rely on the informant's information. *Id.* at 499, 301 S.E. 2d at 400. The affidavit contains statements to the effect that defendant was involved in an operation whereby the Gomez brothers would procure cocaine in Florida and transport it to defendant, who would distribute it to local dealers in the Fayetteville area. Defendant contends that the affidavit does not establish probable cause because it is conclusory and does not set forth specific facts to implicate the premises to be searched. *See State v. Rook*, 304 N.C. at 221, 283 S.E. 2d at 744-45.

[2] We need not decide whether the first affidavit, standing alone, establishes probable cause to search defendant's house. The second affidavit, based upon information supplied by Stewart, directly implicated the premises as the delivery point for drugs being transported from Florida. The affidavit states that Stewart knew defendant's phone number, knew the location of defendant's house, and was able to describe the house. Before proceeding with the delivery, the police checked Stewart's information and found it to be accurate. The affidavit further states that the officers observed Stewart enter the residence with the package of cocaine. Because the pack-

age itself is evidence of the crimes charged, the second affidavit clearly establishes probable cause to search the premises.

Defendant argues that the second affidavit cannot be used to support the warrant because Stewart was acting under police supervision and the package of cocaine was supplied by the police. In effect, he contends that the police created the probable cause to justify the search. We find little merit in this argument.

The present case is analogous to other "controlled delivery" cases in which authorities discover contraband in the mail and, rather than seizing the contraband immediately, allow it to proceed to its destination for the purpose of effecting an arrest of the addressee. *See, e.g., United States v. Outland*, 476 F. 2d 581 (6th Cir. 1973). In such cases, warrants to search the addressee's premises have been challenged on the grounds that the warrants are issued before the contraband reaches its destination. *See generally* 2 W. LaFave, Search and Seizure § 3.7(c) (1987). These "anticipatory" warrants, however, have almost universally been upheld. *Id. See, e.g., Outland, supra.* In the present case, the warrant was not issued until the package of cocaine was inside the premises, so the warrant cannot be challenged on the grounds that it is anticipatory. The present case differs from a typical controlled delivery case only in that (i) the delivery was accomplished by a courier involved in the crime rather than the postal service or a common carrier and (ii) the police substituted a prepared package for the original contraband.

Neither of these factors precludes the use of the second affidavit to establish probable cause. Although the courier's credibility may be questioned on account of his involvement in the crime and his motive for cooperation with the police, he provided accurate and detailed information which was entirely consistent with the information supplied by the confidential informant. The fact that the package was supplied by the police does not affect the validity of the search because the package was merely a duplicate of the original. The police did not materially alter the transaction, they simply allowed the original plan to be carried out. For purposes of establishing probable cause, the delivery of the package undoubtedly provided reasonable grounds to believe that evidence of the crimes charged would be found on the premises. We note that, even if the package contained no drugs, its delivery would still constitute evidence to support the charges of conspiracy and

maintaining a dwelling for the keeping and selling of a controlled substance.

II

[3] We next consider whether the trial court erred in denying defendant's motion to dismiss the charges against him. Defendant first contends that the charges should have been dismissed because they are based upon possession of cocaine which was supplied by law officers. Only the charge of trafficking by possession of over 400 grams is even arguably subject to dismissal on these grounds. The lesser trafficking by possession charge is based upon possession of cocaine other than the drugs contained in the duplicate package. Possession is not an element of the offense of maintaining a dwelling for keeping and selling a controlled substance. Although the conspiracy charge is based upon the transaction involving the package, the conspiracy was complete when defendant agreed with others to do an unlawful act; no overt act was required to complete the crime. *See State v. LeDuc*, 306 N.C. 62, 75, 291 S.E. 2d 607, 615 (1982).

The question presented is whether defendant may be convicted for possession of a controlled substance when the substance was supplied by law officers. Defendant presents two theories to support his contention that his conviction cannot stand—(i) the cocaine having been supplied by the police, his possession of it was not unlawful, and (ii) the actions of the police constituted entrapment as a matter of law or outrageous conduct so as to require reversal of his conviction.

To support his first theory, defendant relies on *State v. Hageman*, 307 N.C. 1, 296 S.E. 2d 433 (1982). In *Hageman*, our Supreme Court held that a conviction for possession of stolen property could not be based upon possession of property that had been recovered by the police because, having been recovered, the property lost its status as stolen property. *Id.* at 10-11, 296 S.E. 2d at 439. We do not find *Hageman* to be controlling in this case. General Statute 90-95(h) provides that possession of specified amounts of controlled substances constitutes the offense of trafficking "except as otherwise provided in this Article." Law enforcement officers and their agents are authorized to possess controlled substances under G.S. 90-101(c)(5). Unlike stolen property, however, controlled substances do not lose their status as controlled substances merely because they are lawfully possessed. There is no provision in the

North Carolina Controlled Substances Act authorizing defendant's possession of the cocaine. Thus, his possession of the drugs constituted a crime under G.S. 90-95(h).

We next consider whether the actions of the officers in this case constituted entrapment or outrageous conduct so as to require reversal of defendant's conviction. Because defendant also contends that the trial court erred in failing to instruct the jury on the defense of entrapment, we shall also consider whether the facts of this case warranted such an instruction.

The actions of the police in this case clearly do not constitute entrapment as a matter of law, nor do the facts of this case support the submission of the defense of entrapment to the jury. Our Supreme Court has stated the law with regard to the defense of entrapment as follows:

> The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities. . . . In the absence of evidence tending to show *both* inducement by government agents *and* that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury.

State v. Walker, 295 N.C. 510, 513, 246 S.E. 2d 748, 749-50 (1978) (citations omitted). The officers in this case did nothing to induce defendant's commission of the crimes charged. As in other controlled delivery cases, the officers did not initiate the crime, but merely monitored it in order to identify the participants. *See Chapman v. United States*, 443 F. 2d 917, 920 (10th Cir. 1971). The only affirmative act of the police with regard to the crimes charged was their substitution of the duplicate package for the original. Because the police merely allowed an ongoing crime to be completed, there is no factual basis to support the defense of entrapment.

Although our courts have not previously considered the question, the United States Supreme Court has held that the mere fact that government agents supply an ingredient for the commis-

sion of a crime does not constitute entrapment. *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973) (undercover agent supplied essential ingredient for manufacture of methamphetamine). In *Russell*, the Court also rejected the defendant's contention that the government's conduct was so outrageous that principles of due process precluded his conviction. *Id.* at 431-32, 93 S.Ct. at 1643, 36 L.Ed. 2d at 373. At least one court has refused to reverse convictions on the grounds of outrageous or unfair government conduct in a case where undercover agents supplied drugs in order to arrest the purchasers. *United States v. McCaghren*, 666 F. 2d 1227, 1230-31 (8th Cir. 1981). The court reasoned that the government agents did not initiate the criminal activity but merely entered an existing drug network as new suppliers. *Id.* at 1231.

In the present case, the government's conduct was not in any way outrageous or unfair. The officers did not alter the original transaction except for substituting a duplicate in place of the original package. Although defendant argues in his brief that the officers "secretly introduced cocaine" into his home, all the evidence tends to show that defendant knew what the package contained. We also find little merit in defendant's contention that there was no competent evidence to show that the original package contained cocaine. Although no scientific evidence was offered, the courier testified that the original box contained a kilogram of cocaine. This testimony, along with the surrounding circumstances, amply supports the inference that the original package contained drugs. *See United States v. Eakes*, 783 F. 2d 499, 504-06 (5th Cir.), *cert. denied*, 477 U.S. 906, 106 S.Ct. 3277, 91 L.Ed. 2d 567 (1986).

Assuming for purposes of argument that the original package did not contain cocaine, that fact would not require reversal. We emphasize that defendant's conviction must be based upon his *knowing* possession of the drugs. *See State v. Weldon*, 314 N.C. 401, 403, 333 S.E. 2d 701, 702 (1985). Therefore, the State cannot obtain a conviction by surreptitiously introducing drugs into a defendant's residence. The source of the cocaine is immaterial so long as defendant knowingly possessed it.

We recognize that, in this case, the officers controlled the amount as well as the nature of the controlled substance, and G.S. 90-95(h) provides greater penalties for possession of greater amounts. Law officers cannot be permitted to arbitrarily aggra-

vate an offense by increasing the amount of drugs they supply to a defendant. Here, however, the evidence shows that defendant planned to obtain a kilogram of cocaine, so we find no unfairness in the officers' actions. Moreover, the evidence shows that the original package was retained by police in Florida as evidence in their own investigation. Under these circumstances, the officers in this State cannot be faulted for utilizing the duplicate package. Our Supreme Court has recognized that, given the nature of drug trafficking, the State "may rightfully furnish to the plyers of this trade opportunity to commit the crime in order that they may be apprehended." *State v. Stanley*, 288 N.C. 19, 33, 215 S.E. 2d 589, 598 (1975). Accordingly, we find no error in the trial court's denial of defendant's motion to dismiss the charges against him on the grounds of entrapment or outrageous police conduct.

Defendant also contends there was insufficient evidence to support his other convictions. Much of defendant's argument in this regard is premised on the assumption that defendant's possession of the duplicate package was the result of outrageous government conduct and, therefore, is not competent evidence to support any of the charges. Because we have ruled that the actions of the police were not outrageous or unfair, defendant's arguments based upon this assumption are without merit.

[4] With regard to the conspiracy charge, defendant contends that the evidence was insufficient because (i) the alleged conspiracy involved the original package, which the State did not prove to contain cocaine and (ii) the conspiracy could not be based on the participation of the courier, who feigned his acquiescence to assist the police. These contentions are meritless. We have already noted that the conspiracy was completed at the moment defendant agreed to participate in the transaction. Because the agreement itself constituted the crime, what the package contained is not relevant to the offense. The agreement was reached before the courier was apprehended, so his acquiescence was not feigned at that time. Moreover, the agreement included parties other than the courier, so his participation is not essential to the charge. *See State v. Wilkins*, 34 N.C. App. 392, 400, 238 S.E. 2d 659, 665, *disc. rev. denied*, 294 N.C. 187, 241 S.E. 2d 516 (1977).

[5] Defendant next contends that there was insufficient evidence to show his actual or constructive possession of both the delivered package of cocaine and the smaller bags of cocaine upon which

the lesser trafficking charge was based. A defendant has possession of a controlled substance when he has both the power and intent to control its disposition and use. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). The State's evidence showed that defendant took the delivered package from the courier and placed it in his freezer, and that he removed it from the freezer and put it in a garbage can outside the house when he learned that police were in the area. These facts sufficiently establish that defendant actually possessed the package and knew what it contained. The smaller bags of cocaine were discovered between the mattresses of a bed being used by the son of Cathy Hendry, who lived with defendant. Hendry testified that she had witnessed defendant sell cocaine in the house on numerous occasions; she often found cocaine in the house; she had seen defendant use the cocaine grinder and scales; and the cocaine found in her son's bed did not belong to her. All evidence showed that defendant had control of the premises. Thus, the evidence was sufficient to support an inference of constructive possession. *State v. Harvey, supra.*

[6] Defendant next argues that there was not sufficient evidence to support the charge of intentionally maintaining a dwelling for the purpose of keeping and selling a controlled substance. It is not disputed that defendant maintained the house as his residence. The delivery of the package of cocaine, the discovery of the other cocaine, the cocaine grinder, and the scales along with Hendry's testimony concerning defendant's prior drug dealing clearly constitute sufficient evidence to support a conviction under G.S. 90-108(a)(7) and (b). Accordingly, the trial court properly denied defendant's motion to dismiss the charges against him.

III

[7] Defendant's final argument is that the trial court erred in admitting evidence of his prior criminal acts. The evidence in question consists of Hendry's testimony concerning defendant's selling and using cocaine in the house and Eduardo Stewart's testimony that he had previously sold cocaine for defendant. Defendant contends that the evidence is inadmissible character evidence under Rule 404(b) of the N.C. Rules of Evidence.

Hendry's testimony is clearly relevant to the charge of maintaining a dwelling for the purpose of keeping and selling a controlled substance and, therefore, its admissibility is not governed by Rule 404(b). The admissibility of Stewart's testimony is gov-

erned by the Rule. In cases decided prior to the enactment of the Rules of Evidence, our courts have held that similar testimony was properly admitted to show a defendant's intent and plan to commit a conspiracy, *State v. Powell*, 55 N.C. App. 328, 331, 285 S.E. 2d 284, 286 (1982), and to show a defendant's guilty knowledge concerning drugs found on the premises. *State v. Weldon*, 314 N.C. at 404-07, 333 S.E. 2d at 703-05. Rule 404(b) provides that evidence of other crimes is admissible to prove intent, plan, or knowledge, and Stewart's testimony was probative on these issues.

Defendant further contends that, even if relevant, the evidence in question should have been excluded under Rule 403 because its probative value was outweighed by its prejudicial effect. We disagree. The evidence was not unfairly prejudicial to defendant and the trial court did not abuse its discretion in admitting the evidence. *See State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986).

For the foregoing reasons, we find that defendant received a fair trial free of reversible error.

No error.

Judges EAGLES and LEWIS concur.

HAROLD G. HAMILTON v. DEBORAH E. HAMILTON (HOWARD)

No. 8810DC676

(Filed 16 May 1989)

1. **Appeal and Error § 6.6— denial of motion to dismiss—presentation of evidence—waiver of appeal**

   Plaintiff waived his right to appeal from the denial of a motion to dismiss when he presented evidence after the motion was denied.

2. **Evidence § 47.1— child custody—psychological summary—consideration by court in earlier order—basis of opinion**

   A written psychological summary prepared by a licensed psychologist was properly admitted in a child custody case to show the basis of an opinion offered by another psychologist

even though the summary had been presented to the court at the time of an earlier child custody decree.

3. Evidence § 47.1— child custody—psychological summary—basis for opinion

A written psychological summary prepared by a licensed psychologist was properly admitted in a child custody case under N.C.G.S. § 8C-1, Rule 703 to show the basis of an opinion offered by another psychologist since plaintiff made only a general objection and requested no *voir dire* to determine whether the summary was of a type reasonably relied upon by experts in the field of psychology, and since statements by one treating psychologist to another are presumptively reliable and considered to be of a type reasonably relied upon by experts in the field of psychology.

4. Appeal and Error § 48.1— objection to testimony—same testimony admitted without objection

Plaintiff lost the benefit of his objection to testimony when the same testimony was admitted without objection during cross-examination of the witness.

5. Evidence § 47; Parent and Child § 6.3— child custody—visitation—opinion by psychologist

A psychologist was properly allowed in a child custody proceeding to state her opinion that the mother could best meet the needs of the child and her recommendations concerning visitation by the father since the testimony was within the area of expertise of the witness and satisfied the helpfulness test for expert opinions under Rule 702. N.C.G.S. § 8C-1, Rules 701, 702, 704.

6. Divorce and Alimony § 25.9— modification of child custody—changed circumstances—sufficient evidence

The trial court's conclusion that there had been a substantial change of circumstances affecting the welfare of a child so as to support a change of custody from the father to the mother was supported by the court's findings that, since the original custody order, the father has interfered with the mother's efforts to maintain a mother-child relationship; the father has insisted that the mother not see the child at school or at day care; the father has terminated his second marriage; the father was violent toward his second wife and the child

and was erratic in his rules and behavior toward the child; the mother has remarried and her current husband has developed a good relationship with the child; the father demonstrated a violent personality outburst toward school officials, causing the child to become the center of controversy within the school setting; a kindergarten teacher noticed that the child was troubled and exhibited anger, aggression, fear and anxiety; when the father was told that the child wanted to live with the mother, he grabbed the child, called him a liar, and threatened not to let him visit his mother if he continued to say such things; the father accused the child of lying to social workers and threatened to cut off visits with the mother; and the mother and her new husband own a new three-bedroom home, and the child has a room of his own at this residence.

Judge PHILLIPS concurring in the result.

APPEAL by plaintiff from *Morelock (Fred M.), Judge.* Order entered 5 February 1988 in District Court, WAKE County. Heard in the Court of Appeals 24 January 1989.

Yeargan, Thompson & Mitchiner, by W. Hugh Thompson, for plaintiff-appellant.

Purser, Cheshire, Parker, Hughes & Manning, by John H. Parker and Patricia A. Moylan, for defendant-appellee.

GREENE, Judge.

In this civil action plaintiff, Harold G. Hamilton, appeals from an order of the trial court awarding defendant, Deborah E. Hamilton, the sole custody of the parties' minor child.

The issue of custody came before the trial court on 10 November 1987 pursuant to defendant's motion in the cause alleging a "substantial and material change in circumstances that materially affects the well being of the child." The history of this custody dispute reveals that the first of several custody orders was entered on 20 January 1984 and granted primary custody of the minor child to the plaintiff, with "reasonable and liberal visitation privileges" to the defendant. After motions in the cause, the trial court again on 11 June 1985 and 28 February 1986 continued primary custody with the plaintiff.

The plaintiff's assignments of error present for our review the following issues: I) whether the trial court erred in denying plaintiff's motion to dismiss made at the end of the defendant's evidence; II) whether the findings are supported by competent evidence; and III) whether the findings of fact support the conclusion of the trial court that there existed a substantial change of circumstances.

I

Plaintiff's motion at the end of the defendant's evidence, to dismiss the defendant's motion for change in custody, is treated as a Rule 41(b) motion for involuntary dismissal. N.C.G.S. Sec. 1A-1, Rule 41(b) (1983) (dismissal granted if upon the facts and the law plaintiff has shown no right to relief). The question presented in a Rule 41(b) motion is "whether the . . . evidence, taken as true, would support findings of fact upon which the trier of fact could properly base a judgment for the" party with the burden of proof. *Woodlief v. Johnson*, 75 N.C. App. 49, 53, 330 S.E. 2d 265, 268 (1985). The defendant, here the party moving for a change in custody, has the burden of showing a substantial change of circumstances. *Searl v. Searl*, 34 N.C. App. 583, 587, 239 S.E. 2d 305, 308 (1977).

[1] As the plaintiff presented evidence after his motion to dismiss was denied, he has waived any right to appeal from the denial of that motion. 9 C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2371, p. 221 (1971) (by presenting evidence, a party moving to dismiss waives his right to appeal from the denial of the motion).

II

The trial court entered some sixty-eight different findings of fact and the plaintiff argues that fifty-three of them are "not supported by properly admissible evidence."

A trial court's "findings of fact modifying a child custody order are conclusive on appeal if supported by competent evidence, . . . even though there is evidence to the contrary" (citation omitted). *Vuncannon v. Vuncannon*, 82 N.C. App. 255, 259, 346 S.E. 2d 274, 276 (1986). Competent evidence in a custody modification case includes only evidence of circumstances (1) existing at the time of the prior custody decree which "[was] not disclosed to the court" and (2) other pertinent circumstances occurring since the entry of

the prior custody decree. *See Wehlau v. Witek*, 75 N.C. App. 596, 598, 331 S.E. 2d 223, 225 (1985).

A

[2] Plaintiff first contends the trial court considered incompetent evidence when it reconsidered evidence which had earlier been presented to the court when the court entered its custody orders in January 1984, June 1985, and February 1986. However, in only one instance did the plaintiff object, except and assign error to any of defendant's evidence on the ground that "it had been a subject of a prior court custody determination." Specifically, the plaintiff objected to the introduction of a written psychological summary by Dr. Rosalind L. Heiko (Dr. Heiko), a licensed psychologist. Dr. Heiko's written summary was used as the basis of an opinion offered by Dr. Paula Clarke, a licensed psychologist who did testify at the trial. Dr. Heiko did not testify. Dr. Heiko's psychological summary related to an evaluation performed by Dr. Heiko on the minor child from 5 September 1985 through 4 November 1985, at a time when earlier custody litigation was pending. It also appears from the record that a portion of Dr. Heiko's psychological summary was referred to in an earlier verified motion for change of custody which was filed on 8 December 1985. Therefore, it appears from the record that Dr. Heiko's report existed at the time of a prior custody decree and was disclosed to the court. Nonetheless, we find no error as the trial court did not admit Dr. Heiko's report in as substantive evidence but only for the limited purpose of representing the basis of the opinion of Dr. Paula Clarke.

B

[3] The plaintiff next contends the trial court erred in allowing Dr. Heiko's report into evidence as representing the basis of the opinion of Dr. Clarke. Rule 703 of our Rules of Evidence permits an expert to base his opinion on "facts or data" "made known to him at or before the hearing" and the "facts or data need not be admissible in evidence" "[i]f of a type reasonably relied upon by experts in the particular field." N.C.G.S. Sec. 8C-1, Rule 703 (1988). As Dr. Heiko did not testify, the introduction of his report into evidence, even as non-substantive evidence, is permissible only if Dr. Heiko's report was "of a type reasonably relied upon by experts" in the field of psychology. When a party objects to the testimony of an expert on the ground that he is using "facts or

data" not "of a type reasonably relied upon by experts in the particular field," the trial court must make a preliminary determination, pursuant to N.C.G.S. Sec. 8C-1, Rule 104(a) as to "whether the particular underlying data is of a kind that is reasonably relied upon by experts in the particular field." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* Sec. 703[03], p. 703-16 (1988); N.C.G.S. Sec. 8C-1, Rule 104(a) (1988) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court"). This determination does not necessarily require a hearing outside the presence of the jury as "[m]uch evidence on preliminary questions . . . may be heard by the jury with no adverse effect." N.C.G.S. Sec. 8C-1, Rule 104, comment. Whether or not to hold a hearing outside the presence of the jury on this matter is left to the discretion of the judge "as the interests of justice require." *Id.* However, "[h]earings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court" *must be held* outside the presence of the jury. N.C.G.S. Sec. 8C-1, Rule 104(c) (1988). "The primary consideration of the judge in deciding whether to remove the jury is the potential for prejudice inherent in the evidence which will be produced by parties on the preliminary question." 1 J. Weinstein & M. Berger, Sec. 104[10], p. 104-74 (1988).

The record indicates the plaintiff only made a general objection to the use and introduction of Dr. Heiko's written summary and did not assert any specific ground for the objection. *See* N.C.G.S. Sec. 8C-1, Rule 103(a)(1) (1988) (objection must clearly present the alleged error). Furthermore, plaintiff requested no *voir dire* and offered no evidence or argument on the question of whether Dr. Heiko's report was "of a type reasonably relied upon by experts" in the field of psychology. N.C.G.S. Sec. 8C-1, Rule 705 (1988) (expert can be required before stating his opinion to disclose "underlying facts or data on direct examination or *voir dire*"). Therefore, the plaintiff has waived any error in the use of Dr. Heiko's report. *State v. Catoe*, 78 N.C. App. 167, 168, 336 S.E. 2d 691, 692 (1985), *disc. rev. denied*, 316 N.C. 380, 344 S.E. 2d 1 (1986) ("[e]rror may not be argued on appeal where the underlying objection fails to present the nature of the alleged error to the trial court"). In any event, statements by one treating psychologist to another are presumptively reliable and considered to be of a type reasonably relied upon by experts in the field of psychology. *See Donavant v. Hudspeth*, 318 N.C. 1, 26, 347 S.E. 2d 797, 812 (1986) ("statements by one treating physician to another are inherently reliable"). Ac-

cordingly, we find the trial court committed no error in admitting this report for the limited purpose of showing the basis of Dr. Clarke's opinion.

C

[4] The plaintiff next contends the trial court erred in admitting the following testimony of Dr. Clarke:

> Q. Who has been punishing him, can you answer that part of it?
>
> A. I don't have that information directly from Ryan. You know, what I am told is, and if this is, you know, this is only my opinion at this point because I don't have direct information from Ryan on this score. It appears—
>
> . . .
>
> A. It appears that he's fearful of his father punishing him.

The plaintiff argues this testimony was inadmissible hearsay. However, on cross-examination the same witness, without objection, testified that "the child was fearful of his father punishing him." "Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E. 2d 584, 588 (1984). Therefore, the plaintiff has waived his right to raise on appeal his objection to the evidence.

D

[5] The plaintiff next contends the trial court erred in admitting over objection the following testimony of Dr. Clarke:

> A. In my opinion, Debbie is better able to meet those needs because she does have the capacity to empathize and see things from Ryan's point of view. She also has the ability to recognize when she is having trouble doing that and to ask for help. In my opinion, Mr. Hamilton does not have that ability.
>
> . . .
>
> Q. Do you have any recommendations regarding visitation or any other recommendations?
>
> . . .
>
> A. I recommend that Ryan continue to see his father, assuming primary custody were with the mother, while being supervised

initially by the Department of Social Services. Later to be supervised by other adults while treatment is taking place, while all parties continue to be in treatment. The treatment would be—what I'm suggesting is that treatment needs to be court ordered for Ryan, because Ryan, to my knowledge, has not received consistent treatment. He is bounced between psychologist and has not been able to be sustained in any kind of treatment relationship; so that needs to be courtordered and be provided on an ongoing basis with both parents' involvement as requested by the therapists.

Rule 704 of the Rules of Evidence provides that "[t]estimony in the form of an opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C.G.S. Sec. 8C-1, Rule 704 (1988). "The test for the admissibility of an opinion of either a lay or expert witness under Rules 701 and 702 respectively is *helpfulness* to the trier of fact." *In re Wheeler*, 87 N.C. App. 189, 196, 360 S.E. 2d 458, 462 (1987). In our opinion, the testimony of Dr. Clarke was within her respective area of expertise and satisfied the helpfulness test for expert opinions under Rule 702. The witness was unquestionably in a better position than the trial court to have an opinion on the subject about which she testified and her testimony undoubtedly aided the court in making its determination. *See In re Byrd*, 72 N.C. App. 277, 281, 324 S.E. 2d 273, 277 (1985) (expert "in the field of juvenile protective services and in permanency placing of children" permitted to give opinion that "parental rights should be terminated in order that permanency placement for [child] could be completed").

E

Plaintiff makes additional arguments that the trial court erred in considering other evidence; however, as no authority was cited by the plaintiff in support of his arguments, these assignments of error are deemed abandoned. App. R. 28(b)(5); *Byrne v. Bordeaux*, 85 N.C. App. 262, 265, 354 S.E. 2d 277, 279 (1987) ("the body of the argument shall contain citations of authority upon which the appellant relies"). In any event, as this case was tried without a jury, any "erroneous admission of evidence will not ordinarily be held prejudicial, because it is presumed that the court did not consider the incompetent evidence." *In re Peirce*, 53 N.C. App. 373, 388, 281 S.E. 2d 198, 207 (1981).

F

Finally, having reviewed the evidence and the findings of fact, we are of the opinion that the findings are supported by competent evidence.

III

[6] The trial court, after the 10 November 1987 hearing and on 5 February 1988, signed an order and concluded in part:

> There has been a substantial change of circumstances since the order of this Court in February, 1987 regarding the condition and welfare of Ryan and his condition and welfare shall appreciably improve by the changing of his custody to the defendant.

As the custody of the minor child had previously been judicially established, the previous orders of the court cannot be changed except upon a "substantial change in circumstances that *affects the welfare of the child.*" *Hinton v. Hinton*, 87 N.C. App. 676, 677, 362 S.E. 2d 287 (1987) (emphasis in original); *see* N.C.G.S. Sec. 50-13.7(a) (1987) ("custody . . . may be modified . . . upon . . . a showing of changed circumstances . . . ."); *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E. 2d 140, 144 (1969) ("there must generally be a substantial change of circumstances before an order of custody is changed").

The following findings, among others, support the trial court's conclusion that there had been "a substantial change of circumstances since the order" of February 1987:

> 1. Since February 1986, "the plaintiff has consistently attempted to thwart efforts by the defendant to maintain and develop a mother-child relationship with Ryan . . . ."
>
> 2. Since February 1986, the plaintiff "demanded of school officials that the defendant's presence in Ryan's classroom and the defendant's participation at Ryan's school as a parent volunteer be terminated."
>
> 3. Since February 1986, the plaintiff "has refused to share with the defendant information concerning Ryan's school work."
>
> 4. Since February 1986, if the "plaintiff did not get his way, he, on many occasions, threatened to stop or disallow visitation by the defendant with Ryan."

5. Since February 1986, the plaintiff "denied the defendant the opportunity to visit with the child at Ryan's day care facilities."

6. The plaintiff in July of 1987 terminated "his marital relationship with Nancy Hamilton."

7. "Nancy Hamilton testified that the conditions in their home prior to their separation were such that the plaintiff exercised violence toward herself and Ryan and that he was erratic in his rules and behavior towards Ryan."

8. "The defendant's home life and family situation have changed and improved since February 1986. The defendant has remarried and her current husband has developed a good relationship with Ryan."

9. Since February 1986, "the plaintiff has demonstrated violent personality outburst to school officials causing Ryan to become the center of controversy within the school setting and the plaintiff has threatened to sue school officials if they were to continue to allow the defendant to have access to Ryan at school."

10. During the 1986-87 kindergarten school year "Dr. Paula Clarke noticed Ryan to be a very troubled child, feeling enormous anger and aggression and stated that Ryan was fearful and anxious."

11. "In March 1987, the plaintiff was told that Ryan wanted to live with the defendant and the plaintiff went home and grabbed Ryan and called him a liar and threatened to not let him visit his mother if he continued to say things like that."

12. "In the Spring of 1986, the plaintiff accused Ryan of lying to the Department of Social Services workers and told the child that if he didn't stop 'lying' to Social Services he wouldn't get to visit with his mother."

13. "The defendant and her [new] husband own and occupy a new three-bedroom home with a yard area in the front and back. Ryan has a room of his own at this residence."

Accordingly, the order of the trial court awarding defendant the sole custody of the parties' minor child is

Affirmed.

Judge COZORT concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

I agree that the appeal has no merit and the order must be affirmed. But since the court's findings clearly support the order only one question material to the appeal is raised, in my opinion; a question not raised by plaintiff but by the record—Are the court's material findings of fact supported by competent evidence? The questions that plaintiff stated in his brief—whether the court "committed reversible error" in denying his motion to dismiss defendant's motion at different stages of the hearing, and in receiving certain items of evidence—are irrelevant to an appeal from a judge's findings, conclusions, and order, and discussing them tends to obfuscate rather than clarify the problem involved and its proper solution. Certainly this modification of a child custody order is not subject to Rule 41, N.C. Rules of Civil Procedure, which has to do with the "Dismissal of Actions."

PAMELA FRENCH WOODS, GUARDIAN OF STEVEN WAYNE LLEWELLYN, A MINOR v. JUDY RHEW BRIDGES SHELTON

No. 8828SC820

(Filed 16 May 1989)

1. Appeal and Error § 38— failure to timely settle record on appeal—abandonment of appeal

Defendant's failure to timely perfect her appeal constituted an abandonment of the appeal on the issue of whether the trial court erred in granting plaintiff's motion for summary judgment in an action to impose an express or constructive trust on the proceeds of a life insurance policy where defendant tendered her proposed record on appeal 139 days after giving notice of appeal.

2. Rules of Civil Procedure § 60.2— amendment of judgment—correction of omission—no error

The trial court did not abuse its discretion in granting plaintiff's motion to amend its judgment pursuant to N.C.G.S. § 1A-1, Rule 60(a) where plaintiff's complaint asked that the court impose a constructive trust on the proceeds of a life insurance policy, alternatively alleged that the insured had established an express trust in favor of his son with defendant as trustee and that defendant had breached her fiduciary duty, the judgment recited only that plaintiff's summary judgment motion was granted and did not state the legal theory under which plaintiff was entitled to prevail, and the amendment merely corrected that omission.

Judge GREENE dissenting.

APPEAL by defendant from *Lewis (Robert D.), Judge*. Judgment entered 4 January 1988 and modified 22 April 1988 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 22 February 1989.

Plaintiff Pamela French Woods, guardian for her son Steven Wayne Llewellyn, sues her deceased ex-husband's fiancee and beneficiary of his life insurance policy, defendant Judy Rhew Bridges Shelton, for the imposition of an express or constructive trust on the proceeds of the policy. The policy was a group life insurance policy with the New York Life Insurance Company which the decedent James E. Llewellyn (Llewellyn) bought at his work place. Plaintiff claimed that a Tennessee court order incorporated a separation agreement between her and the decedent and obligated Llewellyn to maintain a $100,000 life insurance policy with his son as beneficiary. As a result of Llewellyn's death, New York Life paid defendant $20,192.70 pursuant to its policy.

Arguing that there was no genuine issue of material fact, both parties moved for summary judgment. On 4 January 1988 the trial court granted plaintiff's motion for summary judgment and denied defendant's motion. Defendant gave oral notice of appeal.

On 14 March 1988 the deputy clerk of Superior Court of Buncombe County sent defendant a notice of her right to have exemptions designated. The following day, pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure, plaintiff filed a motion to modify the trial court's 4 January 1988 judgment. Plaintiff's

motion stated that it was made "in order to show the status of the [d]efendant as [c]onstructive [t]rustee so that the assets held by the [d]efendant acquired from proceeds of the insurance policy are subject to execution without the application of G.S. 1C-1601." On 1 April 1988 defendant filed a motion to claim exempt property. Plaintiff objected to defendant's schedule of exemptions and requested a hearing on the defendant's motion. On 22 April 1988 the trial court granted plaintiff's motion to modify its earlier judgment. From this amended judgment, defendant also appeals.

Van Winkle, Buck, Wall, Starnes & Davis, by Robert H. Haggard, Michelle Rippon and R. Walton Davis, III, for plaintiff-appellee.

Toms & Bazzle, by James H. Toms and Eugene M. Carr, III, for defendant-appellant.

EAGLES, Judge.

Defendant argues that the trial court erred in granting plaintiff's motion for summary judgment and in amending the judgment. We hold that we may not address defendant's first issue because the appeal from the trial court's initial judgment was not properly perfected. As to defendant's second issue, we hold that the trial court did not abuse its discretion in amending the 4 January 1988 judgment and, accordingly, we affirm.

[1] Defendant first argues that the trial court erred in granting plaintiff's motion for summary judgment. She argues that because the decedent Llewellyn agreed in the separation agreement to maintain a life insurance policy with the Franklin Life Insurance Company and not the New York Life Insurance Company, a constructive trust could not be imposed on the proceeds of the New York Life policy. While defendant's argument raises some interesting legal questions, we may not address them. We hold that our decision in *McGinnis v. McGinnis*, 44 N.C. App. 381, 261 S.E. 2d 491 (1980), controls and that by defendant's failure to comply with the North Carolina Rules of Appellate Procedure, she has abandoned her appeal on this issue.

App. R. 11 prescribes the methods by which an appellant settles the record on appeal. App. R. 11(a) allows the parties, within sixty days after appeal is taken, to settle the record between themselves. App. R. 11(b) further provides that if the record on appeal is not settled by agreement, the appellant "shall, within

60 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal." Under this method of settling the record the appellee has fifteen days to object to the record as proposed. The appellant's proposed record becomes the record on appeal if the appellee fails to object. Further, App. R. 11(e) allows the time limits imposed under this rule to be extended for good cause in accordance with App. R. 27(c).

In *McGinnis* plaintiff, a New York resident, brought an action against her former husband to enforce New York orders on alimony and child support. Initially, the trial court asked both parties to submit memoranda on the "validity and enforceability of the New York judgments." When plaintiff failed to timely file her memorandum, the trial court ruled that she had waived her right to be heard and entered an order denying full faith and credit to one of the New York judgments. After plaintiff filed her memorandum of law, the trial court entered another order vacating its earlier order. Defendant properly appealed from the court's second order, but failed to perfect his appeal.

Eighty-eight days later the trial court granted the New York orders full faith and credit. On appeal the defendant argued that his appeal of the second order "divested the trial court of jurisdiction to enter further orders" granting the New York orders full faith and credit. *Id.* at 385, 261 S.E. 2d at 494. However, defendant had failed to settle the record on appeal or move for an extension of time to file his proposed record within the time set forth by App. R. 11. We held there that defendant's failure to properly perfect his appeal "constituted an abandonment which reinvested the trial court with jurisdiction to render further orders in the cause." *Id.* at 386, 261 S.E. 2d at 495.

Likewise, here defendant's failure to timely perfect her appeal constitutes an abandonment of the appeal on this first issue. Defendant gave oral notice of appeal on 4 January 1988. She tendered her proposed record on appeal pursuant to App. R. 11(b) on 22 May 1988, 139 days later. This record does not indicate whether defendant sought or received an extension of time to settle the record. As our Supreme Court stated in *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E. 2d 357, 361 (1979), " '[c]ounsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process.' . . . A failure by

appellant to meet the requirements of App. R. 11(e), or to comply with the mandate of App. R. 12(a), works a loss of the right of appeal." [Citations omitted.] Accordingly, we hold that this issue is not now properly before us.

[2] Defendant next assigns as error the trial court's grant of plaintiff's motion to amend its 4 January 1988 judgment pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure. We hold that the trial court did not abuse its discretion in granting plaintiff's motion.

Rule 60(a) provides, in part, that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders." In addition, our courts have held that the trial court may correct inadvertent omissions in a judgment through a R. 60(a) amendment so long as the amendment does not affect the substantive rights of the parties. *Hinson v. Hinson*, 78 N.C. App. 613, 337 S.E. 2d 663 (1985), *disc. rev. denied*, 316 N.C. 377, 342 S.E. 2d 895 (1986).

Plaintiff's complaint asked that the trial court impose a constructive trust on the proceeds of Llewellyn's life insurance policy. Alternatively, plaintiff alleged that Llewellyn established an express trust in favor of his son with defendant as trustee and that defendant had breached her fiduciary duty to the decedent's son. We note that the 4 January 1988 judgment only recites that plaintiff's summary judgment motion was granted, defendant's summary judgment was denied, and that plaintiff recover $20,192.70.

The judgment did not state under what legal theory plaintiff was entitled to prevail. The amended judgment of 22 April 1988 merely corrects that omission. The amended judgment clarifies that the trial court granted plaintiff summary judgment under a constructive trust theory. Further, it details that the property defendant acquired with the proceeds of the life insurance policy was subject to the constructive trust. The amended judgment does not declare the rights of the parties in relation to an exemption proceeding and we do not address that issue here. We hold that because the amendment to the judgment does not affect the substantive rights of the parties, the trial court did not abuse its discretion in granting plaintiff's R. 60(a) motion.

Affirmed.

Judge COZORT concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I dissent from the majority's refusal to hear defendant's challenge to the legality of constructive trust relief in this case as well as its application of Rule 60(a). The record does not support the majority's assertion that the court's Amended Summary Judgment merely clarified the theory of relief under the Original Summary Judgment. Plaintiff's complaint contained two distinct claims requesting two distinct forms of relief:

> 1. Plaintiff claimed defendant was unjustly enriched by the New York Life proceeds and therefore requested the court 'impress a constructive trust upon the proceeds of the New York Life policy in the hands of the defendant, and order the defendant to pay the amount of $20,200, together with interest at the legal rate from October 29, 1986 until paid, to the plaintiff for the benefit of Steven Wayne Llewellyn'; and
>
> 2. Plaintiff also claimed that defendant breached certain fiduciary duties to plaintiff and requested that 'plaintiff have and recover from the defendant damages in the amount of $20,200, together with the interest at the legal rate from October 29, 1986 until paid, for the defendant's breach of fiduciary duty.'

The trial court's Original Summary Judgment ordered that "plaintiff shall have and recover of the defendant the sum of $20,192.70 together with interest at the legal rate from October 29, 1986 until paid." The court's Amended Summary Judgment retained the money damages from the Original Judgment, but added that "a constructive trust is hereby impressed upon the proceeds of the New York Life Insurance policy in the hands of the defendant . . . [and] . . . upon all property in the hands of the defendant that the defendant acquired with the proceeds of the New York Life Insurance policy . . . ." The Amended Summary Judgment also ordered the defendant to turn over certain real and personal property covered by the trust it imposed.

Given the appellate record, I first disagree with the majority's analysis of the effect of defendant's abandoning his initial appeal from the Original Summary Judgment. Irrespective of any error assigned to the award of damages in the *Original* Summary Judgment, defendant's abandonment of the appeal from the Original Summary Judgment does not affect defendant's subsequent appeal of the imposition of a constructive trust under the *Amended* Summary Judgment. Since the Original Summary Judgment never mentions any right to constructive trust relief, defendant could not properly raise that issue in his appeal from the Original Summary Judgment; thus, the majority's erroneous application of Appellate Rule 11 to defendant's appeal from the Amended Summary Judgment prevents defendant from *ever* appealing the merits of the trial court's decision to order him to turn over certain properties and impose a trust on defendant's real and personal property. This is not a frivolous issue since the issue has apparently never been presented to our courts and courts in other jurisdictions have reached varying results.

However, the substantive merits of the court's imposition of a constructive trust need not be addressed if this court holds the trial court exceeded its procedural authority under Rule 60(a). The majority erroneously holds Rule 60(a) permits the trial court to add to the Amended Summary Judgment a constructive trust on defendant's life insurance proceeds and certain real and personal property and order the turnover of that property—when the Original Summary Judgment simply rendered a personal judgment against defendant for $20,000 in damages. This case is nearly identical to *H & B Company of Statesville v. Hammond*, 17 N.C. App. 534, 538-39, 195 S.E. 2d 58, 60-61 (1973) wherein this court overturned the trial court's similar use of Rule 60(a):

> The default judgment [awarding damages] was in no way adverse to plaintiff, and rather than seeking to be relieved from its operation, plaintiff was attempting to have its rights under the judgment extended to include additional and entirely different relief. *In allowing plaintiff's motion, the court amended the judgment so as to make it a specific lien against the property now owned by appellants . . . The amendment to the judgment allowed here is much more extensive than a mere technical correction such as contemplated by Rule 60(a).* . . . In support of this contention, plaintiff argues that it should not be penalized for the mistake of its counsel in failing to

> apply to the clerk for all of the relief prayed for in the complaint. To so hold, however, would be to say that it is the appellants who should be penalized for the mistake of plaintiff's counsel. . . .

(Emphasis added.)

Given the trial court's award of damages based on one of the two theories of recovery requested in the complaint, I am aware of no case in this State permitting such an expansion of relief under the guise of clerical error. *Cf. Hinson v. Hinson*, 78 N.C. App. 613, 615-16, 337 S.E. 2d 663, 664, *disc. rev. denied*, 316 N.C. 377, 342 S.E. 2d 895 (1986) (collecting cases rejecting attempts to change substantive provisions of judgments under Rule 60(a)). I also note that, before the court amended its judgment, defendant filed a motion to claim exemptions against the Original Summary Judgment. Defendant contends the court's subsequent amendment under Rule 60(a) deprived him of the exemptions he was entitled to assert against the Original Summary Judgment. I therefore fail to see how the majority can simply assert "the amendment to the judgment does not affect the substantive rights of the parties" and yet specifically decline to address defendant's contention his exemption rights were prejudiced.

I thus dissent on both of the above two grounds. However, even assuming the majority is correct on *one* of these grounds, the majority cannot be correct on *both* grounds: either the trial court could not amend its Original Summary Judgment to add constructive trust relief under Rule 60(a) or, irrespective of defendant's abandoning his first appeal, defendant can challenge the merits of the trust relief subsequently added by the court since he perfected his appeal from the trial court's amendment under the Amended Summary Judgment. Because I believe the majority errs in both respects, I dissent.

DAVID GRANT WASHBURN AND NANCY LITTLE WASHBURN v. JAMES VANDIVER, D/B/A VANDIVER AUTO SALES

No. 8826DC680

(Filed 16 May 1989)

1. **Unfair Competition § 1; Automobiles and Other Vehicles § 6.5— tampering with odometer—unfair and deceptive trade practice—instructions proper—fraud sufficiently explained**

In an action to recover damages for unfair and deceptive trade practices and for violations of state and federal odometer statutes in connection with the sale of a used truck, the trial court's instructions on the issues were proper, and the court gave a proper explanation of the fraud element.

2. **Automobiles and Other Vehicles § 6.5— federal and state odometer statute violations—monetary award for each violation proper**

The trial court did not err in awarding plaintiffs $1,500 for a federal odometer statute violation and $1,500 for a state odometer statute violation.

3. **Unfair Competition § 1; Automobiles and Other Vehicles § 6.5— unfair trade practice—violation of odometer statute—assessment of damages for both—no double recovery**

The assessment of damages on both plaintiffs' unfair trade practices claim and the odometer statute violations did not amount to a double recovery.

4. **Unfair Competition § 1— damages trebled before set-off deducted**

The trial court did not err in trebling the damages awarded on plaintiffs' unfair and deceptive trade practices claim before deducting the set-off amount stipulated by the parties as due and owing on defendant's counterclaim.

APPEAL by defendant from *Harris, Resa L., Judge.* Judgment entered 2 March 1988 in District Court, MECKLENBURG County. Heard in the Court of Appeals 25 January 1989.

Plaintiffs instituted this civil action to recover damages for unfair and deceptive trade practices in violation of G.S. sec. 75-1.1 and for violations of state and federal odometer statutes in connection with the sale of a used truck.

Michael David Bland for plaintiff-appellees.

James J. Caldwell for defendant-appellant.

JOHNSON, Judge.

In September 1985 defendant advertised the sale of a 1977 Ford Truck, "[g]ood looking, clean truck, low mileage" in the Metrolina Car Trader. Plaintiffs responded to the advertisement and went to defendant's used vehicle lot to see the truck on 7 September 1985. When they arrived defendant Vandiver was not present so they spoke with Willie Thompson, a friend of defendant's who used defendant's automobiles and other equipment in exchange for reciprocal favors. He gave them the truck's keys and allowed them to test drive it.

On that same evening defendant Vandiver telephoned plaintiffs about purchasing the truck. They scheduled a meeting for the following morning at the dealership. As arranged, the parties met and plaintiffs purchased the truck. Plaintiffs paid defendant $1,600.00 in cash and a check for $400.00. They also signed a note which required them to pay the $782.50 balance in eleven bi-weekly installments of $75.00 each, totalling $825.00.

During the same month that they purchased the truck plaintiffs discovered from the vehicle's previous owner that the odometer reading was incorrect, reflecting approximately 83,000 miles when the actual mileage was approximately 133,000 miles. When Mrs. Washburn went to defendant's lot to pick up tags for the vehicle, defendant explained to her that Mr. Willie Thompson had changed the truck's odometer. Defendant apologized and offered to refund the full amount plaintiffs had invested in the purchase price but refused to refund the $300.00 they had spent for new tires. Plaintiffs did not accept defendant's offer and subsequently filed this civil action on 29 January 1986. Defendant answered and asserted a counterclaim against plaintiffs for the balance of the purchase price due and owing on the vehicle.

The evidence introduced at trial was quite conflicting. Both defendant Vandiver and Mr. Thompson denied discussing the odometer reading with plaintiffs when they purchased the truck although plaintiffs testified that both told them that the mileage on the odometer was correct. Plaintiffs also testified that defendant Vandiver had them sign a blank odometer statement along with

several other blank documents when they purchased the vehicle because he needed to hurry. They further stated that defendant promised to complete the forms and to send copies to them. Defendant denied having plaintiffs sign any blank documents.

David Holsinger, the truck's previous owner, testified that during September 1985, the month plaintiffs purchased the vehicle, he met David Washburn. He noticed at that time that the mileage reflected on the odometer was incorrect. He shared this information with plaintiffs after telephoning defendant to inform him of the problem and to ask him to notify plaintiffs, which defendant failed to do. He further testified that when he first purchased the truck on 2 October 1984 the mileage was 117,370 although the odometer reading only showed 17,370 miles because the instrument would only register five digits. He also stated that he signed several documents at this time which defendant promised to complete later and to mail copies of them to Holsinger. Holsinger never received copies of any documents except the bill of sale which he received on the date of purchase. When he traded the truck back to defendant in August of 1985, a little less than one year later, the mileage was 133,000, and the odometer showed 33,000 miles.

During the trial, Holsinger was also asked to examine several of the documents which he had signed in blank when he purchased the truck. One of these forms was a title application which was dated 21 May 1985, although Holsinger had signed the form on 2 October 1984 when he purchased the truck. He also examined the certificate of title to the truck which was dated 10 September 1985, supposedly representing the date he traded the truck back to defendant, although plaintiffs purchased the truck on 8 September 1985. He stated that the odometer showed 33,000 miles, representing 133,000 miles, when he traded the vehicle although the certificate of title prepared on that date listed the mileage as 83,446 miles.

Defendant Vandiver testified that when he sold the truck to plaintiffs no discussion was had regarding the mileage; that in completing the mileage statement he relied upon the odometer reading; that he did not have plaintiffs sign any blank documents; and that when he learned from Mr. Holsinger about the problem with the odometer he began an investigation immediately and learned that Mr. Thompson, his friend, had replaced the speedometer and odometer mechanism when the speedometer failed while in his

possession. He further testified that he offered to rescind the sale and to pay plaintiffs their money back, but they did not respond.

Willie Thompson testified that while he was driving the truck on 2 August 1985 the speedometer malfunctioned. He explained that the arrangement he had with defendant required him to repair or replace any of defendant's equipment or automobiles which failed while in his possession or he would lose his privilege to use them. Pursuant to this agreement he purchased the new speedometer on 2 August 1985, replaced the defective one, and did not inform defendant until asked, which occurred after defendant was notified of the odometer mileage change by Holsinger.

The jury found in favor of the plaintiffs on all three issues submitted by the court but assessed damages for the violation of neither the state nor the federal odometer statute. The trial court trebled the damages awarded on the unfair trade practices claim and also ordered defendant to pay $1,500 for each of the odometer statute violations. Defendant gave notice of appeal after his motions for a judgment notwithstanding the verdict and for a new trial in the alternative were denied.

We have seven questions before us on review, four of which concern the jury instructions and shall be first considered.

Defendant first contends that the trial court erred in submitting the issues to the jury. We disagree. As a general rule

> [t]he number, form, and phraseology of issues is in the court's discretion; and there is no abuse of discretion where the issues are 'sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.'

Pinner v. Southern Bell, 60 N.C. App. 257, 263, 298 S.E. 2d 749, 753 (1983), *citing, Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E. 2d 505, 507 (1967). Our scope of review is limited to determining whether the trial court committed an abuse of discretion, *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985), and reversal is proper only where it is shown that the trial court's exercise of discretion was manifestly unsupported by reason. *Id.*

[1] Defendant specifically argues that the issues submitted failed to give the jury a proper explanation and importance of the fraud element; failed to charge that defendant's explanation for the odom-

eter change constituted a valid defense; and incorrectly indicated that having plaintiffs sign a blank odometer statement was a violation per se of the odometer statutes.

The issues submitted to the jury on both the state and federal odometer statutes are identical and are set forth below.

> Did the Defendant, James Vandiver, d/b/a Vandiver Auto Sales, *with intent to defraud*, do any one or more of the following in selling a 1977 Ford truck to Mr. and Mrs. David Washburn for $2,782.50?
>
> ANSWER: _____
>
> (a) Represent to Plaintiffs, David and Nancy Washburn, that the truck had only 83,446 miles, when in fact the Defendant knew or should have known the vehicle had much greater actual mileage?
>
> ANSWER: _____
>
> (b) Represent to Plaintiffs, David and Nancy Washburn, that the truck's odometer had not been altered, set back, or disconnected while in the Defendant's possession when in fact the odometer mileage was in fact changed?
>
> ANSWER: _____
>
> (c) Have the Plaintiffs sign [sic] a blank odometer statement on Sunday, September 8, 1985, and did not give them a completed copy of the document at the time of the sale?
>
> ANSWER: _____
>
> What are the Plaintiff's actual damages, if any?
>
> ANSWER: _____

Our review of these issues reveals no abuse of discretion by the trial court, as they were sufficiently comprehensive for the jury to resolve the factual controversies with which it was faced. *First Nat'l Bank of Catawba Co. v. Burwell*, 65 N.C. App. 590, 310 S.E. 2d 47 (1983). Further, insofar as this argument concerns the element of fraud and the trial court's explanation thereof, the following instructions were given:

> It is not necessary for the Plaintiffs to prove that they were actually defrauded or that they were the persons intend-

> ed to be defrauded, but in order for the Plaintiffs to recover in this claim, it is necessary for the Plaintiffs to prove that the Defendant intended to defraud someone. *To act with the intent to defraud means to act with a specific intent to deceive or cheat ordinarily for the purpose of bringing some financial gain to one's self.*

We find that this instruction is in keeping with the definition of the element and comports in all substantial respects with the instructions given in *Shreve v. Combs*, 54 N.C. App. 18, 282 S.E. 2d 568 (1981). *See also Roberson v. Williams*, 240 N.C. 696, 83 S.E. 2d 811 (1954) and 37 C.J.S. *Fraud* secs. 132-137 (1943). Moreover, defendant never requested a special written instruction more elaborately detailing the element of fraud, which he apparently desired, as required by G.S. sec. 1A-1, Rule 51(b). Therefore, we overrule this assignment of error.

Defendant next argues that the trial court erred in giving its instruction on the state odometer claim by stating initially that the defendant did not deny altering the odometer with the intent to defraud plaintiffs. The court later stated that defendant denies the plaintiffs' allegation. These instructions were conflicting and clearly erroneous, ordinarily requiring reversal. *State v. Overcash*, 226 N.C. 632, 39 S.E. 2d 810 (1946); *Cross v. Beckwith*, 16 N.C. App. 361, 192 S.E. 2d 64 (1972). However, we do not believe that reversal in the instant case is warranted. When we construe the charge contextually as a whole we conclude that the jury was not irreconcilably misled. *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966). Had the trial court's erroneous statement been correct, then there would have been no need to have a trial on the issue and the only issue to resolve would have been the damages question. The mere fact that the issue of defendant's intent was before the jury indicated that the erroneous statement was invalid and its invalidity was recognized. We therefore conclude that the error was inadvertent, nonprejudicial, and does not necessitate reversal.

Defendant's Assignments of Error numbered three and five also basically challenge the court's instruction regarding the intent to defraud element of each claim. We have reviewed the complete jury charge and find that when it is considered in its entirety, no error exists. *Lewis, supra; Greene v. Greene*, 217 N.C. 649, 9 S.E. 2d 413 (1940).

We find defendant's next argument that the court should have awarded a new trial because the verdict was against the clear weight of the evidence meritless and without need for discussion.

[2] By Assignment of Error number six, defendant contends that it was error for the trial court to award plaintiffs $1,500 on each of the odometer statute violations. 15 U.S.C. sec. 1989 (1982) states that

> (a) [a]ny person who, with intent to defraud, violates any requirement imposed under this subchapter [odometer requirements] shall be liable in an amount equal to the sum of
>
> (1) three times the amount of actual damages sustained or $1,500, whichever is the greater; . . .

G.S. sec. 20-348 conforms in all substantial respects with the portion of the federal statute quoted. In addition, G.S. sec. 20-340 provides that State remedies for violation of the statute "shall be in addition to remedies provided by the federal odometer law . . ."

Defendant challenges the court's statutorily authorized award on the grounds that the jury charge failed to include an issue addressing defendant's intent to defraud. Because we have previously treated this matter we do not feel it is necessary to belabor the point. Suffice it to say that the issues submitted included a question of defendant's intent and the court properly explained the meaning of an intent to defraud to the jury. The intent to defraud may be inferred from proof that the seller either recklessly disregarded indications that the odometer reading was incorrect or should have realized the reading was incorrect in the exercise of reasonable diligence. *McCracken v. Anderson Chevrolet-Olds, Inc.*, 82 N.C. App. 521, 346 S.E. 2d 683 (1986).

[3] Defendant also argues that the assessment of damages on both the unfair trade practices claim pursuant to G.S. sec. 75-1.1 and the odometer statute violations amounts to a double recovery. We must disagree. *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984) recognizes and addresses this potential problem. It states the following:

> We do not believe, however, that the only available measure of damages is that for fraudulent inducement. As previously stated, an action for unfair or deceptive acts or practices is

> a distinct action apart from fraud, breach of contract, or breach of warranty [or violation of state and federal odometer statutes]. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used.

Id. at 232, 314 S.E. 2d at 585.

The evidence discloses that plaintiffs paid $2,000.00 for the vehicle, signed a note for an additional $782.50 and invested an additional $300.00 for tires less than one month after purchase. The jury concluded that they had been damaged in the amount of $1,300.00 pursuant to the unfair trade practices claim. The trial court then followed the mandate of G.S. sec. 75-16 and trebled this amount. *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F. 2d 712 (4th Cir. 1983); *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 338 S.E. 2d 918 (1986). The trial court then assessed $1,500.00 on each of the odometer statute violations as required by statute. *Duval v. Midwest Auto City, Inc.*, 578 F. 2d 721 (8th Cir. 1978); *Kirkland v. Cooper*, 438 F. Supp. 808 (D.S.C. 1977). Plaintiffs have been awarded no double recovery. This assignment of error is therefore overruled.

[4] Lastly, we disagree with defendant's argument that the amount awarded on defendant's counterclaim should have been deducted from the actual damages assessed on the unfair trade practices claim before the damages were trebled. In *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E. 2d 643 (1988), this Court decided that the trial court erroneously credited an amount received by plaintiff from codefendants before trebling the damages which were actually awarded. The Court held that because of the remedial and punitive nature of G.S. sec. 75-16, *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981), and the legislative intent upon which the statute was based, the trial court erred by deducting the $137,000 received by plaintiff in settlement before trebling the $400,000 award. Guided by this well-defined principle, we conclude that the trial court committed no error by trebling the damages awarded before deducting the set-off amount of $782.50 stipulated by the parties as due and owing on defendant's counterclaim.

It is for the foregoing reasons that in the trial of defendant's case, we find

No error.

Judges WELLS and BECTON concur.

CATHERINE S. WILLIAMS v. A. CHESTER SKINNER, III, TRUSTEE, W. PAUL HOLT, TRUSTEE AND STRAIGHT EIGHT COMPANY

No. 8830SC758

(Filed 16 May 1989)

1. **Easements § 4.2— road right of way—latently ambiguous description—construction of easement**

Where a deed conveying thirty acres from a common source to defendant's predecessors in title expressly granted "a right-of-way twenty (20) feet wide along the east line of Lot No. 10 for a road and a right-of-way over the logging road," the description of the easement was only latently ambiguous, and the trial court, with the aid of parol evidence, properly found that the grantors intended to grant a right of way from the 30-acre tract to the only public road for the benefit of that tract and properly construed the language to mean that the easement runs down the eastern line of lot 10 to that lot's southeast corner and then along the southern line of lot 10 until it reaches the public road near where a logging road to the south of lot 10 forks into the public road.

2. **Easements § 4.1— road right of way—patently ambiguous description**

A conveyance of a 20-foot road right of way entering a lot at or near its northwest corner and running "such course as is most practical" contained a patently ambiguous description and was unenforceable.

3. **Easements § 8.4— dispute over easement—no right to damages for interference**

Defendant does not have a claim against plaintiff for damages for interference with his use of a road right of way easement where plaintiff never physically interfered with defendant's use of the easement and plaintiff's lawsuit claiming that defendant had no easement was not frivolous.

APPEAL by plaintiff from *Downs, James U., Judge.* Amended judgment entered 19 February 1988 in Superior Court, MACON County. Heard in the Court of Appeals 16 February 1989.

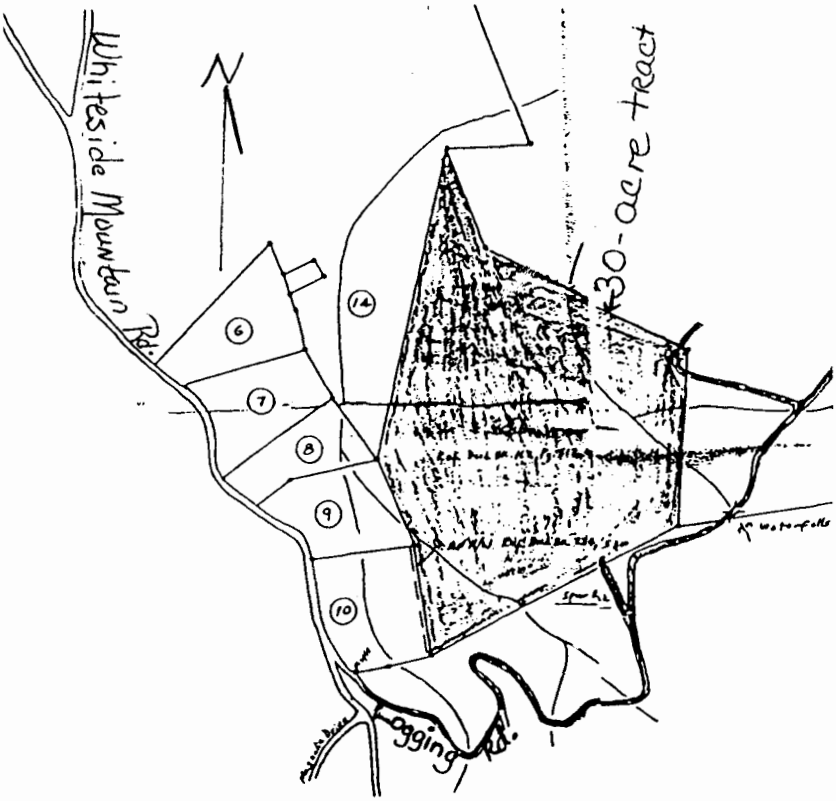
This is a civil action in which plaintiff landowner appeals from a judgment granting adjacent landowner, defendant A. Chester Skinner, III, as trustee, a 20 foot wide easement across the eastern and southern boundary lines of plaintiff's parcel of land.

Herbert L. Hyde for plaintiff-appellant.

McKeever, Edwards, Davis & Hays, P.A., by Fred H. Moody, Jr., for defendant-appellee A. Chester Skinner, III.

JOHNSON, Judge.

Plaintiff and defendant own adjacent parcels of land located partly in Macon County and partly in Jackson County, North Carolina. Plaintiff's land, a more or less rectangular parcel known as lot number 10 of the S. P. Ravenel Subdivision, fronts on its western boundary on Whiteside Mountain Road, a public road. Defendant's property, known as the 30-acre tract, lies to the east of lot number 10. The common boundary line of the two parcels is the east line of lot number 10 and a portion of the west line of the 30-acre tract. The 30-acre tract has no direct access to any public road, the nearest road being Whiteside Mountain Road, just west of lot number 10. To aid in understanding the locations of the specific parcels, roads, and disputed easements involved, plaintiff's exhibit 27, a composite map drawn by Charles W. McDowell, appears on the following page.



Lot number 10 and the 30-acre parcel have common sources, both having been owned previously by A. L. Guentner and later by J. L. Strickland and wife, Georgia Mae Strickland. The 30-acre parcel was deeded out first from the common source, Strickland and wife, in a deed to James T. Walker and wife, dated 15 August 1959. This deed conveyed, in addition to the 30 acres, "a right-of-way twenty (20) feet wide along the east line of Lot No. 10 for a road and right-of-way over the logging road . . ." This expressly granted easement also appeared in the three mesne conveyances occurring prior to the 5 July 1985 transfer of the 30-acre tract to the Straight Eight Company, a partnership, of which defendant Skinner is the trustee.

On 31 July 1967, Georgia Mae Strickland conveyed to defendant's predecessors in title, Carrington Barrs and wife, another easement over the northwest corner of lot number 10 referred to as the Champion Paper Company easement. This easement, which will be described in conjunction with lot number 10's chain of title, is also contained in the subsequent conveyances of the 30-acre tract.

Turning now to plaintiff's chain of title, lot number 10 was deeded out by the common source, Strickland and wife, on 9 October 1959. The deed expressly reserved the above-quoted easement for a road along the east line of lot number 10 and over the logging road. Another exception in the deed reserved "a right of way for a road as set forth in the deed dated December 29, 1943, to Champion Paper and Fibre Company and recorded in the records of Macon County Office of Register of Deeds in Book J-5, page 388." This reservation, referred to above as the Champion Paper Company easement, was described in a 1943 deed of approximately 1,436 acres (located southeast and west of the parties' properties) to Champion as "a road right of way at least 20 feet wide over and across lot No. 10 . . ., said road to enter said lot [No. 10] at or near its northwest corner and run such course as is most practical."

Both the easement reservation along the east line of lot number 10 and the logging road, and the Champion Paper Company easement appear in the next two deeds in plaintiff's chain of title. However, only the Champion Paper Company easement is excepted in the next two deeds in the chain of title. The second of these deeds grants lot number 10 to plaintiff. On 25 June 1985, approximately one month before the commencement of this action, plaintiff filed a deed of correction in which she and her grantor stipulated that "an additional right of way was erroneously and improperly included" in their prior deed. The new deed reserved only "a 20 foot wide right of way along the east line of the said lot 10 to the extent that the same is valid and in effect."

In 1967, Carrington Barrs, then owner of the 30-acre tract, constructed a road from Whiteside Mountain Road to the 30-acre tract along the south line of lot number 10. Lot number 10 was at that time owned by Dunlap and wife. Mr. Barrs used this road for access to his 30-acre tract.

In July of 1985, plaintiff, who acquired lot number 10 in 1982, notified defendant Skinner that she objected to his using the road-

way over lot number 10 to the 30-acre tract, and would consider his use of it in the future to be actionable trespass. Defendant Skinner ceased using the road until June of 1987.

On 30 July 1985, plaintiff instituted this action against defendants seeking, *inter alia*, a permanent injunction prohibiting defendants from entering her property to reach their 30-acre tract. She also asks that defendants' express easement along her east line and the logging road be removed as a cloud from her title.

After a bench trial of this matter, the court entered an amended order on 19 February 1988. Among the findings of fact made were the following:

> 15. The 30-acre tract of the Defendant, Skinner, was the first tract conveyed out by the common source, Strickland.
>
> 16. That a road along the east line of Lot #10 will not provide access to the 30-acre tract to a public road.
>
> 17. That at the time of the severance of the 30-acre tract from Lot #10 by Strickland, Strickland owned no other land or interests in land except for Lot #10 over which access to the 30-acre tract could be gained to a public way, and the said 30-acre tract does not have access or a right of access over any other land to the public way.
>
> 18. That based upon the evidence presented, Champion Paper and Fiber Company never constructed any road across Lot #10 in accordance with the easement recorded in book J-5 at page 388.
>
> 19. That the predecessor in title to the Defendant Skinner, Carrington Barrs, constructed and used a road over and across the southern line of Lot #10 which connects the 30-acre tract to the public road.
>
> 20. That the Champion Paper and Fiber Company right of way recorded in book J-5 at page 388 and excepted from several deeds in the Plaintiff's chain of title, especially when considered along side the restrictive covenants hereinabove referred to, is sufficiently definite as to be locatable.
>
> 21. That there exists a logging road near the south line of Lot #10, but not on Lot #10.

22. That the right of way contained in the conveyance from Strickland and wife to Walker and wife, book 70, page 592, Jackson County Registry, which included a conveyance for the common use of a 20 foot wide road right of way extending along the east line of Lot #10 and a right over the logging road, evidenced an intent of the parties to that deed to convey to the 30-acre tract belonging to the Defendant Skinner a 20 foot wide road right of way along the east line of Lot #10 and over and across the south line of Lot #10 exiting at or near the southwest corner of said lot at its intersection with the public road.

23. That because of the various exceptions contained in the Plaintiff's chain of title of which she had record notice, she is estopped from denying the existence of an easement for a road 20 feet in width over and across the southernmost portion of Lot #10 for the benefit of the 30-acre tract.

The court then concluded the following as a matter of law:

2. That the conveyance from Strickland to Walker by deed dated May 18, 1961 and recorded in book 270 at page 592, Jackson County Registry, conveyed a right of way and easement for a road twenty (20) feet in width extending along the east line of Lot #10 and a right of way over the logging road which this Court concludes was an extension of said twenty (20) foot wide road right of way along the south line of Lot #10 and exiting Lot #10 at or near the southwest corner thereof where it intersects with the public road, and, therefore, the Defendant, Skinner, is entitled to a road right of way and easement at least twenty (20) feet in width along the east line of Lot #10 and along the south line of said lot to the public road, by express grant and express reservation.

3. That should it be determined that the Defendant Skinner is not entitled [to] the easement described hereinabove by express grant and reservation, this Court concludes that the said Defendant Skinner is entitled to an easement by implication for the benefit of his 30-acre tract over and across the south line of Lot #10, said easement by implication having been established heretofore as an easement for a road twenty (20) feet in width lying twenty (20) feet to the north of the south line of Lot #10 and leading from the 30-acre tract to

the public road, all as the same is presently located upon said Lot #10.

Based on these findings of fact and conclusions of law, the trial court held defendant Skinner to be the owner of an express easement appurtenant to the 30-acre tract along the east line of lot number 10 extending along the south line thereof to the public road. In the alternative, the court decreed defendant Skinner to be the owner of an easement by implication for the benefit of the 30-acre tract along the south line of lot number 10 leading to the public road. The court enjoined plaintiff from interfering with defendant's use of the road right granted. Plaintiff gave notice of appeal from the judgment in apt time.

[1] By his first Assignment of Error, plaintiff contends that the trial court erred in holding that the easement expressly granted in the deed from Strickland and wife to Walker and wife of a road right of way along the east line of lot number 10 and over a logging road evidenced an intent by the parties to convey for the benefit of the 30-acre tract a road right of way along the east line of lot number 10 and over and across the south line thereof, exiting at its southwest corner at the public road.

An express easement in a deed, as in the instant case, is, of course, a contract. *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962). In construing it, our purpose is to determine the intention of the parties at the time the contract was made. *Id.* The description of an expressly granted or reserved easement "must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers." *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E. 2d 484, 485 (1942) (citations omitted). If a latent, rather than a patent, ambiguity in the description exists, parol evidence is admissible to "fit the description to the thing intended." *Id.* "There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land." *Id.*

Lastly, we recognize that in a non-jury trial in which the trial judge is the finder of facts, as here, those findings are conclusive on appeal if supported by competent evidence, even though there may be evidence which would support a contrary conclusion. *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E. 2d 265 (1985).

Turning now to the easement before us, it is clear that the grantor intended to grant a right of way from the 30-acre tract to

the only nearby public road for the benefit of that tract. Construing the description in the easement in light of the rules set forth above, we conclude that it is sufficient to give effect to the parties' intention. The ambiguity in the description is latent and may be resolved by resort to parol evidence, namely plats properly before this Court.

The first language, "along the [e]ast line of Lot No. 10" is straightforward enough. The difficulty comes in interpreting the phrase "over the logging road" since the logging road is not actually on lot number 10. The logging road, however, winds along to the south of lot number 10 and the 30-acre tract on land owned by a stranger in title to the parties' properties. From our study of the plats properly introduced at the trial of this matter, one of which is reproduced above, we note that the logging road, although not on lot number 10, approaches extremely close to the southwest corner of lot number 10 near the public road. Although the language "over the logging road" is somewhat imprecise, we believe it is a sufficient guide to indicate that after running down the east line of lot number 10, the easement would meet the public road near the lot's southwest corner, which is where the logging road appears to fork into the public road. We therefore find that it is rational to construe the easement's language to mean that after the easement runs down the east line of lot number 10 to that lot's southeast corner, the easement would necessarily travel along the south line of lot number 10 in order to reach the public road near where the logging road forks into the public road.

In finding the description adequate, we also note that the use of the road along the south line of lot number 10 by defendant's predecessor in title, and acquiesced in by plaintiff's predecessor in title, sufficiently located the right of way on the ground. This user will be deemed to be the location which was intended by the original parties to the easement. *Allen v. Duvall*, 311 N.C. 245, 316 S.E. 2d 267 (1984).

By her second and fourth Assignments of Error, plaintiff raises further arguments concerning the express easement discussed above. We find these arguments to be totally without merit and therefore we do not address them.

By her third Assignment, plaintiff contends that the trial court erred in holding, in the alternative, that defendant is entitled to an easement over the south line of lot number 10 by implication.

In light of our holding that defendant has a valid express easement over lot number 10, we deem it unnecessary to address this question.

[2] On cross-appeal, defendant raises two Assignments of Error which we now address. First, he urges that the trial court erred in failing to grant him an easement over the northwest corner of lot number 10, referred to above as the Champion Paper Company easement. This easement is described as "said road to enter lot [number 10] at or near its northwest corner and run such course as is most practical." The trial court found as fact that this easement has never been constructed on lot number 10. It also concluded that the Champion Paper Company easement was eliminated by deed in 1953.

Setting aside defendant's contention that the easement was revived in 1959 and therefore not extinguished, we conclude that the easement is unenforceable because of the patently ambiguous description it contains. *Thompson, supra.* The language that the easement should "run such course as is most practical" is too vague and uncertain to be aided by parol evidence. *Id.* The trial court erred in finding as fact that the easement is "sufficiently definite as to be locatable." This assignment of error is overruled.

[3] By his final argument, defendant contends that the court erred in failing to award him money damages. We disagree. It is a correct proposition that the holder of an easement may seek monetary damages for wrongful interference with his use of the easement. Hetrick, Webster's Real Estate Law in North Carolina, 3d ed. sec. 330. The record discloses no physical obstruction by plaintiff of the road along the south line of her parcel. Defendant argues, however, that he was injured by plaintiff's claim that he had no easement and her resulting legal action.

We find that defendant does not have a claim against plaintiff for damages since she never actually interfered with his use of the easement. Further, her lawsuit was not frivolous and she was entitled to have the rights of both parties determined in a court of law.

For all the foregoing reasons, we hold that both parties received a fair trial free from prejudicial error.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

BARBARA S. BECKWITH, EXECUTRIX OF THE ESTATE OF PETER OBERDORF BECKWITH v. JAMES M. LLEWELLYN, WILLIAM P. THOMPSON, THOMPSON, PADDOCK & LLEWELLYN, RICHARD A. VINROOT, A. WARD McKEITHEN AND ROBINSON, BRADSHAW & HINSON, P.A.

No. 8826SC677

(Filed 16 May 1989)

Judgments § 16; Attorneys at Law § 7.1— wrongful death action—attorney's fee—collateral attack on judgment

The trial court correctly granted summary judgment for defendants in an action for malpractice and breach of fiduciary duty against the attorneys in a wrongful death action where plaintiff, as executrix of the estate of her husband, had filed a wrongful death action; defendants had represented her in that action; the action was settled; and the settlement was submitted and approved by the court pursuant to N.C.G.S. § 28A-13-3(a)(23). The essence of plaintiff's claims in this action is to dispute the attorney's fees received by defendants in the settlement of the wrongful death suit and in effect to change the amount of fees awarded to defendants in that action. Although defendants were not parties in the wrongful death suit, the settlement order was binding and final as to their entitlement to attorney's fees in that action and they are therefore entitled in this action to the benefit of the doctrine of collateral estoppel.

Judge BECTON dissenting.

APPEAL by plaintiff from *Griffin, Kenneth A., Judge.* Judgment entered 4 February 1988 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 25 January 1989.

Plaintiff is a resident of Mecklenburg County and is the executrix of the Estate of Peter Oberdorf Beckwith, plaintiff's deceased husband. Defendants Vinroot and McKeithen are residents of Mecklenburg County and are licensed to practice law in North Carolina. Defendant Robinson, Bradshaw & Hinson, P.A., is a Charlotte, North Carolina law firm where individual defendants Vinroot and McKeithen were employed as principals and agents.

Individual defendants Llewellyn and Thompson are residents of the State of Arkansas and are licensed to practice law in that state. Defendant Thompson, Paddock and Llewellyn, P.A., is a

Smith, Arkansas law firm where Llewellyn and Thompson were principals and employees.

Plaintiff's decedent, Peter Beckwith, died as a result of a plane crash in Jackson County, Georgia, on 11 March 1982. Plaintiff subsequently qualified in Mecklenburg County as the executrix of her husband's estate. In her capacity as executrix, plaintiff consulted legal counsel in Charlotte concerning the institution of a wrongful death action on behalf of the estate. Plaintiff asked defendant Llewellyn, who was a friend of plaintiff and her husband, to investigate a possible cause of the crash. Defendant Llewellyn's investigation disclosed information concerning problems with the plane, which suggested possible liability on the part of the manufacturer. Plaintiff's Charlotte counsel indicated to plaintiff that he would undertake the wrongful death litigation for a forty percent (40%) contingency fee. Plaintiff asked defendant Llewellyn about the reasonableness of the fee and a possible conflict of interest with another lawyer from Winston-Salem who was representing the owner and pilot of the plane and the insurer and who was to work in conjunction with the Charlotte counsel. Llewellyn told plaintiff that his firm charged a fee of approximately one-third for similar work but that 40% might be reasonable for two attorneys in North Carolina. Llewellyn also indicated there might be a conflict of interest in being represented by the Winston-Salem lawyer. Plaintiff expressed an interest in having defendant Llewellyn and his firm represent the estate. Llewellyn informed plaintiff that he could not handle the case alone and that his partners would have to agree to represent plaintiff. Plaintiff was also told that retention of local counsel in the Charlotte area should be considered. A meeting in Charlotte was set up between plaintiff and defendant Thompson, who had compiled further information about the plane, to discuss the facts of the case and the possibility of representation. The partners in the law firm agreed to represent plaintiff if she wanted them. Plaintiff and defendant Llewellyn discussed a written employment contract. Llewellyn pointed out to plaintiff that the fee charged to plaintiff for representation in the wrongful death litigation would not be reduced by any subrogation amounts that were subject to repayment and that local counsel would still have to be retained. Llewellyn also pointed out that the expenses involved in the litigation would be considerable because of travel problems and that the cost of local counsel would be an expense of the litigation to be paid before the firm's fee was calculated. Plaintiff indicated

that these terms were acceptable and executed a letter to the firm to proceed with the litigation. In this letter plaintiff agreed to pay the firm a fee of 33⅓% of any recovery as a result of the litigation and that this amount would be calculated after the costs of litigation had been deducted. Included in the costs of litigation were the costs of employing local associate counsel. Some time after the execution of the letter the defendants Llewellyn and Thompson employed defendants Vinroot and McKeithen and the firm of Robinson, Bradshaw and Hinson, P.A., as local counsel in the litigation. Prior to retaining the local counsel, defendant Llewellyn contacted plaintiff and pointed out that as the services of the local counsel would be considered an expense, the local counsel's fee would be deducted before the Thompson firm's fee would be calculated. Llewellyn once again pointed out to plaintiff that when the Thompson firm took the case it was with the understanding that local counsel would have to be hired and that this cost would be in addition to the Thompson fee. Plaintiff agreed that was the understanding and stated that she was satisfied with the arrangement with the Robinson firm.

The wrongful death action was commenced on or about 19 December 1983 and pursued by the firms through 19 December 1984 in the United States District Court for the Western District of North Carolina on behalf of the plaintiff individually, on behalf of the plaintiff as guardian of the minor children and on behalf of the estate. Negotiations concerning a settlement were held between the parties to the wrongful death claim. From July 1984 through December 1984, defendant Llewellyn communicated settlement offers from the defendants in the wrongful death suit to plaintiff. Some of these settlement offers were for structured settlements. In November 1984, defendant Llewellyn told plaintiff that the settlement offers had reached an amount of approximately $2.4 million in present value, the amount which plaintiff's lawyers were hoping to obtain for her. Defendant Llewellyn presented the plaintiff with the settlement proposal and recommended that the plaintiff accept the settlement. Llewellyn explained that the settlement appeared to have a value of approximately $4.2 million and met the goal of approximately $2.4 million net to the plaintiff after fees and costs. Plaintiff accepted the settlement proposal. After plaintiff agreed to the settlement another attorney was employed by defendants to examine the proposed settlement and render an opinion concerning the reasonableness of the settlement and be

prepared to make an independent representation to the court to assist the court in determining whether the settlement should be approved. This service was charged as an expense to the case. The deceased was survived by minor children and court approval was required under N.C. Gen. Stat. § 28A-13-3(a)(23).

On 18 December 1984 plaintiff met defendants in the office of defendants McKeithen and Vinroot. At that time defendant Vinroot went over the proposed settlement in detail, particularly as it related to attorney's fees and how they were calculated. Defendant Vinroot asked plaintiff if she agreed to the distribution of the amounts under the settlement agreement. Plaintiff agreed with the distribution.

Prior to the hearing to approve the settlement, plaintiff was advised that her earlier letter authorizing the Thompson firm to proceed with the wrongful death litigation and setting the amount of attorney's fees was inappropriate for a structured settlement. Plaintiff was told to execute another letter which dealt with payments under the structured settlement, monies received as a result of discovery abuse, litigation costs, and how payments to extinguish subrogation rights and fees and expenses incident to probate proceedings would be paid.

On 19 December 1984 plaintiff again met with defendants in the office of defendants McKeithen and Vinroot, at which time defendant Vinroot again went over in detail with plaintiff the terms of the proposed settlement. Plaintiff was told that the present value of the settlement had been recalculated to be $3,985,000 as opposed to the earlier estimate of $4.2 million. The attorney's fees were approximately 42.6% of the settlement amount rather than just under 39% which was anticipated earlier when the proposed settlement was approved. Plaintiff acknowledged that she understood the changes in the proposed settlement distributions and that the settlement was acceptable to her as it was. Plaintiff also indicated that she wanted the court to approve the distribution set forth in the proposed settlement.

On 19 December 1984, plaintiff, through counsel, petitioned the Superior Court of Mecklenburg County for an order approving the settlement of the wrongful death suit. Included in the petition was a reference to plaintiff's agreement with defendants as to counsel fees to be paid in the wrongful death suit, and attached to the petition was an exhibit consisting of a letter agreement

setting out the payments to be made under the settlement. Those payments were as follows:

Monthly Payments To Barbara Beckwith:	
$6,250 monthly, commencing December 15, 1985, with a 4% annual increase compounded for the life of Barbara Beckwith, or 240 months, whichever is the longer.	$ 5,381,630*
Deferred Payments To Barbara Beckwith:	
December 1, 1989	150,000
December 1, 1994	200,000
December 1, 1999	450,000
December 1, 2004	600,000
December 1, 2009	1,000,000
Additional Deferred Payments To Barbara Beckwith (or children):	
June 1, 1990	100,000
June 1, 1991	100,000
Deferred Payments To Thompson, Paddock & Llewellyn, P.A.:	
May 15, 1985	250,000
May 15, 1986	250,000
May 15, 1987	250,000
May 15, 1988	250,000
Initial Payment at time of settlement (of 1,100,000) to be applied as follows:	
Reserve for costs	15,000
Robinson, Bradshaw & Hinson, P.A.	380,000
Thompson, Paddock & Llewellyn, P.A.	500,000
Barbara Beckwith	205,000
	$10,081.620

*Based upon normal life expectancy

Plaintiff filed the present action on 21 April 1986. In the complaint, plaintiff alleged malpractice and breach of fiduciary duty, intentional disregard of duty, conspiracy and negligence. Plaintiff sought damages in excess of $10,000, punitive damages and costs.

On 6 August 1986 defendants filed a motion for summary judgment on the grounds, *inter alia*, that plaintiff's action constituted a collateral attack on the order of the Superior Court approving the settlement and attorney's fees in the wrongful death suit.

The trial court granted defendants' motion for summary judgment on 4 February 1988. Plaintiff appealed from that order.

Browder, Russell, Morris and Butcher, P.C., by James W. Morris, III; and James, McElroy & Diehl, P.A., by William K. Diehl, Jr., for plaintiff-appellant.

Jones, Hewson & Woolard, by Harry C. Hewson and Hunter M. Jones, for defendants-appellees.

WELLS, Judge.

Plaintiff assigns error to the trial court's grant of summary judgment for defendants.

Article 13 of Chapter 28A of the North Carolina General Statutes sets forth the powers and duties of personal representatives of decedents' estates. G.S. § 28A-13-3(a)(23) (1988) provides in pertinent part that personal representatives have the power and duty:

> (23) To maintain actions for the wrongful death of the decedent . . . and to compromise or settle any such claims, whether in litigation or not, provided that any such settlement shall be subject to the approval of a judge of superior court unless all persons who would be entitled to receive any damages recovered under [the wrongful death act] are competent adults. . . .

As we have noted in our factual synopsis, the proposed settlement of plaintiff's wrongful death suit was submitted to Judge Griffin for approval. In his Order of 19 December 1984 approving the settlement agreement, Judge Griffin made extensive findings of fact as to the type and quality of services provided by the defendants in the wrongful death action, and found and concluded that the fees agreed upon were fair and reasonable and in the best interest of the beneficiaries of the Estate of Peter Beckwith.

He ordered that plaintiff, as personal representative of the Estate of Peter Beckwith, be authorized and directed to execute the settlement agreement and ordered that the attorney's fees incurred in the wrongful death action be paid.

The doctrine of estoppel by judgment is firmly entrenched in the law of this State. *See Vann v. N.C. State Bar*, 79 N.C. App. 166, 339 S.E. 2d 95 (1986) and cases cited and relied upon there.

> It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to parties and privies, in all other actions involving the same matter.

Id. (*quoting Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157 (1942)).

The essence of plaintiff's claims in this action is to dispute the attorney's fees received by defendants in the settlement of the wrongful death suit, and in effect to change the amount of fees awarded to defendants in that action. We perceive this action to be a collateral attack on the judgment approving the structured settlement and attorney's fees in the wrongful death suit.

"It is settled law that a judgment which is regular and valid on its face may be set aside only by motion in the original cause in the court in which the judgment was rendered." *Jeffreys v. Snipes*, 45 N.C. App. 76, 262 S.E. 2d 290, *disc. rev. denied*, 300 N.C. 197, 269 S.E. 2d 624 (1980). "Such a judgment may not be attacked collaterally. Neither may a direct attack be maintained in an independent action." *Id.* at 78, 262 S.E. 2d at 291. "A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 167 S.E. 2d 549, *cert. denied*, 275 N.C. 501 (1969).

In the present case plaintiff petitioned the trial court for an order approving settlement in the wrongful death suit as required by G.S. § 28A-13-3(a)(23). This settlement included provisions for attorney's fees. The petition also included provisions which indicated that plaintiff agreed to pay a certain amount of attorney's fees to defendants. Plaintiff executed the settlement agreement herself and defendants executed the petition for court approval on her behalf. Defendant's forecast of evidence indicates the trial court questioned plaintiff about her understanding of the settlement, her approval of attorney's fees and the work of her attorneys. Plain-

tiff approved the settlement and distribution of fees. The trial court then signed an order approving the settlement and the fees. This action by the trial court constituted a valid final adjudication of the appropriate level or amount of attorney's fees. There can be no collateral attack on that judgment. Although defendants here were not "parties" in the wrongful death suit, the settlement order was binding and final as to their entitlement to attorney's fees in that action, and we therefore hold that they are entitled in this action to the benefit of the doctrine of collateral estoppel to defeat plaintiff's claims against them.

Summary judgment is appropriate for the disposition of cases where there is no genuine issue of fact, and its purpose is to eliminate trials in cases where only questions of law are involved. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The materials before the trial court in this case showed that defendants were entitled to judgment as a matter of law. The judgment of the trial court must be and is

Affirmed.

Judge JOHNSON concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

The contract entered into between plaintiff and defendants called for defendants to receive 33⅓%, plus expenses, of any recovery in the wrongful death action. The lawyers collected fees amounting to at least 42.6% and arguably, as much as 55% of the settlement.

Plaintiff's complaint is grounded on allegations of breach of fiduciary obligation and negligence. In my view, these contentions adequately state a cause of action for attorney malpractice. *See, generally*, R. Miller & J. Smith, Legal Malpractice, ch. 11 (3d ed. 1989) (fiduciary duties); *see Hodges v. Carter*, 239 N.C. 517, 519-20, 80 S.E. 2d 144, 145-46 (1954) (negligence). I do not agree that this new and separate cause of action constitutes a collateral attack by plaintiff upon the settlement.

I would reverse the judgment of the trial judge and, accordingly, I dissent.

STATE OF NORTH CAROLINA v. ESTIL HERMAN WARD

No. 8822SC585

(Filed 16 May 1989)

1. **Criminal Law § 85.2— witness afraid of defendant—admission as harmless error**

A defendant charged with murder and arson was not prejudiced by the erroneous admission of testimony by a witness that she was "afraid" of defendant at the time of trial where the witness testified without objection that defendant had threatened to kill her and sell her child if she reported the crimes.

2. **Arson § 4.2— second degree arson—trailer uninhabited—insufficient evidence for conviction**

Defendant could not be convicted of common law second degree arson under N.C.G.S. § 14-58 for burning a trailer because the trailer was uninhabited at the time it was burned where the male occupant had been murdered and left in a trash dumpster several days before the burning, and the female occupant had disconnected power to the trailer, vacated it and paid defendant $50 pursuant to a scheme with defendant to burn the trailer.

3. **Criminal Law § 102.6— prosecutor's jury argument—no plain error**

The trial court did not commit plain error in a murder and arson trial by failing to intervene during the prosecutor's closing argument when the prosecutor stated that "you have heard people who are involved in this killing, yet there is someone else that knows about this killing," asked whether the victim's family "likes not having that boy or thinking he is out in some garbage dump," stated that this case was "the sorriest doings I've ever seen in my life," and stated that certain prosecution witnesses were "truthful."

4. **Criminal Law § 138.38— murder—mitigating circumstance—strong provocation or extenuating relationship—insufficient evidence**

Evidence that a murder victim's wife told defendant the victim had been mistreating her did not require the trial court to find strong provocation or an extenuating relationship be-

tween defendant and the victim as a mitigating circumstance for defendant's second degree murder of the victim.

Judge PHILLIPS concurs in the result.

Judge COZORT concurring.

APPEAL by defendant from *Gudger (Lamar), Judge.* Judgment entered 11 January 1988 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 10 January 1989.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Lucien Capone III and Summer Intern R. Dawn Gibbs, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant-appellant.

GREENE, Judge.

Defendant appeals his convictions of second-degree murder and second-degree arson. The evidence at trial tended to show that Lori Mayse allegedly hired defendant and her half-brother to kill her husband, Robert Mayse. After various failed attempts, the defendant and the half-brother succeeded in beating and choking Robert Mayse to death. A short time thereafter, defendant wrapped the victim's body in a blanket and disposed of it in a trash dumpster. Defendant then left the State for several days. When he returned, Ms. Mayse gave defendant fifty dollars to burn the trailer where she and the victim had resided. Ms. Mayse did not live in the trailer after defendant left the state. The evidence further showed that Ms. Mayse had disconnected the electrical power to the trailer before the trailer was burned. Kim Beuckles, the half-brother's girlfriend, testified that defendant threatened to harm her and her child if she reported the crime and stated she was still afraid of defendant at the time of trial.

After the jury convicted defendant of second-degree murder and second-degree arson, the trial court found that aggravating factors outweighed any mitigating factors and sentenced defendant to life imprisonment on the murder charge. The court imposed the presumptive twelve-year sentence for second-degree arson. Defendant appeals both convictions.

These facts present the following issues: I) where a prosecution witness had already testified defendant threatened to kill her and sell her child if she testified against him, whether defendant was prejudiced by the trial court's admission of the witness's subsequent statement that she was "afraid" of defendant; II) where one inhabitant of a trailer was dead and the other had vacated the trailer and paid defendant $50 as part of a plan with defendant to burn the trailer, whether the trial court erroneously failed to dismiss the charge of arson under Section 14-58; III) whether the trial court committed plain error in failing to intervene *ex mero motu* to exclude certain remarks by the prosecutor during his closing argument; and IV) whether the trial court erroneously failed to find an "extenuating relationship" between defendant and his murder victim mitigated the offense of second-degree murder.

I

[1] During the prosecution's case, the following exchange occurred between a witness and the prosecutor:

> Q. You say [defendant's alleged accomplice] spoke up and told you that they killed Robert?
>
> A. They had killed Robert and wrapped him up in a blanket and put him in my truck and hauled him to a dumpster. . . .
>
> Q. All right.
>
> A. And then [defendant] says, "You better not believe [the accomplice] because he may be lying," and started laughing about it. . . .
>
> Q. All right. Go ahead.
>
> A. And he said that if [the accomplice], me, or Lori told about what had happened he would kill us, and he said that if I said anything he would take my little boy off and sell him.
>
> Q. Sell him?
>
> A. Right.
>
> . . .
>
> Q. *You [sic] afraid of [the defendant]?*
>
> A. *Yes, I am.*

MR. CANNON: Objection.

COURT: Overruled.

(Emphasis added.) Defendant contends the trial court erroneously admitted the witness's testimony that she was "afraid" of defendant at the time of trial.

We agree. The State had not contended defendant intimidated the witness at the time of trial. The witness's testimony that she was afraid of defendant at the time of trial has no apparent relevance to this case other than to imply the defendant was a violent person; consequently, the witness's statement that she was afraid at the time of trial should not have been admitted. *State v. Bell*, 87 N.C. App. 626, 636, 362 S.E. 2d 288, 294 (1987). However, defendant did not object at trial nor assign error on appeal to the witness's immediately preceding testimony that defendant had threatened to kill her and sell her child if she reported the crime. Given that testimony, we do not believe there is a reasonable possibility that a different result would have been reached if the trial court had excluded the witness's statement that she was afraid of defendant at the time of trial. *See* N.C.G.S. Sec. 15A-1443(a) (1988).

II

[2] Defendant also contends the trial court erroneously failed to grant his motion to dismiss the charge of second-degree arson under Section 14-58, which states:

> There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first-degree . . . If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second-degree . . .

N.C.G.S. Sec. 14-58 (1986). Before a motion to dismiss is denied, the court must find substantial evidence of each essential element of the offense charged. The evidence is considered in the light most favorable to the State and the State is entitled to every reasonable inference from that evidence. *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980).

Section 14-58 does not re-define the crime of arson but instead incorporates the common law definition that "arson is the wilful and malicious burning of the dwelling house of another person." *State v. Vickers*, 306 N.C. 90, 100, 291 S.E. 2d 599, 606 (1982).

"Further, since arson is an offense against the security of the habitation and not the property, an essential element of the crime is that the property be inhabited by some person." *Id.* The only inhabitants of the trailer before it burned were Robert Mayse and his wife, Lori. Defendant contends the State's evidence showed the trailer was uninhabited at the time it was burned since: (1) Robert Mayse had been murdered, wrapped in a blanket, and left in a trash dumpster several days before the burning; and (2) Lori Mayse had disconnected the power to the trailer, vacated it and paid defendant $50 pursuant to an alleged scheme with defendant to burn the trailer. Defendant thus contends he could not be convicted of common law arson under these facts since both prior inhabitants of the trailer were permanently absent from the trailer at the time it was burned.

We agree. "[T]he main purpose of common law arson is to protect against danger to those persons who *might* be in the dwelling house which is burned." *State v. Jones*, 296 N.C. 75, 77-78, 248 S.E. 2d 858, 860 (1978) (emphasis added); *accord State v. White*, 288 N.C. 44, 50, 215 S.E. 2d 557, 561 (1975) ("gravamen" of offense is danger to persons "who are or might be in the dwelling . . ."). Under these particular facts, there was no danger to anyone who "might" have been in the trailer at the time it burned. First, the State's evidence showed Robert Mayse was dead several days before defendant allegedly burned the trailer. While temporary absence from a dwelling will not affect its status as an inhabited dwelling, the inhabitant's death certainly renders it uninhabited since someone must "live" in a dwelling for it to be "inhabited." *See State v. Eubanks*, 83 N.C. App. 338, 339, 349 S.E. 2d 884, 885 (1986); *see also Vickers*, 306 N.C. at 100, 291 S.E. 2d at 606. Thus, Robert Mayse no longer inhabited the trailer at the time it was burned.

Likewise, the evidence shows that Lori Mayse had permanently abandoned the trailer at the time of the burning. Ms. Mayse had shut off electric power to the trailer and was living elsewhere at the time of the burning. Furthermore, the State's evidence showed her consent to, if not active participation in, a scheme with defendant to burn the trailer. This fact alone arguably precluded defendant's conviction of common law arson: it is certainly evidence of Ms. Mayse's intention not to return to the trailer. *Compare State v. Allen*, 322 N.C. 176, 196, 367 S.E. 2d 626, 637 (1987) (tenant could commit arson by burning own apartment only because entire building where others dwelled was threatened) *with* 5 Am. Jur.

2d, *Arson and Related Offenses* Sec. 26 (1962) (if person cannot commit common law arson against own dwelling, defendant who burns dwelling at person's request cannot be prosecuted for common law arson). Thus, the undisputed evidence is that Lori Mayse had ceased to inhabit the trailer at the time it was burned.

Other statutes prohibit an occupant from burning, or procuring others to burn, the occupant's dwelling. *E.g.*, N.C.G.S. Sec. 14-65 (1986); N.C.G.S. Sec. 14-67.1 (1986); *see also* N.C.G.S. Sec. 14-49(b) (1986) (damaging property by incendiary device). However, our courts maintain a clear distinction between the "ancient crime" of arson and other statutory crimes. *White*, 288 N.C. at 51, 215 S.E. 2d at 561. Accordingly, we reverse defendant's conviction of common law arson under Section 14-58. We therefore do not address defendant's contention that the trial court should have submitted certain alleged lesser-included offenses to the jury at the time it submitted the issue of common law arson.

III

[3] Although defendant failed to object to the prosecutor's closing remarks at trial, defendant now argues the trial court's failure to exclude the remarks constitutes plain error. Specifically, defendant complains he was prejudiced by the prosecutor's following statements: (1) "Let me tell you something, folks, you have heard people who are involved in this killing, yet there is someone else that knows about this killing"; (2) "Do you think the family of this boy over here that's been here all week likes not having that boy or thinking he is out in some garbage dump?"; (3) "That is, without a doubt, the sorriest doings I've ever seen in my life, the killing and all the other stuff you've heard about this week." Defendant also contests the prosecutor's statements that certain prosecution witnesses were "truthful."

The trial court properly instructed the jury that defendant was entitled to remain silent during his trial and that the jury was the sole judge of the witnesses' credibility. We reject defendant's contention the trial court's failure to intervene during the prosecutor's remarks was "plain error" in light of our Supreme Court's analysis of similar facts in *State v. Wilson*, 311 N.C. 117, 130, 316 S.E. 2d 54-55 (1984):

> Defendant did not object to the prosecutor's argument at the time the above statements were made. . . . The de-

> fendant's closing argument and the trial judge's charge to the jury emphasized the presumption of innocence of the defendant and the State's burden of proving its case beyond a reasonable doubt. Assuming, arguendo, that the prosecutor's statement could be construed as . . . impermissible . . ., it was not so extreme or so clearly calculated to prejudice the jury that the trial judge should have *ex mero motu* instructed the jury to disregard the remarks. Whatever error there may have been, it was cured by the trial judge's instructions to the jury.

Accordingly, we reject this assignment of error.

IV

[4] Although defendant did not request the trial court find that defendant had an extenuating relationship with the murder victim, Robert Mayse, defendant argues the trial court was nevertheless required to find that factor mitigated his conviction of second-degree murder. *Cf.* N.C.G.S. Sec. 15A-1340.4(a)(2)(i) (offense mitigated if defendant acted under strong provocation or relationship between defendant and victim was "extenuating"). It is true that the trial court has the duty to find a statutory mitigating factor that has not been requested by defendant when the evidence " 'so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn' and the credibility of the evidence 'is manifest as a matter of law.' " *State v. Gardner*, 312 N.C. 70, 72, 320 S.E. 2d 688, 690 (1984) (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 455 (1983)). Given this standard, defendant asserts the trial court was required to find that an extenuating relationship between defendant and Robert Mayse existed such that his conviction for the murder of Robert Mayse was mitigated.

Our review of the evidence does not support this assertion. Defendant contends the trial court was compelled to find this factor in light of Lori Mayse's testimony that she told defendant the victim had been "torturing" and otherwise mistreating her. Since there was evidence of a scheme between Ms. Mayse and defendant to burn the trailer, the trial court did find defendant's relationship with *Lori Mayse* mitigated his alleged arson of her trailer; however, any relationship between defendant and Lori Mayse did not necessarily compel the trial court to find a similar extenuating relationship existed between defendant and *Robert Mayse*, the murder victim. There was no evidence of strong provocation or an extenuating relationship between defendant and the victim such that the trial

court was compelled to find this mitigating factor under the evidentiary standards set forth in *Gardner*. Accordingly, we also reject this assignment of error.

Conviction for second-degree murder—no error.

Conviction for second-degree arson—reversed.

Judge PHILLIPS concurs in the result.

Judge COZORT concurs

Judge COZORT concurring.

I agree that the facts in this case did not support submission to the jury of the offense of second-degree arson. I hasten to add, however, that defendant is subject to being reindicted and tried on the appropriately designated offense under Article 14 or Article 15 of Chapter 14 of the General Statutes.

GARY W. MYERS v. H. McBRIDE REALTY, INC., MARLO INVESTMENTS, INC., D/B/A REALTY WORLD, A LANDMARK COMPANY; C. W. KIDD, SHERIFF MECKLENBURG COUNTY; LOUISE C. LILES; AND DOMER REEVES

No. 8826SC682

(Filed 16 May 1989)

1. **Execution § 11; Injunctions § 13.1— execution sale—compliance with statutory notice requirements—plaintiff not entitled to preliminary injunction**

Plaintiff was not entitled to a preliminary injunction in his action to enjoin the sale of real property where the statutory requirements for notice of an execution sale were met when the sheriff attempted to locate plaintiff by running his name through the DMV computer, checking the city cross-reference directory, and checking the phone book; a deputy went to the address listed on the execution notice and to an address where plaintiff owned real property; plaintiff could not be located; the decision was then made by the sheriff to serve plaintiff by certified mail at his last known address; and since

the sheriff did not know which of the two addresses was plaintiff's last address, notice was sent to both. N.C.G.S. § 1-339.54.

2. Courts § 9.4— motion to dismiss not ruled on by judge—subsequent dismissal by another judge—no appeal from one superior court judge to another

There was no merit to plaintiff's contention that the trial court erred in hearing defendants' motions to dismiss on the ground that this action amounted to an appeal from one superior court judge to another, since the rule that one superior court judge may not review rulings of another does not apply to interlocutory orders given during the progress of an action which affect the procedure and conduct of the trial; in this case two defendants originally made motions to dismiss at the preliminary injunction hearing; the judge made no ruling on defendants' motions but left that question for later resolution; all of the defendants made motions to dismiss before the trial judge; and it was proper for the trial judge to conduct further proceedings in the matter and entertain defendants' motions which dealt with issues different from those ruled upon by the first judge.

3. Execution § 11— action to enjoin sale of property—dismissal proper

The trial judge did not err in dismissing plaintiff's action to enjoin the sale of his real property where he reviewed the pleadings, the case on file of the present case, and a full transcript of the hearing on plaintiff's request for preliminary injunction, and the evidence tended to show that several defendants were recipients of a money judgment in their favor at a prior proceeding; proper notice was given to plaintiff concerning his right to exemptions and the execution sales; and a valid execution sale was carried out.

APPEAL by plaintiff from *Snepp, Frank W., Judge*. Judgment entered 25 March 1988 in MECKLENBURG County Superior Court. Appeal by plaintiff from *Burroughs, Robert M., Judge*. Judgment entered 10 April 1988 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 25 January 1989.

Plaintiff is a citizen and resident of Mecklenburg County, North Carolina. Individual defendants Kidd, Liles, and Reeves are also residents of Mecklenburg County. Defendant corporations are cor-

porations duly organized and existing under and by virtue of the laws of the State of North Carolina with their principal places of business in Mecklenburg County.

On 12 September 1983 a money judgment was entered in Mecklenburg County Superior Court against plaintiff in the case of *H. McBride Realty, Inc., et al. v. Gary W. Myers*, after a trial by jury on claims of breach of contract and fraud. On 7 October 1983, counsel for defendant, then plaintiff H. McBride Realty, Inc. (McBride Realty), served Myers' counsel of record with a Notice of Right to Have Exemptions Designated. On 9 May 1984, counsel for McBride Realty again served Myers with a Notice of Right to Have Exemptions Designated. These notices were not responded to by either Myers or his attorney.

An execution notice was issued against plaintiff on 1 August 1984, which noted on its face that plaintiff made a partial payment of $500 on 27 August 1984. The 1 August 1984 execution was returned unsatisfied by the Sheriff of Mecklenburg County on 16 August 1984. On 17 June 1987, counsel for defendant McBride Realty filed an affidavit which stated that counsel had again served plaintiff on 23 April 1987 with Notice to Have Exemptions Designated. This notice was served on plaintiff by mailing the same to his last known address. Plaintiff once again failed to respond. On 8 July 1987, execution was again issued against plaintiff. There were three sales of the property located at 8737 Marshall Acres Drive pursuant to the execution of 8 July 1987: an original sale with an upset bid, a resale with another upset bid, and a final sale on 16 November 1987. Notice of the original sale held on 28 September 1987 was published in the *Mecklenburg Times*, a newspaper qualified for legal advertisements on 4 September, 11 September, 18 September, and 25 September 1987. Notice of the original sale was posted on 1 September 1987 and was sent by certified mail to plaintiff at two different addresses on 1 September 1987. Notice of the first resale was published in the *Mecklenburg Times* on 16 and 23 October 1987 for a resale scheduled for 26 October 1987. This notice was posted on 9 October 1987. Notice of the second resale to be held on 16 November 1987 was published in the *Mecklenburg Times* on 6 and 13 November 1987. This notice was posted on 30 October 1987 and sent to plaintiff at his last known address by certified mail on 6 November 1987. The sale of the property located at 8737 Marshall Acres Drive was confirmed by the Clerk of Superior Court on 1 December 1987.

On 4 December 1987 plaintiff commenced the present action by filing a complaint and an affidavit wherein plaintiff stated that he had not received notice of the sale of his property by the sheriff and that he did not learn that his property located on Marshall Acres Drive had been sold until 2 December 1987. Plaintiff's complaint contained a prayer for relief which requested *inter alia* the issuance of a temporary restraining order and preliminary injunction enjoining the sheriff from executing a deed to the property at issue. On 4 December 1987 the trial court issued a temporary restraining order and scheduled a hearing on plaintiff's request for a preliminary injunction.

A hearing was held before Superior Court Judge Robert M. Burroughs on plaintiff's request for preliminary injunction on 15 December 1987. At that hearing, defendants sheriff and Reeves made motions to dismiss plaintiff's complaint and action. Judge Burroughs did not rule on these oral motions to dismiss. Judge Burroughs issued an order in open court, making findings of fact and conclusions of law, denying the application of plaintiff for a preliminary injunction, and dissolved the temporary restraining order. Judge Burroughs authorized execution of the deed to the land at issue and disbursement of the funds but enjoined the holder of the deed from alienating the property until a hearing on the merits could be held.

A written order reiterating the order issued by Judge Burroughs in open court was subsequently prepared by counsel for defendant Sheriff of Mecklenburg County. This order was presented to plaintiff's attorney and defendants' attorneys for review. Various problems with the order and Judge Burroughs' schedule delayed the signing of the order. The order was eventually signed by Judge Burroughs on 10 April 1988.

On 15 March 1988, a hearing was held before Judge Frank W. Snepp on defendants' motions to dismiss. After reviewing the pleadings and record, including the transcript of the 15 December 1987 hearing and Judge Burroughs' bench order, Judge Snepp granted defendants' motions to dismiss in an order entered on 25 March 1988.

Plaintiff appeals from the orders of 25 March 1988 and 15 December 1987.

William D. McNaull, Jr. for plaintiff-appellant.

Sandra T. Bisanar, Associate County Attorney; Kennedy, Covington, Lobdell & Hickman, by Lisa D. Hyman; and Morrison & Peniston, by Dale S. Morrison, for defendant-appellees.

WELLS, Judge.

[1] Plaintiff argues on appeal that the trial court erred in failing to grant plaintiff's motion for a preliminary injunction.

> A preliminary injunction, as a general rule, will be issued only "(1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation."

Robins & Weill v. Mason, 70 N.C. App. 537, 320 S.E. 2d 693, *disc. rev. denied*, 312 N.C. 495, 322 S.E. 2d 558-59 (1984) (*quoting Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E. 2d 566 (1977)) (emphasis in original). The burden is on the plaintiff to establish his right to a preliminary injunction. *Pruitt v. Williams*, 25 N.C. App. 376, 213 S.E. 2d 369, *appeal dismissed*, 288 N.C. 368, 218 S.E. 2d 348 (1975). The issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983) (*quoting State v. School*, 299 N.C. 351, 261 S.E. 2d 908, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 55, 66 L.Ed. 2d 11 (1980)). "[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *Id.* at 402, 302 S.E. 2d at 760.

Plaintiff's argument on appeal is that the statutory requirements for notice of an execution sale were not met in the present case. As a result plaintiff argues that the evidence tended to show a likelihood of success by plaintiff on the merits and that he would suffer irreparable loss if the court did not issue the injunction. We disagree.

In execution sales, notice of execution is governed by N.C. Gen. Stat. § 1-339.51 to G.S. § 1-339.54. *See Henderson County v. Osteen*, 292 N.C. 692, 235 S.E. 2d 166 (1977). Plaintiff's argument

on appeal is primarily concerned with the requirements of G.S. § 1-339.54 which deals with notice to a judgment debtor of sale of real property. G.S. § 1-339.54 (1983) reads as follows:

> In addition to complying with G.S. 1-339.52, relating to posting and publishing the notice of sale, the sheriff shall, at least ten days before the sale of real property,
>
> (1) If the judgment debtor is found in the county, serve a copy of the notice of sale on him personally, or
>
> (2) If the judgment debtor is not found in the county,
>
> a. Send a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff, and
>
> b. Serve a copy of the notice of sale on the judgment debtor's agent, if there is in the county a person known to the sheriff to be an agent who has custody or management of, or who exercises control over, any property in the county belonging to the judgment debtor.

In the present case plaintiff excepts to the trial court's finding that the requirements of G.S. § 1-339.54 were complied with by the issuance of a certified letter sent to plaintiff's last known address. While we are not bound by the findings of a trial court in the granting or denial of a preliminary injunction on appeal, we find that the evidence in the present case supports the findings made by the trial court concerning satisfaction of the requirements of G.S. § 1-339.54. As noted above, when the judgment debtor is not found in the county the sheriff may serve the notice of sale upon the judgment debtor by sending a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff. The evidence tended to show that the deputy sheriff attempted to locate the plaintiff by running his name through the Department of Motor Vehicles' (DMV) computer. The DMV printout showed a person with plaintiff's name at a Blueberry Lane address. The deputy checked the city cross-reference directory which showed a concrete service business at that address. The phone book was checked and no one with plaintiff's name was listed. The deputy went to the address listed on the execution notice and to an address where plaintiff owned real property. The deputy could not locate plaintiff. At this point the decision was made by the Sheriff's Department to serve plaintiff by certified mail

at his last known address. The Sheriff's Department did not know which of the two addresses was plaintiff's last address so the notice was sent to both addresses. We hold that the Sheriff's Department complied with the requirements of G.S. § 1-339.54. As plaintiff failed to show a likelihood of success on the merits of his request for a preliminary injunction, the trial court did not err in denying plaintiff's request for a preliminary injunction. The assignment of error is overruled.

[2] Plaintiff also contends that the trial court erred in hearing defendants' motions to dismiss on the grounds that this action amounted to an appeal from one superior court judge to another superior court judge. "The general rule in this jurisdiction is that ordinarily a trial judge may not review the orders, judgments, or actions of another judge of coordinate jurisdiction." *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983). "To permit one superior court judge to overrule the final order or judgment of another would result in the disruption of the orderly process of a trial and the usurpation of the reviewing function of appellate courts." *Id.* at 642, 304 S.E. 2d at 189. "This rule does not apply, however, to *interlocutory* orders given during the progress of an action which affect the procedure and conduct of the trial." *Id.* (emphasis in original). "An interlocutory order or judgment does not determine the issues in the cause but directs further proceedings preliminary to the final decree." *Id.*, 304 S.E. 2d at 190.

In the present case, defendants Sheriff and Reeves originally made motions to dismiss before Judge Burroughs at the preliminary injunction hearing on 15 December 1987. Judge Burroughs made no ruling on defendants' motions, but left that question for later resolution. All of the defendants made motions to dismiss before Judge Snepp on 15 March 1988. Judge Snepp granted defendants' motions to dismiss on 25 March 1988.

Judge Burroughs' order of 15 December 1987 dealt solely with issues concerning the propriety of plaintiff's request for a preliminary injunction and was clearly contemplative of further proceedings on the merits. As such, Judge Burroughs' order, though denying plaintiff's request, was interlocutory in nature. Judge Burroughs did not address or render any decision on defendants' motions to dismiss. It was proper for Judge Snepp to conduct further proceedings in this matter and to entertain defendants' motions to dismiss which dealt with issues different from those ruled upon by Judge Burroughs. Plaintiff's assignment of error is overruled.

[3] Plaintiff next assigns error to Judge Snepp's order granting defendants' motions to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We note that at the hearing on defendants' motions to dismiss, Judge Snepp reviewed the pleadings, the case file of the present case and a full transcript of the 15 December hearing. "Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under Rule 56." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 325 S.E. 2d 223 (1985). Therefore, we will examine this assignment of error in light of the rules concerning the granting of summary judgment. "A party moving for summary judgment is entitled to such judgment if he can show, through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that he is entitled to judgment as a matter of law." *Hagler v. Hagler*, 319 N.C. 287, 354 S.E. 2d 228 (1987). "Where the pleadings or proof of the plaintiff disclose that no claim exists, summary judgment for defendant is proper." *Colonial Building Co. v. Justice*, 83 N.C. App. 643, 351 S.E. 2d 140, *disc. rev. denied*, 319 N.C. 402, 354 S.E. 2d 711 (1987). Plaintiff has failed to establish a claim upon which he may obtain relief. The evidence tends to show that several defendants were recipients of a money judgment in their favor at a prior proceeding. Proper notice was given to plaintiff concerning his rights to exemptions and the execution sales and that a valid execution sale was carried out. There appears to be no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. The trial court order dismissing the present action is

Affirmed.

Judges BECTON and JOHNSON concur.

STEELCASE, INC., PLAINTIFF v. THE LILLY COMPANY, INC., DEFENDANT

No. 8828SC547

(Filed 16 May 1989)

1. **Sales § 22— defective wood stain—failure to use according to instructions—Products Liability Act not applicable**

Plaintiff's breach of contract claim did not fall within the purview or effect of the Products Liability Act, to which a defense of contributory negligence would be applicable, where plaintiff was able to convince a trier of fact that it suffered damages flowing from a failure to meet direct and express contractual obligations. N.C.G.S. § 99B-4(1) (1985).

2. **Evidence § 29.2— damages—business records—admissible**

The trial court erred in an action for damages arising from defective wood stain furnished to plaintiff by defendant in excluding certain business records where the records in each case were made in the usual course of plaintiff's business and were made contemporaneously with the occurrences of situations involving the damaged furniture; the records were compiled by persons authorized to make them; and in each case the evidence was identified through the testimony of a witness familiar with the business entries in the system under which they were made and who could have also authenticated the records. N.C.G.S. § 8C-1, Rule 803(6).

3. **Judgments § 55— prejudgment interest—breach of contract—allowable**

The trial court erred in an action for breach of contract in the furnishing of wood stains by not allowing prejudgment interest from the date of the breach, even though the action was pending at the time the 1985 amendment of N.C.G.S. § 24-5 became effective and was therefore not governed by its current provisions, because the amount of damages to which plaintiff was entitled could be determined by examining evidence relevant to the contract such as the business records or documentation concerning the damaged furniture.

APPEAL by plaintiff and defendant from *Lewis, Robert D., Judge*. Judgment entered 23 December 1987 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 8 December 1988.

Plaintiff Steelcase operates a facility in Henderson County, North Carolina, manufacturing office furniture. Defendant Lilly Company is engaged in the business of manufacturing and selling finishes and stain for use in the furniture industry.

Plaintiff uses wood stains in the production of wood furniture. Prior to 1981, plaintiff had used wood stains supplied to it by Sherwin-Williams Company. In the spring of 1980, plaintiff began negotiations with defendant for defendant to supply the wood stains, on the basis that defendant could reproduce the Sherwin-Williams stains. In January of 1981, plaintiff began purchasing and using stains produced by defendant. The stain was applied to the furniture which was then passed through plaintiff's drying ovens.

Later in 1981, plaintiff began receiving complaints from customers concerning a discoloration or "whitening" of walnut furniture purchased from plaintiff. Plaintiff also noted that furniture stored in its warehouse exhibited the same discoloration or whitening effect. Plaintiff and defendant initially worked in cooperation to repair the damaged furniture by applying a methylpyrol compound. These efforts proved unsatisfactory.

The whitening effect was eventually determined by an independent testing agency acting on behalf of plaintiff to be the result of incomplete drying of the furniture stain. In November 1981, defendant reformulated the walnut oil stain.

In a complaint against defendant in February 1985, plaintiff asserted six separate claims for relief: (1) breach of contract; (2) breach of express warranty; (3) breach of implied warranty of merchantability; (4) breach of implied warranty of fitness for a particular purpose; (5) negligence of defendant; and (6) unfair and deceptive trade practice.

Defendant answered, denying the allegations of the complaint and raising as defenses failure to state a claim upon which relief can be granted, failure to commence the action within the time allowed by the statute of limitations, contributory negligence and limitation of remedies.

On 14 December 1987 defendant was allowed to amend its answer to include a defense of failure to use the product in accordance with express adequate instruction delivered with the product to plaintiff.

The case was tried before a jury at the 7 December 1987 session of Buncombe County Superior Court. At the end of the trial, issues were submitted to the jury concerning the contract, implied warranty and damages. These issues submitted and answered by the jury were as follows:

I—THE CONTRACT

1. Did the contract include an agreement that Lilly would reproduce a walnut finish materially similar in working properties to the Sherwin-Williams finish?

Answer: Yes

2. Did Lilly breach the contract by failing to supply a walnut finish materially similar in working properties to the Sherwin-Williams finish?

Answer: Yes

3. Did that breach of contract cause Steelcase to incur more than nominal damages?

Answer: Yes

II—IMPLIED WARRANTY

1. Did Lilly impliedly warrant to Steelcase that the walnut finish was fit for Steelcase's particular purpose?

Answer: Yes

2. Was the implied warranty of fitness for a particular purpose breached by Lilly?

Answer: Yes

3. Did Steelcase use the walnut finish contrary to expressed and adequate instructions which Steelcase knew or should have known in the exercise of reasonable and diligent care by reason of the letter of March 9, 1981 from Lilly to Steelcase?

Answer: Yes

4. Did that breach of warranty cause Steelcase to incur more than nominal damages?

Answer: _____

III—DAMAGES

1. Is Steelcase limited in their recovery to replacement of the industrial coating without charge or to refund the purchase price paid?

Answer: No

2. What amount is Steelcase entitled to recover?

Answer: $250,000.00

On 16 December 1987, defendant made a motion for judgment notwithstanding the verdict. This motion was denied on 21 December 1987. Judgment was entered on the verdict on 23 December 1987. Both parties appealed.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Philip J. Smith and Michelle Rippon, for plaintiff.

Morris, Phillips and Cloninger, by William C. Morris, Jr., for defendant.

WELLS, Judge.

Defendant's Appeal

[1] Without making reference to any exception or assignment of error, defendant presents an argument contending that this case is "a products liability action" and that under applicable provisions of the Products Liability Act, N.C. Gen. Stat. § 99B-4, the jury's answer to issue number 3 under the implied warranty claim defeats plaintiff's claim and entitles defendant to judgment in its favor as a matter of law. The pertinent portions of the statute provide:

> G.S. § 99B-4. *Injured parties' knowledge or reasonable care.* No manufacturer or seller shall be held liable in any product liability action if:
>
> (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings. . . .

G.S. § 99B-4(1) (1985).

Defendant's argument has merit as it applies to plaintiff's implied warranty claim, as the jury found, in effect, that plaintiff's contributory negligence in its use of defendant's product defeated plaintiff's entitlement to damages *under that claim.*

We hold, however, that plaintiff's breach of contract claim does not fall within the purview or effect of the Products Liability Act. Claims under that act are rooted in negligence, to which a defense of contributory negligence would obviously be applicable. Where, as in this case, a plaintiff is able to convince a trier of fact that it has suffered damages flowing from the failure of a defendant to meet direct and express contractual obligations, the defense of contributory negligence has no application to that claim.

Our review of the record and briefs reveals a long and complicated jury trial involving extensive and contradictory testimony and evidence as to the cause of the damage to plaintiff's furniture and plaintiff's resulting monetary losses. Plaintiff offered evidence tending to show that defendant had originally formulated a defective stain containing too much linseed oil, a stain not duplicative of the Sherwin-Williams stain plaintiff had contracted for, and that this breach of contract caused plaintiff's damages and losses. Defendant offered evidence tending to show that if plaintiff had used defendant's stain in accordance with instructions furnished by defendant, plaintiff's furniture would not have been damaged by the use of defendant's stain.

The verdict indicates that the jury sifted through this evidence and found that defendant did breach its contract with plaintiff and that this breach caused plaintiff's damages. Defendant does not contend or question that the evidence did not support this part of the jury's verdict.

As to defendant's appeal, we find no error in the trial.

Plaintiff's Appeal

[2] Plaintiff assigns error to the trial court's ruling that certain evidence pertaining to plaintiff's damages constituted hearsay and was therefore inadmissible. Plaintiff argues that this evidence should have been admitted because it is covered by the business records exception to the hearsay rule. The types of business records covered in the business records exception and its prerequisites are codified at N.C. Gen. Stat. § 8C-1, Rule 803(6) (1988) of the Rules of Evidence, as follows:

> (6) *Records of Regularly Conducted Activity.*—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In construing Rule 803(6), this Court has stated, "Records made in the usual course of business, made contemporaneously with the occurrences, acts and events, recorded by one authorized to make them and before litigation has arisen, are admissible upon proper identification and authentication." *State v. Miller*, 80 N.C. App. 425, 342 S.E. 2d 553, *disc. rev. denied and appeal dismissed*, 317 N.C. 711, 347 S.E. 2d 448 (1986). We went on to state in *Miller* that:

> Authentication of records of regularly conducted activity is 'by the testimony of the custodian or *other qualified witness*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.' Rule 803(6) N.C. Rules Evid. (emphasis added.) 'Other qualified witness' has been construed to mean a witness who is familiar with the business entries and the system under which they are made.

Id. at 429, 342 S.E. 2d at 556. (Emphasis in original.)

In the present case the business records at issue involve evidence of plaintiff's damages as a result of the whitened walnut furniture. These records are illustrative of the following: (1) miscellaneous out-of-pocket expenses; (2) no charge replacements to dealers; (3) additional credit to dealers; and (4) evidence concerning expenses for field trips made by plaintiff in an effort to repair the damaged furniture. The records involved in categories 1-3 above were compiled by the plaintiff's billing adjustments group, which handled product-related problems. Plaintiff's manager of general financial accounting services, Wayne Postma, was responsible for this billing adjustments group. Records involved in category 4 were

compiled by the office of plaintiff's division controller for its Fletcher, North Carolina plant. In each case the records were made in the usual course of plaintiff's business and were made contemporaneously with the occurrences of situations involving the damaged furniture. The records were compiled by persons authorized to make them—either the plaintiff's billing adjustments group or the office of plaintiff's division controller for the Fletcher, North Carolina plant. In each case the evidence was identified through the testimony of a witness familiar with the business entries and the system under which they were made and who could have also authenticated the records. As such, we find that the records at issue in the present case are the kind of records intended to be covered by the business records exception to the hearsay rule. The trial court's ruling that this evidence was inadmissible was in error.

[3] Plaintiff also argues that the trial court erred in failing to award plaintiff prejudgment interest calculated from the date of breach on the judgment award of $250,000. Though N.C. Gen. Stat. § 24-5 clearly provides for interest to be calculated from the date of breach in breach of contract actions, the present case is not governed by the 1985 amendment of G.S. § 24-5 providing for such interest. Chapter 214 of the 1985 Session Laws of North Carolina, which rewrote G.S. § 24-5 to provide for interest from the date of breach states at Section 2: "This act shall become effective October 1, 1985. This act shall not affect pending litigation and shall not affect the law as it existed before the enactment of Chapter 327 of the 1981 Session Laws." The present action was begun on 29 February 1985. Judgment was entered on 23 December 1987. Therefore, the present case was pending at the time the act became effective and is not governed by the current provisions of G.S. § 24-5.

In breach of contract cases decided prior to the 1985 amendment of G.S. § 24-5 interest was allowed from the date of breach under certain circumstances. "The rule in such cases is that when recovery is had for breach of contract and the amount of the recovery is ascertained from the contract itself or *from other relevant evidence*, interest should be added to the recovery from the date of breach." *Wilkes Computer Services v. Aetna Casualty & Surety Co.*, 59 N.C. App. 26, 295 S.E. 2d 776, *disc. rev. denied*, 307 N.C. 473, 299 S.E. 2d 229 (1983). (Emphasis added.) In the present case the plaintiff has been determined by the jury to be entitled to recover damages from the defendant for breach of con-

tract. The amount of the damages to which the plaintiff is entitled can be determined by examining evidence relevant to the contract such as the business records or documentation concerning the damaged furniture. Therefore, we hold that plaintiff is entitled to prejudgment interest calculated from the date of breach.

As to defendant's appeal, no error.

As to plaintiff's appeal, the case must be remanded for a new trial as to damages consistent with this opinion, and for an appropriate award of interest.

No error in part; new trial and remanded in part.

Judges BECTON and JOHNSON concur.

LOUIS E. SIGNORELLI, PETITIONER v. TOWN OF HIGHLANDS, N.C.; BOARD OF ADJUSTMENT OF THE TOWN OF HIGHLANDS, N.C.; RANDOLPH P. SHAFFNER, CHAIRMAN OF BOARD OF ADJUSTMENT OF THE TOWN OF HIGHLANDS, N.C., IN HIS OFFICIAL CAPACITY; AND RICHARD P. BETZ, BUILDING INSPECTOR AND ZONING ADMINISTRATOR OF HIGHLANDS, IN HIS OFFICIAL CAPACITY, RESPONDENTS

IN RE: APPLICATION OF LOUIS E. SIGNORELLI

No. 8830SC528

(Filed 16 May 1989)

Municipal Corporations § 30.6— special use permit to operate game room—denial proper

The Board of Adjustment of respondent town did not err in denying petitioner's application for a special use permit to operate a game room in a leased building on Main Street on the ground that the plans were so indefinite that public health and safety questions could not properly be addressed by the Board.

APPEAL by petitioner from Order and Judgment of *Judge J. Marlene Hyatt* entered the 4th day of January 1988 in MACON County Superior Court. Heard in the Court of Appeals 7 December 1988.

Haire & Bridgers, P.A., by Charles G. King, for petitioner appellant.

Karl, McConnaughhay, Roland & Maida, P.A., by Roderic G. Magie, for respondent appellees.

COZORT, Judge.

Petitioner is appealing the denial of a special use permit to establish a game room within the same building as a donut shop he operates on Main Street in the Town of Highlands. The Board of Adjustment denied the application based on, among other considerations, a finding and conclusion that petitioner's plan as submitted was so lacking in detail that protection of the public welfare could not be assured. Petitioner appealed the Board's decision by writ of *certiorari* to the superior court. After a hearing, the trial court dismissed the writ, denying petitioner's request for relief from the Board's decision. Petitioner appeals. We affirm.

Louis E. Signorelli (hereinafter referred to as "petitioner") owns a leasehold interest in a building on Main Street in Highlands where he operates a donut shop. On 28 July 1987, petitioner submitted a special use permit application to the Board of Adjustment, Town of Highlands (hereinafter referred to as "the Board"), for a "donut shop and game room." Petitioner desired to install video and/or pinball games in an unoccupied part of the leased building in an area of approximately 940 square feet. The game area was separated from the donut bakery shop by a wall.

The building was in B-1A Inner-Central Business District and was certified by the Building Inspector to be in compliance with the building code. Petitioner had received from the Town of Highlands a business license to operate pinball machines. Highland's zoning ordinance required that places of entertainment were allowed in B-1A and B-1 districts only, and a special use permit had to be obtained for places of entertainment. On 11 August 1987 the Zoning Board of Adjustment held a hearing to consider petitioner's application for a special use permit.

Petitioner's evidence consisted of his sworn testimony and a blueprint of the building. The Board also received sworn testimony for and against the application from members of the community. The Board denied petitioner's application. In denying the application, the Board made four conclusions, summarized as follows: (1)

the proposed use will materially endanger the public health or safety if located where proposed; (2) the proposed use satisfies all the required conditions and specifications set forth in Sections 12.65 through 12.83 of the Town Ordinance; (3) the proposed use will substantially injure the value of adjoining or abutting property, or in the alternative, the use is not a public necessity; and (4) the proposed use will not be in harmony with the area in which it is located and in general conformity with the plan of development of the Town and its environs.

Petitioner appealed the Board's decision by writ of *certiorari* to the Macon County Superior Court. After a hearing the trial judge dismissed the writ and denied the relief sought by petitioner. In its order the trial court concluded, after making findings of fact, (1) that there had been no unconstitutional delegation of zoning power from Highlands to the Board, (2) that the Board had not denied petitioner's rights to due process or equal protection of the law, (3) that the Board had not violated petitioner's first amendment guarantee of freedom of association, and (4) that petitioner failed to meet the burden of producing evidence and the burden of persuasion to allow the Board to find in petitioner's favor. Petitioner is appealing that order.

On appeal the petitioner raises five issues: (1) that the trial court erred in considering matters in the record not considered by the Board of Adjustment; (2) that the denial of the permit was an unconstitutional delegation of the zoning power of the Board; (3) that petitioner was denied his rights to equal protection under the law because another business in the same zone was allowed to operate some games; (4) that petitioner was denied due process of law by the Board's failure to follow its own rules; and (5) the trial court erred in finding that petitioner had not met his burden of persuasion. We find that the last issue raised by the petitioner, relating to the evidentiary burden, is the controlling issue in this appeal, and we turn our attention to that issue.

Petitioner contends that the trial court erred in finding that he did not meet his burden of persuasion. Petitioner argues that he met his evidentiary burdens, as reflected in the Board's conclusion that he had complied with the building code established for the Town's B-1A District. He claims that such compliance established a *prima facie* case which entitled him to the special use permit. While we agree with petitioner's contention that he made

out a *prima facie* case for a permit, we find that the Board was correct in denying a permit based on the plan as submitted. A review of appellate decisions in this State demonstrates that the evidentiary burden in special use permit proceedings can shift from the applicant to those who oppose the application.

> 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. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Humble Oil & Refining Co. v. Bd. of Aldermen of Town of Chapel Hill, 284 N.C. 458, 468, 202 S.E. 2d 129, 136 (1974). In *Woodhouse v. Bd. of Com'rs of Town of Nags Head*, 299 N.C. 211, 217, 261 S.E. 2d 882, 887 (1980), the court held that "an applicant has the initial burden of showing compliance with standards and conditions required by the ordinance for the issuance of a conditional use permit." Further,

> To hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit. An applicant "need not negate every possible objection to the proposed use." (Citation omitted.) Furthermore, "once an applicant . . . shows that the proposed use is permitted under the ordinance and presents testimony and evidence which shows that the application meets the requirements for a special exception, the burden of establishing that such use would violate the health, safety and welfare of the community falls upon those who oppose the issuance of a special exception." *West Whiteland Township v. Exton Materials, Inc.*, 11 Pa. Cmwlth. 474, 479, 314 A. 2d 43, 46 (1974); *Appeal of College of Delaware County*, 435 Pa. 264, 254 A. 2d 641 (1969).

Id. at 219, 261 S.E. 2d at 887-88. Commentators on the subject have suggested the following approach, which we find to have value:

> [A]pplicants for special use permits *should* be required to bear the burden of producing evidence and the burden of persuasion with respect to all ordinance requirements and conditions that

> are specific enough so that the applicant can reasonably be expected to understand what evidence must be presented to establish a prima facie case. For example, if the ordinance requires that each development have adequate sewage treatment facilities, an applicant will know how to demonstrate compliance with this requirement. On the other hand, if the ordinance provides that special use permits are to be issued only if the Board finds a proposed project to be "consistent with the public health and safety," an applicant has no way to anticipate and submit proof to overcome every conceivable objection to the project that might fall under this broad language. Therefore, an applicant should not be required to shoulder the burden of proof with regard to such general standards.

B. Brough and P. Green, Jr., The Zoning Board of Adjustment, at 83-84 (2d ed. Institute of Government, The University of North Carolina at Chapel Hill, 1984) (emphasis in original) (footnote omitted).

Applying those principles to the issue presented by this case, we find the first question to be determined is whether petitioner produced sufficient evidence of compliance with specific zoning conditions and building codes. If so, the second determination is whether the Board met its burden of showing that the proposed use would materially endanger the public health and safety if located where proposed and developed according to the plan as submitted.

The Board found and concluded from uncontroverted evidence that Petitioner complied with building code requirements and the setback, maximum height, vision clearance and easement requirements. Petitioner has, therefore, met his initial burden of establishing a *prima facie* case for issuing the permit, as to those specific requirements and conditions. Petitioner contends that, having met this burden, he is entitled to the permit. We disagree. In our examination of the record, we find that the Board properly determined, in the second part of the analysis, that there was evidence that the plans as submitted were not specific enough for the Board to properly decide that the proposed use will not materially endanger the public health or safety.

In support of that conclusion, the Board found:

> Although water, electric, and sewer connections are already in place in an existent building that would not be altered on the exterior and that meets building code requirements

> for remodeling on the interior, *no set of plans or specifics were submitted regarding hours of operation, number of machines and tables, or methods of supervision so that protection of the public welfare against traffic and noise difficulties was not assured.* The parking and loading requirements have been waived for the B1-A [*sic*] District, but the potential increase in traffic on Main Street during commercial hours is a matter affecting the welfare of the community. Fire Department accessibility is assured by the proposal's proximity to the Fire Department immediately behind the building. (Emphasis supplied.)

The evidence before the Board supports this crucial finding. In addition to petitioner's application listing the proposed use as a "donut shop and game room," the Board considered an architectural blueprint of the building. The blueprint shows a building of approximately 1,660 square feet, less than half of which contains a donut shop. Eating, service, and bakery areas are drawn in great detail. In contrast the blueprint reveals a blank, 940-square-foot rectangle entitled "Rental Area" making up the remainder of the building. There is no indication from the drawing what kind of layout is planned or how many machines petitioner intends to place in that area.

Testimony from petitioner likewise failed to demonstrate in any reasonable measure of specificity what petitioner planned for the game room area of the building. At the hearing petitioner was asked by a Board member what kind of games he desired to install. Petitioner replied, "Whatever is permitted, whatever the law is, I will comply with it." When asked what changes he would make in the building's interior, petitioner replied, "I will clean it up and make it look nice." And when asked whether he had thought about soundproofing, petitioner replied that he had not thought about soundproofing but would soundproof if it was necessary.

Despite petitioner's apparent good faith desire to accede to the Board's wishes, we decline to require the Board to generate a plan to which petitioner can tailor his needs. The Board has the duty to give applicants impartial review. Impartiality would be destroyed if the Board created the plan for petitioner to follow. *In the Appeal of Hi-Line Boat Club*, 403 Pa. 50, 53, 169 A. 2d 47, 48 (1961), the Pennsylvania Supreme Court held that, since

the zoning ordinance required a plan drawn to scale as a prerequisite for granting a special exception, "[i]t was within the Board's discretion to reject anything less formal."

The Board has a duty to safeguard the health and safety of the entire community. A plan lacking in essential details and specifics potentially threatens health and safety no less than a detailed plan which is antithetical to the public interest. If the Board approves a special use in ignorance of the specifics, health and safety could be threatened when the plan later materializes. A finding that setback requirements and building codes have been met does not provide a sufficient safeguard.

We hold that the Board did not err in denying petitioner's application on the ground that the plans were so indefinite that public health and safety questions could not be properly addressed by the Board. As the Board correctly pointed out in its brief before this Court, petitioner is not barred from resubmitting an application with more details. If he does, the other alleged errors complained of by petitioner may not reoccur upon reconsideration and need not be addressed here.

The decision of the trial court affirming the Board's denial of petitioner's application is

Affirmed.

Judges PHILLIPS and GREENE concur.

IN THE MATTER OF: THE APPEAL OF WESTINGHOUSE ELECTRIC CORPORATION FROM THE APPRAISAL OF CERTAIN OF ITS REAL PROPERTY BY THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1983

No. 8810PTC720

(Filed 16 May 1989)

1. Taxation § 25.7— ad valorem taxes—valuation of turbine facility

Competent, material and substantial evidence supported the Property Tax Commission's conclusion that a county's calculation of the reproduction cost new of taxpayer's facility for manufacturing and refurbishing turbines was essentially

correct and was determined through the use of all three traditional approaches to valuation of improvements to realty for ad valorem tax purposes. Even if the Commission improperly used an expert witness's reproduction cost new rather than the county's, the method used did not increase the taxpayer's assessment and was not prejudicial to the taxpayer where the county's reproduction cost figure was slightly higher than that of the witness.

2. **Taxation § 25.7— ad valorem taxes—valuation of improvements—residual depreciation method**

In valuing a taxpayer's improvements to realty for ad valorem tax purposes, the Property Tax Commission did not err in using the residual method in calculating depreciation by which the Commission first subtracted the 20% physical depreciation from reproduction cost new and then subtracted the 40% depreciation for functional and economic obsolescence from the resulting subtotal rather than subtracting both types of depreciation from reproduction cost new.

APPEAL by Westinghouse Electric Corporation from order of the North Carolina Property Tax Commission. Order entered 12 January 1988 in WAKE County. Heard in the Court of Appeals 23 February 1989.

Weinstein & Sturges, P.A., by John J. Doyle, Jr. and L. Holmes Eleazer, Jr., for appellant Westinghouse Electric Corporation.

Ruff, Bond, Cobb, Wade & McNair, by Hamlin L. Wade, for appellee Mecklenburg County.

JOHNSON, Judge.

This appeal concerns the tax valuation of property owned by Westinghouse Electric Corporation (Taxpayer) in Mecklenburg County. The property at issue was originally built in 1968 by Taxpayer for manufacturing and refurbishing nuclear turbines. Since the decline in the demand for nuclear turbines the facility has shifted to manufacturing and refurbishing fossil fueled turbines, although work is still done on nuclear components.

In 1983, Taxpayer's plant was appraised for ad valorem tax purposes at $41,218,760 by Mecklenburg County (County). Taxpayer appealed this valuation to the Mecklenburg County Board of Equaliza-

tion and Review (Board) which reduced the appraisal to $35,000,000. Thereafter, Taxpayer appealed the Board's decision to the North Carolina Property Tax Commission (Commission). After several days of hearings on the matter, the Commission rendered its final decision on 12 January 1988 declaring the value of Taxpayer's property to be $29,511,160. On 11 February, Taxpayer filed notice of appeal to this Court. On 5 July, the Commission modified its final order as to certain terminology used in the final order. By order of this Court, on 24 August, the modification was added to the record on appeal.

By this appeal, Westinghouse contends that the Commission erred (1) in utilizing the cost approach as the basis for its valuation of Taxpayer's property, and (2) in computing the total depreciated value of the improvements to Taxpayer's property.

Before turning to the merits of Taxpayer's first Assignment of Error, we take note of the substantive law governing the appraisal of property in North Carolina as set forth in G.S. sec. 105-271 et seq., known as the Machinery Act. G.S. sec. 105-283 requires that all property be appraised at its "true value in money," or market value as far as practicable. *In re Appeal of Bosley*, 29 N.C. App. 468, 224 S.E. 2d 686, *disc. rev. denied*, 290 N.C. 551, 226 S.E. 2d 509 (1976). G.S. sec. 105-284 (effective until 1 January 1987) mandates that taxes shall be levied uniformly on assessments. Specific factors which must be considered in appraising the value of both land and improvements thereon are stated in G.S. sec. 105-317(a) (effective until 1 January 1987). Regarding improvements to real property, G.S. sec. 105-317(a)(2) states that it is the duty of the appraiser:

> In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and *any other factors that may affect its value.* (Emphasis added.)

The weight to be accorded relevant evidence is a matter for the factfinder, which is the Commission. *In re Appeal of Greensboro Office Partnership*, 72 N.C. App. 635, 325 S.E. 2d 24, *disc. rev. denied*, 313 N.C. 601, 330 S.E. 2d 610 (1985).

Our standard on review is to determine whether in light of the "whole record" on appeal, the Commission's decision is supported

by competent, material and substantial evidence. G.S. sec. 105-345.2(b) and (c). Further, there is a presumption that ad valorem tax assessments are correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975) (citations omitted). In order to rebut this presumption, it is not sufficient for the taxpayer to prove that the method used by the tax assessor was incorrect, he must also show that the result reached is *substantially* greater than the true value in money of the property assessed. *Id.*

Essentially, Taxpayer contends that the Commission failed, in its 1983 assessment, to give proper consideration to all methods and factors impacting upon the true value or "market value" of the property as required by G.S. sec. 105-283 (1985) and -317(a) (effective until 1 January 1987).

At the hearing of this matter, the Commission heard testimony from six experts in the field of property assessment, three testifying on behalf of the Taxpayer and three for the County. They represented different viewpoints as to which methodology should be employed in appraising Taxpayer's property. Although the testimony of Mr. McShane, Taxpayer's in-house tax manager, has apparently been removed from the transcript of the hearing, we have gleaned his approach through review of his written appraisal, contained in the County's exhibits on appeal.

Two of the County's experts, both also employees of the County, testified in detail about the computer assisted mass appraisal system utilized by the County in appraising Taxpayer's property. Mr. Lane Helms, Real Estate Appraiser Supervisor for the County, explained that there are three methods used in revaluation of a property: market value or comparable sales, cost, and income. The market approach is heavily relied upon in determining land values. For improvements to real property the County uses a complex approach involving all three methods. Sales data concerning various types of improvements are collected from different sources over a period of about two years. This information is then used to create a system of "points" or values for the various structural components of each type of improvement. This system is utilized in various computer programs which incorporate sales, income, and cost data to arrive at a base value for a specific property. Finally, adjustment is made for depreciation of the property.

Taxpayer's experts each used somewhat varying appraisal techniques to arrive at their final estimates of value for the prop-

erty. However, they all reached similar values, ranging from $20,000,000 to $21,150,000.

The County presented one other expert in the field of real estate appraisal, a Mr. Flanagan. He employed a cost approach based on objective data supplied by the Taxpayer in arriving at his final valuation of $32,760,000. Mr. Flanagan found the market approach unworkable because, in his professional opinion, no bona fide comparable sales existed on 1 January 1983, the date as of which the witness was to determine the property's fair market value.

In rendering its final decision in this matter, the Commission concluded that while the County properly considered all three of the traditional approaches to valuation, that it failed to "give adequate consideration to the diminished value of the property resulting from external economic conditions, i.e., the decline in the market for turbines and in particular, the demand for nuclear turbines."

The Commission allowed the County's appraisal of 20% physical depreciation to stand. However, based on testimony of two of Taxpayer's experts concerning comparable sales and offerings, the Commission increased the adjustment for functional and economic obsolescence from the County's 22% to 40%. These changes resulted in the following valuation of Taxpayer's property:

Reproduction Cost New (per Flanagan Report)	50,767,000
Less: Physical Depreciation (20%)	(10,153,400)
subtotal	40,613,600
Less: functional and economic obsolescence (40%)	(16,245,440)
Total Depreciated Value of Improvements (as of 1 January 1983)	24,368,160
Land Value (per County Exhibit 16)	5,143,000
TOTAL	$29,511,160

[1] Taxpayer urges that this calculation is in error since it is premised on a reproduction cost new of $50,767,000 supplied by Mr. Flanagan. The argument is that since Mr. Flanagan arrived at this figure by using solely the cost method of appraisal and rejected the market approach, that the figure fails to meet the requirement of G.S. sec. 105-317(a) (effective until 1 January 1987)

that all factors bearing on value be considered. This argument is without merit.

The Commission concluded as a matter of law that the reproduction cost new of Taxpayer's property as reached by the County was essentially correct and that it was determined through the use of all three of the traditional approaches to valuation. From our review of the whole record on appeal, we find that this conclusion is supported by competent, material and substantial evidence. However, Taxpayer points out that Mr. Flanagan's figure, rather than the County's, was used by the Commission in its final order. While this is a correct statement, it is not grounds for altering the Commission's appraisal. As stated above, to rebut the presumption that an ad valorem tax assessment is correct, a taxpayer must show not only that the means used was wrong, but also that it resulted in an assessment *substantially* greater than the true value in money of the property. *In re Appeal of Amp, Inc., supra.* Applying this rule to the instant case, we find the Taxpayer suffered no prejudice. Even if the Commission should have adopted the County's reproduction cost new, rather than Mr. Flanagan's figure, which we do not hold, the method used did not increase Taxpayer's assessment. *In re Appeal of Greensboro Office Partnership, supra.* In fact, since the County's reproduction cost new figure is slightly higher than Mr. Flanagan's figure, the Taxpayer actually benefited by the Commission's adopting the latter. The Taxpayer has failed to show that the valuation of its property is substantially greater than its true value. This assignment of error is overruled.

[2] By his second Assignment of Error, Taxpayer contends that the Commission erred in computing the depreciated value of the improvements to its property. Specifically, Taxpayer objects to the Commission's use of the residual method in calculating depreciation. Using this method, the Commission first subtracted the 20% physical depreciation from reproduction cost new. From the resulting subtotal, the Commission then subtracted 40% depreciation for functional and economic obsolescence.

Taxpayer complains that both types of depreciation should have been subtracted from the reproduction cost new figure, and that use of the residual method converted his 40% depreciation for functional and economic obsolescence into an effective rate of 32%. We find no error.

Neither party to this appeal has cited us to any case law bearing on the proper method of calculating multiple depreciation. Our own research also reveals none. Taxpayer supports its contention by pointing to a statement from a manual on real estate appraisal: "In the cost approach, depreciation from all causes should be subtracted from current cost new." American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* (8th ed. 1983). This treatise is, of course, not binding authority on this Court. Further, while the quoted statement is correct as a general proposition, it does not indicate what method should be used in computation.

We believe that the Commission was free to choose a method of calculating depreciation based on its assessment of expert testimony. It is true that the Commission increased depreciation for economic and functional obsolescence based on testimony of two of Taxpayer's experts who did not use the residual method for calculation. In our view, this fact did not bind the Commission to employ these experts' method of calculation, as it was free to accept as much of their testimony as it found convincing. Two other experts, Mr. Flanagan, and Taxpayer's own expert Mr. McShane, in his written appraisal, recommended that the residual method be employed. In the absence of case law to the contrary, we cannot say that the Commission erred in adopting the position of certain experts over that of others.

For all the foregoing reasons, the decision of the North Carolina Tax Commission is

Affirmed.

Judges ARNOLD and PHILLIPS concur.

JOSEPH BLAIR SLAUGHTER, PLAINTIFF v. WILLIAM M. SLAUGHTER AND LEROY S. VEASEY, DEFENDANTS

No. 8810SC704

(Filed 16 May 1989)

Joint Ventures § 1— pond dredged by neighbors—joint venture—negligence of backhoe operator imputed to neighbor

In an action to recover for injuries sustained by plaintiff when he was struck by a backhoe operated by one defendant, the trial court erred in allowing the other defendant's motion for judgment n.o.v. on the ground that defendants were not engaged in a joint enterprise as a matter of law and therefore the negligence of defendant backhoe operator could not be imputed to defendant landowner, since the evidence tended to show that defendants, as neighbors and brothers-in-law, agreed to pool their resources, one supplying the fuel and the other operating a backhoe, in order to accomplish the mutually beneficial task of dredging a pond located between their houses.

APPEAL by plaintiff from Judgment of *Judge Donald W. Stephens* entered 22 March 1988 in WAKE County Superior Court. Heard in the Court of Appeals 26 January 1989.

Burns, Day & Presnell, P.A., by Lacy M. Presnell, III, and Daniel C. Higgins, for plaintiff appellant.

Broughton, Wilkins & Webb, P.A., by Charles P. Wilkins, for defendant appellee Leroy S. Veasey.

COZORT, Judge.

Plaintiff appeals from an order of the trial court allowing defendant Veasey's motion for judgment notwithstanding the verdict on the ground that defendants were not engaged in a joint enterprise as a matter of law and therefore the negligence of defendant Slaughter could not be imputed to defendant Veasey. We reverse.

Defendants Slaughter and Veasey are brothers-in-law. Plaintiff Slaughter is defendant Slaughter's son and defendant Veasey's nephew. At all times pertinent to this action, defendants owned adjoining tracts of land on which there was a two-acre pond located approximately midway between their residences and situated on

Veasey's land. Veasey owned approximately 135 acres of farmland and prior to 1978 had used the pond for irrigation purposes. Since 1978 he had leased an allotment for tobacco and had not used the pond for crop irrigation. However, both the Veaseys and the Slaughters used the pond to irrigate their family gardens and yards, and both families used the pond for sport fishing. By 1985, the tobacco allotment lease was soon to expire, and Veasey planned to resume using the pond to irrigate his farm.

Sometime prior to 1985 the pond had become filled with soil due to erosion from surrounding farms, and was too shallow for irrigation or fishing purposes and had become a breeding ground for mosquitoes. On a Sunday afternoon in 1984 or 1985, as defendants were walking over their property and talking, Veasey mentioned to his brother-in-law that he intended to have the pond dug out or dredged as soon as he could acquire the funds. Defendant Slaughter then suggested that he borrow the hydraulic excavator, a type of backhoe, that he drove when he worked for his nephew, who owned a lumber company. Defendant Slaughter told Veasey that he could get the machine free of charge and work in the evenings after work and in his spare time. Veasey agreed to supply the fuel and stated that he was willing to pay for the dredging, but no specific amount was mentioned by either defendant. Veasey testified at trial that he did not expect his brother-in-law to do the work for free and that he would have been glad to pay whatever he charged. Defendant Slaughter testified that Veasey did offer to compensate him but that the discussion about money was a "casual mentioning," and that he had responded, "If it took too long, then we will talk about it." He also testified to having said that "we might have a few small minor repairs. If we do, we will talk about it and if it's too much, we will split it . . . ."

Several months later, Slaughter had the backhoe transported to Veasey's property and began dredging the pond. Within a day or two of beginning the dredging, Veasey rode on the backhoe with Slaughter for thirty or forty minutes and Slaughter showed him how he was trying to fill the muskrat holes that were causing problems on the dam. At that time Veasey said that he thought that digging in the area of the dam "might undermine the foundation," so Slaughter moved the machine and worked around the pond away from the dam. Veasey gave no further directions regarding the dredging.

On 1 August 1985, after defendant Slaughter had been dredging the pond for a couple of months, plaintiff went down to the pond where his father was working and warned him of an approaching storm. Defendant Veasey was not present. After his father motioned for him to come up on the machine, plaintiff rode on the backhoe for a few minutes, then debarked and began walking back to the Slaughter house. After checking to see if his son was out of range, defendant Slaughter swung the boom of the machine around to leave the pond. At that time the machine lunged unexpectedly and the boom struck plaintiff, causing serious injury to his foot. As a result of that injury, plaintiff's left leg was amputated below the knee.

Defendant Slaughter performed no more work on the pond after the accident. He never asked for a bill nor received any compensation for his services.

After receiving testimony from the parties, the trial court submitted the following issues to the jury, which were answered as indicated:

> 1. Were Leroy S. Veasey and William Maynard Slaughter engaged in a joint enterprise on August 1, 1985 whereby Mr. Veasey was responsible for any negligent acts of Mr. Slaughter committed in the furtherance of such joint enterprise?
>
> Answer: Yes.
>
> 2. Was Joseph Blair Slaughter injured by the negligence of William M. Slaughter?
>
> Answer: Yes.
>
> 3. Did Joseph Blair Slaughter cause or contribute to his injury by his own negligence?
>
> Answer: No.
>
> 4. What amount of damages, if any, is Joseph Blair Slaughter entitled to recover?
>
> Answer: $150,000.00.

Upon motion of defendant Veasey for judgment notwithstanding the verdict, the trial court allowed the motion, set aside the jury verdict on the first issue of joint enterprise, and dismissed the action as to defendant Veasey. Plaintiff appeals. We reverse.

In ruling upon a motion for judgment notwithstanding the verdict, the trial court may grant the motion only if the evidence is insufficient to justify a verdict for the plaintiff as a matter of law. *Murrow v. Daniels*, 321 N.C. 494, 501-02, 364 S.E. 2d 392, 397 (1988). Like the trial court, on appeal we must consider the evidence in the light most favorable to the non-movant, taking all evidence supporting the non-movant's claims as true, and resolving all inconsistencies and conflicts in favor of the non-moving party. *Id.*

A joint enterprise is an alliance between two or more people in pursuit of a common purpose such that negligence of one participant may be imputed to another. *McAdams v. Blue*, 3 N.C. App. 169, 173, 164 S.E. 2d 490, 493 (1968). Parties may be said to be engaged in a joint enterprise when there is a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movement of each other with respect thereto. *James v. Atlantic & E. Carolina R.R. Co.*, 233 N.C. 591, 598, 65 S.E. 2d 214, 219 (1951). We believe the evidence supports the jury's conclusion that the parties were engaged in a joint enterprise. We therefore reverse the order of the trial court allowing defendant Veasey's motion for judgment notwithstanding the verdict.

Ample evidence supports a finding of community of interest in the purpose of the undertaking. Both of the defendants wanted to resume using the pond for fishing and irrigation. The fact that the mosquitoes were more troublesome to the Slaughter family or that Veasey's primary motivation was to supply irrigation for his farm is not inconsistent with a finding that the parties were motivated by a common purpose. Taken in the light most favorable to plaintiff, the evidence shows that defendant Slaughter was not primarily motivated by any compensation that he might receive for his services.

Veasey contends, however, that even if there were a community of interest in the purpose of the undertaking, defendants did not have an equal right to govern the movements and conduct of each other with respect to that undertaking. He argues that the dredging of the pond required no action on his part, that he did not know how to operate the backhoe, and that, as the owner of the pond, he could have halted the enterprise at any time and ordered his brother-in-law to discontinue the dredging. We are not persuaded by these arguments.

The fact that the undertaking at hand could be accomplished only through use of the backhoe, which only Slaughter had the expertise and ability to operate, does not absolve Veasey of responsibility for his agent's negligent act committed while carrying out their enterprise. The control required for imputing negligence under a joint enterprise theory is not actual physical control, but the *legal right* to control the conduct of the other with respect to the prosecution of the common purpose. *James*, 233 N.C. at 598, 65 S.E. 2d at 219. Furthermore, that Veasey could have called off the enterprise does not affect his legal responsibility while that enterprise was ongoing.

Taken in the light most favorable to plaintiff, the evidence shows that defendants, as neighbors and brothers-in-law, agreed to pool their resources—one supplying the fuel and the other operating the backhoe—in order to accomplish the mutually beneficial task of dredging the pond. Therefore, we reverse the order of the trial court granting judgment notwithstanding the verdict to defendant Veasey and remand for entry of judgment in accordance with the jury verdict.

Reversed and remanded.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. JAMES ARNOLD BAILEY

No. 8819SC1034

(Filed 16 May 1989)

1. Criminal Law § 121— driving while impaired—entrapment—no instruction required

The trial court did not err by denying defendant's request that the jury be charged on the defense of entrapment in a prosecution for driving while impaired where defendant approached an officer at the Charlotte Motor Speedway seeking assistance in locating his truck; the officer testified that defendant had an odor of an intoxicant about him and that he formed the opinion that defendant was under the influence of some intoxicant as defendant stood talking with him; and

defendant's testimony denied that the officer told him that he was intoxicated and that he should wait a while before driving. There was no showing of any persuasion or fraud on the part of the officer, nor a showing that the criminal design originated with the officer.

2. Automobiles and Other Vehicles § 130— driving while impaired —refusal to consider limited driving privilege—abuse of discretion

The trial court abused its discretion in a prosecution for driving while impaired by refusing to allow defendant to show good cause for the authorization of a limited driving privilege. The court's abuse is additionally borne out by the trial judge's pretrial statement to defendant's attorney indicating that "under no circumstances [does he] ever grant limited driving privilege[s]."

APPEAL by defendant from *Davis (James C.), Judge*. Judgment entered 4 May 1988 in Superior Court, CABARRUS County. Heard in the Court of Appeals 11 April 1989.

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

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for defendant-appellant.

ORR, Judge.

The State's evidence tended to show that on 20 May 1987 Officer Childress and several other troopers were at the Charlotte Motor Speedway directing traffic. At about 8:50 p.m., defendant approached Officer Childress who was standing next to his patrol car and asked for help in locating his truck. Defendant told the officer that he had been trying to find his truck for "several hours." Defendant's motions were slow, his speech was slurred, and the officer smelled alcohol about defendant's person.

After defendant explained his situation, Officer Childress pointed out the general location of where defendant's truck was thought to be. Defendant was told that he was intoxicated and that he should wait awhile. Defendant then visually located his truck and walked away.

The officer observed defendant as he walked off and he noticed that defendant stumbled and staggered. Officer Childress then saw defendant get into his truck and the interior light come on momentarily. When the truck started to move, the officer got into his car and drove toward defendant. Defendant thereafter exited the parking lot and drove his truck about 500 feet on Highway 29. Officer Childress pulled defendant over and arrested him for driving while impaired. He was taken into custody and given a breathalyzer test which registered .14. Defendant was convicted of driving while impaired before the Honorable F. M. Montgomery in Cabarrus County District Court and a Level Five punishment was imposed.

Defendant appealed that judgment to the Superior Court of Cabarrus County. He was convicted before a jury and a Level Five punishment was imposed. Defendant's request for a limited driving privilege was denied. Defendant appeals to this Court.

I.

[1] We will first address the issue of whether the trial court erred in denying defendant's request that the jury be charged on the defense of entrapment. Defendant argues that he offered evidence sufficient to raise the question of entrapment for the jury.

A defendant is entitled to have the judge charge the jury on all of the substantive features of the case which the evidence supports. *See State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982). However,

> [b]efore the trial court can submit the defense of entrapment to the jury there must be some credible evidence tending to support defendant's contention . . . . The defense of entrapment consists of two essential elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers . . . to induce a defendant to commit a crime; and (2) that the criminal design originated in the minds of the law enforcement officers rather than the innocent defendant, such that the crime was the product of the creative activity of the law enforcement officers.

State v. Martin, 77 N.C. App. 61, 66, 334 S.E. 2d 459, 462 (1985), *cert. denied*, 317 N.C. 711, 347 S.E. 2d 47 (1986). (Citation omitted.)

The facts here show that defendant approached Officer Childress seeking assistance in locating his truck. Officer Childress testified

that defendant had an odor of an intoxicant about his person, and that as defendant stood talking with him, he immediately formed the opinion that defendant was under the influence of some intoxicant. Defendant's testimony denied that the officer told him that he was intoxicated and that he better wait awhile. He contends that he would not have driven had he been instructed not to do so.

The foregoing evidence does not support a finding that defendant was entitled to have the instruction which he requested. There was no showing of any persuasion or fraud on the part of the officer, nor was there a showing that the criminal design originated with Officer Childress. Defendant has failed to meet his burden of production and persuasion as to this issue. *See State v. Hageman*, 307 N.C. 1, 28, 296 S.E. 2d 433, 448 (1982). Even assuming *arguendo* that Officer Childress did not tell defendant that he was intoxicated, the officer's conduct of allowing defendant to walk away and get into his truck did not induce defendant to commit a crime. The officer's testimony shows that defendant had not broken any laws until he drove his truck onto Highway 29 while intoxicated. Therefore, the officer had no cause to detain defendant until that time. This assignment of error is overruled.

II.

[2] The next issue which we shall address is whether the trial court abused its discretion in denying defendant's request for a limited driving privilege. Defendant argues that the court abused its discretion by not allowing him to show that he met the statutory requirements for receiving a limited driving privilege. The State contends that defendant was informed before trial that under no circumstances would the court grant defendant a limited driving privilege if he was convicted as charged. According to the State, defendant could have remanded the case to district court and accepted that judgment which would have included a limited driving privilege, or he could have sought continuances until his case came before a judge who would grant him a limited driving privilege.

The statute which governs limited driving privileges states that "[a] limited driving privilege is a judgment issued in the discretion of a court for good cause shown . . . ." G.S. 20-179.3(a) (1983). Section (b) establishes that a person who has been convicted of driving while impaired under G.S. 20-138.1 is eligible for a limited driving privilege if he shows:

(1) At the time of the offense he held a valid driver's license;

(2) At the time of the offense he had not within the preceding 10 years been convicted of an offense involving impaired driving;

(3) Punishment Level Three, Four, or Five was imposed for the offense of impaired driving; and

(4) Subsequent to the offense he has not been convicted of, or had an unresolved charge lodged against him for, [sic] an offense involving impaired driving.

Defendant contends that he could have met the requirements of the statute if he had been allowed to demonstrate good cause. His official record of convictions for violations of motor vehicle laws and his driver's license record show that he had no prior convictions for violations of this type. The court found no aggravating or grossly aggravating factors. Having found mitigating factors, punishment was imposed at level five. There was no showing of any subsequent violations of this nature. Consequently, the court's refusal to allow defendant to show good cause for the authorization of a limited driving privilege, in the absence of more, must be seen as an abuse of discretion. "A discretionary order of the trial court is conclusive on appeal in the absence of abuse or arbitrariness, or some imputed error of law or legal inference. But the exercise of discretion implies conscientious judgment arrived at in accordance with established rules, and not arbitrary action." 1 Strong's N.C. Index 3d *Appeal and Error* section 54 (1976). (Citations omitted.) In this case, the court's discretion should have been directed at the question of whether defendant demonstrated "good cause" and not at whether the court should allow him the opportunity to do so. The statute lists six reasons which might be used to show good cause. Defendant was wrongfully denied the opportunity to offer evidence as to this issue.

Furthermore, the court's abuse is additionally borne out in the trial judge's pretrial statement to defendant's attorney indicating that "under no circumstances [does he] ever grant limited driving privilege[s]." This statement reflects the court's unwillingness to properly exercise discretion as the statute requires. "Where the record discloses that the court refused to determine a discretionary matter in the exercise of its discretion, but determined the question as a matter of law, the ruling is reviewable . . . ." 1 Strong's N.C. Index 3d *Appeal and Error* section 54 (1976).

Based upon the foregoing, we reverse the judgment below and remand this case on the sole issue of defendant's eligibility for a limited driving privilege. We will not disturb the remaining portion of that judgment.

Reversed, remanded in part and affirmed in part.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. RODNEY LOVELL

No. 8810SC826

(Filed 16 May 1989)

1. **Assault and Battery § 15.7— stabbing of fellow inmate—insufficient evidence of self-defense**

A defendant charged with assault with a deadly weapon inflicting serious injury by stabbing a fellow prison inmate was not entitled to an instruction on self-defense because of evidence that he believed the victim had arranged to have another inmate assault defendant for $300 where (1) defendant was not free from fault in the affray in that the victim exhibited no threatening behavior toward defendant before defendant stabbed him and defendant continued to pursue the victim even though the victim ran from him, and (2) there was no showing that defendant was in apparent danger of imminent death or great bodily harm when he stabbed the victim.

2. **Criminal Law § 138.38— stabbing of inmate—mitigating factors—provocation and duress—insufficient evidence**

The trial court did not err in refusing to find strong provocation and duress as mitigating factors in sentencing defendant for assault with a deadly weapon inflicting serious injury by stabbing a fellow prison inmate where there was conflicting evidence as to whether the victim was trying to arrange an assault, and there was no manifestly credible evidence that defendant was to be the target of such an assault.

APPEAL by defendant from *Brannon, Anthony M., Judge.* Judgment entered 23 March 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 23 February 1989.

Defendant, an inmate at Central Prison in Raleigh, was convicted by a jury of assault with a deadly weapon inflicting serious injury, pursuant to G.S. sec. 14-32(b). From sentence pronounced thereon, defendant appeals.

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

Bailey & Dixon, by Alan J. Miles, for defendant-appellant.

JOHNSON, Judge.

The charge against defendant Rodney Lovell of assault with a deadly weapon inflicting serious injury arose out of an incident which occurred on 2 October 1987 in Central Prison where defendant is an inmate. Upon conviction on this charge, defendant was sentenced to five years' imprisonment, from which he appeals.

Defendant is serving a life sentence for a prior conviction for second degree murder. On the date of the assault in question he was housed in long term administrative segregation in Central Prison. There was a total of eight prisoners in defendant's block, including the victim of the assault, Daryl Cole. Defendant put on evidence which tended to show that he and Cole had unfriendly relations, and that Cole was agitated by the fact that defendant ran the black market canteen on the block. There was also evidence of racial tension on the block apparently engendered by Cole. Cole was one of six black inmates on the block, and defendant was one of two whites.

On 2 October 1987, defendant stood outside his cell talking with another inmate. Cole had just exited the showers and walked to the cell of Raymond Gaither, another black inmate. Cole said to Gaither, in a voice loud enough for defendant to hear, that when he returned to his cell he would pay Gaither $300.00 to "do a little work" for him, and that "these white boys [are] getting a little out of hand."

About ten minutes later, Cole passed by defendant downstairs in the day room where other inmates were recreating. Defendant approached Cole and asked him a question, the substance of which

is unclear. Defendant claims that Cole responded by saying, "it's all going to change real soon." At that point defendant stabbed Cole in the abdomen with a homemade steel weapon known as a shank. Cole began to run away from the defendant. He headed up some stairs pursued by defendant, and when Cole tripped, defendant stabbed him again, this time in the arm. Cole continued to run from defendant and attempted to fend him off with a trash can that he had grabbed. Defendant finally walked away from Cole. As a result of the assault, Cole sustained serious injuries to his left arm and abdomen which necessitated his undergoing surgery and being hospitalized for approximately one month.

[1] By this appeal, defendant raises two questions for our review. First, he argues that the trial court erred in denying his request that the court instruct the jury on self-defense. Defendant contends that he had no alternative choice of action in dealing with Cole in that he believed Cole had taken out a contract with Gaither to assault defendant, and the only way he could prevent the assault was to stab Cole so that he would be moved from the cell block and thereby be unable to pay Gaither the $300.00 for the assault. Defendant also alleges that Cole was an informant for prison authorities and therefore he could not seek aid from prison officials. He argues that under the circumstances he had apparent necessity to defend himself.

Defendant is entitled to an instruction on self-defense only if, viewing the evidence in the light most favorable to defendant, it appears that he was free from fault in the affray, and there was real or apparent necessity for the defendant to kill or inflict serious bodily injury in order to protect himself from death or great bodily harm. *State v. Spaulding*, 298 N.C. 149, 154, 257 S.E. 2d 391, 394-95 (1979). In applying this standard to the facts of the instant case, we find that defendant was not entitled to a jury instruction on self-defense.

In order for a defendant to be free from fault in causing the attack, he must not have provoked the affray by seeking out his victim. *Spaulding, supra; State v. Brooks*, 37 N.C. App. 206, 245 S.E. 2d 564 (1978). In the case *sub judice*, the victim, Cole, merely walked past defendant in the day room. He exhibited no threatening behavior toward defendant before defendant assaulted him. Further, defendant continued to pursue Cole even though Cole ran from him.

The facts of this case are similar to the situation in *Brooks, supra*, in which the defendant inmate, after an argument with the victim, followed the victim to the shower area and waited to confront him. In holding that defendant was not entitled to a self-defense instruction, this Court reasoned that the defendant was not without fault when he voluntarily put himself in a situation in which he knew the other inmate would likely use force. *Brooks, supra*. In the case *sub judice*, defendant also was not without fault since he aggressively and voluntarily sought out his victim.

We also do not believe that defendant was in apparent danger of imminent death or great bodily harm. First, defendant was not afraid that Cole would personally harm him. Rather, his concern was that Cole had arranged to have another inmate assault defendant for a price. However, from the evidence before us we cannot conclude that defendant was in imminent danger of bodily harm. There is no evidence that Cole had the financial ability to arrange for an assault against anyone, nor that he ever named defendant as being the target of any alleged assault. Cole's statements before the assault to Gaither constituted at most a verbal threat to defendant; however, even that is doubtful since Cole never specifically threatened defendant.

This Court has stated in *State v. Dial*, 38 N.C. App. 529, 248 S.E. 2d 366 (1978), that a mere verbal threat to use force, unaccompanied by any showing of the ability or intent to carry out the threat immediately, is not sufficient to merit a jury instruction on self-defense. We believe that the facts of the instant case fall under the mandate of *Dial*, and that the trial court did not err in refusing defendant's request for an instruction on self-defense.

[2] By his second Assignment of Error, defendant contends that the trial court erred in refusing to find mitigating factors based on duress or provocation. At defendant's sentencing hearing, the trial court found one statutory aggravating factor and one statutory mitigating factor pursuant to G.S. sec. 15A-1340.4. Defendant submitted several other mitigating factors which were rejected by the court. After concluding that defendant's one aggravating factor outweighed his mitigating factor, the court sentenced defendant to an active term of five years, a sentence two years in excess of the presumptive term.

In North Carolina, a defendant has the burden of proving a mitigating factor by a preponderance of the evidence. *State v.*

Thompson, 314 N.C. 618, 336 S.E. 2d 78 (1985), *aff'd*, 318 N.C. 395, 348 S.E. 2d 798 (1986). If the defendant meets this burden by presenting uncontradicted, substantial and manifestly credible evidence in support of the factor, the judge is required to find a statutory factor. *State v. Cameron*, 314 N.C. 516, 335 S.E. 2d 9 (1985). However, the same evidence may not be used to support more than one mitigating factor. *State v. Crandall*, 83 N.C. App. 37, 348 S.E. 2d 826 (1986), *disc. rev. denied*, 319 N.C. 106, 353 S.E. 2d 115 (1987). To demonstrate that a trial court has erred in failing to find a mitigating factor, a defendant must show conclusively that no other reasonable inference may be drawn from the evidence. *State v. Canty*, 321 N.C. 520, 364 S.E. 2d 410 (1988).

In order to find the factor of strong provocation under G.S. sec. 15A-1340.4(a)(2)i, defendant must present uncontradicted, substantial and manifestly credible evidence of "a threat or challenge by the victim to the defendant." *State v. Braswell*, 78 N.C. App. 498, 502, 337 S.E. 2d 637, 639 (1985), *quoting State v. Puckett*, 66 N.C. App. 600, 606, 312 S.E. 2d 207, 211 (1984). We cannot say that the evidence before us rises to this level. Cole never directly threatened defendant. Although there is some evidence that he was attempting to arrange an assault, Cole himself contradicts this, and, in any event, there is no manifestly credible evidence that defendant was the target.

Turning to the issue of duress as a statutory mitigating factor pursuant to G.S. sec. 1340.4(a)(2)b, we also find the evidence insufficient to support a finding in mitigation. The evidence, as stated above, is inconclusive that defendant was the target of a future assault, and also that his only recourse was to assault Cole first. While we recognize that considerable stress is often inherent in a prison environment, we do not find uncontradicted, manifestly credible evidence that defendant acted under duress or coercion when he assaulted the victim.

For all the foregoing reasons, we hold that defendant received a fair trial free of prejudicial error.

No error.

Judge ARNOLD concurs.

Judge PHILLIPS concurs in the result.

MANEOLA S. JENNINGS v. HELOISA JESSEN

No. 8821SC721

(Filed 16 May 1989)

Husband and Wife § 26— alienation of affections—damages

Evidence presented by plaintiff at a hearing upon default and inquiry, including testimony by plaintiff and a financial consultant and an exhibit concerning her income and expenses at the time her husband left her, was sufficient to support the trial court's award to plaintiff of $200,000 as compensatory damages for alienation of affections. The trial court also properly awarded plaintiff $300,000 in punitive damages where defendant's adulterous affair with plaintiff's husband was established along with aggravated circumstances which accompanied it.

Judge GREENE dissenting.

ON writ of *certiorari* by defendant from judgment entered 15 September 1987 in Superior Court, FORSYTH County, by *Friday, Judge*. Heard in the Court of Appeals 26 January 1989.

Molitoris & Connolly, by Theodore M. Molitoris, for plaintiff appellee.

William L. Durham for defendant appellant.

PHILLIPS, Judge.

In this alienation of affections case defendant's repeated failure to comply with discovery and the court's orders resulted in her answer being stricken and a default judgment being entered against her for $200,000 in compensatory damages and $300,000 in punitive damages. That defendant consorted with and eventually married plaintiff's former husband is not disputed here; her main contention is that the evidence does not show that there was any love and affection between the spouses for her to alienate or that plaintiff was damaged in the amount of the judgment. But in entering the default and default judgment pursuant to G.S. 1A-1, Rules 37(b)(2), 37(d), and 55, N.C. Rules of Civil Procedure, the substantive allegations asserted in the complaint, undisputed by an answer, were deemed to have been admitted. *Bell v. Martin*, 299 N.C. 715, 264 S.E. 2d 101, *reh'g denied*, 300 N.C. 380, --- S.E. 2d --- (1980).

Plaintiff's uncontested allegations prove all the essential elements of an action for alienation of affections—that she and her husband were happily married, that defendant maliciously alienated her husband's affection, etc. *Bishop v. Glazener*, 245 N.C. 592, 96 S.E. 2d 870 (1957).

The only issue to decide is whether the evidence supports the amount of damages awarded. The proper measure of damages is the present value in money of the support, consortium, and other legally protected marital interests plaintiff lost through the defendant's wrong. In addition thereto, she may also recover "for the wrong and injury done to her health, feelings, or reputation." *Sebastian v. Kluttz*, 6 N.C. App. 201, 219, 170 S.E. 2d 104, 115 (1969). (Citations omitted.) The evidence presented by plaintiff at the hearing on discovery sanctions—including the testimony of plaintiff and her witness, accepted by the court as an expert in the field of financial consulting, and plaintiff's documentary exhibit concerning her income and expenses at or about the time her husband left her—was sufficient to support the court's finding that she suffered loss of support, consortium, and injury to her health, feelings and reputation in the amount of $200,000. Since the findings are supported by competent evidence they are binding. *Hall v. Hall*, 88 N.C. App. 297, 363 S.E. 2d 189 (1987). Defendant's reliance upon *Heist v. Heist*, 46 N.C. App. 521, 265 S.E. 2d 434 (1980), as authority for not allowing punitive damages is misplaced to say the least. For in *Heist* there was no evidence of sexual intercourse with plaintiff's husband; whereas, defendant's adulterous affair with plaintiff's husband has been established, along with the aggravated circumstances that accompanied it.

Defendant also argues that the court erred in considering several bits of inadmissible and irrelevant evidence. Assuming *arguendo* that the evidentiary smatterings objected to were irrelevant and inadmissible, they were also immaterial to the case and defendant could not have been prejudiced by them. For the evidence upon which the verdict is based was to the effect that defendant's adulterous relationship with plaintiff's husband was deliberately carried on for months in a condominium that plaintiff and her husband owned, and that on occasion she even had the effrontery to telephone plaintiff for his whereabouts.

Affirmed.

Judge COZORT concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority that the question of damages is the dispositive issue. Specifically, the question is whether the evidence supports the findings and whether the findings support the conclusions of law. *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E. 2d 185, 190 (1980) ("evidence must support findings; findings must support conclusions; conclusions must support the judgment").

The trial court sitting without a jury, concluded in pertinent part:

> 2. The plaintiff is entitled to an award as compensatory damages the sum Two Hundred Thousand Dollars ($200,000.00);

In support of its conclusion on the issue of the amount of compensatory damages, the trial court found as facts:

> 5. During the marriage plaintiff and her husband regularly entertained high level executives at R. J. Reynolds Tobacco Company and now plaintiff no longer has contact with these individuals, nor is she invited to their social events. Plaintiff and her husband had travelled internationally for vacations and regularly went to the South Carolina coast where they had a home together.
>
> . . . .
>
> 7. Plaintiff has suffered damages as a result of defendant's wilful conduct as alleged in the Complaint. Specifically, plaintiff has suffered loss of support, consortium, injury to her health, feelings and reputation. Plaintiff has suffered damages and is entitled to have and recover of the defendant as compensatory damages the sum Two Hundred Thousand Dollars ($200,000.00) and as punitive damages the sum of Three Hundred Thousand Dollars ($300,000.00).

Rule 52(a)(1) requires a trial court "[i]n all actions tried upon the facts without a jury" to "find the facts *specially* and state *separately* its conclusions of law thereon." N.C.G.S. Sec. 1A-1, Rule 52(a)(1) (1983) (emphasis added). Generally, the findings of fact "must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached

its ultimate conclusion on each factual issue." 9 C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2579, p. 710 (1971). The findings "should be clear, specific, and complete, without unrealistic and uninformative generality on the one hand, and on the other without an unnecessary and unhelpful recital of nonessential details of evidence." *Id.* at 711. Here, the conclusion of the trial court, which was merely a repeated finding of fact, that the plaintiff "is entitled to an award as compensatory damages the sum Two Hundred Thousand Dollars ($200,000.00)," is unsupported by any specific findings of fact as to how the trial court arrived at that amount and therefore does not meet the mandate of Rule 52(a)(1).

The order of the trial judge does not disclose "the steps by which the trial court reached its ultimate conclusion" on the lump sum amount of $200,000.00 in compensatory damages. It therefore cannot be determined whether the order represents a "correct application of the law." *Coble*, 300 N.C. at 712, 268 S.E. 2d at 189 ("The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law."). For example, it cannot be ascertained: (1) what amount of the compensatory award, if any, was for future losses and whether those losses were reduced to their present value, *see Pierce v. New York Cent. R.R. Co.*, 409 F. 2d 1392, 1399 (6th Cir. 1969) (appellate court remanded for new findings where it could not determine if trial court reduced future damages to their present worth); *Sebastian v. Kluttz*, 6 N.C. App. 201, 216, 170 S.E. 2d 104, 113 (1969) (error for trial judge to fail to instruct jury that they should "limit the award, if any, for future losses to the present case value or present worth of such losses"); (2) whether the trial court gave any credit for the $325,000.00 property settlement the plaintiff received from her husband prior to the trial, *see* D. Dobbs, *Remedies* Sec. 7.3, p. 532 (1973) (where plaintiff has already secured property settlement agreement with disaffected spouse, a credit on the award seems proper); *see also Rapisardi v. United Fruit Co.*, 441 F. 2d 1308, 1312 (2d Cir. 1971) (appellate court remanded for new findings where it could not determine from trial court findings whether the trial court considered evidence in mitigation of damages).

As it cannot be determined from the order of the court what evidence the trial judge considered in setting the compensatory

award, I would vacate the entire order of the trial court and remand to the trial court for the making of new findings, new conclusions and the entry of a new order. *See Quick v. Quick*, 305 N.C. 446, 454, 290 S.E. 2d 653, 659 (1982) (in alimony case, there was "no way to determine what evidence the trial judge believed and what evidence he found incredible" and the Supreme Court remanded for new findings).

HOUSING AUTHORITY OF THE CITY OF RALEIGH, PLAINTIFF v. ELLA McCLEAIN AND/OR OCCUPANTS, DEFENDANTS

No. 8810DC958

(Filed 16 May 1989)

1. **Landlord and Tenant § 1— public housing—occupant not lessee—not a tenant**

The trial court correctly concluded that Ms. Burton had no tenancy or property interest in a public housing unit where the unit was leased to Ms. McCleain, Ms. Burton's mother; Ms. Burton was listed as a member of the household; Ms. McCleain asked the housing manager to delete Ms. Burton's name from the members of the household; the trial court found that Ms. Burton agreed to move out of the apartment, although she denies agreeing to leave; the housing manager deleted Ms. Burton's name from the lease; Ms. McCleain moved into a nursing home; Ms. Burton again agreed to leave but did not do so; and the Housing Authority received no rent from the unit and filed this action for summary ejectment against Ms. McCleain and occupants. Ms. Burton's sole duty was to her mother and her only authorization to live in the unit was her mother's decision to put her on the list of members of the household. She was never the lessee of the unit and she was not a remaining head of the household because of her consent to have her name removed from the lease and to leave the unit.

2. **Ejectment § 2— public housing—subject matter jurisdiction as to occupant**

The district court had subject matter jurisdiction of a summary ejectment action brought by the Housing Authority

against its lessee and plaintiff was entitled to possession of the apartment; however, there was no jurisdiction to order summary ejectment and excess costs against an occupant who was not a tenant. N.C.G.S. § 42-26.

Judge GREENE concurring in the result.

APPEAL by defendant, Nina Ruth Burton, from *Morelock (Fred M.), Judge*. Judgment entered 8 February 1988 in District Court, WAKE County. Heard in the Court of Appeals 23 March 1989.

This case involves the right of occupancy of a housing unit managed by the Housing Authority of the city of Raleigh (RHA) and eviction procedures employed by RHA. Ella McCleain was granted a leasehold by RHA on 14 May 1985. The lease described Ms. McCleain as the head of the household and "Tenant." Ms. McCleain's daughter, Nina Burton, was listed as a member of the household. Ms. Burton lived in the unit for two and one-half years and assisted her elderly, infirm mother. She was usually unemployed but occasionally did housecleaning work.

On or about 5 October 1987, Ms. McCleain contacted Sarah Turner, Housing Manager for the city of Raleigh, and asked Ms. Turner to come to her apartment. In the presence of Ms. Burton, Ms. Turner and two of Ms. McCleain's granddaughters, Ms. McCleain stated that Ms. Burton was drinking and not taking care of her and asked Ms. Turner to delete Ms. Burton's name from the list of members of the household. The trial court found that Ms. Burton agreed to move out of the apartment but Ms. Burton denies agreeing to leave. At that meeting, Ms. Turner deleted Ms. Burton's name by marking through it on the lease and writing beside it "deleted 10-5-87." Ms. McCleain made her mark by the deletion.

Around the end of October or early November 1987, Ms. Turner learned that Ms. McCleain was planning to move to a nursing home. However, when Ms. McCleain moved, Ms. Burton remained in the apartment. At RHA's request, Ms. Burton again agreed to leave but did not do so. RHA did not receive rent for the unit from any source for November 1987, and RHA sent Ms. McCleain a written notice of termination of the lease effective 25 November 1987 for nonpayment of rent. As part of this notice, RHA advised Ms. McCleain of her rights to appeal through informal conferences or to grievance procedures established under the lease.

Upon Ms. Burton's failure to vacate the premises, RHA filed this action for summary ejectment on 2 December 1987 against Ella McCleain and/or occupants. The trial court made findings of fact and conclusions of law and entered judgment for RHA ordering Ms. Burton and Ms. McCleain to vacate the apartment and deliver possession to RHA. Ms. Burton appeals.

Moore & Van Allen, by Thomas W. Steed, Jr., William D. Dannelly, Denise Smith Cline and Christopher J. Blake, for plaintiff-appellee.

East Central Community Legal Services, by Gregory C. Malhoit, Augustus S. Anderson, Jr., and William D. Rowe, for defendant-appellant.

LEWIS, Judge.

Ms. Burton makes three basic arguments. First, she contends the trial court erred in concluding that she had no tenancy or property interest in the public housing unit. Next, she contends that even if she is not a tenant she is entitled to due process prior to eviction through the tenant grievance procedure. Finally, she contends that if she is not a tenant the trial court lacked subject matter jurisdiction to order summary ejectment. We have reviewed her arguments and conclude she did not have a tenancy interest in the public housing unit and was not entitled to the benefit of the tenant grievance procedure prior to eviction. However, we hold the trial court did not have subject matter jurisdiction under the summary ejectment statute to order Ms. Burton to vacate the housing unit; the court did have subject matter jurisdiction as to Ms. McCleain.

[1] Ms. Burton contends that as a family member listed on the lease she is a tenant of the RHA unit with certain rights under the lease and federal law. She contends that families have tenancy rights in public housing units. Ms. Burton was listed as a member of the household but she had no responsibilities to RHA. Her sole duty was to her mother and her only authorization to live in the unit was her mother's decision to put her name on the list of members of the household. Ms. Burton did not acquire hereditary or prescriptive rights to the RHA unit in which her mother was responsible as "tenant." 24 C.F.R. Section 966.53(f) (1988) defines a "tenant" as "any lessee or the remaining head of the household of any tenant family." Ms. Burton was never the lessee of the

unit. By her consent to have her name removed from the lease and to leave the unit, Ms. Burton is not a remaining head of the household either. We note that Ms. Burton argues in her brief that her tenancy interest in the apartment should not be subject to the whim of her elderly mother. However, Ms. Burton did not except to the trial court's finding that she agreed to have her name removed from the lease and to leave the unit; we will not address the sufficiency of the evidence supporting this finding. App. R. 10(a). The trial judge correctly made findings of fact and conclusions of law that Ms. Burton was not at any time a "tenant" as defined by the lease between RHA and Ms. McCleain.

If we adopt Ms. Burton's position, each time an RHA lease is seriously breached by the named tenant for nonpayment of rent or some other specified reason, RHA would have to proceed against each person in the household to regain possession. Since some occupants may be minors or unavailable, the litigation could be cumbersome and lengthy. Such a process would seriously disrupt the whole object of providing housing for those who need it and qualify for it.

Ms. Burton's second argument is that she was denied due process by RHA's failure to afford her the protections of the lease's grievance procedures. These arguments were not preserved at trial and will not be considered here for the first time. *See Management, Inc. v. Development Co.*, 46 N.C. App. 707, 266 S.E. 2d 368, *disc. rev. denied and appeal dismissed*, 301 N.C. 93, 273 S.E. 2d 299 (1980).

[2] Ms. Burton's third argument is that the trial court lacked subject matter jurisdiction. This action was brought under G.S. 42-26 which states:

> Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:
>
> (1) When a tenant in possession of real estate holds over after his term has expired.

> (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
>
> (3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

Since 1872, summary ejectment has been interpreted as "intended only to apply to a case in which the tenant entered into the possession under some contract, either actual or implied, with the supposed landlord or with some person under whom the supposed landlord claimed in privity, or when the tenant himself was in privity with some person who had so entered." *McCombs v. Wallace*, 66 N.C. 481, 482-83 (1872). As summary ejectment is "restricted to the cases . . . where the relation between the parties is simply that of landlord and tenant," *Hauser v. Morrison*, 146 N.C. 248, 249, 59 S.E. 693, 694 (1907), there is no jurisdiction to order summary ejectment against Ms. Burton, one who is not a tenant.

However, this action was commenced by RHA against its lessee, Ms. McCleain. Therefore, the district court had subject matter jurisdiction. We affirm that part of the judgment finding that RHA was entitled to terminate the lease with Ella McCleain effective 25 November 1987. RHA is entitled to possession of the apartment at 8B Hoke Street, Raleigh. We also affirm that part of the judgment concluding that Ms. Burton is not a tenant. However, that portion of the judgment assessing part of the costs to Ms. Burton and directing that she vacate the apartment pursuant to this summary ejectment action is reversed and remanded to the district court.

Affirmed in part; reversed and remanded in part.

Judge ARNOLD concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

As Ms. Burton has not properly preserved on appeal her due process arguments, I would not reach the question of whether she

was a tenant as that term is used in the public housing laws. Nonetheless, summary ejectment of Ms. Burton is not authorized as she was not a "tenant" or "lessee" or "other person under [the tenant or lessee]" as those terms are used in N.C.G.S. Sec. 42-26 (1984). Accordingly, I join with the majority in vacating that portion of the judgment directing that Nina Burton vacate the apartment and assessing costs against Nina Burton.

CARMEL F. CALDWELL, PLAINTIFF v. JORETTA C. CALDWELL, DEFENDANT

No. 8830DC1140

(Filed 16 May 1989)

Divorce and Alimony § 30; Abatement and Revival § 13— divorce and equitable distribution—death of party—action moot

The trial court did not err by dismissing plaintiff's action for divorce and defendant's counterclaim for equitable distribution where plaintiff was killed in an automobile accident after the counterclaim but before any other pleadings or actions were taken. Plaintiff's death dissolved the marital status and, since there is no longer a marital status upon which a final decree of divorce may operate, there can also be no basis upon which a judgment of equitable distribution could be rendered. N.C.G.S. § 50-21(a).

APPEAL by defendant from *Bryant, Steven J., Judge.* Order entered 14 September 1988 in District Court, HAYWOOD County. Heard in the Court of Appeals 20 April 1989.

Defendant appeals from an order dismissing plaintiff's action for divorce and defendant's counterclaim for equitable distribution.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiff-appellee.

Alley, Hyler, Killian, Kersten, Davis and Smathers, by George B. Hyler, for defendant-appellant.

JOHNSON, Judge.

The sole issue raised by defendant in this appeal is whether the trial court erred in dismissing plaintiff's action for divorce and defendant's counterclaim for equitable distribution.

The facts are simple and not in dispute. On 12 January 1988, plaintiff instituted an action for divorce against defendant, Joretta C. Caldwell, alleging, *inter alia*, that the parties had been separated from each other for more than one year; and that there were certain properties subject to equitable distribution. Defendant filed answer denying that plaintiff was entitled to a divorce based on one year's separation in that the parties had not lived separate and apart for one year. Defendant also counterclaimed, alleging that the parties had not been separated for one year, but that in the event the court found that the parties had been so separated, the defendant requested equitable distribution of the parties' marital property.

Plaintiff was killed in an automobile accident on 27 March 1988 before any other pleadings or actions were taken. On 29 April 1988, counsel for plaintiff moved to dismiss the divorce action and the counterclaim. Thereafter, a hearing was held on the motion to dismiss and the court granted the motion dismissing all matters because of the death of the plaintiff. Defendant appealed.

Defendant argues that both the action for divorce and her counterclaim for equitable distribution survived the death of her husband. We disagree.

G.S. sec. 1A-1, Rule 25(a) provides: "No action abates by reason of the death of a party if the cause of action survives." G.S. sec. 28A-18-1 provides:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.
>
> (b) The following rights of action in favor of a decedent do not survive:
>
> . . .
>
> (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

At common law a claim for absolute divorce was included in the category of actions which did not survive the death of a party, and in which "the relief sought could not be enjoyed, or granting it would be nugatory after death." The general rule is that

> [s]ince death itself dissolves the marital status and accomplishes the chief purpose for which the action is brought, there is no longer a marital status upon which a final decree of divorce may operate. The jurisdiction of the court to proceed with the action is terminated. The marital status of the parties is the same as if the suit had never been begun.

1 R. Lee, North Carolina Family Law sec. 48 (4th ed. 1979).

In the case of *Elmore v. Elmore*, 67 N.C. App. 661, 313 S.E. 2d 904 (1984), this Court recognized and applied the general rule that an action for divorce abated upon the death of a party to the action. In *Elmore*, the plaintiff, who had filed an action for an absolute divorce based on grounds of one year's separation, appealed from the ruling of the trial court granting the defendant's motion for a directed verdict and entering of judgment denying the divorce. While the matter was pending on appeal, the plaintiff died. This Court dismissed the appeal, holding that while it believed the trial court erred in granting the defendant's motion for a directed verdict, the action abated upon plaintiff's death, thereby rendering the appeal moot. *Id.* The Court further stated that

> [i]t is clearly the general rule that an action *solely* for absolute divorce abates upon the death of one of the parties, and the marital status cannot thereafter be altered. To hold that the marital status becomes unalterable, but that property rights incidental thereto do not, would be illogical and inconsistent. . . .

Id. at 668, 313 S.E. 2d at 909 (emphasis added).

While we recognize that in *Elmore*, the action was one *solely* for an absolute divorce with property rights being only incidental thereto, the fact that equitable distribution was specifically requested in the case *sub judice* does not negate the application of the general rule here. The North Carolina General Statutes providing for equitable distribution by the court of marital property are clear in their meaning and the intent of the Legislature in their enactment. The plain language of G.S. sec. 50-21(a) clearly provides that with but one exception the equitable distribution of marital property *must* follow a decree of absolute divorce. Subsection (a) reads in pertinent part as follows:

> 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.

Defendant's reliance upon *Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E. 2d 237 (1986), that the parties' right to equitable distribution did not abate upon the death of the plaintiff is misguided. In *Swindell* the wife commenced an action for absolute divorce and equitable distribution. The absolute divorce was granted on the grounds of one year's separation. However, prior to a hearing on the matter of equitable distribution, but subsequent to the granting of the absolute divorce decree, defendant-husband died intestate. The court thereafter ordered that the administrator of defendant-husband's estate be substituted as defendant, and that certain claimed heirs-at-law be added as parties defendant. On appeal of the issue of the propriety of the court's order directing that certain claimed heirs-at-law be added as parties defendant, this Court held that given the death of the defendant-husband prior to equitable distribution, but subsequent to a complaint for equitable distribution, joining the heirs-at-law was necessary to determine the issues of equitable distribution. Therefore, defendant in the instant case argues that *Swindell* presupposes that the death of a party does not render issues of equitable distribution moot. Defendant overlooks the fact that in *Swindell* the party died subsequent to the granting of the decree of absolute divorce; whereas, in the case *sub judice*, the plaintiff died before a decree of absolute divorce could be granted. Therefore, plaintiff's death dissolved the marital status. Since there is no longer a marital status upon which a final decree of divorce may operate, there can also be no basis upon which a judgment of equitable distribution could be rendered. Except for a consent judgment, which may be entered at any time during the pendency of the action, G.S. sec. 50-21(a), an equitable distribution of property *shall follow* a decree of absolute divorce. *McIver v. McIver*, 77 N.C. App. 232, 334 S.E. 2d 454 (1985); *McKenzie v. McKenzie*, 75 N.C. App. 188, 330 S.E. 2d 270 (1985). Plaintiff's death, therefore, rendered both the action for divorce and equitable distribution moot.

The trial court properly dismissed the complaint and counterclaim in this matter.

Affirmed.

Judges BECTON and ORR concur.

WALLACE R. EDWARDS, PETITIONER-APPELLANT/CROSS-APPELLEE v. MILLIKEN & COMPANY AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLEES/CROSS-APPELLANTS

No. 8820SC519

(Filed 16 May 1989)

1. **Master and Servant § 111— appeal from ESC decision filed after statutory period—appeal allowed**

The trial court did not err in allowing claimant's appeal from an ESC decision which was filed one day after the thirty-day period allowed by N.C.G.S. § 96-15(h), since counsel for claimant mailed the petition for judicial review from Raleigh to the Clerk of Superior Court in Moore County on 3 July 1986; claimant received his copy of the petition, which was also mailed on 3 July, on 5 July 1986 in Moore County; counsel for the employer received his copy on 7 July 1986; and failure of the petition to be marked "filed" in the office of the Clerk of Moore County Superior Court was through no fault of claimant and any neglect was entirely excusable.

2. **Master and Servant § 108.2— unemployment compensation—voluntary quit—availability of suitable work—insufficiency of findings**

Claimant's appeal from a ruling of the ESC denying unemployment compensation benefits based on the Commission's determination that claimant left work voluntarily without good cause attributable to the employer must be remanded for a finding as to whether substitute work as an industrial engineer was suitable for claimant who had been a cause analyst and had held the position of industrial engineer twenty-two years earlier.

APPEAL by petitioner and cross-appeal by Employment Security Commission of North Carolina from Judgment of *Judge W. Douglas Albright* entered 8 February 1988 in MOORE County Superior Court. Heard in the Court of Appeals 10 January 1989.

Tharrington, Smith & Hargrove, by Elizabeth F. Kuniholm, for petitioner appellant, cross-appellee.

Chief Counsel T. S. Whitaker and C. Coleman Billingsley, Jr., for respondent appellee, cross-appellant, Employment Security Commission of North Carolina.

Thompson, Mann and Hutson by M. Lee Daniels, Jr., for intervenor appellee, Milliken & Company.

COZORT, Judge.

Claimant appeals from a ruling of the Employment Security Commission denying unemployment compensation benefits based on the Commission's determination that claimant left work voluntarily without good cause attributable to the employer. We vacate and remand for further findings.

Claimant began his employment with Milliken in 1951 and, until the severance of the employment relationship in 1985, had been employed by Milliken continuously for thirty-four years. In 1963 claimant was promoted to the position of industrial engineer manager. His most recent promotion was to a cause analyst position in 1983. In September of 1984, Milliken reduced the number of cause analysts at its plants and eliminated claimant's position. Claimant was offered the substitute position of industrial engineer, a position that he had held more than twenty-two years before. Although the job of industrial engineer was one or more pay grades below that of cause analyst, Milliken offered claimant the same salary that he had been receiving as cause analyst. However, claimant was informed that he would not receive an increase in salary until the pay grade for industrial engineer rose above claimant's current salary level. Milliken further informed claimant that it could offer no hope that claimant would eventually advance beyond the position of industrial engineer to a management-level position such as he held previously. Considering the proffered position to be a demotion, claimant refused the job. However, he agreed to work in the position temporarily until Milliken could find a replacement. Claimant left his employment in March of 1985. He received a year of severance pay and accrued vacation.

Claimant filed a new initial claim for unemployment insurance benefits in March of 1986. The claims adjudicator denied benefits. An appeals referee subsequently found claimant not disqualified. On appeal the Employment Security Commission reversed the appeals referee and found claimant disqualified. The Superior Court affirmed the Commission. Claimant appeals.

[1] As a preliminary matter, we first address the issue raised by the Commission's cross-appeal. The Commission argues that claimant's appeal was untimely and that the Superior Court therefore erred in allowing the Petition for Judicial Review of the Commission's ruling and, in the alternative, allowing the Petition for Certiorari.

The Commission mailed its decision to claimant on 6 June 1986. Pursuant to statute, a Commission decision becomes final thirty days after mailing, and the court must dismiss any petition for review that is untimely filed. N.C. Gen. Stat. § 96-15(h) (1988). The thirty-day period ended 7 July (6 July was a Sunday). Claimant's appeal was not filed until 8 July 1986.

After conducting a hearing on the Commission's motion to dismiss, the trial court found, *inter alia*, that counsel for claimant mailed the petition for judicial review from Raleigh to the Clerk of Superior Court in Moore County on 3 July 1986; that claimant received his copy of the petition, which was also mailed on 3 July, on 5 July 1986, in Moore County; that counsel for the employer received his copy on 7 July 1986; and that the failure of the petition to be marked "filed" in the office of the Clerk of Moore County Superior Court was through no fault of petitioner and that any neglect was entirely excusable. We hold that the court did not err in allowing the appeal.

The Commission further contends that the order signed by the trial judge was inconsistent with the judge's statements in open court in that there had been no ruling on claimant's alternative petition for certiorari. This Court is not a fact-finding body. The appropriate remedy for the Commission was to apply by motion to the trial court to correct any alleged error. We find no merit to the Commission's cross-appeal.

[2] We now turn to the merits of petitioner's claim.

The Commission made the following findings of fact, which have not been excepted to by claimant:

> 1. At the time the Claims Adjudicator issued a determination in this matter, the claimant had filed continued claims for unemployment insurance benefits for the period March 2, 1986 through March 15, 1986. The claimant has registered for work with the Commission, has continued to report to

an employment office of the Commission and has made a claim for benefits in accordance with N.C. Gen. Stat. § 96-15(a).

2. The claimant last worked for Milliken & Company on March 24, 1985. The claimant was employed in a position as "Industrial Engineer" (hereinafter "I.E.").

3. The claimant left this job. When the claimant left the job, continuing work was available for the claimant with the employer.

4. The claimant had worked since 1951 for Milliken & Company. He had been promoted over the years, rising from an hourly position to "Cause Analyst" in 1983. "Cause Analyst" was a management position.

5. In August or September, 1984, the claimant had learned that his position specifically was being eliminated and "Cause Analyst" positions, in general, at Milliken & Company were being drastically reduced. He then was offered the "I.E." job at the same salary ($2,708 per every four weeks) as "Cause Analyst," although the "I.E." was a lower salary grade than "Cause Analyst." His salary was not to be reduced, but he would not have gotten any salary increases until "I.E." salary grade rose over and above what he was making.

6. The claimant chose to leave his work because he objected to the change in jobs from "Cause Analyst" to "I.E." He reasonably believed it reduced or eliminated his further chances for promotion or salary increases, even though the salary would remain the same and not be reduced. He agreed, however, to stay temporarily and work as "I.E."

7. The claimant worked through March 24, 1985, when he left with severance pay plus accrued vacation pay of about a year.

Based on these findings, the Commission concluded that claimant left work voluntarily without good cause attributable to the employer. Claimant excepts and assigns error to these conclusions.

When an employee leaves employment following an elimination of the employee's position, but the employer has offered continued employment in a substitute position, it is appropriate to analyze the case as a voluntary quit, with the ultimate resolution of the issue of good cause depending on whether the substitute work

was "suitable." *See In re Troutman*, 264 N.C. 289, 141 S.E. 2d 613 (1965). Since the Commission failed to make that dispositive finding, we must remand. The fact that claimant agreed to work temporarily as an industrial engineer as a favor to the employer does not mandate a finding that the work was suitable.

We believe that the resolution of whether the industrial engineer position was suitable is a factual determination that should be made by the trier of fact. In making its determination, the Commission is to consider the factors set forth in N.C. Gen. Stat. § 96-14(3). Claimant's prior earnings is but one of several factors to be considered under that provision.

We therefore vacate the order of the Superior Court and remand for further remand to the Employment Security Commission for a finding of whether the job of industrial engineer was a suitable substitute job and a determination of whether claimant left his job "with good cause attributable to the employer."

Vacated and remanded.

Judges PHILLIPS and GREENE concur.

WAYNE J. McMILLAN, PLAINTIFF v. STATE FARM FIRE AND CASUALTY COMPANY AND STATE FARM GENERAL INSURANCE COMPANY, DEFENDANTS

No. 8816SC919

(Filed 16 May 1989)

1. Insurance § 131.1 — fire insurance — standard appraisal provisions — binding

The trial court properly granted summary judgment for defendants in an action arising from a fire insurance claim where plaintiff's contract with defendants clearly provided that in the event they failed to agree upon the amount of loss, either party could demand that the amount of the loss be set by appraisal; this procedure was properly followed as detailed in the contract; and there was no evidence of fraud, mistake, duress or other impeaching circumstances in the ap-

praisal process and award. Plaintiff was bound by the terms of his contract and the appraisal provisions were not revocable at will.

2. **Damages § 11.1— refusal to settle fire insurance claim—not aggravated conduct—punitive damages properly dismissed**

The trial court did not err in an action arising from a fire insurance claim by dismissing plaintiff's claim for recovery of punitive damages based upon defendant's alleged bad faith in refusing to settle the claim where defendant's purportedly unreasonable actions did not rise to the level of aggravated conduct.

3. **Insurance § 131.1— fire insurance contracts—mandatory appraisal clause—constitutionality—not raised at trial**

Plaintiff's challenge to the constitutionality of the statutory provision which requires the inclusion of an appraisal clause in all fire insurance contracts in North Carolina was not raised at trial and was not properly before the Court of Appeals. N.C.G.S. § 58-176 (1982).

APPEAL by plaintiff from *Ellis, Craig B., Judge.* Judgment entered 20 April 1988 in ROBESON County Superior Court. Heard in the Court of Appeals 10 April 1989.

Plaintiff's home was damaged by fire on 15 December 1985. Defendants were plaintiff's fire insurers, and one of their agents on 2 January 1986 offered to settle the damage to the residence for $12,354.97. Plaintiff responded by submitting an appraisal and building estimate indicating that the total amount of loss was at least $69,936.50.

Defendants demanded an appraisal pursuant to the terms of the policy, relevant portions of which appear as follows:

> 5. Appraisal. If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where

> the residence premises is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

Defendants appointed William Cutler and plaintiff appointed Lee Werner, who was subsequently replaced by Thomas Hatchell, as appraisers. The Honorable E. Lynn Johnson appointed Greve Grinnell to act as umpire. Defendants' attorney wrote to all parties concerned on 21 May 1986 that "State Farm is guaranteeing the payment of Mr. Grinnell's fee in acting as an umpire and will deduct one-half of such from any payment to Wayne J. McMillan and Attorney Cabell Regan once the claim has been resolved."

The appraisers failed to agree on the amount of loss and submitted documentation of their evaluations by 30 June 1986 to umpire Grinnell. Plaintiff's appraiser estimated the loss to the dwelling at $69,936.00 and to the personal property at $25,000.00. Defendants' appraiser, however, estimated the loss to the dwelling at $21,062.47 and to the personal property at $1,719.80. On 15 July 1986 the three met to review the opinions of both appraisers, after which the umpire and defendants' appraiser signed an agreement as to the amount of the fire loss damage. The amount of the loss involving dwelling damages was set at $27,252.69, and the actual cost to repair was set at $29,466.10. The amount of personal property loss was set at $5,649.30.

Defendants issued checks to plaintiff on 31 July 1986 in the amounts of $27,252.69 and $5,649.30, which plaintiff returned on 5 June 1987. Plaintiff did not pay his portion of the umpire's fee, and defendants eventually paid the entire amount of $550.00. Plaintiff filed suit on the policy on 23 June 1987, and defendants filed a counterclaim seeking to recover one-half of the umpire's fee. The trial court denied plaintiff's motion to vacate the appraisal award and for summary judgment, granted defendants' motion for summary judgment, and entered judgment for defendants in the amount of $275.00.

Murray, Regan and Regan, by Cabell J. Regan, for plaintiff-appellant.

Anderson, Broadfoot, Johnson & Pittman, by John H. Anderson, II, for defendant-appellees.

WELLS, Judge.

[1] Plaintiff contends that the appraisal provisions of the standard fire insurance policy do not operate to establish a final and binding determination of the amount of loss. Rather, he argues that the appraisal provisions are not binding upon the parties but are revocable at will, and that because any award calculated pursuant to them is not final and binding, there remains a genuine issue of fact as to the amount of loss. He contends that the trial court erred in granting summary judgment for defendants based upon the appraisal award.

In evaluating this argument we emphasize, however, that plaintiff's contract with defendants clearly provided that in the event they failed to agree upon the amount of loss, either party could "demand that the amount of the loss be set by appraisal." The agreement further provided that "[i]f the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three *shall set the amount of the loss.*" (Emphasis added.) Defendants' forecast of evidence showed that the contractual provisions for appraisal were followed.

In *Young v. New York Underwriters Insurance Co.*, 207 N.C. 188, 176 S.E. 271 (1934), the North Carolina Supreme Court addressed a similar issue arising out of a fire insurance contract that also provided for appraisal to establish the amount of loss. The Court stated that "[t]he parties entered into a valid and definite written agreement for submission of the controversy to appraisers. . . . The appraisers and the umpire [complied with the contractual procedure and] signed and delivered an award. . . . Such award so made is presumed to be valid. . . . Consequently, such award must stand, unless there is evidence of fraud, mistake, duress, or other impeaching circumstance."

We hold that plaintiff was bound by the terms of his contract with defendants, which clearly established the procedure for determining the amount of loss when in dispute. The forecast of evidence

indicates that this procedure was properly followed as detailed in the contract; the awards, therefore, were final and binding.

There being no evidence of fraud, mistake, duress or other impeaching circumstances in the appraisal process and award, the trial court properly granted summary judgment for defendants.

[2] Plaintiff also argues that the trial court erred in dismissing his claim for recovery of punitive damages based upon defendants' alleged bad faith. Relying on *Dailey v. Integon General Insurance Corp.*, 75 N.C. App. 387, 331 S.E. 2d 148, *disc. rev. denied*, 314 N.C. 664, 336 S.E. 2d 399 (1985), plaintiff contends that defendants' tortious bad faith refusal to settle the claim entitled him to punitive damages. This Court made clear in *Dailey* that tortious conduct in connection with a breach of contract must " 'partake of some element of aggravation before punitive damages will be allowed.' " *Id.* (*quoting Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976)).

In support of this argument plaintiff asserts that defendants failed to conduct a reasonable investigation before demanding appraisal, and that their settlement offer was unreasonably low. Plaintiff also characterizes defendants' action in initiating the appraisal process when he had been without the use of his home for approximately two months as unreasonable, given their duty to relieve the financial distress of their insured. *See Dailey, supra.* These examples of purportedly unreasonable actions do not rise to the level of aggravated conduct, such as were found in *Dailey, supra.*

[3] In his brief, plaintiff attempts to challenge the constitutionality of the statutory provision which requires the inclusion of the appraisal clause in all fire insurance contracts in North Carolina. *See* N.C. Gen. Stat. § 58-176 (1982). As plaintiff points out, the required appraisal clause makes no provision for hearing or the taking of evidence, and provides no rules for the role of the appraisers. While we agree that the required appraisal clause carried with it serious due process implications, plaintiff did not raise the constitutional issue or argument at trial, but instead attempted to rely on the provisions of the North Carolina Uniform Arbitration Act which require notice and hearing. *See* N.C. Gen. Stat. §§ 1-567.6 and 1-567.7 (1983). Under these circumstances, plaintiff's constitutional arguments are not properly before us. *See Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980) and cases cited therein; *Ratcliff v. County of*

Buncombe, 81 N.C. App. 153, 343 S.E. 2d 601, *appeal dismissed*, 318 N.C. 417, 349 S.E. 2d 599 (1986).

We have considered plaintiff's remaining assignments of error, find them to be without merit, and overrule them.

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. GEORGE LEE FORTNER

No. 8830SC995

(Filed 16 May 1989)

1. **Criminal Law § 75.8— statements made to SBI agent—warning given before resumption of interrogation—statement admissible**

The trial court did not err in admitting into evidence statements made by defendant to an SBI agent after defendant had expressed to the sheriff a desire not to answer further questions since defendant was advised of his constitutional rights before each interrogation and affirmatively indicated he understood them; when defendant told the sheriff that he did not want to answer further questions, the sheriff immediately ceased his interrogation; several hours later the SBI agent began his questioning but only after advising defendant of his rights and obtaining defendant's signature on a waiver form; and the statement made by defendant to the SBI agent was exculpatory.

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

Evidence was sufficient to be submitted to the jury in a prosecution for homicide where it tended to show that defendant admitted that he shot the victim; the victim was killed with a handgun, and just prior to and immediately after the shooting, defendant's wife saw a holstered handgun lying on the kitchen table where the victim had been sitting; no knife, other than two closed pocketknives found in the victim's pants pocket, was found on or near the victim's body; and defendant

and the victim were the only known occupants of defendant's apartment when the gunshots were fired.

APPEAL by defendant from *Burroughs (Robert M.), Judge.* Judgment entered 17 March 1988 in Superior Court, SWAIN County. Heard in the Court of Appeals 11 April 1989.

Defendant was charged with the 26 September 1987 shooting death of John Shannon (Shannon). A trial was held during the 14 March 1988 Criminal Session of Superior Court in Swain County at the conclusion of which defendant was found guilty of second degree murder. From a judgment imposing a twenty year active sentence, defendant appeals.

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

Smith & Queen, by Frank G. Queen, for defendant-appellant.

LEWIS, Judge.

Defendant brings forward two assignments of error. He first asserts that the trial court committed prejudicial error in admitting into evidence statements made by defendant to a State Bureau of Investigation (SBI) agent after defendant had expressed a desire not to answer questions. Second, defendant contends the court erroneously submitted the case to the jury in that there was insufficient evidence that defendant committed the crime charged.

[1] The statement to which defendant objects was made during an interview session with SBI agent Tim Shook (Shook) in the early morning hours of 27 September 1987. At that time defendant was under arrest and incarcerated in the Swain County jail. Several hours earlier, defendant had made an unsolicited admission in front of law enforcement personnel that he shot Shannon, and shortly thereafter, under questioning, he made inculpatory statements to Sheriff Ray Kline (Kline) and Deputy Sheriff Mitchell Jenkins (Jenkins) that he had shot Shannon after Shannon had insulted defendant's father and threatened defendant with a knife and that he had thrown the gun into the river. After this statement, defendant told Kline he did not want to answer further questions. Kline immediately ceased his questions.

Shook testified at trial that although he talked to Kline before he questioned defendant, he was not advised that defendant had

previously told Kline he did not wish to answer any more questions. Shook further testified that prior to questioning defendant, he advised defendant of his constitutional rights and made sure defendant understood these rights. Shook also obtained defendant's signature on a waiver of rights form. Defendant then told Shook that he was asleep in the bedroom when Shannon was shot and that he did not remember anything. Defendant stated that his earlier statement to Kline was made in an effort to have his bond reduced.

Defendant argues that his Fifth Amendment right to remain silent was violated when Shook initiated questioning after defendant had previously expressed to Kline his desire not to answer further questions and that the statement made to Shook should have been excluded. We do not agree.

The United States Supreme Court stated in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966):

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Id. at 473-74, 16 L.Ed. 2d at 723, 86 S.Ct. at 1627-28. However, in a subsequent case, *Michigan v. Mosley*, 423 U.S. 96, 46 L.Ed. 2d 313, 96 S.Ct. 321 (1975), the Supreme Court held that such prohibition against continued questioning did not mean that the police may never interrogate a person once that person invokes the right to remain silent. Whether a statement obtained after a suspect has expressed a desire not to answer further questions is admissible depends on whether his right to cut off further questioning "was scrupulously honored." *Id.* at 104, 46 L.Ed. 2d at 321, 96 S.Ct. at 326. In applying the Supreme Court's admonitions in *Miranda* and *Mosley*, our Supreme Court in *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981), held that a defendant's constitutional rights were not violated when police continued to question him after he indicated he did not want to answer any more questions. In that case, the court noted that each time the defendant said he did not wish to answer further questions the police immediately ceased interrogation for some period of time, that defendant had repeatedly been advised of his rights, and that prior to

his "confession" defendant indicated that he understood his rights and voluntarily and affirmatively waived them.

Here, the evidence reveals that before each interrogation session defendant was advised of his constitutional rights and affirmatively indicated he understood them and that when defendant told Kline he did not want to answer further questions, Kline immediately ceased his interrogation. Several hours later Shook began his questioning but only after advising defendant of his rights and obtaining defendant's signature on a waiver form. Finally, we note that contrary to the confession elicited from the defendant in *Temple*, the statement made by defendant to Shook was exculpatory in nature. Defendant's argument is without merit.

[2] Also without merit is defendant's second contention that the trial court erred in not granting his motion to dismiss for lack of sufficient evidence. A motion to dismiss is properly denied if there is substantial evidence as to each and every element of the crime charged and that defendant committed it. *State v. Leonard*, 74 N.C. App. 443, 328 S.E. 2d 593, *disc. rev. denied*, 314 N.C. 120, 332 S.E. 2d 487 (1985). " ' "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E. 2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E. 2d 277 (1980), *quoting Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977). This evidence must also be viewed in the light most favorable to the State and given every favorable inference. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

In the case before us, aside from defendant's own admissions to the police that he shot Shannon, the State's evidence tended to show that 1) Shannon was killed with a gun, 9 mm. caliber or larger (not a rifle), 2) just prior to and immediately after the shooting defendant's wife saw a holstered handgun lying on the kitchen table where Shannon had been sitting, 3) no knife, other than two closed pocketknives found in Shannon's pants' pocket, was found on or near Shannon's body and 4) defendant and Shannon were the only known occupants of defendant's apartment when the gunshots were fired. Taking these facts in the light most favorable to the State and assigning them every favorable inference, we are of the opinion that there was sufficient evidence to submit this case to the jury. Defendant's assignment is overruled.

For the foregoing reasons we hold defendant had a trial free from prejudicial error.

No error.

Judges ARNOLD and GREENE concur.

STATE OF NORTH CAROLINA v. KENNETH DUANE FARRIS

No. 8823SC1025

(Filed 16 May 1989)

Criminal Law § 86.2— cross-examination of defendant—convictions over ten years old—absence of findings

In a prosecution for first degree sexual offense and taking indecent liberties with a minor, the trial court erred in permitting the prosecutor to cross-examine defendant about convictions more than ten years old for contributing to the delinquency of a minor and assaulting a juvenile where the court made no findings of specific facts and circumstances to support its determination that the probative value of the convictions outweighs the prejudicial effect thereof. N.C.G.S. § 8C-1, Rule 609(b) (1988).

APPEAL by defendant from *Cornelius, C. Preston, Judge*. Judgment entered 31 March 1988 in YADKIN County Superior Court. Heard in the Court of Appeals 22 March 1989.

Defendant was indicted on two counts of first degree sexual offense and one count of taking indecent liberties with a minor. Defendant was tried on these charges at the 28 March 1988 Criminal Session of Yadkin County Superior Court. The State's evidence tended to show that defendant lived with his wife and their two children, a daughter, aged 11, and a son, aged 10. On 15 November 1987, defendant was at home with his son and daughter. Defendant's wife was at work and his son was in the yard. Defendant made his daughter come into his bedroom and take off her clothes. Defendant also took off his clothes. Defendant then touched his daughter's chest and vaginal area and placed his fingers in her vagina. Defendant also made his daughter engage in fellatio with him.

The next day at school defendant's daughter told the guidance counselor about the incident with her father. The guidance counselor requested that Mrs. Farris come to the school where she was told about the incident between her husband and her daughter. The daughter discussed the incident with a police officer and members of the Department of Social Services at defendant's home, first in the presence of her mother and then alone with the officer and social workers in a car. While in the car, the daughter told the officer and the social worker what her father had done. A medical doctor testified that she conducted a physical examination of the daughter which showed scarring in the external part of the child's genitalia and scarring in the interior of the vagina. The doctor testified that this interior scarring was consistent with the history of sexual fondling as related by the daughter and the use of fingers to manipulate the area and indicated repeated trauma to the area.

Defendant's evidence at trial tended to show that defendant had had disciplinary problems with his daughter—she would not do what she was told and would not listen to her parents. Defendant testified that he used paddling or a belt as disciplinary measures. Defendant's evidence further showed that on 15 November 1987, defendant's wife left for work between 8:45 and 8:50 a.m. Defendant was expecting a visit from a friend with whom he had planned to go fishing. The friend arrived at defendant's house no more than five minutes after Mrs. Farris left. Defendant testified that at that time his son was in the yard and his daughter was outside hanging out clothes. Defendant was at the back door. Defendant testified on cross-examination to having a drinking problem and to having numerous prior convictions for driving while impaired and driving while his license was revoked or suspended. Defendant further testified to having convictions for assault and battery, leaving the scene of an accident involving personal injury, trespassing, and two 1977 convictions for contributing to the delinquency of a minor and assaulting a juvenile.

At trial defendant was convicted of two counts of first degree sexual offense and one count of taking indecent liberties with a minor. Defendant was sentenced to two life sentences to run concurrently for the first degree sexual offense convictions and a term of ten years for taking indecent liberties with a minor to run consecutively after the life sentences. Defendant appealed from these judgments.

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

Appellate Defender Malcolm Ray Hunter, by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant.

WELLS, Judge.

Defendant contends the trial court erred by admitting into evidence defendant's convictions for contributing to the delinquency of a minor and assault on a juvenile which were more than ten years old. Defendant argues that the trial court should have made findings of fact to support its determination that the probative value of the convictions outweighed the prejudicial effect. Defendant further argues that admission of the evidence of the convictions was prejudicial to his case. Rule 609 of the Evidence Code of North Carolina concerns impeachment of a witness by evidence of conviction of a crime. The Rule provides that evidence that a witness has been convicted of a crime which is punishable by more than 60 days' confinement is admissible to attack the credibility of the witness. N.C. Gen. Stat. § 8C-1, Rule 609(a) (1988). The statute further imposes a time limit on such evidence and prescribes a procedure for the trial court to follow when evidence exceeding the time limit is introduced. The statute states in part:

> (b) *Time limit.*—Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

G.S. § 8C-1, Rule 609(b) (1988). In the present case the State attempted to attack the credibility of defendant's testimony by introducing evidence of defendant's convictions of contributing to the delinquency of a minor and assault on a juvenile, each of which was more than ten years old. The following excerpt from the trial transcript is illustrative of the trial court's actions regarding this matter:

> Q. You were convicted of contributing . . . .
>
> MR. ELMORE: . . . OBJECTION. Ask to be heard.

THE COURT: Approach the bench a moment. (The following is conference at the bench between all counsel and the Court):

THE COURT: Is that within the ten years?

MRS. HARDING: No, it isn't.

MR. ELMORE: No, sir.

MRS. HARDING: It's in January, 25th, 1977.

MR. ELMORE: Clearly outside of the scope. . . .

THE COURT: . . . when was the date of the offense here?

MRS. HARDING: Here? November 15th, 1987.

THE COURT: It would be within the ten there.

MR. ALBRIGHT: I'd like to see a certified copy of it.

MRS. HARDING: I have that.

THE COURT: Let's see it.

. . .

THE COURT: Did he give written notice?

MRS. HARDING: Yes, sir.

THE COURT: Let's see the certified copy?

MRS. HARDING: There are going to be two; one is, if allowed, I'll ask about a contributing, and also about a [sic] assault on a juvenile.

THE COURT: Okay, the Court will determine that in the interest of justice, that the probative value of the conviction substantially outweighs the [sic] its prejudicial effect. OVERRULED.

. . .

Q. You have also been convicted, have you not, of contributing to the delinquency of a minor in Pulaski, Virginia in January of 1977?

A. Yes.

Q. And, you have also been convicted in Pulaski, Virginia of assaulting a juvenile, haven't you?

A. Yes, same thing; same case.

Inherent in Rule 609(b) is "a rebuttable presumption that prior convictions more than ten years old [are] more prejudicial to defendant's defense than probative of defendant's general character for credibility and, therefore, should not be admitted into evidence." *State v. Blankenship*, 89 N.C. App. 465, 366 S.E. 2d 509 (1988). "[I]n those rare instances where the use of the older prior convictions [is] not more prejudicial than probative, the trial court must make appropriate findings of fact." *Id.* at 468, 366 S.E. 2d at 511. These findings must concern "specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect." *State v. Hensley*, 77 N.C. App. 192, 334 S.E. 2d 783, *disc. rev. denied*, 315 N.C. 393, 338 S.E. 2d 882 (1986). The transcript makes it clear that the State laid no foundation for the admission of these prior convictions, thereby failing to provide the trial court a basis for making appropriate Rule 609(b) findings.

In the present case the trial court clearly failed to make appropriate findings of specific facts and circumstances to support its determination that the probative value of the convictions outweighs their prejudicial effect. This failure to make the necessary findings of fact amounted to reversible error. Accordingly, defendant is entitled to a new trial.

As a result of our decision on defendant's first assignment of error, it is unnecessary for us to address defendant's other assignments of error.

New trial.

Chief Judge HEDRICK and Judge EAGLES concur.

IN THE MATTER OF: MARY LEE WHITE, POST OFFICE BOX 34, EAST SPENCER, NORTH CAROLINA 28093, PETITIONER-APPELLANT v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, POST OFFICE BOX 25903, RALEIGH, NORTH CAROLINA 27611, DOCKET NO. X-UI 68696, RESPONDENT-APPELLEE

No. 8819SC863

(Filed 16 May 1989)

Master and Servant § 108— unemployment compensation—plaintiff not seeking work—compensation properly denied

Undisputed evidence that claimant did not seek work on at least two different days each week supported the ESC's conclusion that claimant was not "actively seeking work" pursuant to Commission Regulation 10.25(A), even though claimant generally made two job contacts each week, but both on the same day; accordingly, claimant could not be deemed "available for work" under N.C.G.S. § 96-13(a)(3) and was therefore ineligible to receive unemployment compensation benefits.

Judge GREENE concurring in the result.

APPEAL by claimant from *Collier, Judge*. Judgment entered 27 April 1988 in Superior Court, ROWAN County. Heard in the Court of Appeals 24 February 1989.

Claimant Mary Lee White appeals the trial court's decision affirming the Employment Security Commission's (ESC) order holding that she was not eligible to receive unemployment compensation benefits from the week ending 27 June 1987 through the week ending 24 October 1987. The Commission had affirmed and adopted as its own the findings of fact and conclusions of law made by the appeals referee. The appeals referee determined that claimant was not eligible for unemployment compensation benefits because she was not "actively seeking work" and, therefore, she was not "available for work" pursuant to G.S. 96-13(a)(3).

Central Carolina Legal Services, Inc., by Marsha C. Hughes Grayson and Bruce L. Perkins, for claimant-appellant.

T. S. Whitaker, Chief Counsel, and James A. Haney, Staff Attorney, for the Employment Security Commission of North Carolina, respondent-appellee.

EAGLES, Judge.

The claimant presents only one assignment of error on appeal, whether the trial court erred in affirming ESC's decision because the findings of fact and conclusions of law were not supported by the record. We affirm.

We first note that in her brief claimant argues that Commission Regulation 10.25(A) is irrational, arbitrary, and capricious, on its face and as applied. In essence, claimant's argument asserts that the regulation is unconstitutional. This claim was not raised below and, accordingly, we may not address it here. *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984).

Claimant next argues that the trial court erred in affirming ESC's decision that she was not eligible to receive unemployment compensation benefits. Claimant contends that the record supports the conclusion that she was, in fact, "actively seeking work" and was, therefore, "available for work." We emphasize that the issue here concerns only the eligibility conditions established by G.S. 96-13. In pertinent part G.S. 96-13 provides:

> (a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that—
>
> * * *
>
> (3) He is able to work, and is available for work: Provided that, unless temporarily excused by Commission regulations, *no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work.* [Emphasis added.]

Pursuant to its rule-making authority granted by G.S. 96-4(a) the Commission established Commission Regulation 10.25(A) defining the phrase "actively seeking work."

> *Actively seeking work* is defined as doing those things which an unemployed person who wants to work would normally do. A prima facie showing of "actively seeking work" has been established when: During the week for which a claim for regular unemployment insurance benefits has been filed, the claimant sought work on at least two (2) different days and made a total of at least two (2) in person job contacts. [Emphasis in original.]

Claimant here failed to except to any findings of fact and, accordingly, "our review is limited to whether ESC and the court below correctly interpreted the law and correctly applied the law to the facts found." *Couch v. N.C. Employment Security Comm.*, 89 N.C. App. 405, 407, 366 S.E. 2d 574, 575, *aff'd*, 323 N.C. 472, 373 S.E. 2d 440 (1988). The undisputed facts demonstrate that from 27 June 1987 through 24 October 1987 claimant never looked for work on more than one day each week. She generally made two job contacts each week, but admitted that the two contacts each week were made on the same day. The referee found that when claimant initiated her claim for benefits she saw a video explaining the requirement to look for work two days each week. She was also given a booklet which further described this requirement which she admitted she had not read.

The referee concluded that because claimant did not seek work on at least two different days in accordance with Commission Regulation 10.25(A) she "was not actively seeking work [and], therefore, claimant was not available for work within the meaning of the law during the week(s) in question." We agree.

In *In the Matter of: McNeil v. Employment Security Comm.*, 89 N.C. App. 142, 365 S.E. 2d 306 (1988), our court recently stated that the phrase "available for work" was not easily defined, but that each individual's availability for work would vary depending upon the facts and circumstances of each case. In addition, our Supreme Court has stated that in determining availability for work "[a] large measure of administrative discretion must be granted to the [ESC] in the application of these terms in the statute to specific cases." *In re Watson*, 273 N.C. 629, 634, 161 S.E. 2d 1, 6 (1968).

The facts here support the Commission's conclusion that claimant was not "actively seeking work" pursuant to Commission Regulation 10.25(A). Accordingly, claimant may not be deemed "available for work" under G.S. 96-13(a)(3).

Affirmed.

Judge COZORT concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

I write separately to reject any suggestion by the majority that the only way for a claimant to prove she is "actively seeking work" is to show she has "sought work on at least two different days" during the week for which unemployment compensation is sought. I believe Commission Regulation No. 10.25(A) merely provides one method of establishing compliance with N.C.G.S. Sec. 96-13(a)(3). Nonetheless, as the Commission is vested with "a large measure of administrative discretion" in applying the terms of the statute to specific cases, I agree that the facts in this case can support the conclusion of the Commission that the claimant was not "actively seeking work." *See In re Watson*, 273 N.C. 629, 634, 161 S.E. 2d 1, 6 (1968).

INTERSTATE HIGHWAY EXPRESS, INC. v. S & S ENTERPRISES, INC., JEFF M. STOKLEY AND DENISE STOKLEY

No. 885DC922

(Filed 16 May 1989)

1. **Rules of Civil Procedure § 36— withdrawal of admissions— court's discretion**

The language of N.C.G.S. § 1A-1, Rule 36(b) clearly gives the trial court the discretion to allow or not to allow a party to withdraw admissions, and in the exercise of that discretion, the court is not required to consider whether the withdrawal of the admissions would prejudice plaintiff in maintaining its action.

2. **Rules of Civil Procedure § 36; Corporations § 1.1— failure to respond to request for admissions—no separate identity of corporation—individuals responsible**

In an action to recover for transportation services provided by plaintiff to defendants, the trial court properly entered summary judgment for plaintiff where it was conclusively established by failure of the individual defendants to respond to plaintiff's request for admissions that defendant corporation had no separate identity and was the individual defendants' alter ego, and that the individual defendants were themselves indebted to plaintiff for the amount sued for.

APPEAL by defendants Jeff M. and Denise Stokley from *Tucker, Elton G., Judge*. Judgment entered 22 April 1988 in NEW HANOVER County District Court. Heard in the Court of Appeals 20 March 1989.

On 23 March 1987 plaintiff filed a complaint in which it alleged, *inter alia*, that the individual defendants, as shareholders, created and maintained the corporate defendant as an inadequately capitalized corporation; that the corporate defendant never had any separate corporate existence, but had been used for the sole purpose of permitting the individual defendants to transact a portion of their business under a corporate guise; that the conduct of the individual defendants was fraudulent and was an unfair and deceptive trade practice; and that "the defendants" were indebted to plaintiff for transportation services in the net sum of $9,922.00.

Defendants filed a verified answer in which they alleged that there was no corporate enterprise denoted as S & S Enterprises, Inc. in the complaint and in which they denied the other essential allegations of plaintiff's complaint.

On 27 April 1987 plaintiffs served on each defendant a Request For Admissions. In the Request served on defendant S & S Enterprises, Inc., it was requested to admit, *inter alia*, the following:

> 2. You ordered the transportation services referred to [in the] complaint or they were ordered on your behalf.
>
> 3. You received everything you expected to receive from the plaintiff.
>
> . . .
>
> 11. The balance herein sued for is due and owing by you to plaintiff.
>
> . . .
>
> 20. Every statement or allegation contained in plaintiff's complaint is true and correct.

In the Request served on the individual defendants, they were requested to admit, *inter alia*, the following:

> 1. S & S Enterprises, Inc., . . . is your alter ego and has no independent identity.
>
> . . .

3. S & S ordered the transportation services referred to in the complaint or they were ordered on S & S's behalf.

. . .

12. The balance herein sued for is due and owing by you to plaintiff.

. . .

21. Every statement or allegation contained in plaintiff's complaint is true and correct.

Defendants failed to respond to plaintiff's Request For Admissions, and on 1 October 1987 plaintiff moved for summary judgment.

On 21 April 1988 defendant Jeff Stokley filed an affidavit in which he asserted, *inter alia*, that he was president of S & S Enterprises, Inc. of Wilmington, a North Carolina corporation; that the debt sued for by plaintiff was incurred by that corporation in 1984, and that as of 31 December 1984 that corporation had assets in excess of $100,000.00. Stokley also asserted that he had invested over $100,000.00 "in the defendant corporation" and that he had not entered into any contract with plaintiff "in this claim."

Plaintiff's motion for summary judgment came on for hearing before Judge Tucker on 22 April 1988. Defendants requested that they be allowed to withdraw their admissions, asserting that their failure to respond was due to inadvertence of counsel. The trial court did not specifically rule on defendants' request, but did, at the close of argument, enter summary judgment for plaintiff in the sum of $9,922.00, plus interest. The corporate defendant did not appeal. Plaintiff did not appeal. The individual defendants did appeal, and it is that appeal which is now before us for disposition.

Robert G. Bowers for plaintiff-appellee.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Reid G. Hinson, for defendant-appellants.

WELLS, Judge.

[1] Defendants assign error to the trial court's denial of their motion to amend or withdraw their admissions. Rule 36(b) of the North Carolina Rules of Civil Procedure provides:

> (b) *Effect of admission.* Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 36(b) (1983).

Defendants contend that the trial court erred by not requiring plaintiff to present evidence that withdrawal or amendment would prejudice it in maintaining its action. Defendants attempt to distinguish prior cases holding that the decision whether to permit withdrawal or amendment of admissions is within the trial court's discretion. In *Whitley v. Coltrane*, 65 N.C. App. 679, 309 S.E. 2d 712 (1983), for example, this Court held that the trial court did not abuse its discretion in denying the defendant's motion to withdraw her admission where she had failed to respond to plaintiff's request for admission. Defendants draw attention to the portion of that opinion which states that "defendant's admission . . . was superfluous in considering plaintiff's motion for summary judgment because plaintiff's evidence on the . . . issue was unrefuted." *Id.* Defendants contend that the basis for the court's holding in *Whitley* was the fact that the defendant there could "show no prejudice by the trial court's failure to grant her motion to withdraw her admission. . . ."

The portion of *Whitley* upon which defendants rely is *dicta.* This Court clearly based its decision in that case on the language of Rule 36(b) that provides that the trial court's determination regarding whether to allow a party to withdraw or amend its admission is discretionary. "Rule 36(b) of the North Carolina Rules of Civil Procedure provides that 'the court may permit withdrawal' of the admission, making the ruling upon a motion to withdraw an admission discretionary with the trial court." *Id.*

We hold that the language of the Rule clearly gives the trial court the discretion to allow or not allow a party to withdraw admissions and that in the exercise of that discretion it was not required to consider whether the withdrawal of the admissions would prejudice plaintiff in maintaining its action. We overrule this assignment of error.

[2] Defendants next argue that the trial court erred in entering summary judgment against them. Summary judgment shall be rendered "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." N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(c) (1983).

In addressing this issue, we emphasize that by the failure of the individual defendants to respond to plaintiff's Request For Admissions, it was conclusively established that S & S Enterprises, Inc. had no separate identity, was the Stokley's *alter ego, and* that the Stokleys were themselves indebted to plaintiff for the amount sued for. We therefore hold that the trial court correctly entered summary judgment for plaintiff against the Stokleys.

In a cross-assignment of error, plaintiff contends that the trial court erred in failing to treble its damages and award it attorney's fees and other expenses. As we have noted earlier, plaintiff did not appeal from the trial court's judgment. Under Rule 10(d) of the North Carolina Rules of Appellate Procedure, cross-assignments of error are limited to presenting an alternative basis in law for supporting the judgment entered. Plaintiff has therefore failed to preserve the questions for our review. The judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

WALTERIA M. SPAULDING v. R. J. REYNOLDS TOBACCO COMPANY, INC.

No. 8821SC642

(Filed 16 May 1989)

Master and Servant § 7.5; Limitation of Actions § 3.2— discrimination in employment alleged—period of limitation changed by statute—action barred

Plaintiff's claim of discrimination filed under the Handicapped Persons Act right to employment statute was not timely where that statute was repealed and replaced by another which shortened the statute of limitations from three years to 180 days; plaintiff was entitled to a reasonable time after repeal of the old Act within which to file her action; the "reasonable time" could not exceed the limitations period allowed under the new law; though plaintiff had one year and five months of unexpired time under the old Act, she nevertheless had to file within 180 days so as not to exceed the limitations period of the new Act; and plaintiff's suit filed one year and five months after enactment of the new statute was barred.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from Order of *Judge J. D. DeRamus* entered 28 January 1988 in FORSYTH County Superior Court. Heard in the Court of Appeals 12 January 1989.

Badgett, Calaway, Phillips, Davis, Stephens & Peed, by Herman L. Stephens, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, by W. Andrew Copenhaver, M. Ann Anderson and Richard L. Rainey, for defendant appellee.

COZORT, Judge.

Plaintiff sued defendant alleging discrimination by her firing which she claims was due to her being handicapped by asthma. Plaintiff brought suit under the Handicapped Persons Act right to employment statute, formerly N.C. Gen. Stat. § 168-6 (1982), which was repealed in 1985. A new Handicapped Persons Protection Act, Session Laws 1985, c. 514, s. 1, effective 1 October 1985, codified as N.C. Gen. Stat. §§ 168A-1 through 168A-12, was enacted at the same time. Plaintiff was fired on 16 March 1984 and brought suit on 13 March 1987. Defendant's summary judgment motion

was granted. Plaintiff appeals. We affirm, holding that plaintiff's action is barred by the applicable statute of limitations.

Plaintiff was employed with defendant as a laboratory technician from 1981 until she was terminated on 16 March 1984. Plaintiff suffers from chronic asthma. Plaintiff's asthma is aggravated by exposure to cigarette smoke.

In 1984, plaintiff returned to work after a medical leave for an ankle injury. Shortly after her return, plaintiff's overall job performance was evaluated and plaintiff was placed on a five-week probation because of job performance problems. Plaintiff was examined in 1984 by Dr. L. W. Stringer, who recommended that she not work in a smoke-filled environment. Thereafter defendant reassigned plaintiff to a job which did not expose her to cigarette smoke. She was later assigned to a job which exposed her to cigarette smoke. Plaintiff claims that the smoke caused her to have breathing difficulties. Her requests for reassignment were denied, and problems with plaintiff's job performance continued. On 13 February 1984, plaintiff was given an unacceptable rating by her supervisors for the period of her probation. Plaintiff left work on 23 February 1984 because of asthmatic spasms. She returned to work on 5 March 1984 after being fully certified to return to work. Plaintiff again complained of being assigned to a job which exposed her to cigarette smoke. Her employment was terminated by defendant on 16 March 1984.

The dispositive issue in this case is whether plaintiff's claim was filed within a reasonable time after the former Handicapped Persons Act right to employment statute was repealed and the new Act was enacted, with the result being that the statute of limitations for such actions was shortened from three years to 180 days.

Plaintiff contends that the alleged discrimination occurred on 16 March 1984 when she was fired. The statute under which plaintiff filed her claim was repealed effective 1 October 1985. Session Laws 1985, c. 514, s. 1 (1985). The Act replacing the former Handicapped Persons Act (HPA) right to employment statute is entitled the Handicapped Persons Protection Act (HPPA). N.C. Gen. Stat. § 168A-1 (1987). The new Act provides for a statute of limitations of 180 days. N.C. Gen. Stat. § 168A-12 (1987). The old Act did not provide its own statute of limitations. Plaintiff contends, therefore, that the three-year statute of limitations in § 1-52(2)

applied because plaintiff was suing on a liability created by statute. N.C. Gen. Stat. § 1-52(2) (1983). Since she filed suit on 13 March 1987, within three years of the time her cause of action arose on 16 March 1984, plaintiff contends that her claim was not time barred even though the old Act under which she claims was repealed before the suit was filed.

We find plaintiff's claim was barred because she failed to file her claim within a reasonable time after the repeal of the old Act and the adoption of the new law. In *Culbreth v. Downing*, 121 N.C. 205, 28 S.E. 294 (1897), the Supreme Court considered the effect of the General Assembly reducing the statute of limitations for a particular action from twenty years to three years. The Court held:

> The Legislature may change the remedy and the statute of limitations, which applies to the remedy, by extending or shortening the time, *provided in the latter case a reasonable time is given for the commencement of an action before the statute works a bar. Nichols v. R.R.*, 120 N.C., 495; *Terry v. Anderson*, 95 U.S., 628.
>
> This is the extent to which this Court has heretofore gone, and any more rigid rule would seem to be unconstitutional. This rule leaves open the question in each case, What is a *reasonable time*? (emphasis in original) and that is objectionable, because it is attended with uncertainty in the minds of litigants and the profession.
>
> *We therefore hold that a reasonable time shall be the balance of the time unexpired, according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute.* For example, if the action would have been barred in six years, and four years have elapsed before the amending act, then two years more would be a reasonable time. If three years' time would bar the action, and the three years have elapsed, as in the present case, before the amending act is passed, then three years thereafter would be the limit, and no more; *and this rule will apply to all other periods of limitation on actions.*

Id. at 205, 26 S.E. at 295 (emphasis added).

In the case below, the balance of time unexpired under the old statute of limitations when the new Act was passed was ap-

proximately one year five months. Under *Culbreth*, the reasonable time to allow plaintiff's suit would be one year five months from the date the new law became effective (1 October 1985), except that the unexpired time exceeds the 180-day statute of limitations allowed under the new law. *Culbreth* holds that the "reasonable time" cannot exceed the limitations period allowed under the new law. Therefore, plaintiff had 180 days after the new Act became effective in which to sue. The Act became effective 1 October 1985, and unless plaintiff's suit was filed before 1 March 1986, it was barred by the statute of limitations. Plaintiff's suit was filed 13 March 1987 and was, therefore, barred.

The trial court's order of summary judgment is

Affirmed.

Judge GREENE concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I vote to vacate the order dismissing plaintiff's action. Her action under the authority of the former Act is materially different from actions authorized by the new Act, and in my opinion the diminished statute of limitations does not apply to it; and if it does the 180 days allowed her to sue after the statute became effective was not reasonable, "taking all the circumstances into consideration." *Blevins v. Northwest Carolina Utilities, Inc.*, 209 N.C. 683, 686, 184 S.E. 517, 519 (1936).

STATE OF NORTH CAROLINA, APPELLEE v. OSBORNE WHITE, A/K/A ARGO COOKE, APPELLANT

No. 8812SC1003

(Filed 16 May 1989)

Arrest and Bail § 11.4— surety's location of defendant—no extraordinary cause shown

The trial court did not err in failing to find "extraordinary cause" for the remission of a judgment of forfeiture of an ap-

pearance bond where the evidence tended to show that petitioner surety obtained information as to defendant's whereabouts and informed officers who then arrested defendant. N.C.G.S. § 15A-544(h).

APPEAL by petitioner from *Herring, Judge*. Order entered 9 September 1988 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 8 May 1989.

This is an appeal from an order entered pursuant to G.S. 15A-544 denying petitioner's request to strike an order of forfeiture and to enter a judgment of remission. The record reveals the following: Defendant, Osborne White, was indicted for possession with intent to sell and distribute cocaine and for the sale and delivery of cocaine. On 15 January 1987, petitioner, acting as surety, posted a secured appearance bond in the amount of $4,800.00. Defendant failed to appear in court on 7 May 1987, his scheduled court date. An order for defendant's arrest was issued on that date, and an Order of Forfeiture was entered. Petitioner, having learned of defendant's failure to appear, obtained information as to defendant's whereabouts. Thereafter, petitioner informed Officer Ed Clark of the Fayetteville Police Department of defendant's location. Officer Clark, using the information provided by petitioner, was able to locate and arrest defendant. On 25 February 1988, petitioner filed a petition praying the court to enter an order striking the Order of Forfeiture and to enter a judgment of remission. At the hearing on the petition, the trial court found as facts, *inter alia*, "[t]hat the surety, Oscar Brady, exercised some effort though not dramatic effort in assisting Officer Clark in locating and arresting the defendant and that on June 11, 1987, the defendant pled guilty to a negotiated plea of sale of cocaine and was sentenced to a term of imprisonment." The court also found that petitioner made no showing of unusual expense in the apprehension of defendant and that petitioner was not compensated for posting the bond but did so as a friend of defendant's mother. The court further found "[t]hat the surety does not appear to be a well-educated person but did acknowledge that he knew the defendant went by two different names when he (surety) undertook the bond." Thereafter, the court concluded as a matter of law that petitioner failed to show extraordinary cause as required by G.S. 15A-544(h) and denied petitioner's request to strike the Order of Forfeiture and to enter a judgment of remission. Petitioner appealed.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, for petitioner, appellant.

Maynette Regan for appellee, Cumberland County Board of Education.

HEDRICK, Chief Judge.

Petitioner, by his first assignment of error, argues the trial court erred in denying his application for remission. Petitioner asserts that he has shown "extraordinary cause" under G.S. 15A-544(h); therefore, "it was incumbent upon the lower court to order remission of the bond. . . ."

G.S. 15A-544(h) states in pertinent part that "[f]or extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate." This statute authorizes the trial court to exercise its discretion to remit a judgment of forfeiture, in whole or in part, only upon a showing of "extraordinary cause." *State v. Vikre*, 86 N.C. App. 196, 356 S.E. 2d 802, *disc. rev. denied*, 320 N.C. 637, 360 S.E. 2d 103 (1987). This Court in *Vikre* presumed that since "extraordinary cause" was not defined by the statute, the legislature intended the words to be given their usual meaning. *See Transportation Service v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973). Webster's Third New International Dictionary (1968) defines "extraordinary" as "going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk or a kind other than what ordinary experience or prudence would foresee." From the evidence disclosed by the record, we cannot say that the trial court erred in not finding "extraordinary cause" in this case. This assignment of error is without merit.

Petitioner next argues that some of the trial court's findings are not supported by the evidence, and the findings do not support the conclusions and the order entered. Petitioner argues that the findings are insufficient to show an "absence of extraordinary cause" and that the findings reveal that the trial court improperly considered G.S. 15A-544(e) in its determination, as evidenced by Finding of Fact No. 8 which states "[t]hat more than 90 days has passed since entry of the judgment of forfeiture against the surety."

G.S. 1A-1, Rule 52(a)(1) states:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

This Court in *State v. Rakina and State v. Zofira*, 49 N.C. App. 537, 540-541, 272 S.E. 2d 3, 5 (1980), *disc. rev. denied*, 302 N.C. 221, 277 S.E. 2d 70 (1981) stated:

> Appellant argues for more specificity than is required. Under Rule 52(a), N.C. Rules Civ. Proc., the court need only make brief, definite, pertinent findings and conclusions upon the contested matters. A finding of such essential facts as lay a basis for the decision is sufficient. [Citations omitted.]

While we recognize that some of the findings and conclusions made by the trial judge refer to G.S. 15A-544(e), it is clear from the order that he based his decision correctly on G.S. 15A-544(h).

In reviewing the evidence disclosed by the record, we cannot hold the trial judge abused his discretion in not granting the relief sought. The evidence clearly supports the findings, and the findings support the conclusions and the order signed. This argument, like the other, is meritless. The order of the trial court will be affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

JOEL PETTEWAY, JR. v. SOUTH CAROLINA INSURANCE COMPANY, A MEMBER OF THE SEIBELS BRUCE GROUP, AND GEICO, A/K/A GOVERNMENT EMPLOYEE'S INSURANCE COMPANY

No. 884SC1098

(Filed 16 May 1989)

Insurance § 69— uninsured motorist coverage—unidentified motorist—absence of collision

Plaintiff was not entitled to recover under the uninsured motorist provisions of automobile insurance policies for injuries caused by an unidentified motorist where the record

shows that his injuries did not result from a collision between motor vehicles even though a disinterested witness can verify that an unidentified motorist was involved.

APPEAL by plaintiff from *Reid, Judge*. Order entered 25 July 1986 in Superior Court, ONSLOW County. Heard in the Court of Appeals 19 April 1989.

On 16 April 1985 plaintiff was seriously injured when an automobile he was driving in Onslow County overturned after being forced off the highway by an unidentified motorist. Plaintiff's vehicle did not contact any other vehicle. The incident was witnessed by another motorist, Michael R. Castracane, who stayed until the police arrived and assisted in removing plaintiff from the wreck. The car plaintiff was driving, owned by his father-in-law, was insured by defendant GEICO, his own car was insured by defendant South Carolina Insurance Company, and each policy had the uninsured motorist coverage mandated by G.S. 20-279.21(b)(3). Plaintiff sued defendants to recover those coverages and, after the foregoing facts were conclusively established by discovery, the suit was dismissed by an order of summary judgment in which the judge noted that except for being restrained by the law there was sufficient independent verification of the unidentified motorist's existence and negligence to warrant the claim being made.

Lanier & Fountain, by Keith E. Fountain, for plaintiff appellant.

Anderson, Cox, Collier & Ennis, by Donald W. Ennis, for defendant appellee South Carolina Insurance Company.

Marshall, Williams, Gorham & Brawley, by Ronald H. Woodruff, for defendant appellee GEICO.

PHILLIPS, Judge.

The only question before us being whether plaintiff's claim to the benefit of defendants' uninsured motorist coverages is legally enforceable under G.S. 20-279.21(b)(3) and the record showing without contradiction that plaintiff's injuries did not result from a collision between motor vehicles, the order is correct and we affirm it.

In personal injury cases based upon the negligence of an unidentified motorist, G.S. 20-279.21(b)(3) authorizes recovery under the uninsured motorist provision of automobile liability insurance policies written in this state only if the injuries resulted from a "collision

between motor vehicles," and it has been held that the coverage does not apply when the claimant's vehicle merely overturns or runs into something other than a vehicle, such as a ditch. *East v. Reserve Insurance Co.*, 18 N.C. App. 452, 197 S.E. 2d 225 (1973); *Hendricks v. United States Fidelity and Guaranty Co.*, 5 N.C. App. 181, 167 S.E. 2d 876, *cert. denied*, 275 N.C. 594, --- S.E. 2d --- (1969). Plaintiff does not dispute the validity of these holdings; his only argument is that since the legislature's apparent purpose in enacting the collision requirement was to prevent fraudulent claims based upon the alleged negligence of fictitious motorists that the requirement is dispensed with when, as here, a disinterested eyewitness can verify that an unidentified motorist was involved. The plain wording of the above quoted statutory provision, as well as the foregoing decisions, require that this argument be rejected.

In affirming the order, however, we do not approve statements in the cited cases indicating that the "collision" required by the statute for uninsured motorist coverage is with the unidentified vehicle. In reaching that conclusion the panel apparently gave more weight to the policy language about a "hit-and-run automobile" than it did to the statutory terms, which no policy provision can override. The statutory phrase "collision between motor vehicles" is not restricted to any particular vehicles, restricting it by interpolation is not our office, and there is no reason to suppose that in using that unqualified phrase that the General Assembly intended to exclude from the statute's beneficent provisions victims of motor vehicle collisions caused by unidentified motorists whose vehicles have no collision. The phrase is not ambiguous and the clear indication is rather that the legislature intended to make the provisions available to all insureds who are injured in motor vehicular collisions caused by unidentified motorists. Furthermore, the statements were unnecessary to those decisions, neither of which involved a collision between motor vehicles of any kind, and their apparent approval in *McNeil v. Hartford Accident and Indemnity Co.*, 84 N.C. App. 438, 352 S.E. 2d 915 (1987) was qualified, to say the least, since the collision requirement was deemed to have been met by plaintiff's vehicle colliding with a vehicle that was hit by the unidentified vehicle. In any event a motor vehicular collision of some kind is certainly essential to plaintiff's case and no such collision occurred.

Affirmed.

Judge COZORT concurs.

Judge PARKER concurs in the result.

THE STATE OF NORTH CAROLINA v. SHELDON EARL LANIER

No. 888SC1032

(Filed 16 May 1989)

Arrest and Bail § 11.4— appearance bond—petition for remission of judgment of forfeiture—extraordinary cause—failure to make appropriate findings

Where petitioner-surety filed a petition for remission of a judgment of forfeiture of an appearance bond pursuant to N.C.G.S. § 15A-544(h), the trial court erred in failing to make appropriate findings of fact and conclusions of law under the proper test as to whether "extraordinary cause" was shown.

APPEAL by petitioner surety-obligor from *Fellers, Carlton, Judge*. Order entered 29 July 1988 in Superior Court, WAYNE County. Heard in the Court of Appeals 13 April 1989.

This is an appeal by petitioner surety-obligor from an order denying petitioner-surety's petition for remission.

H. Jack Edwards for respondent appellee Wayne County Board of Education.

Jean P. Hollowell for petitioner-surety appellant.

JOHNSON, Judge.

On 31 October 1986, petitioner-surety American Bankers Insurance Company, by and through its North Carolina agent, Piedmont Investment, a partnership owned and operated by Benny West and Steven Eller, signed a $10,000.00 appearance bond for one Sheldon Earl Lanier, who was charged with felonious breaking and entering, larceny, and receiving and possession of stolen goods. The defendant Lanier failed to appear for his trial on 31 March 1987, and was called and failed. An order for forfeiture and notice and an order for defendant's arrest were issued. On 27 July 1987,

a judgment of forfeiture was entered. On 5 August 1987, the judgment of $10,000.00 was remitted in the amount of $5,000.00 pursuant to G.S. sec. 15A-544(e).

On 9 February 1988, the defendant was arrested in Phoenix, Arizona by petitioner-surety's North Carolina agent(s) who returned the defendant to North Carolina and surrendered him to the custody of the Wayne County jail. On 11 February 1988, petitioner-surety, through its North Carolina agent, filed a petition for remission of the judgment of forfeiture pursuant to G.S. sec. 15A-544(h). At the 14 July 1988 Criminal Session of Superior Court, Judge Fellers conducted a hearing on the petition, after which he denied any remission. From this denial, petitioner-surety appeals.

By its first Assignment of Error, petitioner-surety contends that the trial court erred in failing to make any findings of fact and conclusions of law in its order denying the petition for remission. We must agree.

G.S. sec. 15A-544(e) and (h) provide the two situations in which the court is authorized to order remission after entry of judgment of forfeiture. *State v. Moore*, 57 N.C. App. 676, 292 S.E. 2d 153 (1982). Under subsection (e), the court is guided in its discretion as "justice requires," and under subsection (h), the court is guided in its discretion as to whether the evidence presented constitutes a showing of "extraordinary cause." *Id.* Petitioner-surety in the case *sub judice* sought remission pursuant to subsection (h) which provides in pertinent part that

> [f]or extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate. Any person moving for remission of judgment must do so by verified petition. . . .

This Court has held in cases reviewing orders of judgments entered pursuant to subsection (h) that the trial court should make brief, definite, pertinent findings of fact and conclusions of law to support its order. *Moore, supra; State v. Rakina and State v. Zofira*, 49 N.C. App. 537, 272 S.E. 2d 3 (1980), *disc. rev. denied*, 302 N.C. 221, 277 S.E. 2d 70 (1981).

After conducting a hearing on petitioner-surety's motion, Judge Fellers commented, "[t]his money goes to the school board, right?

Well, I think the school board needs this money more than the [s]urety and I am not going to make any remissions. Petition denied." Judge Fellers then entered the following order:

> This cause coming on to be heard and being heard before the undersigned Judge Presiding upon Motion of Piedmont Investment Company, Inc., Surety, in the above-captioned matter for a Remission of the Bond;
>
> And after reviewing the Court record and hearing argument from Jean P. Hollowell, Attorney for the petitioner-surety, and Jack Edwards, Attorney for the respondent-Wayne County Board of Education, it appears to the Court that this Petition for Remission should not be granted;
>
> Therefore, it is ORDERED, ADJUDGED AND DECREED that the Petition for Remission is hereby denied.

In support of its petition, petitioner-surety submitted affidavits and some twenty pages of exhibits detailing the time, effort and expense its agent(s) incurred in finding, arresting and returning the defendant to the proper authorities. The alleged expenses total $3,030.92.

The school board, as the trial judge observed, may indeed need the funds more than the surety. However, this is not the test required by G.S. sec. 15A-544(h). The required test is whether "extraordinary cause" is shown. Without the trial court making appropriate findings of fact and conclusions of law under the proper test, we are unable to give effective review of the trial court's decision. Therefore, this matter must be remanded to the trial court for it to review the evidence of record, make appropriate findings of fact and conclusions of law, and to enter an order supported by the conclusions of law.

By its second Assignment of Error, petitioner-surety contends the trial court erred in the denial of its petition for remission. We do not reach this issue in that the matter must be remanded to the trial court for it to make a determination, from the evidence of record, whether "extraordinary cause" is shown.

Reversed and remanded.

Judges BECTON and ORR concur.

IN THE MATTER OF THE ESTATE OF ELIZABETH SPANN BAUMANN

No. 8824SC752

(Filed 16 May 1989)

1. **Wills § 30.1— vague bequest—presumption against intestacy inapplicable—bequest void**

The trial court did not err in an action to interpret a holographic will by concluding that bequests of "a sum of money ( )" were void for vagueness where respondents' argument that the language in question should be construed as a residuary clause so as to avoid partial intestacy is meritless since such an interpretation would not prevent partial intestacy as to the real property; furthermore, no court may provide a dollar amount where the intent of the testatrix, taken from the four corners of the will, is uncertain.

2. **Wills § 55— possessions—reference to personal property only**

The trial court did not err in an action to interpret a holographic will by ruling that the use of the term "possessions" referred to the personal property of the testatrix and not to real property where the testatrix showed an intention to differentiate between personal property and real property by using the term "real estate" in another section of the will and the contrary interpretation was unlikely to have been the intent of the testatrix as gathered from the four corners of the will.

APPEAL by respondents from *Lamm, Judge*. Judgment entered 28 May 1987 in Superior Court, WATAUGA County. Heard in the Court of Appeals 17 April 1989.

This is a proceeding instituted by the administrators of the estate of Elizabeth Spann Baumann seeking interpretation of a holographic will. The pertinent portions of the will appear in the record as follows:

> . . . do Will to . . . Mike [and] Jenefred Church a Sum of money ( ).
>
> To my brother Fred C. Spann ½ of all my possissions [sic] to have and to hold.

To Erline [and] Philip Spann my nephew [and] neice a Sum of money ( ) To Jr. Their Son . . . a Sum of money ( ). . . . To Billie Baumann—Fred C. Baumann nephew all Realestate [sic] in Mich. . . .

Following a hearing, the trial court entered a judgment making the following conclusions of law:

1. The attempted bequests in the will of Elizabeth S. Baumann, '. . . a sum of money ( ) . . . .', to Mike & Jenefred Church, Elaine & Philip Spann,' Jr. their Son', and Virginia Spann Green and Husband, fail for lack of a specific monetary figure and are void for vagueness.

2. Fred Spann—'possessions'—In making reasonable inferences as to the decedent's intent from within the four corners of her will, the Court concludes that the term 'Possessions' in the second paragraph of said will refers to the decedent's personal property and not any real estate, the decedent showing an intention to differentiate by using the term real estate in another section of her will.

The trial court then ordered that the Michigan real estate be granted to Billie Baumann, that one-half of testator's personal property pass to Fred C. Spann, and that the other one-half of the personal property and all remaining real estate pass by intestate succession under G.S. 31-42. Respondent Fred C. Spann and Diane S. Griffin, guardian ad litem for respondents Jenefred and Mike Church, appealed.

Diane S. Griffin for respondents, appellants Jenefred and Mike Church.

Finger, Watson, Di Santi & McGee, by John A. Turner, for respondent, appellant Fred C. Spann.

HEDRICK, Chief Judge.

[1] Respondents Jenefred and Mike Church and respondent Fred C. Spann have raised questions concerning the correct construction of testatrix' will. The intention of the testatrix as gathered from the four corners of the will is our controlling guide in such interpretation. *Campbell v. Jordan*, 274 N.C. 233, 162 S.E. 2d 545 (1968).

In this case, respondents Jenefred and Mike Church specifically contend the trial court erred in concluding that bequests of

"a sum of money ( )" made in the will were void for vagueness. We disagree. There is generally a presumption in construing a will that a testatrix did not intend to die intestate as to any part of his or her property. *Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867 (1963). However, where partial intestacy cannot be avoided even if language of the will is interpreted as disposing of the property in question, this presumption against partial intestacy cannot be applied. *Ravenel v. Shipman*, 271 N.C. 193, 155 S.E. 2d 484 (1967). For this reason, respondents' argument that the language in question should be construed as a residuary clause so as to avoid partial intestacy is meritless since such an interpretation would not prevent partial intestacy as to the real property.

Furthermore, the bequests of "a sum of money" along with a blank space bracketed by parentheses could hardly be construed as a residuary clause. We therefore agree with the trial court that such attempted bequests fail due to vagueness. Whether the testatrix chose to not provide for respondents or merely forgot to write amounts in the parentheses is irrelevant. No court may provide a dollar amount where the intent of the testatrix, taken from the four corners of the will, is uncertain. Respondents' argument is without merit.

[2] Respondent Fred C. Spann argues that the trial court erred in ruling that use of the term "possessions" referred only to the personal property of the testatrix and not to real property, and that he is entitled to one-half of all real property as well as personal property. We agree with Judge Lamm's conclusion that the term "possessions" refers only to personal property since the testatrix showed an intention to differentiate between personal property and real property by using the term "real estate" in another section of the will. That the testatrix would devise one-half of her real property to respondent and then make specific devises of real property to others is unlikely to have been the intent of the testatrix as gathered from the four corners of the will. Respondent's argument is without merit.

The judgment of the superior court is affirmed.

Affirmed.

Judges WELLS and EAGLES concur.

IN THE MATTER OF: LEWIS P. GREGORY, JR. v. NORTH CAROLINA DEPARTMENT OF REVENUE AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8821SC643

(Filed 16 May 1989)

Master and Servant § 108.1— unemployment compensation—employee of Department of Revenue—discharge for failure to file tax returns

A supervisory employee of the N. C. Department of Revenue who was discharged for failure to file 1985 and 1986 state income tax returns on time or to request extensions of time for filing was discharged for misconduct connected with his work within the purview of N.C.G.S. § 96-14(2) and thus is not entitled to unemployment benefits.

APPEAL by petitioner from *Seay, Judge.* Judgment entered 16 March 1988, *nunc pro tunc* 7 March 1988, in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 February 1989.

Pfefferkorn, Pishko & Elliot, by David C. Pishko and Ellen R. Gelbin, for petitioner appellant.

Attorney General Thornburg, by Assistant Attorney General Marilyn R. Mudge, for respondent appellee North Carolina Department of Revenue.

Staff Attorney Kathryn S. Aldridge for respondent appellee Employment Security Commission of North Carolina.

PHILLIPS, Judge.

Petitioner, a professional level employee of the North Carolina Department of Revenue responsible for the collection of delinquent taxes, was discharged for failing to timely file, or to request an extension of time in which to file, his 1985 and 1986 individual state income tax returns. His claim for unemployment benefits was denied by the Employment Security Commission, and the decision was affirmed by the Superior Court. That petitioner neither timely filed the tax returns required by law nor applied for extensions of time within which to file has been established and is no longer disputed. The only question petitioner raises is whether these facts support the Commission's conclusion that he was dis-

charged for misconduct connected with his work under G.S. 96-14. The trial judge held that they do, and we agree.

Misconduct in connection with work is defined in our Employment Security Law at G.S. 96-14(2) as:

> . . . conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Petitioner fallaciously argues that his failure to file his tax returns on time did not constitute misconduct under this statute because the Department has no rule or policy requiring employees to file their returns on time. Petitioner's conduct being forbidden by statute a work rule to the same effect was unnecessary. Furthermore, a finding of misconduct does not necessarily depend upon the violation of a specific work rule. *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 349 S.E. 2d 842 (1986). Since the Department of Revenue administers and enforces our tax laws it is obviously in its interest, as well as that of the public, for its supervisory employees to comply with the laws they are employed to enforce; and that petitioner's delinquencies were contrary to that interest is self-evident. And it is immaterial that it has not been shown that petitioner's delinquencies harmed the Department; harm to the employer is not an element of misconduct as defined by G.S. 96-14(2), which speaks only of conduct and does not mention consequences.

Affirmed.

Judges ARNOLD and JOHNSON concur.

JULIANA G. YATES, PETITIONER v. BOBBY RAY DOWLESS, RESPONDENT

No. 8826DC1190

(Filed 16 May 1989)

Divorce and Alimony § 24.10; Parent and Child § 7— disabled adult children—no obligation of parent to support—child support order improper

There is no longer a statutory obligation on the part of parents to support their disabled adult children, and the trial court therefore erred in ordering respondent to pay "continuing ongoing child support without regard to the child's chronological age." N.C.G.S. § 50-13.8.

APPEAL by respondent from *Elkins, Judge*. Order entered 18 July 1988 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 May 1989.

This is a civil action wherein petitioner, mother moved the court to require respondent, father to continue to pay child support for their mentally retarded son, Jason Scott Dowless. Petitioner also moved for an increase in the child support payments from $400.00 per month to $600.00 per month. Both motions were allowed, and respondent was ordered to pay $600.00 per month "continuing ongoing child support without regard to the child's chronological age." Respondent appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith, and Associate Attorney General Bertha Fields, for the petitioner, appellee.

Thomas R. Cannon and Amy L. McGrath for respondent, appellant.

HEDRICK, Chief Judge.

The sole question presented on this appeal is whether respondent is obligated to support his son, Jason, beyond 3 November 1989, Jason's twentieth birthday. In an earlier order, respondent agreed to support Jason until he graduates from high school or reaches the age of 20.

The common law of this state was that a father was under a legal obligation to continue to support a child who, before and

after reaching majority, was and continued to be insolvent, unmarried, and incapable, mentally or physically, of earning a livelihood. *Wells v. Wells*, 227 N.C. 614, 44 S.E. 2d 31 (1947). In 1967, the General Assembly enacted G.S. 50-13.8 which provided:

> *Custody and Support of Persons Incapable of Self-Support Upon Reaching Majority.* For the purposes of custody and support, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support.

In 1971, the General Assembly, by Section 3 of Session Laws 1971, c. 218, added a proviso to G.S. 50-13.8 which exempted parents from liability for charges made by a facility owned or operated by the Department of Natural Resources for the care of their children who were long-term patients. In 1979, G.S. 50-13.8 was amended to read as follows:

> *Support of persons incapable of self-support upon reaching majority.* For the purposes of custody, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support.

The State, in its brief, readily concedes that there is no longer a statutory obligation on the part of parents to support their disabled adult children. However, the State argues that the intention of the legislature in amending G.S. 50-13.8 was not to relieve a parent of the obligation to support an adult child who is mentally or physically incapable of self-support. "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E. 2d 386, 388-389 (1978). "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E. 2d 793, 804 (1970).

In light of the plain and definite meaning found in G.S. 50-13.8, we hold the trial judge erred in ordering respondent to pay "contin-

uing ongoing child support without regard to the child's chronological age," and that portion of the order will be reversed.

Reversed.

Judges ARNOLD and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 MAY 1989

BOLING v. JACK ECKERD DRUG CO. No. 8826DC967	Mecklenburg (85CVD7646)	Affirmed
COOK v. WESTERN & SOUTHERN LIFE INS. CO. No. 8819SC759	Cabarrus (87CVS1028)	Affirmed
DANIELS v. ALL-STAR SPORTS No. 8822DC686	Iredell (87CVD1396)	Affirmed in part; reversed in part & remanded
FINK v. REDDING No. 8820DC774	Moore (86CVS797)	Affirmed
KINLAW v. KINLAW No. 8820DC1063	Stanly (87CVD415)	Affirmed
LITTLEJOHN v. LITTLEJOHN No. 8821DC1255	Forsyth (82CVD5829)	Affirmed in part and remanded in part
PERRY-GRIFFIN FOUNDATION v. THORNBURG No. 883SC702	Pamlico (87CVS65)	Affirmed
STATE v. BELL No. 888SC1199	Wayne (87CRS7295)	Remanded for resentencing
STATE v. DAVIS No. 8819SC1089	Rowan (87CRS10474)	No Error
STATE v. FOSTER No. 8815SC1194	Alamance (88CRS1953) (88CRS1954)	New Trial
STATE v. GANTT No. 8826SC1219	Mecklenburg (87CRS17319) (87CRS18551)	No Error
STATE v. HARDEN No. 8826SC931	Mecklenburg (87CRS055000)	No Error
STATE v. HINES No. 8826SC1116	Mecklenburg (87CRS81194) (87CRS81195)	No Error
STATE v. JONES No. 8821SC1017	Forsyth (87CRS33273)	Vacated & Remanded
STATE v. JONES No. 881SC1372	Perquimans (88CRS13)	No Error

STATE v. LOWRY No. 8826SC1258	Mecklenburg (87CRS76528)	No Error
STATE v. McGILBERRY No. 881SC1192	Pasquotank (83CRS3689) (83CRS3690) (85CRS964)	Appeal Dismissed
STATE v. MARSH No. 8812SC1308	Cumberland (88CRS9676)	No Error
STATE v. MATTIS No. 8815SC1428	Orange (87CRS7099)	No Error
STATE v. PAGE No. 8816SC945	Robeson (87CRS15840)	No Error
STATE v. RUSSELL No. 889SC1162	Vance (88CRS103) (88CRS177)	No Error
STATE v. SANCHO No. 888SC1145	Wayne (88CRS1969)	No Error
STATE v. STRAUCH No. 8811SC1175	Lee (87CRS6606)	No Error
STATE v. WILLIAMS No. 887SC1301	Wilson (88CRS454) (88CRS455) (88CRS456) (88CRS458)	No Error
STATE v. WOODS No. 8819SC1254	Rowan (86CRS8287) (86CRS8288)	Affirmed
STATE v. YARBOROUGH No. 8814SC1336	Durham (88CRS3727) (88CRS4651)	Remanded for resentencing
WHITE v. UNION COUNTY & ZONING BD. OF ADJUSTMENT No. 8820SC1121	Union (88CVS0329)	Reversed & Remanded

FILED 16 MAY 1989

BENBOW v. BENBOW No. 8821DC811	Forsyth (83CVD5130)	Affirmed
BOONE DEVELOPMENTS, INC. v. TOWN OF BOONE No. 8824SC647	Watauga (86CVS655)	Affirmed

BUCK v. WILLIAMS No. 883SC753	Craven (85CVS930)	No Error
CHAVEZ v. PHILLIPS INVESTMENT BLDRS. No. 8826SC1045	Mecklenburg (84CVS11244)	New Trial
COATS v. ECKERT No. 8829SC772	McDowell (87CVS49)	Vacated & Remanded
HABER v. HARTLEY No. 8824DC640	Watauga (87CVD405)	Affirmed
HENDERSON v. FENESTRA, INC. No. 8810IC529	Ind. Comm. (030636)	Affirmed in part, vacated in part & remanded
LAMBDIN v. NANTAHALA VILLAGE No. 8830DC524	Swain (86CVD80)	Affirmed
PREFERRED SAVINGS BANK v. AVERY CLOSE CONDOMINIUM No. 8818SC1094)	Guilford (87CVS12571)	Dismissed
SELF v. CITIZENS SAVINGS BANK No. 8825SC504	Catawba (86CVS1644)	Affirmed
STATE v. BURTON No. 8820SC911	Richmond (87CRS4619) (87CRS4621) (87CRS4622) (87CRS4623)	No Error
STATE v. GARDNER No. 8824SC1021	Mitchell (86CRS754) (86CRS756)	Vacated & Remanded
STATE v. JAMES No. 8821SC653	Forsyth (87CR27150) (87CR27151) (87CR27148) (87CR25088) (87CR10254) (87CR10253)	Remanded for resentencing
STATE v. KELLAM No. 8818SC924	Guilford (87CRS40473) (88CRS20264)	No Error Vacated
STATE v. SMITH No. 8816SC1114	Robeson (87CRS14752) (87CRS14754) (87CRS14755)	New trial in part; vacated in part

STATE v. WIGGINS No. 882SC1203	Martin (88CRS260) (88CRS261) (88CRS262) (88CRS263) (88CRS264) (88CRS265) (88CRS266) (88CRS267) (88CRS353) (88CRS883)	No Error
WARLICK v. BROUGHTON HOSP. No. 8825SC1176	Burke (88CVS429)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADVERSE POSSESSION

APPEAL AND ERROR

ARREST AND BAIL

remission of a judgment of forfeiture of an appearance bond. *S. v. Lanier*, 779.

The trial court did not err in failing to find "extraordinary cause" for the remission of a judgment of forfeiture of an appearance bond where the surety obtained information as to defendant's whereabouts and informed officers who arrested defendant. *S. v. White*, 773.

ARSON

§ 4.2. Insufficiency of Evidence

Defendant could not be convicted of common law second degree arson for burning a trailer because the trailer was uninhabited at the time it was burned where the male occupant had been murdered and the female occupant had vacated the trailer. *S. v. Ward*, 682.

ASSAULT AND BATTERY

§ 15.7. Self-Defense Instruction not Required

A defendant charged with assault with a deadly weapon inflicting serious injury by stabbing a fellow prison inmate was not entitled to an instruction on self-defense because of evidence that he believed the victim had arranged to have another inmate assault defendant for $300. *S. v. Lovell*, 726.

ATTORNEYS AT LAW

§ 7. Fees Generally

Plaintiff's complaint raised the existence of a justiciable issue and did not justify an award of attorney fees to defendant under G.S. 6-21.5 or G.S. 1A-1, Rule 11. *Harris v. Harris*, 67.

§ 7.4. Fees Based on Provisions in Notes

The evidence was sufficient to support an award of attorney fees in an action to collect amounts due under a promissory note. *Barker v. Agee*, 537.

§ 7.5. Allowance of Fees as Part of Costs

The Clerk of Superior Court did not err by taxing the costs of the guardian ad litem's attorney fee to the estate in an action to revoke letters testamentary. *In re Estate of Sturman*, 473.

AUTOMOBILES

§ 6.5. Liability for Fraud in Sale of Motor Vehicles

The trial court gave proper instructions on the issues and the fraud element in an action to recover damages for an unfair trade practice and for violations of state and federal odometer statutes in connection with the sale of a used truck. *Washburn v. Vandiver*, 657.

The trial court did not err in awarding plaintiffs $1,500 for a federal odometer statute violation and $1,500 for a state odometer statute violation. *Ibid.*

The assessment of damages for an unfair trade practice and for odometer statute violations did not amount to a double recovery. *Ibid.*

AUTOMOBILES — Continued

§ 50. Sufficiency of Evidence on Issue of Negligence Generally

The trial court did not err in an action arising from the collision of an automobile with a moped by granting one defendant's motion for summary judgment where the materials before the court established that the other defendant owned the automobile and was driving it. *Brown v. Lyons*, 453.

§ 63.1. Sufficiency of Evidence of Negligence; Striking Children Darting into Road

The trial court erred in granting summary judgment against the guardian ad litem for the victim of a collision between a moped and an automobile. *Brown v. Lyons*, 453.

§ 112. Homicide; Competency of Evidence

An expert in accident reconstruction was properly permitted to give his opinions in a prosecution for manslaughter arising from an automobile accident. *S. v. Purdie*, 269.

An accident reconstruction expert had a sufficient basis for his opinions even though he did not physically examine the scene or personally interview witnesses. *Ibid.*

§ 113.1. Homicide; Sufficiency of Evidence

Evidence that defendant was intoxicated and crossed the center line was sufficient for the jury in a prosecution for involuntary manslaughter. *S. v. Purdie*, 269.

§ 126. Driving While Impaired; Competency of Evidence

Evidence of an accident victim's medical treatment and expenses was improperly admitted in a prosecution for driving while impaired, but such error was not prejudicial in this case. *S. v. Barber*, 42.

§ 126.2. Driving While Impaired; Breathalyzer Tests Generally

The trial court did not err in admitting evidence concerning defendant's refusal to give a breath sample for a breathalyzer test. *S. v. Barber*, 42.

§ 127.1. Driving While Impaired; Sufficiency of Evidence

The evidence was sufficient to be submitted to the jury in a prosecution for driving while impaired. *S. v. Barber*, 42.

§ 130. Driving While Impaired; Punishment Generally

The evidence was sufficient to prove that an accident victim sustained serious injury caused by defendant's impaired driving so as to support the trial judge's sentencing of defendant as a level two offender. *S. v. Barber*, 42.

The trial court abused its discretion in a prosecution for driving while impaired by refusing to allow defendant to show good cause for the authorization of a limited driving privilege. *S. v. Bailey*, 721.

BANKS AND BANKING

§ 13. Paying Checks of Depositor; Loans and Pledges to Secure Loans

The appointment of a receiver for a bank depositor did not nullify the bank's right to set off money in the depositor's bank accounts to cover his outstanding debts to the bank. *State ex rel. Eure v. Lawrence*, 446.

A bank's agreement with a depositor's receiver that the depositor's checking and savings accounts would remain open and that checks or withdrawals would

CONSPIRACY — Continued

§ 8. Verdict and Judgment

Assuming the trial court erred in imposing judgments for four conspiracies when the evidence revealed only one agreement, vacation of the three excessive convictions was unnecessary where the court consolidated the cases for judgment and imposed the statutory mandatory minimum sentence. *S. v. Kite*, 561.

CONSTITUTIONAL LAW

§ 30. Discovery

The trial court did not err by denying defendant's motion to discover witnesses' statements in advance of their testimony. *S. v. Batts*, 404.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court properly denied a motion by an indigent defendant charged with statutory rape and first degree sexual offense for the appointment of a psychiatrist to examine and test defendant. *S. v. Freeman*, 380.

§ 46. Removal or Withdrawal of Appointed Counsel

The trial court did not err in a prosecution for second degree sexual offense by denying defendant's motions for a new appointed counsel and for a continuance to obtain retained counsel. *S. v. Callahan*, 579.

§ 69. Right of Confrontation; Direct Examination of Witnesses

In a prosecution arising from the sexual abuse of defendant's daughter by defendant, defendant could not raise for the first time on appeal Sixth Amendment confrontation clause issues regarding his ex-wife's testimony as to what their daughter had told her. *S. v. Britt*, 126.

§ 81. Punishment; Consecutive Sentences

Consecutive life sentences for first degree rape and first degree sexual offense did not constitute cruel and unusual punishment because the crimes were committed within moments of each other. *S. v. Freeman*, 380.

CONTEMPT OF COURT

§ 3. Civil or Indirect Contempt

Plaintiff could be held in contempt for failure to comply with an erroneous order requiring him to pay collected rents into court. *Rivenbark v. Southmark Corp.*, 414.

CONTRACTS

§ 21.1. Sufficiency of Performance; Breach Generally

Where defendant breached its contract to pay plaintiffs $2,000 upon plaintiffs' conveyance of a utility easement to defendant, the time when plaintiffs first made a demand for payment was of no legal significance. *Nichols v. Carolina Telephone*, 503.

§ 21.3. Anticipatory Breach

The trial court properly granted summary judgment for defendants in an action for anticipatory breach of contract arising from defendant's failure to build certain roads by the time stated in an agreement for the sale of land. *Messer v. Laurel Hill Associates*, 439.

CORPORATIONS

COUNTIES

COURTS

CRIMINAL LAW

CRIMINAL LAW — Continued

§ 34. Evidence of Defendant's Guilt of Other Offenses

The trial court erred in admitting evidence of a similar rape and burglary purportedly committed by defendant to prove his identity as the perpetrator of the rape and burglary in question where there was no direct evidence of defendant's participation in the similar crimes. *S. v. Jeter*, 588.

§ 34.2. Admission of Inadmissible Evidence of Defendant's Guilt of Other Offenses as Harmless Error

The defendant in a prosecution for felonious possession of LSD waived his objection to evidence of his concurrent arrest for misdemeanor possession of marijuana by admitting during direct examination the truth of the State's allegation that he possessed marijuana. *S. v. Agee*, 346.

§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant

Evidence of defendant's participation in a robbery two days after the robbery for which he was being tried was properly admitted to identify defendant as a perpetrator of the robbery in question. *S. v. McDowell*, 289.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Motive

In a prosecution for burglary and taking indecent liberties with a minor, the trial court properly admitted testimony that defendant had touched another young girl in a similar manner five years before and had touched his own daughter in a similar manner during the year prior to trial. *S. v. Roberson*, 83.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Common Plan or Scheme

The trial court did not err in a prosecution involving trafficking in cocaine by admitting evidence concerning defendant's selling and using cocaine in his house and testimony from a witness who had previously sold cocaine for defendant. *S. v. Rosario*, 627.

§ 35. Evidence that Defendant Was Framed

In a prosecution of defendant for sexual offenses involving his stepdaughters, testimony defendant sought to elicit from his wife concerning her financial motive to encourage her daughters to fabricate the sexual incidents in question was not relevant and was properly excluded. *S. v. Knight*, 460.

§ 43.1. Photographs of Defendant

Photographs taken of defendant at the time of his arrest were properly admitted for the purpose of illustrating testimony about defendant's appearance. *S. v. Styles*, 596.

§ 46.1. Flight of Defendant; Competency of Evidence

Evidence that defendant attempted to flee from the arresting officer was improperly admitted in an armed robbery case to show how defendant and property taken in the robbery came into police custody. *S. v. McDowell*, 289.

§ 50. Expert and Opinion Testimony in General

An expert in accident reconstruction was properly permitted to give his opinions in a prosecution for manslaughter arising from an automobile accident. *S. v. Purdie*, 269.

CRIMINAL LAW — Continued

§ 102.5. Conduct of Prosecutor in Examining Witnesses

The prosecutor's question to a witness as to whether defendant "rolled" a cigarette was not prejudicial even if it implied the use of an illegal substance. *S. v. Freeman*, 380.

§ 102.6. Particular Conduct and Comments in Jury Argument

Alleged expressions of personal beliefs by the prosecutor in his jury argument were not so grossly improper as to require the trial court to intervene *ex mero motu*. *S. v. Styles*, 596.

The trial court did not commit plain error in a murder and arson trial by failing to intervene during the prosecutor's closing argument. *S. v. Ward*, 682.

§ 102.8. Jury Argument; Comment on Defendant's Failure to Testify

The prosecutor's closing argument that the jury should compare certain characteristics to the defendant and to a State's witness "who you got to see up there; to hear from" was at most only a veiled reference to defendant's failure to testify and did not require the trial court to intervene *ex mero motu*. *S. v. Styles*, 596.

§ 102.9. Jury Argument; Comment on Defendant's Character Generally

The trial court did not abuse its discretion in failing to allow defendant's objection when the prosecutor called defendant an "animalistic human being." *S. v. Freeman*, 380.

§ 102.12. Jury Argument; Comment on Sentence or Punishment

The prosecutor's argument that defendant, if given a two-year prison sentence for driving while impaired, would serve no more than two months and ten days for his crime was improper because it amounted to a discourse on parole, but defendant was not prejudiced thereby. *S. v. Barber*, 42.

§ 111.1. Particular Miscellaneous Instructions

The trial judge is required to inform the prospective jurors of the charges against defendant but not of the elements of each crime charged. *S. v. Styles*, 596.

§ 121. Instructions on Defense of Entrapment

The trial court did not err by denying defendant's request that the jury be charged on the defense of entrapment in a prosecution for driving while impaired. *S. v. Bailey*, 721.

§ 134.2. Time and Procedure for Imposition of Sentence

The trial court did not err by denying defendant's motion for a continuance before conducting the sentencing hearing after defendant was convicted of rape, first degree sexual offense, incest, and taking indecent liberties with his daughters. *S. v. Hewett*, 1.

§ 138.7. Severity of Sentence; Particular Matters and Evidence

There was no error when sentencing defendant for two counts of assault with a deadly weapon with intent to kill inflicting serious injury from admitting testimony concerning statements made by defendant to his psychologist about his consumption of alcohol prior to the offenses for the limited purpose of proving what he had told his psychologist and not to prove that he had used alcohol. *S. v. Reed*, 119.

CRIMINAL LAW — Continued

§ 138.16. Sentence; Aggravating Factor of Position of Leadership or Inducement of others to Participate

The fact that a defendant induces a victim to take part in the offense or exercises leadership or dominance over a victim of a crime will not support a finding of the aggravating circumstance that defendant induced others to participate in the offense or that defendant occupied a position of leadership or dominance over the other participants. *S. v. Mosley*, 239.

§ 138.21. Sentence; Aggravating Factor of Especially Heinous, Atrocious, or Cruel Offense

The trial court did not err in a prosecution for two counts of assault with a deadly weapon with intent to kill inflicting serious injury by finding as an aggravating factor in both cases that the offense was especially heinous, atrocious or cruel. *S. v. Reed*, 119.

§ 138.24. Sentence; Aggravating Factor of Age of Victim

The trial court erred in finding old age of the ninety-two-year-old victim as an aggravating factor for first degree burglary. *S. v. Styles*, 596.

§ 138.29. Sentence; Other Aggravating Factors

The trial court did not err when sentencing defendant for two counts of assault with a deadly weapon with intent to kill inflicting serious injury by finding as a nonstatutory aggravating factor that the assault on his wife was premeditated and deliberated. *S. v. Reed*, 119.

The fact that the victim of indecent liberties was under the age of 16 did not support a finding of the statutory aggravating factor that defendant involved a person under age 16 in the commission of the crime. Nor was this factor properly found on the basis of evidence that another child under age 16 was present with the victim and defendant when the victim performed oral sex on defendant since the acts involving the other child amounted to a joinable offense. *S. v. Mosley*, 239.

§ 138.38. Sentence; Mitigating Factor of Strong Provocation or Extenuating Relationship with Victim

The trial court did not err in refusing to find strong provocation and duress as mitigating factors in sentencing defendant for assault with a deadly weapon inflicting serious injury by stabbing a fellow prison inmate. *S. v. Lovell*, 726.

Evidence that a murder victim's wife told defendant the victim had been mistreating her did not require the trial court to find strong provocation or an extenuating relationship as a mitigating circumstance for defendant's second degree murder of the victim. *S. v. Ward*, 682.

§ 146.5. Forfeitures

A defendant was not entitled to appeal as a matter of right from the judgment entered on his plea of guilty to the misdemeanor of hunting deer with dogs in Alamance County. *S. v. Hester*, 594.

DAMAGES

§ 3.4. Compensatory Damages for Personal Injuries; Mental Anguish

Plaintiff failed to raise a genuine issue of material fact as to physical impact or physical injury sufficient to support a claim for the negligent infliction of mental

DAMAGES — Continued

distress based on counterclaims filed against plaintiff in a prior civil action. *Edwards v. Advo Systems, Inc.*, 154.

§ 11.1. Circumstances where Punitive Damages Appropriate

The trial court did not err in an action arising from a fire insurance claim by dismissing plaintiff's claim for recovery of punitive damages based upon alleged bad faith in refusing to settle the claim. *McMillan v. State Farm Fire and Casualty Co.*, 748.

§ 12.1. Pleading Punitive Damages

Plaintiff's complaint failed to allege sufficient facts to support a claim against the manufacturer of a school bus for punitive damages in an enhanced injury liability action. *Warren v. Colombo*, 92.

DEATH

§ 3.1. When Wrongful Death Action May Be Maintained

Plaintiff's claims for the deaths of his children at the hands of their custodians when defendant law agencies and officers attempted to arrest one custodian for murder was not cognizable under the wrongful death statute, 42 U.S.C. § 1983, or Art. I, §§ 18 and 19 of the N.C. Constitution. *Lynch v. N.C. Dept. of Justice*, 57.

DEEDS

§ 18. Covenants in Regard to Improvements

Neither plaintiff nor defendant was entitled to summary judgment in an action in which plaintiffs sought to enforce a covenant contained in a deed alleged to require defendant partnership as grantee to construct two roads on the property conveyed by the deed. *Messer v. Laurel Hill Associates*, 439.

DIVORCE AND ALIMONY

§ 19. Modification of Alimony Decree

A court modifying an alimony order may make additional and independent findings of fact as to the parties' health and financial needs existing at the time of the original alimony order based on evidence presented at the modification hearing. *Self v. Self*, 323.

§ 19.4. Modification of Alimony Decree; Burden and Sufficiency of Showing Changed Circumstances

The trial court's conclusions that there had been a substantial change in circumstances and that plaintiff was no longer a dependent spouse were unsupported by the findings where the court failed to make any findings regarding plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income. *Self v. Self*, 323.

§ 21.9. Enforcement of Alimony Awards; Equitable Distribution of Marital Property

Defendant's release of property rights under a 1980 postnuptial contract did not violate public policy simply because it was executed prior to the adoption of the Equitable Distribution Act. *Small v. Small*, 614.

DIVORCE AND ALIMONY — Continued

§ 23. Jurisdiction of Child Custody Actions Generally

Though it is the better practice for district court judges to require a statement to be filed under oath as required by G.S. 50A-9 by the parties seeking child custody before the court undertakes a custody determination, the trial court in this case properly tried and determined subject matter jurisdiction. *Watson v. Watson*, 315.

§ 24.10. Termination of Child Support Obligation

There is no longer a statutory obligation on the part of parents to support their disabled adult children. *Yates v. Dowless*, 787.

§ 25.9. Modification of Child Custody Order; Where Evidence of Changed Circumstances Is Sufficient

The trial court's findings supported its conclusion that there had been a substantial change of circumstances affecting the welfare of a child so as to support a change of custody from the father to the mother. *Hamilton v. Hamilton*, 639.

§ 26.1. Modification of Foreign Child Custody Orders; Cases Involving Full Faith and Credit Clause

Plaintiff's appeal from the trial court's order giving full faith and credit to a Florida child custody modification order is dismissed where a Florida appellate court vacated the order on the ground that the Florida trial court had no jurisdiction over the children. *Gasser v. Sperry*, 72.

§ 30. Equitable Distribution

A consent order providing that plaintiff would receive $15,000 from an IRS refund and that such amount would "be applied toward any subsequent equitable distribution which she may receive by agreement or court order" permitted defendant to deduct the $15,000 from a lump sum distributive award to plaintiff provided by a property settlement agreement entered by the parties. *Harris v. Harris*, 67.

The trial court in an equitable distribution proceeding properly valued a rental house and lot owned by the parties as tenants by the entirety. *Loye v. Loye*, 328.

Interest should begin accruing on a distributive award in an equitable distribution action from the date the decision was announced in open court rather than from the date the judgment was signed or the date payments on the award began. *Ibid.*

A presumption of a gift of separate property to the marital estate arose where defendant used funds from the sale of a house which he owned prior to marriage to buy a second house which was conveyed to both spouses as tenants by the entirety, and the trial court properly found that the second house was marital property where the conveyance itself contained no statement that defendant intended to keep the residence his separate property, and there was no other evidence to that effect. *Thompson v. Thompson*, 229.

The trial court did not err by dismissing plaintiff's action for divorce and defendant's counterclaim for equitable distribution where plaintiff was killed after the counterclaim but before any other pleadings or actions were taken. *Caldwell v. Caldwell*, 740.

Defendant's release of equitable distribution rights under a postnuptial contract and subsequent separation agreements was analyzed with reference to property settlement rules. *Small v. Small*, 614.

EASEMENTS

EJECTMENT

ESTOPPEL

EVIDENCE

EVIDENCE — Continued

§ 47.1. Expert Testimony; Necessity for Statement of Facts as Basis for Opinion

A written psychological summary prepared by a licensed psychologist was properly admitted in a child custody case to show the basis of an opinion offered by another psychologist. *Hamilton v. Hamilton*, 639.

EXECUTION

§ 11. Conduct of Sale

Statutory requirements for notice of an execution sale were met where the sheriff was unable to locate plaintiff and served plaintiff by certified mail at his last known address. *Myers v. H. McBride Realty, Inc.*, 689.

The trial judge did not err in dismissing plaintiff's action to enjoin the execution sale of his real property. *Ibid.*

FRAUD

§ 9. Pleadings

Plaintiffs' complaint was insufficient to state a claim for fraudulent misrepresentation concerning the building of recreational facilities in a housing development where it failed to allege that defendants knew when the representations were made that no recreational facilities would be built. *Leake v. Sunbelt Ltd. of Raleigh*, 199.

§ 12. Sufficiency of Evidence

The trial court erred in granting summary judgment for defendant insurer on plaintiff's claim that defendant fraudulently induced plaintiff to pay additional insurance premiums for worthless underinsurance motorist coverage. *Davidson v. Knauff Ins. Agency*, 20.

Plaintiffs who bought townhouses on the basis of false answers given to them by defendants' agents concerning a proposed road and trees behind the property were entitled to have their fraudulent misrepresentation claim heard by a jury, and recovery was not precluded as a matter of law by a plat within their chain of title which showed that a proposed thoroughfare was to be built on the adjoining property. *Leake v. Sunbelt Ltd. of Raleigh*, 199.

GARNISHMENT

§ 2. Proceedings to Secure and Enforce Garnishment

Due process requires that a child support enforcement agency may automatically garnish wages for enforcement of child support only at the rate set out in the controlling child support order, and the agency may not garnish at a higher rate without first pursuing a motion to show cause why the debtor should not be garnished at a higher rate than that set by the underlying order. *Sampson County Child Support Enforcement ex rel. Bolton v. Bolton*, 134.

The hearing provided by G.S. 110-136.4 in IV-D garnishment proceedings does not violate a debtor's rights to equal protection when compared to the hearing granted private litigants under G.S. 110-136.5. *Ibid.*

HOMICIDE

§ 21.7. Sufficiency of Evidence of Second Degree Murder

The State's evidence was sufficient to support conviction of defendant for second degree murder by shooting the victim with a handgun. *S. v. Fortner*, 753.

§ 28.8. Instructions on Defense of Accidental Death

The trial court erred in failing to instruct the jury on the defense of accident. *S. v. Garrett*, 79.

§ 30.2. Submission of Lesser Offense of Manslaughter

The evidence was sufficient to support conviction of defendant for voluntary manslaughter of his brother. *S. v. Garrett*, 79.

HOSPITALS

§ 3. Liability of Hospital for Negligence of Employee

The trial court properly entered summary judgment for defendant hospital in a medical malpractice action based on the failure to notify plaintiff that she had breast cancer for nearly three months after having become aware of her condition. *Bullock v. Newman*, 545.

HUSBAND AND WIFE

§ 10. Separation Agreement; Requisites and Validity

The Court of Appeals rejected the contention that an attorney who was a notary could not acknowledge a postnuptial agreement and two separation agreements. *Small v. Small*, 614.

§ 12. Separation Agreement; Resumption of Marital Relationship

Defendant's release of her equitable distribution rights was not rescinded simply because the parties continued or resumed sexual relations after the execution of a postnuptial contract and separation agreements. *Small v. Small*, 614.

§ 12.1. Separation Agreement; Revocation and Rescission; Fraud and other Grounds

Plaintiff's loan of $102,000 to a corporation in which he had a controlling interest was an asset which he was required by the terms of a separation agreement to disclose to defendant, and his failure to do so constituted a material breach of the agreement which gave defendant the right to rescind the separation agreement so that it would not bar her claim for equitable distribution and alimony. *Lee v. Lee*, 584.

§ 26. Alienation; Damages

Evidence presented by plaintiff at a hearing upon default and inquiry was sufficient to support the trial court's award to plaintiff of $200,000 as compensatory damages and $300,000 as punitive damages for alienation of affections. *Jennings v. Jessen*, 731.

INDICTMENT AND WARRANT

§ 9.11. Time

The State complied with the statutory requirements in a prosecution for attempted first degree rape by stating that the offense occurred in the summer of 1986. *S. v. Reynolds*, 552.

INFANTS

INJUNCTIONS

INSURANCE

INSURANCE — Continued

§ 134. Fire Insurance; Persons Entitled to Payment

If a secured party is not named as a loss payee or co-insured in a policy of fire insurance on the collateral, or if the security agreement does not require the debtor to obtain insurance on the collateral for the benefit of the secured party, and there has been no assignment of rights to the insurance policy, the secured party has no right enforceable against the insurer with respect to the proceeds of the policy. *Zorba's Inn, Inc. v. Nationwide Mut. Fire Ins. Co.*, 332.

JOINT VENTURES

§ 1. Generally

The evidence supported a jury verdict finding that defendants were engaged in a joint venture in dredging a pond between their houses and that the negligence of defendant backhoe operator was imputed to defendant landowner. *Slaughter v. Slaughter*, 717.

JUDGMENTS

§ 2.1. Consent to Judgment Rendered out of Term and out of County

The trial judge had no jurisdiction to sign an order once her term and the period of consent between the parties to allow her to sign the order out of term had expired. *In re Foreclosure of Brooks*, 86.

§ 5.1. Final Judgments

An interlocutory order requiring plaintiff to pay into court an amount for rents collected for property sold to one defendant was not proper under G.S. 1-508 where plaintiff made no admission that the money belonged to another but contended that he had the right under the contract of sale to continue to act as landlord and collect rents. *Rivenbark v. Southmark Corp.*, 414.

§ 16. Direct and Collateral Attack on Judgments

The trial court correctly granted summary judgment for defendants in an action for malpractice and breach of fiduciary duty against the attorneys in a wrongful death action where a settlement was submitted and approved by the court. *Beckwith v. Llewellyn*, 674.

§ 37. Requisites of Res Judicata

A dismissed schoolteacher was not estopped by res judicata to assert his bias claim against defendant school board where plaintiff filed his bias claim at the same time he petitioned for judicial review of his dismissal hearing, and defendant caused the two actions to be separated. *Crump v. Bd. of Education*, 168.

§ 55. Right to Interest

The trial court erred in an action for breach of contract in the furnishing of wood stains by not allowing prejudgment interest from the date of the breach. *Steelcase, Inc. v. The Lilly Co.*, 697.

JURY

§ 7.8. Challenges for Cause; Particular Grounds

There was no prejudice in an action for rape, first degree sexual offense, incest, and indecent liberties with a minor from the judge's excusing of a juror after the juror told the court he might be related to defendant. *S. v. Hewett*, 1.

MASTER AND SERVANT — Continued

§ 108. Right to Unemployment Compensation Generally

A claimant who did not seek work on at least two different days each week was not "actively seeking work" pursuant to an ESC regulation and thus was not "available for work" under G.S. 96-13(a)(3) so as to be eligible for unemployment compensation, although claimant generally made two job contacts on the same day each week. *In re White v. Employment Security Comm.*, 762.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

A supervisory employee of the N. C. Department of Revenue who was discharged for failure to file state income tax returns was discharged for misconduct connected with his work so that he was not entitled to unemployment benefits. *In re Gregory v. N.C. Dept. of Revenue*, 785.

§ 108.2. Unemployment Compensation; Availability for Work

Claimant's appeal from a ruling of the ESC denying unemployment benefits on the ground that claimant left work voluntarily without good cause attributable to the employer must be remanded for a finding as to whether substitute work as an industrial engineer was suitable for claimant who had been a cause analyst and had held the position of industrial engineer twenty-two years earlier. *Edwards v. Milliken & Co.*, 744.

§ 111. Unemployment Compensation; Appeal and Review of Proceedings before Employment Security Commission

The trial court did not err in allowing claimant's appeal from an ESC decision where the evidence tended to show that the appeal was received by the clerk of court within the thirty-day period allowed by G.S. 96-15(h) but was not marked "filed" until one day after the statutory period expired. *Edwards v. Milliken & Co.*, 744.

MORTGAGES AND DEEDS OF TRUST

§ 2. Purchase Money Mortgages

The trial court correctly concluded that a deed of trust and promissory note were purchase money instruments and that plaintiffs were not entitled to a deficiency judgment in an action arising from the settlement of a dispute between plaintiff clients and defendant attorney in which defendant agreed to purchase real property from plaintiffs. *Friedlmeier v. Altman*, 491.

§ 9. Release of Part of Land from Mortgage Lien

The trial court correctly concluded that a release agreement had no application to a voluntary release in a declaratory judgment action to determine the rights of parties involved in a note, deed of trust, and release agreement. *Walker v. First Federal Savings and Loan*, 528.

The trial court in a declaratory judgment action to determine the rights of parties to a note, deed of trust, and release agreement correctly concluded that G.S. 45-45.1(4) did not operate to reduce plaintiff's indebtedness under the note. *Ibid.*

MUNICIPAL CORPORATIONS

§ 2.2. Annexation; Compliance with Statutory Requirements; Use and Size of Tracts

A town could qualify three distinct noncontiguous subareas of an area to be annexed as property developed for urban purposes by using a different statutory urban purpose test for each subarea. *Wallace v. Town of Chapel Hill*, 422.

MUNICIPAL CORPORATIONS — Continued

§ 2.3. Annexation; Compliance with Statutory Requirements; Other Requirements

A town substantially complied with statutory provisions pertaining to the extension of water service to an annexed area although petitioners were required to pay the costs of a twelve-inch water line extension to their property. *Wallace v. Town of Chapel Hill*, 422.

A town did not violate statutory provisions pertaining to the extension of water and sewer services to an annexed area because such services were provided by a water and sewer authority rather than by the town. *Ibid.*

A municipality could annex nonurban property without showing that the nonurban area constitutes a necessary land connection between the municipality and an area developed for urban purposes or between two or more areas developed for urban purposes. *Ibid.*

§ 30.6. Zoning Ordinances; Special Permits and Variances

A municipal board of adjustment did not err in denying petitioner's application for a special use permit to operate a game room in a leased building on the ground that the plans were so indefinite that public health and safety questions could not properly be addressed by the board. *Signorelli v. Town of Highlands*, 704.

§ 30.19. Zoning; Nonconforming Uses; Changes in Continuation of Nonconforming Use

The trial court properly concluded that there was no cessation of plaintiffs' nonconforming use and reversed the City Board of Adjustment's denial of a certificate of occupancy for plaintiffs' duplex apartment. *Flowerree v. City of Concord*, 483.

§ 31. Zoning; Judicial Review in General

Plaintiff's complaint, filed in the superior court after a county board of adjustment denied her application for a special use permit for her mobile home, constituted a direct attack on the ordinance permitted by G.S. 153A-348, and the trial court erred in dismissing the complaint for failure to state a claim for relief. *White v. Union County*, 148.

Plaintiff's complaint filed in the superior court was sufficient to obtain review in the nature of certiorari of a decision of a county board of adjustment denying her a special use permit for a mobile home, and the trial court erred in denying plaintiff's motion to amend her complaint pursuant to Rule 15(a) to caption it a "Petition for Writ of Certiorari," notwithstanding the complaint failed to request the court to issue a writ of certiorari or to review the board's action. *Ibid.*

§ 31.2. Zoning; Scope and Extent of Judicial Review

The trial court did not improperly substitute its judgment for that of the City's Board of Adjustment or improperly conclude based on insufficient findings of fact that there had been no cessation of plaintiffs' nonconforming use. *Flowerree v. City of Concord*, 483.

NARCOTICS

§ 1.1. Activities Regulated or Prohibited

There was sufficient evidence to support the charge of intentionally maintaining a dwelling for the purpose of keeping and selling a controlled substance. *S. v. Rosario*, 627.

NARCOTICS — Continued

§ 4. Sufficiency of Evidence

The trial court did not err by denying defendant's motion to dismiss cocaine trafficking charges. *S. v. Rosario*, 627.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The State's evidence was sufficient for the jury to find that defendant had constructive possession of cocaine with intent to sell. *S. v. Harrison*, 496.

Evidence of defendant's possession of cocaine and his participation in conspiracies involving cocaine was sufficient to support defendant's conviction of various narcotics offenses although a codefendant got the cocaine from a truck and gave it to the buyer. *S. v. Kite*, 561.

The evidence was sufficient to show defendant's actual or constructive possession of cocaine found in his house. *S. v. Rosario*, 627.

§ 5. Punishment

The trial court erred in increasing defendant's sentence for possession of marijuana based on a prior conviction for possession of marijuana where the State filed no supplemental indictment alleging the prior conviction. *S. v. Williams*, 510.

NEGLIGENCE

§ 22. Sufficiency of Complaint in Negligence Actions

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for enhanced injuries due to negligent design and manufacture of a school bus. *Warren v. Colombo*, 92; *Mumford v. Colombo*, 107; *Mumford v. Colombo*, 109; *Corbitt v. Colombo*, 111; *Corbitt v. Colombo*, 113; *Albritton v. Colombo*, 115; *Holmes v. Colombo*, 117.

§ 29. Sufficiency of Evidence of Negligence Generally

The trial court erred in entering summary judgment on plaintiff's negligence claim against defendant insurer based on an agent's breach of fiduciary duty by failing to inform plaintiff that the underinsured motorist coverage he was purchasing was worthless. *Davidson v. Knauff Ins. Agency*, 20.

§ 47.1. Negligence in Condition or Use of Buildings; Condition of Stairways and Steps

The trial court properly entered summary judgment for defendant in a negligence action arising from plaintiff's slip and fall on a handicap ramp. *Bailey v. Jack Pickard Imports, Inc.*, 506.

§ 57.11. Insufficiency of Evidence in Actions by Invitees

The evidence was insufficient to establish negligence by defendant hotel owner and showed contributory negligence by plaintiff as a matter of law in an action to recover for injuries sustained by plaintiff when he slipped and fell in a bathtub in defendant's hotel. *Kutz v. Koury Corp.*, 300.

§ 58. Summary Judgment for Contributory Negligence of Invitee

Summary judgment was properly entered for defendant in plaintiff's action to recover for injuries sustained when she caught her foot on a water hose lying across the aisle in the garden shop of defendant's store and fell to the floor. *Wyrick v. K-Mart Apparel Fashions*, 508.

PARENT AND CHILD

PARTNERSHIP

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

QUIETING TITLE

§ 2.2. Burden of Proof; Evidence

The trial court properly concluded that land covered by an old road was owned by defendants rather than plaintiffs where defendants established a chain of title going back more than thirty years. *Canady v. Cliff*, 50.

RAPE AND ALLIED OFFENSES

§ 4. Relevancy and Competency of Evidence

There was no error in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor in allowing the victims to use anatomical dolls during their testimony and in allowing a drawing by one victim to be admitted into evidence. *S. v. Hewett*, 1.

There was no error in a prosecution for rape, incest, taking indecent liberties with a child, and first degree sexual offense from the admission of testimony from the victim's pediatrician concerning the mother's statements to him and his partner relating what the victim had told her mother. *S. v. Britt*, 126.

§ 4.1. Proof of other Acts and Crimes

The trial court did not err in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor involving defendant's two daughters by denying defendant's motion in limine asking that the State be allowed to present evidence only as to events on the two dates in the State's bill of particulars. *S. v. Hewett*, 1.

§ 4.2. Evidence of Physical Condition of Prosecutrix

The trial court did not err in a prosecution for first degree rape, first degree sexual offense, incest, and taking indecent liberties with a minor by denying defendant's motion for an independent medical examination of the two victims where defendant did not make a credible showing that the additional examinations would have been probative or necessary. *S. v. Hewett*, 1.

§ 5. Sufficiency of Evidence

The trial court correctly denied defendant's motion at the close of all the evidence to dismiss the charges of first degree sexual offense. *S. v. Hewett*, 1.

Circumstantial evidence presented by the State was sufficient for the jury to find that defendant was the perpetrator of a rape and a sexual offense although the victim was unable to identify defendant as the perpetrator. *S. v. Styles*, 596.

§ 6. Instructions

The trial court did not err in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor by not giving defendant's requested instructions on alibi, the credibility of child witnesses, and on expert witnesses. *S. v. Hewett*, 1.

There was plain error in a conviction for first degree sexual offense where the offense for which defendant was found guilty could not be determined from the jury's general verdict. *S. v. Britt*, 126.

§ 18.1. Assault with Intent to Commit Rape; Competency and Relevancy of Evidence

There was no prejudice in a prosecution for attempted first degree rape from the trial court's failure to strike portions of testimony which were non-responsive and irrelevant. *S. v. Reynolds*, 552.

RULES OF CIVIL PROCEDURE — Continued

§ 24. Intervention

The trial court did not err in a proceeding to determine plaintiff's right to property garnished from defendant's account debtor by denying a third party bank's motion to intervene for lack of timeliness. *Loman Garrett, Inc. v. Timco Mechanical, Inc.*, 500.

§ 34. Discovery

The trial court's order refusing to compel discovery and sanctioning plaintiff's counsel for abusing discovery was supported by unchallenged findings. *Alexvale Furniture v. Alexander & Alexander*, 478.

§ 36. Admission of Facts

The trial court has the discretion to allow or not allow a party to withdraw admissions without considering whether the withdrawal would prejudice plaintiff in maintaining its action. *Interstate Highway Express v. S & S Enterprises, Inc.*, 765.

It was conclusively established by failure of the individual defendants to respond to plaintiff's request for admissions that defendant corporation was the alter ego of the individual defendants, and the individual defendants were thus indebted to plaintiff for transportation services provided by plaintiff to the corporation. *Ibid.*

§ 37. Failure to Make Discovery; Consequences

The trial court did not err in striking parts of defendant's answer and crossclaim for failure to respond to plaintiff's discovery request, although the better practice would have been for plaintiff to specify the sanctions it sought. *J. D. Dawson Co. v. Robertson Marketing, Inc.*, 62.

A witness and her attorney were substantially justified in opposing the discovery sought pursuant to a subpoena, and the trial court's imposition of attorney fees on them under Rule 37(a)(4) was error. *Cochran v. Cochran*, 574.

§ 41.1. Voluntary Dismissal

Where plaintiff's first action was involuntarily dismissed by court order for failure to comply with the Rules of Civil Procedure, plaintiff's subsequent voluntary dismissal of the action pursuant to Rule 41(a) did not operate as an adjudication on the merits. *Jarman v. Washington*, 76.

§ 41.2. Dismissal in Particular Cases

Before the trial court may dismiss a plaintiff's complaint under Rule 41(b) for failure to comply with a court order, it must first consider other less severe sanctions. *Rivenbark v. Southmark Corp.*, 414.

It would be manifestly unjust to permit defendant to voluntarily dismiss its counterclaims and thereby raise anew the settled issue of the existence of a contract after the parties had rested and the trial judge had implicitly ruled against defendant on its counterclaims. *Whitaker's Inc. v. Nicol Arms*, 487.

§ 45. Subpoena

A subpoena issued from Mecklenburg County was insufficient to compel the attendance of a nonparty witness for a deposition in Wake County. *Cochran v. Cochran*, 574.

RULES OF CIVIL PROCEDURE — Continued

§ 56.4. Summary Judgment; Necessity for and Sufficiency of Supporting Material; Opposing Party

The trial court did not err in an action arising from the collision of an automobile with a moped by refusing to consider a deposition in support of plaintiffs' motion to amend the complaint and in response to one defendant's motion for summary judgment. *Brown v. Lyons*, 453.

§ 60.2. Relief from Judgment or Order; Grounds

An interlocutory order requiring plaintiff to pay into court rents collected for property sold to one defendant was not properly entered under Rule 60(a) as a clarification of a previous order because it involved matters of a serious or substantial nature. *Rivenbark v. Southmark Corp.*, 414.

The trial court did not abuse its discretion in granting plaintiff's motion to amend its judgment. *Woods v. Shelton*, 649.

§ 60.3. Relief from Judgment or Order; Relation to other Rules

Defendant could not use a motion under Rule 60(b) as a substitute for appellate review. *J. D. Dawson Co. v. Robertson Marketing, Inc.*, 62.

SALES

§ 22. Actions for Personal Injuries Based upon Negligence; Defective Materials; Manufacturer's Liability

Plaintiff's complaint was sufficient to state a claim against defendant school bus manufacturer for enhanced injuries due to negligent design and manufacture of a school bus. *Warren v. Colombo*, 92; *Mumford v. Colombo*, 107; *Mumford v. Colombo*, 109; *Corbitt v. Colombo*, 111; *Corbitt v. Colombo*, 113; *Albritton v. Colombo*, 115; *Holmes v. Colombo*, 117.

North Carolina expressly rejects strict liability in product liability actions. *Warren v. Colombo*, 92.

Plaintiff's breach of contract claim did not fall within the purview or effect of the Products Liability Act, to which a defense of contributory negligence would be applicable. *Steelcase, Inc. v. The Lilly Co.*, 697.

SCHOOLS

§ 13.2. Dismissal of Teachers

Plaintiff teacher did not waive his right to raise a charge of bias on the part of defendant school board in his dismissal because he did not ask board members to recuse themselves from his dismissal hearing. *Crump v. Bd. of Education*, 168.

The trial judge correctly instructed the jury that the bias of one member of defendant school board was sufficient for the jury to find that plaintiff teacher had been deprived of a fair dismissal hearing. *Ibid.*

Evidence of a school board's prehearing involvement in the dismissal of plaintiff teacher, when coupled with denials by board members at the dismissal hearing of any involvement in or familiarity with the case, was sufficient to demonstrate disqualifying personal bias which supported the jury's award to plaintiff of damages for a violation of his right to due process. *Ibid.*

SCHOOLS — Continued

Plaintiff teacher's evidence in an action to recover damages for denial of due process in his dismissal hearing was sufficient to demonstrate injury where it tended to show that he experienced insomnia and depression and was unable to find employment as a teacher following his dismissal. *Ibid.*

In plaintiff teacher's action to recover damages for denial of due process in his dismissal hearing, the trial court properly excluded evidence concerning the charges against plaintiff as contained in a letter from the school superintendent to plaintiff. *Ibid.*

SEARCHES AND SEIZURES

§ 21. Application for Warrant; Requisites of Affidavit Generally; Hearsay, Tips from Informers

The fact that an affidavit supporting a search warrant in a narcotics case contained information from a confidential informant which was relayed by another officer did not preclude its use to establish probable cause. *S. v. Rosario*, 627.

§ 23. Application for Warrant; Sufficiency of Showing of Probable Cause

An affidavit supporting a search warrant in a narcotics prosecution was sufficient to establish probable cause even though a drug courier's credibility could be questioned because of his involvement in the crime and his cooperation with the police, and even though police supplied the courier with a package of cocaine which was a duplicate of the original seized in Florida. *S. v. Rosario*, 627.

§ 44. Voir Dire Hearing on Motion to Suppress Evidence

A trial court order suppressing evidence seized from the trunk of defendant's automobile was remanded for a new hearing for specific findings dealing with the issues of whether the officer had a reasonable and articulable suspicion to detain defendant pursuant to his inquiries, whether the length of detention was reasonable, and whether defendant gave his oral consent to search the vehicle. *S. v. Ghaffar*, 281.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Petitioner's "chore services" benefits were improperly terminated where his termination letter did not contain any information regarding his right to representation and the reason given for termination was not sufficiently specific. *King v. N.C. Dept. of Human Resources*, 89.

§ 2. Recovery of Amount Paid to Recipient

A county social services agency could not recoup from plaintiff the AFDC overpayment made to her ex-husband merely because her dependent children were members of the ex-husband's assistance unit at the time the overpayment was made. *Campos v. Flaherty*, 219.

The DSS may not treat utility allowances as part of a family's "liquid resources and income" in computing the amount it can withhold from monthly AFDC checks in recouping past AFDC overpayments. *Robinson v. Flaherty*, 319.

STATE

TAXATION

TELECOMMUNICATIONS

TRESPASS

UTILITIES COMMISSION

§ 52. Right to Judicial Review

Defendant publisher of Yellow Pages was not required to exhaust all administrative remedies as a prerequisite to seeking judicial review of the Utilities Commission's decision concerning its jurisdiction over defendant. *State ex rel. Utilities Comm. v. Southern Bell*, 260.

VENDOR AND PURCHASER

§ 6. Responsibility for Condition of Premises; Failure to Disclose Material Facts

The trial court properly entered summary judgment for defendant landowner and defendant real estate agent in an action for fraud and negligent misrepresentation concerning erosion at beachfront property sold to plaintiffs. *Blackwell v. Dorosko*, 310.

WAIVER

§ 1. Matters Which May Be Waived

A noteholder did not waive his right to accelerate the debt based on isolated instances of acceptance of late payments. *Barker v. Agee*, 537.

WILLS

§ 30.1. Presumption against Intestacy as to Whole or Part of Estate

The trial court did not err in an action to interpret a holographic will by concluding that bequests of "a sum of money ( )" were void for vagueness. *In re Estate of Baumann*, 782.

§ 55. Designation of Amount or Share; Whether Gift Is Confined to Personalty or to Realty

The trial court did not err in an action to interpret a holographic will by ruling that the use of the term possessions referred to the personal property of the testatrix where the testatrix showed an intention to differentiate between personal property and real property by using the term real estate in another section of the will. *In re Estate of Baumann*, 782.

WITNESSES

§ 1. Competency of Witness

There was no prejudicial error in a prosecution for attempted first degree rape from allowing a ten-year-old witness to testify without first inquiring into her competence where the witness was correctly determined to be competent at a voir dire examination held after her testimony. *S. v. Reynolds*, 552.

§ 1.2. Children as Witnesses

There was no abuse of discretion in a prosecution for rape, first degree sexual offense, incest, and taking indecent liberties with a minor in allowing a nine-year-old victim to interrupt her testimony and leave the courtroom to regain her composure. *S. v. Hewett*, 1.

The trial court did not err in a prosecution for attempted first degree rape by finding that the ten-year-old prosecuting witness was competent to distinguish truth from non-truth. *S. v. Reynolds*, 552.

WITNESSES — Continued

The trial court did not err in a prosecution for attempted rape by permitting the prosecuting witness's eleven-year-old cousin to testify even though the judge did not question the witness himself. *Ibid.*

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina