NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 94

6 JUNE 1989

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RALEIGH
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CITE THIS VOLUME
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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE HAJMM COMPANY, PLAINTIFF v. HOUSE OF RAEFORD FARMS, INC.; E. MARVIN JOHNSON, DEFENDANTS

No. 8816SC574

(Filed 6 June 1989)

1. **Corporations § 13— revolving fund certificate—refusal to redeem—breach of bylaws**

The evidence was sufficient to support plaintiff's claim that defendants violated the bylaws of the corporate defendant, an agricultural cooperative, by refusing to retire a revolving fund certificate issued to plaintiff by defendant corporation in exchange for stock in a predecessor corporation after defendant corporation had retired other certificates in the same series.

2. **Corporations § 13— revolving fund certificate—judgment for full amount**

The trial court did not err in entering judgment for plaintiff for the full amount of a revolving fund certificate rather than permitting the jury to consider whether other certificates were retired by the corporate defendant at full or only partial value where the corporate defendant's bylaws required the retirement of each series of certificates to be either in full or on a pro rata basis, the evidence showed that the holders of other certificates in the same series received full value, and plaintiff was thus entitled to full value.

3. Corporations § 13— revolving fund certificate—refusal by directors to redeem—unreasonable exercise of discretion—jury question

A jury question on the issue of whether the corporate defendant's board of directors unreasonably exercised its discretion in refusing to redeem plaintiff's revolving fund certificate was presented by plaintiff's evidence of the corporate defendant's strong financial position and testimony by the corporation's president that the corporation may never pay the certificate.

4. Corporations § 25— revolving fund certificate—refusal to redeem—bylaws as basis of action

Defendant corporation's bylaws could serve as a basis for plaintiff's action based on the corporation's refusal to retire a revolving fund certificate issued to plaintiff where the certificate constituted a contract between plaintiff and the corporation upon which the corporation conditionally promised to pay plaintiff $387,500 in consideration for stock plaintiff held in a predecessor corporation, and the bylaws were incorporated into and constituted additional terms of the parties' contract and thus were more than internal rules for the corporation.

5. Corporations § 13— revolving fund certificate—fiduciary duty of directors and president

The trial court properly submitted to the jury an issue as to whether the directors and president of defendant corporation owed a fiduciary duty to plaintiff holder of a revolving fund certificate where the certificate was issued to plaintiff in consideration for the stock plaintiff held in a predecessor corporation; since the certificate was redeemable at the corporation's discretion and the corporation refused to reveal financial information about itself to plaintiff, plaintiff had the right to expect the corporation to exercise its discretion in good faith; and plaintiff was not a pure creditor of defendant corporation but had some characteristics of a shareholder in that the certificate was part of defendant corporation's original capitalization, was listed under stockholders' equity on the corporation's balance sheet, and was junior and subordinate to all other debts of the corporation upon dissolution of the corporation.

6. Fiduciaries § 1; Fraud § 7— breach of fiduciary duty—prima facie case—shift of burden of proof

The trial court properly instructed the jury that once plaintiff established a prima facie case that defendants owed plaintiff a fiduciary duty and breached that duty, which amounted to constructive fraud, the burden of proof shifted to defendants to prove that they acted in an open, fair and honest manner.

7. Evidence § 47— expert testimony—opinion on ultimate issue—admissibility

The trial court did not err in the admission of testimony by an expert witness that directors of defendant corporation abused their discretion in failing to redeem plaintiff's revolving fund certificate since the testimony did not constitute an opinion on a legal conclusion or standard for which there is a specific legal meaning not readily apparent to the witness; the court gave a precautionary instruction on the weight to be accorded expert testimony; and the complexity of this case required specialized knowledge for an understanding of the use of revolving fund certificates by agricultural cooperatives. N.C.G.S. § 8C-1, Rule 704.

8. Damages § 11.1— breach of fiduciary duty—constructive fraud—punitive damages

The refusal of defendant corporation and its president to redeem plaintiff's revolving fund certificate in violation of their fiduciary duty to plaintiff, which amounted to constructive fraud, was a sufficient basis for the imposition of punitive damages.

9. Unfair Competition § 1— revolving fund certificate—refusal to redeem—unfair trade practice—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim against a corporation and its president for an unfair trade practice where it alleged: defendants breached a fiduciary duty to plaintiff by refusing to redeem a revolving fund certificate issued to plaintiff in exchange for stock in a predecessor corporation; defendants manipulated the corporation's income to the benefit of the individual defendant's family and to the detriment of plaintiff's interest; defendants' actions were an abuse of discretion and a violation of the corporation's bylaws; and defendants' acts were in or affecting commerce.

10. Unfair Competition § 1; Election of Remedies § 1.1— unfair trade practice—punitive or treble damages—election after verdict

Plaintiff is not entitled to recover both treble and punitive damages for an unfair trade practice but may elect its remedy after the court has determined whether to treble the compensatory damages.

Judge GREENE dissenting.

APPEAL by defendants and cross appeal by plaintiff from Judgment of *Judge Herbert O. Phillips, III*, entered 29 December 1987, *nunc pro tunc* 17 December 1987, in the SCOTLAND County Superior Court. Heard in the Court of Appeals 9 December 1988.

Petree Stockton & Robinson, by G. Gray Wilson and R. Rand Tucker, for defendant appellants, cross-appellees.

Adams, McCullough & Beard, by William H. McCullough, Charles C. Meeker and John J. Butler, for plaintiff appellee, cross-appellant.

COZORT, Judge.

Plaintiff sued defendants House of Raeford Farms, Inc. (Raeford), and E. Marvin Johnson for their refusal to retire a revolving fund certificate issued to plaintiff by Raeford in exchange for stock plaintiff sold to Raeford. Plaintiff asserted claims of relief alleging that defendants: (1) violated Raeford's by-laws by refusing to retire plaintiff's certificate after retiring other certificates in the same series as plaintiff's; (2) breached a fiduciary duty owed plaintiff; and (3) committed an unfair or deceptive trade practice. The trial court granted defendants' motion to dismiss the unfair or deceptive trade practice claim for failure to state a claim upon which relief can be granted. The other issues went to the jury, which found for plaintiff. The judge awarded plaintiff $387,500 in actual damages, and the jury awarded plaintiff $100,000 in punitive damages. Plaintiff and defendants appeal. The primary issues submitted on appeal by defendants are: (1) whether defendants' motions for directed verdict and judgment notwithstanding the verdict were properly denied and the issues properly submitted to the jury; (2) whether there was sufficient evidence to create a jury issue on partial redemption; (3) whether defendants owed plaintiff a fiduciary duty; (4) whether plaintiff's expert testimony on breach of fiduciary duty

was properly admitted; and (5) whether there was sufficient evidence to submit to the jury on the issue of punitive damages. The plaintiff contends that the trial court erred in granting defendants' motion to dismiss plaintiff's unfair or deceptive trade practice claim. In defendants' appeal, we find no error. In plaintiff's appeal, we find the trial court erred in dismissing the unfair or deceptive trade practice claim, and we remand for a new trial on that issue.

The HAJMM Company, plaintiff herein, is a limited partnership engaged in the business of agricultural marketing. Defendant Raeford is an agricultural cooperative engaged in processing turkeys and other poultry. Defendant Johnson is President and Chairman of the Board of Raeford. Raeford was formed in 1975 when plaintiff and two other turkey producers, Stone Brothers and Nash Johnsons and Sons, Inc. (NJS), sold their stock in Raeford Turkey Farms, Inc. (RTF), to defendant Raeford. Plaintiff held a 25% share, Stone Bros. held a 25% share, and NJS held a 50% share in RTF. For its stock plaintiff was issued a "Class B—Series 1975 Revolving Fund Certificate" in the amount of $387,500. Raeford issued a Class B—Series 1975 certificate to Stone Bros. in the amount of $387,500 for its 25% share of RTF and issued a Class B—Series 1975 certificate to NJS in the amount of $750,000 in exchange for its 50% share in RTF. In the same year, Raeford also issued Class A—Series 1975 certificates to other turkey producers at the same time the three Class B certificates were issued.

In 1978 Raeford redeemed and cancelled the Class A—Series 1975 certificates. The same year, Raeford retired the Class B—Series 1975 certificate originally issued to Stone Bros., who negotiated its certificate to FCX, Inc. In its 1984 financial statement Raeford discounted to zero value the Stone Bros./FCX certificate *and* the certificate to NJS. Raeford subtracted the value of the Stone Bros./FCX and NJS Class B—Series 1975 certificates from the total amount owed on other certificates, thereby reducing stockholder's equity. Plaintiff's Class B—Series 1975 certificate was not redeemed at that time and continues to be shown as part of stockholder's equity in Raeford's financial statements. On or about 4 February 1986 plaintiff made a formal demand to defendants to redeem plaintiff's certificate for $387,500. Citing provisions in Raeford's by-laws giving them the sole discretion to decide whether to retire plaintiff's certificate, defendants refused plaintiff's request. Plaintiff filed suit in March of 1986.

The trial court submitted seven issues to the jury, which were answered as follows:

1. Did the defendant, House of Raeford Farms, Inc., breach its bylaws by refusing to retire the revolving fund certificate of the plaintiff, HAJMM, in the reasonable exercise of its discretion?

Yes.

2. Did the defendant, House of Raeford Farms, Inc., breach its bylaws by retiring any of the revolving fund certificates in the same annual series as that of the plaintiff, HAJMM, and refusing to retire that of the plaintiff, HAJMM?

Yes.

3. Do the defendants, E. Marvin Johnson and Raeford Farms, Inc., owe a fiduciary duty to the plaintiff, HAJMM?

Yes.

4. If so, was their refusal to retire HAJMM's revolving fund certificate an open, fair and honest transaction?

No.

5. In what month and year did the breach or violation occur?

March, 1986.

6. In your discretion, what amount of punitive damages, if any, should be awarded to the plaintiff, HAJMM from the defendant E. Marvin Johnson.

None.

7. In your discretion what amount of punitive damages, if any, should be awarded to the plaintiff, HAJMM from the defendant, House of Raeford Farms, Inc.?

$100,000.

The trial court determined that plaintiff should recover the full amount of the certificate, $387,500, from both defendants. The court entered judgment for $387,500 actual damages against both defendants and $100,000 punitive damages against Raeford. Defendants and plaintiff entered timely notices of appeal. We consider defendants' appeal first.

We initially consider defendants' argument that the trial court erred in denying defendants' motion for directed verdict and defendants' motion for judgment notwithstanding the verdict. Defendants' motion for directed verdict should be granted only if the trial judge concludes that no reasonable juror could find for plaintiff. *West v. Slick*, 313 N.C. 33, 40, 326 S.E. 2d 601, 606 (1985). In considering the defendants' motion all conflicts in the evidence must be resolved in favor of plaintiff and the evidence must be viewed in a light most favorable to plaintiff. *Id.* The standard of review is the same for a motion for judgment notwithstanding the verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E. 2d 333, 337 (1985).

[1] Defendants contend that plaintiff offered insufficient evidence to prove that Raeford breached its by-laws by retiring certificates in the same series as plaintiff's while refusing to retire plaintiff's certificate. In the alternative, defendants argue that even if the certificates were of the same series, the trial court should have submitted to the jury an issue on whether Raeford retired other certificates for full or partial value. We reject both arguments.

Plaintiff's evidence tended to show that defendant Raeford issued identical "Class B—Series 1975" Revolving Fund Certificates to plaintiff and to Stone Brothers when it was formed in 1975. Both certificates were in the amount of $387,500. The remaining 50% of RTF was owned by NJS. Defendant Johnson owned 80% of NJS and served as its president. Defendant Johnson is also Chief Executive Officer of defendant Raeford, a post he has held since 1978. NJS is one of defendant's largest turkey suppliers. In exchange for NJS's 50% share of RTF, defendant Raeford issued the same "Class B—Series 1975" certificate to NJS that had been issued to plaintiff and Stone Brothers, except NJS's certificate was in the amount of $750,000. Defendant Raeford also issued "Class A—Series 1975" certificates to other turkey producers in 1975.

Plaintiff's evidence also tended to show that Raeford refused plaintiff's demand to pay its certificate even though Raeford paid an identical Stone Brothers' certificate in 1978. Raeford was less solvent in 1978 than in 1986 when plaintiff made its demand. Moreover, Raeford discounted NJS's $750,000 certificate on its books to zero value in 1984, even though that certificate was nearly twice the amount of plaintiff's. The Class A—Series 1975 certificates were also paid off in 1978. Defendants argue that the Class A

certificates were of a different series than the Class B certificates because the Class A certificates were issued at a different time and to a different class of people, patron members of Raeford, not former owners of RTF which held the Class B certificates.

Raeford's by-laws support plaintiff's argument that the Class A and Class B certificates are of the same series. The by-laws provide as follows:

> Such certificates shall be issued in *annual series, each certificate in each series upon its face being identified by the year in which it is issued; and each series shall be retired fully or on a prorata [sic] basis*, only at the discretion of the board of directors of the association, *in the order of issuance by years as funds are available for that purpose.* (Emphasis supplied.)

The by-laws require designation of certificates by "annual series." Both Class A and Class B certificates are identified with the caption "Series 1975." Class A and B certificates were, therefore, the same series. We find the evidence sufficient to support plaintiff's claim that defendants breached Raeford's by-laws.

[2] Defendants contend alternatively that the trial court erred in failing to instruct the jury that they should determine whether Stone Bros., NJS, and the Class A certificates were retired at full value or on a pro rata basis. Defendants maintain that the trial court's decision to enter judgment for the full amount of the certificate, rather than permitting the jury to consider the amount, amounted to an improper directed verdict on damages.

Defendant Raeford's by-laws require that the retirement of each *series* must be either in full or on a pro rata basis. Thus, if the Class A and B holders received full value, then plaintiff was entitled to receive full value. The evidence is clear that Class A holders received $100 each, plus cancellation of their promissory notes to Raeford, in exchange for Raeford taking back the certificates. Moreover, Raeford discounted the entire value of all Series 1975 certificates, except plaintiff's, in its 1987 Financial Statement. For the purposes of Raeford's books, the entire 1975 Series was considered paid in full, except plaintiff's certificate. Finally, concerning the certificates of Stone Bros./FCX and NJS, Raeford paid FCX $950,000 in 1978 for the certificate and other obligations and passed a corporate resolution providing that the actions would

"thus retire, all interests of FCX in the association . . . ." FCX then transferred "all its right, title and interest" in the Class B instrument to Raeford. As for the NJS certificate, Raeford discounted the certificate's full value on its books. In short, there is simply no evidence that Class A and B holders, except plaintiff, received anything but full value. The jury was therefore properly instructed to find that plaintiff should receive full value if it found defendants violated Raeford's by-laws or defendants unreasonably denied plaintiff's demand.

[3] Next defendants challenge the sufficiency of plaintiff's evidence on whether Raeford acted unreasonably in exercising its discretion not to redeem plaintiff's certificate. The certificates were redeemable, if at all, defendants contend, in the sole discretion of Raeford's board as the by-laws provided. Defendants note the cyclical nature of the poultry business and the Board's desire to become more competitive by purchasing new plant and equipment as factors they considered in declining plaintiff's demand for payment. Similarly, defendants point out that the certificates by their terms were junior and subordinate to all other corporate debts. Defendants argue that Raeford had to consider the effect on other creditors of paying a junior creditor's debts, as well as a balance sheet showing current liabilities and long-term debts exceeding $5,000,000.

On the issue of the subordinate nature of the debt, plaintiff offered expert testimony from Dr. James Baarda that the "junior and subordinate" language meant that when the cooperative dissolves, all other debts are paid before the certificates. Defendants' expert agreed with Dr. Baarda that the "subordinate" language did not mean payment of the certificate was to be withheld if the corporation had other debts. Defendants' argument seems disingenuous in light of the payment to the Class A holders, the redemption of the Stone Brothers certificate, as well as the bookkeeping cancellation of the NJS certificate. The total value of these certificates far exceeded plaintiff's certificate.

Plaintiff's evidence of Raeford's strong financial position, together with testimony of defendant Johnson that Raeford may never pay the certificate, supported plaintiff's claim that the Board unreasonably exercised its discretion in refusing to pay plaintiff's certificate. Plaintiff's evidence showed that Raeford's net worth nearly quadrupled in five years from $6.8 million in 1983 to $27 million in 1987. In 1986, the year plaintiff demanded payment, plain-

tiff's net earnings were $6.1 million. While Raeford spent $6.5 million in 1987 on a new plant and equipment, Raeford was able to loan defendant Johnson $394,000 and invest $3.4 million of excess cash in a securities portfolio in 1987. Nevertheless, defendant Johnson testified that he told Mr. Hervey Evans, one of plaintiff's principals, "I might not never pay it [the certificate]." An attorney for the Federal Land Bank testified that Mr. Johnson told him, "It's not bearing any interest, so there's really no reason to pay it. It's sort of like owing money to yourself." Likewise, at the director's meeting discussing plaintiff's request to pay the certificate, Mr. Johnson stated that the Board "decided that we didn't need to bother with it; it shouldn't be paid, it wasn't good business . . . ." As to Raeford's by-laws governing the certificates, Mr. Johnson stated: "[T]he by-laws wasn't [*sic*] that important to me. I, I've never read them all the way through. I just glanced at them, that's about it."

We agree with defendants that the mere financial ability of a corporation to pay is insufficient to prove an abuse of discretion. *See, e.g., Claassen v. Farmers Grain Co-op.*, 208 Kan. 129, 490 P. 2d 376 (1971). We are also mindful that the business judgment rule protects corporate directors from being judicially second-guessed when they exercise reasonable care and business judgment. The directors "are not guarantors that they will make no mistakes in the management of corporate business." R. Robinson, *North Carolina Corporation Law and Practice* § 12-6 at 178 (3d ed. 1983). Nevertheless, on the facts of this case, we find that plaintiff's evidence was sufficient to go to the jury on the question of whether Raeford unreasonably exercised its discretion in refusing to pay plaintiff's certificate.

[4] Next defendants maintain that the trial judge erred in submitting the issue of breach of Raeford's by-laws because by-laws are intracorporate rules of governance which cannot serve as a basis for plaintiff's cause of action. We note initially that defendants requested that the jury be instructed to address whether defendants abused their discretion in refusing to retire plaintiff's certificate. The trial court instructed the jury as defendants requested. Defendants cannot now complain because the trial court granted their request. *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 50, 362 S.E. 2d 578, 582 (1987), *disc. review denied*, 321 N.C. 473, 364 S.E. 2d 921 (1988). Second, plaintiff's certificate constituted a contract between plaintiff and Raeford upon which Raeford condi-

tionally promised to pay plaintiff $387,500 in consideration for the stock plaintiff held in Raeford's predecessor corporation, RTF. *See, e.g., Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E. 2d 410, 414 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974). Raeford's by-laws were incorporated into plaintiff's certificate. Those by-laws constituted additional terms of the parties' contract and therefore more than internal rules for defendant Raeford. Defendants' argument is without merit.

[5] Defendants also contend the trial court erred in submitting to the jury the issue of whether defendants owed plaintiff a fiduciary duty. According to defendants the certificate held by plaintiff was an instrument of debt. They maintain that no fiduciary duty exists in a debtor-creditor relationship.

A fiduciary duty " 'exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Stone v. McClam*, 42 N.C. App. 393, 401, 257 S.E. 2d 78, 83, *cert. denied*, 298 N.C. 572, 261 S.E. 2d 128 (1979) (citation omitted). We find the facts of this case sufficient to show that plaintiff placed a special confidence and trust in Raeford and its directors. Plaintiff accepted the certificate as partial consideration for the 25% share plaintiff held in RTF. Plaintiff's interest was in turn transferred to Raeford as successor in interest to RTF, and Raeford recognized the certificate as a capital contribution on its balance sheet. Furthermore, since the certificate was redeemable at Raeford's discretion and since Raeford refused to reveal financial information about itself to plaintiff, plaintiff had the right to expect Raeford to exercise its discretion in good faith.

Also, we are unpersuaded that the certificate was a pure debt instrument. The existence of a fiduciary relationship is not contingent upon a technical or legal relationship. *Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E. 2d 113, 116 (1971). Shareholders of a corporation are owed a fiduciary duty by that corporation's officers and directors. N.C. Gen. Stat. § 55-35 (1982). The issuance of the revolving fund certificate has some characteristics of a corporation/shareholder relationship. First, the certificate was originally issued in exchange for stock held in Raeford's predecessor, RTF, as partial consideration for plaintiff's capital contribution to Raeford. Plaintiff's certificate, along with similar certificates to Stone Bros.

and NJS, was part of Raeford's original capitalization. *See First Citizens Bank and Trust Co. v. Parker*, 225 N.C. 480, 485, 35 S.E. 2d 489, 492 (1945) ("The fiduciary character of the debt does not depend upon its form but the manner of its origin and the acts by which it is incurred . . . ."). Second, Raeford listed the certificates under stockholder's equity on its balance sheet as it did for common stock. Finally, like common stock, the certificate was junior and subordinate to all other debts of Raeford, secured or unsecured. It is fundamental to corporate law that if the corporation dissolves, the common stockholders receive a distribution, if at all, after all the debts have been paid. 19 Am. Jur. 2d *Corporations* § 2866 at 648 (1986).

[6] Defendants next challenge the instruction given to the jury on the fiduciary duty issue on the grounds that the trial court erred in shifting the burden of proof to defendants to prove that a breach of that duty did not occur. We find no error. Once plaintiff established a *prima facie* case that defendants owed plaintiff a fiduciary duty and that duty was breached, which amounted to constructive fraud, the burden of proof shifted to defendants to prove that they acted in an open, fair and honest manner, and the court so instructed the jury. *See Sanders v. Spaulding & Perkins, Inc.*, 82 N.C. App. 680, 681, 347 S.E. 2d 866, 867 (1986).

[7] We turn now to defendants' contention that the trial court erred in admitting plaintiff's expert testimony from Dr. James Baarda. Defendants contend Dr. Baarda's testimony embraced ultimate legal conclusions and thus amounted to an impermissible instruction to the jury and usurpation of the jury's duty.

N.C. Gen. Stat. § 8C-1, Rule 704 (1986) provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Our Supreme Court has stated that "an expert may not testify that a particular legal conclusion or standard has or has not been met, at least *where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness.*" *State v. Ledford*, 315 N.C. 599, 617, 340 S.E. 2d 309, 321 (1986) (emphasis added).

Defendants first argue that the trial court should have excluded Dr. Baarda's testimony that the directors abused their discretion in failing to redeem plaintiff's certificate. We do not believe the testimony at issue constituted testimony on a legal conclusion or

standard for which there is a specific legal meaning such that exclusion was required. The existence or nonexistence of a fiduciary duty was a question of *fact* for the jury. The jury had to determine whether plaintiff had placed special confidence and faith in defendants to act in plaintiff's interests. *See Stone*, 42 N.C. App. at 401, 257 S.E. 2d at 83. We further find that the trial judge instructed the jury, in part, as follows: "[Y]ou should consider the opinion of an expert witness, but you are not bound by it." He also instructed, "You must . . . apply the facts as you find them to be to the law as I am about to give it to you." *Accord*, 3 Weinstein's Evidence ¶ 704 [02] at 704-16 (1988) *and United States v. Fogg*, 652 F. 2d 551, 556-67 (5th Cir. 1981), *cert. denied*, 456 U.S. 905, 102 S.Ct. 1751, 72 L.Ed. 2d 162 (1982). (Applying Federal Rule 704—which is identical to North Carolina's Rule 704—the court held that no error occurred where an IRS agent stated a legal conclusion on defendant's culpability because of the court's precautionary instructions to the jury on the weight to be afforded expert testimony.) We also believe that the complexity of this case and the specialized knowledge necessary to understand the use of revolving fund certificates in agricultural cooperatives distinguishes this case from those relied on by defendants. *See Fogg*, 652 F. 2d at 557 (5th Cir. 1981) (the court considered the complexity of the case in affirming the use of expert testimony even though it embraced a legal conclusion). The cases relied on by defendants involve less complex issues such as gross negligence (*Murrow v. Daniels*, 85 N.C. App. 401, 355 S.E. 2d 204, *rev'd on other grounds*, 321 N.C. 494, 364 S.E. 2d 281 (1988)); the construction and interpretation of a right-of-way agreement (*Board of Transportation v. Bryant*, 59 N.C. App. 256, 296 S.E. 2d 814 (1982)); and whether an easement by implication existed (*Williams v. Sapp*, 83 N.C. App. 116, 349 S.E. 2d 304 (1986)). We find no error in the admission of Dr. Baarda's testimony.

[8] Defendants next contend that the trial court erred in submitting a punitive damages issue to the jury because plaintiff failed to show aggravated or tortious conduct other than defendants' mere refusal to pay. We disagree. In answering the third and fourth issues "Yes," the jury found that defendants had a fiduciary duty to plaintiff and their refusal to retire plaintiff's certificate was not an open, fair or honest transaction. Defendants' breach of their fiduciary duty to plaintiff, which also amounted to evidence sufficient to prove constructive fraud, justified punitive damages.

See Sanders, 82 N.C. App. at 681, 347 S.E. 2d at 868 (1986). Defendants' assignment of error is overruled.

Defendants have raised several other issues on appeal. We have carefully reviewed those arguments, and we find they entitle defendants to no relief and do not merit further discussion. *See State v. Tomblin*, 276 N.C. 273, 277, 171 S.E. 2d 901, 904 (1970).

[9] We now turn to plaintiff's cross appeal. Plaintiff's sole assignment of error alleges the trial court erred in the dismissal of its unfair or deceptive trade practices claim for failure to state a claim upon which relief can be granted. Moreover, plaintiff contends that the jury's factual determination that defendants' refusal to redeem was not an open, fair or honest transaction established an unfair or deceptive trade practice as a matter of law. We agree that the trial judge erred in dismissing plaintiff's unfair or deceptive trade practice claim. We do not agree, however, that plaintiff has established that claim as a matter of law.

The standard of review for the granting of defendants' N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion requires us to test the legal sufficiency of plaintiff's claim. The allegations in plaintiff's complaint are treated as true. *White v. White*, 296 N.C. 661, 667, 252 S.E. 2d 698, 702 (1979). In its complaint plaintiff alleged that defendants owed plaintiff a fiduciary duty and that defendants breached that duty when they refused to redeem plaintiff's certificate. Plaintiff alleged that the refusal was unreasonable. Plaintiff alleged that defendants manipulated Raeford's income to the benefit of defendant Johnson's family and to the detriment of plaintiff's interest. Plaintiff alleged that defendants' actions were inequitable, arbitrary, in bad faith, were an abuse of discretion, and a violation of Raeford's by-laws. Plaintiff further alleged that defendants' acts were in or affecting commerce. These allegations, though not denominated as such, are sufficient to allege constructive fraud. Therefore, the allegations were sufficient to allege a claim of unfair or deceptive trade practice. *Spence v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 665, 668, 347 S.E. 2d 864, 866 (1986).

We do not agree, however, with plaintiff's argument that we should find that, in the case below, the unfair or deceptive trade practice has been established as a matter of law. Plaintiff urges this Court to treble the damages and remand the cause only for consideration of attorney fees. In rejecting this argument, we note initially that the case was not tried below with any consideration

given to an unfair or deceptive trade practice claim. Had the claim been present during trial, it could have profoundly affected defendants' preparation for trial and the tactics pursued during trial. It would be manifestly unfair to declare, at this stage of the proceedings, that the claim was proven as a matter of law with no contrary result possible, even though the claim was not prosecuted or defended as such below.

We also reject plaintiff's argument because the jury made no findings concerning whether defendants' practices were in or affecting commerce and whether the acts had an impact on plaintiff. N.C. Gen. Stat. § 75-1.1 (1988); *Wilder v. Squires*, 68 N.C. App. 310, 319, 315 S.E. 2d 63, 68, *disc. rev. denied*, 311 N.C. 769, 321 S.E. 2d 158 (1984).

> Ordinarily, it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce.

Hardy v. Toler, 288 N.C. 303, 310, 218 S.E. 2d 342, 346-47 (1975). Since the jury has not made the requisite findings, we will not speculate, based on the findings made on plaintiff's other claims, whether plaintiff has established its claim as a matter of law.

[10] On remand the trial court must consider the factual findings already made by the jury together with additional factual findings the jury will make under proper instructions in accordance with the statutes and case law relative to unfair or deceptive trade practice claims. Then the trial court must determine whether defendants engaged in unfair or deceptive trade practices. If the trial court finds that defendants engaged in an unfair or deceptive trade practice, plaintiff is entitled to have its actual damages trebled and may be entitled to attorney fees in the trial court's discretion, if the court finds that defendants' act or practice was willful and their refusal to resolve the matter was unwarranted. N.C. Gen. Stat. §§ 75-16 and 75-16.1 (1988). Plaintiff would then elect to recover either punitive damages or treble damages. Plaintiff is not entitled to recover both treble and punitive damages under § 75-16. *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 53, 362 S.E. 2d 578, 584 (1987), *disc. rev. denied*, 321 N.C. 473, 364 S.E. 2d 921 (1988).

In summary, in defendants' appeal we find no error. In plaintiff's appeal we vacate the order granting defendants' Rule 12(b)(6)

motion as to unfair or deceptive trade practices, and we remand for a new trial on that claim.

No error in part; vacated and remanded in part.

Judge PHILLIPS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I dissent from the majority's ruling on the admissibility of Dr. Baarda's testimony that the defendants "abused their discretion" and "breached" certain "fiduciary duties." Despite the adoption of Rule 704, Dean Brandis has stated the continuing validity of state precedent that an expert may not opine on whether a legal standard has or has not been fulfilled in a specific case:

> In attempting to relate the facts it often happens that a witness will use words which, though familiar to the layman's vocabulary, also have a legal meaning. Whether such usage will violate the opinion rule depends upon the sense in which the words are used and the nature of the issues in the case. Thus a witness may state that he was in 'possession' of land or chattel . . . or that the prosecutrix was 'raped' . . . if the words are employed in a popular sense to describe the facts rather than their legal consequences. *Where the legal relations growing out of the facts are in dispute, and the witness's words appear to describe the relations themselves, the same words may be objectionable.* Under these circumstances it is improper for a witness to testify whether a transaction was 'bona fide' or induced by 'fraud' . . . or whether he was an 'agent' . . . and a witness may not testify to the legal effect of a contract or to its meaning when that is a question for the court to decide from the writing itself; but he may testify to his own intention and understanding *where they are relevant.*

1 H. Brandis, *Brandis on North Carolina Evidence* Sec. 130 at 579-82 (3rd ed. 1988) (emphasis added).

It is true that the federal courts have been generally reluctant to overrule a trial judge who allows expert opinion that arguably states relevant legal standards have been met. *E.g., Specht v. Jensen*, 832 F. 2d 1516, 1527 (10th Cir. 1987) (en banc) (permit-

ting constitutional expert to state opinion on dispositive issue whether "search" occurred under Fourth Amendment). However, even after this state's adoption of Rule 704, our own Supreme Court and this court have followed a more conservative course which confirms Dean Brandis's observation. *See, e.g., State v. Weeks*, 322 N.C. 152, 167, 367 S.E. 2d 895, 903 (1988) (psychiatric testimony that defendant did not act in "cool state of mind" and was unable to conform behavior to legal requirements improperly stated legal standard had not been met); *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986) (expert precluded from stating that injuries were "proximate cause" of death); *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985) (dictum) (court noted it would bar expert testimony that defendant "raped" victim in rape trial); *Murrow v. Daniels*, 85 N.C. App. 401, 355 S.E. 2d 204, *rev'd on other grounds*, 321 N.C. 494, 364 S.E. 2d 392 (1987) (expert's opinion that defendant's lack of security was "gross negligence" was improper legal conclusion) (cited with approval by Supreme Court in *Weeks*); *Williams v. Sapp*, 83 N.C. App. 116, 349 S.E. 2d 304 (1986) (error to allow attorney to give expert opinion that plaintiff was legally entitled to easement by implication); *but see State v. Franks*, 262 N.C. 94, 124 S.E. 2d 537 (1962) (where defendant charged with selling unregistered securities, expert could state that debentures must be registered under state securities law).

Dr. Baarda testified as an expert with degrees in law and agricultural economics. He testified extensively concerning the nature of agricultural cooperatives and the use of revolving certificates for their financing. The majority summarizes Dr. Baarda's testimony as "testimony that the directors abused their discretion in failing to redeem plaintiff's certificate." That simple paraphrase does not do justice to the breadth of Dr. Baarda's extensive testimony concerning the legal effect of key provisions of the certificates, as well as Dr. Baarda's opinion that defendants abused their discretion and breached their fiduciary duties to plaintiff in failing to redeem the certificates:

> Q. All right. I am trying to deal with the subject of discretion, Dr. Baarda. What discretion is available to the Board under this Section [of the certificate] that you are reading from?
>
> . . .
>
> A. That this cooperative gives the discretion to the Board of Directors to redeem.

Q. I'd like to ask whether you have an opinion as to whether there is an additional type of discretion permissible to the Board of Directors?

A. (Reading over paragraph.) Yes, there is an additional discretion.

Q. What is that discretion?

A. [The] discretion . . . to revolve [the certificates] out of order . . . under some extraordinary circumstances . . . spelled out in the by-laws [such as] to compromise or settle the dispute between the owner thereof and the association, and then for other purposes such as settling an estate or when an owner moves from the territory.

. . .

Q. Based upon your experience, and your review of materials which you have previously testified to, do you have an opinion satisfactory to yourself as to whether the Board of Directors of Raeford abused its discretion in failing to redeem HAJMM's Class B revolving fund certificate?

A. [M]y opinion is that the Board of Directors did abuse its discretion in failing to redeem this equity.

Q. Do you have an opinion satisfactory to yourself as to when the abuse of discretion occurred?

A. In my opinion the abuse occurred when demand was made on the cooperative to pay it back and the cooperative refused to do so.

Q. Do you have an opinion satisfactory to yourself as to whether the abuse of discretion is a continuing matter?

A. Yes, this decision can be made at any time, so it is a continuing problem.

. . .

Q. Do you have an opinion satisfactory to yourself as to whether there was a fiduciary duty both by Raeford and the defendant, Marvin Johnson, to the HAJMM Company?

. . .

A. In my opinion . . . there was such a relationship.

Q. Do you have an opinion satisfactory to yourself as to whether the fiduciary duty was breached?

. . .

A. I believe that the fiduciary duty was breached.

Q. Do you have an opinion satisfactory to yourself as to when the fiduciary duty was breached?

A. I believe it was breached when the Evans family made demand on the cooperative to pay it back, and the cooperative refused to do so.

Q. Do you have an opinion satisfactory to yourself as to whether this breach is continuous?

A. Yes, this, this is a continuing duty.

The court submitted issues to the jury concerning whether defendant breached its by-laws by refusing to retire the certificates in the reasonable exercise of its discretion, and whether defendants breached a fiduciary duty by refusing to retire the certificates. Contrary to the majority's assertion, this case may not be distinguished from the state precedents cited earlier: irrespective of how complex the *factual* issues were in those cases, they did not involve *legal standards* which were necessarily less complex than those relevant to this case. Once Dr. Baarda clarified the admittedly complex facts concerning the operation and financing of this agricultural cooperative and stated criteria pertinent to judging its financial transactions, the jury was in as good a position as Dr. Baarda to apply the relevant legal standards given by the trial judge to the facts of this case. I question the helpful "expert" nature of the conclusion that defendants breached their "fiduciary" duties to plaintiff since the legal meaning of the term "fiduciary" is nearly identical to its meaning to laymen. *Compare Webster's Third New Int'l Dictionary* at 845 (1968) *with Black's Law Dictionary* at 753-54 (1968). Thus, given the minimal helpfulness of the specific legal conclusions stated above, the unfair prejudice to defendants of Dr. Baarda's weighty legal conclusions warrants their exclusion under Rule 403.

Although the federal courts would arguably apply the rules of evidence to permit these opinions under these facts, we are bound by the unqualified state precedents cited earlier. Given those authorities, the erroneous admission of Dr. Baarda's opinions were

not cured by the trial judge's pattern instructions on credibility and expert testimony. As I believe there is a reasonable likelihood a different result might have been reached had Dr. Baarda's legal conclusions been excluded, I would grant defendants a new trial of the issues embraced by his testimony.

Furthermore, by establishing defendants' breach of fiduciary duty (and therefore their constructive fraud), Dr. Baarda's testimony also significantly affected plaintiff's deceptive trade claims. Thus, while I agree with the majority that the trial court erroneously dismissed plaintiff's deceptive trade claims, I would remand for a new trial of all claims, including the deceptive trade claims.

STATE OF NORTH CAROLINA v. DOUGLAS MARSHALL

No. 8826SC785

(Filed 6 June 1989)

1. **Searches and Seizures § 20— search warrant—no affidavit—sworn application sufficient**

A search warrant in a prosecution for possession with intent to sell or deliver and trafficking in cocaine was properly issued even though a separate paper identified as an affidavit was not attached to the officers' sworn application. Defendant's argument would require that an officer submit a separate sworn affidavit even when its contents would be a duplicate of the sworn statement in the application. N.C.G.S. § 15A-244.

2. **Searches and Seizures § 24— search warrant—probable cause—variance between application and supplemental report—reliability of informant**

Information supplied to a magistrate in a prosecution for possession of marijuana with intent to sell and deliver and trafficking in cocaine was sufficient to find probable cause where the affidavit contained underlying circumstances supporting the informant's basis of knowledge and his reliability and the informant was said to have told officers he was inside the house within the preceding 48 hours and saw cocaine being sold. Although a supplemental report from an officer did not contain an explicit recitation that the informant had been inside the house, that variance between the documents does not

show that officers were acting in bad faith and defendant's argument that the informant was not demonstrably reliable was without merit where the affidavit stated that officers had known the informant for four weeks and that he had supplied information that led to the arrest of nine individuals. N.C.G.S. § 15A-978(a).

3. Searches and Seizures § 20— search warrant—failure to file with clerk—not a constitutional violation

In a prosecution for possession of marijuana with intent to sell and deliver and trafficking in cocaine, even assuming that an application and warrant were never filed with the clerk as required by N.C.G.S. § 15A-974, that failure does not rise to the level of a constitutional violation that would require suppression of evidence.

4. Searches and Seizures § 39— search warrant—scope of search—automobile and yard of house

In a prosecution for possession of marijuana with intent to sell or deliver and trafficking in cocaine, a car parked fifteen feet from the front door and in the front yard of the premises named in the search warrant was within the curtilage of the house and was subject to search even though it was registered in the name of a woman who lived with defendant at the house.

5. Searches and Seizures § 41— execution of search warrant—use of force to gain entry

The trial court in a prosecution for possession of marijuana with intent to sell and deliver and trafficking in cocaine correctly ruled that a search was conducted in accordance with N.C.G.S. § 15A-251 and correctly denied defendant's motion to suppress based on the assertion that police used excessive force to gain admission to his house where an officer testified on voir dire that he knocked on the door of the house and announced he was a police officer and had a search warrant, heard the sounds of people running and faintly heard the word "police," and another officer kicked open the door ". . . a couple of seconds" after the knock and announcement. The evidence indicated circumstances under which the police officers could have reasonably believed that they were being denied access and that evidence could be destroyed.

6. Constitutional Law § 67— identity of confidential informant—disclosure denied—no error

The trial court did not err in a prosecution for possession of marijuana with intent to sell or deliver and trafficking in cocaine by denying defendant's motion for disclosure of a confidential informant where there was sworn testimony from the officer who had contact with the informant and who participated in a search of defendant's house that the informant was not on the premises at any time during the search. The charges against defendant were based on the seizure of cocaine and marijuana in the house in which defendant admitted residing, and were not based on or proved by any information the informant purportedly gave officers.

7. Searches and Seizures § 45— motion to suppress evidence—denial of new hearing based on newly discovered evidence—no error

There was no error in a prosecution for possession of marijuana with intent to sell and deliver and trafficking in cocaine in refusing to hear a renewed motion to suppress evidence based on newly discovered evidence where the new evidence consisted of a two paragraph excerpt from the arresting officer's supplemental report which had been withheld from defendant but which contained information brought out through the testimony of officers at the suppression hearing. N.C.G.S. § 15A-975(c).

8. Criminal Law § 76.1— admissibility of inculpatory statement—denial of voir dire hearing—arguments heard at pretrial suppression hearing—no error

There was no error in a prosecution for possession of marijuana with intent to sell or deliver and trafficking in cocaine in failing to grant a voir dire hearing to determine admissibility of an inculpatory statement where all of defendant's arguments regarding the use of his statements as evidence were heard at a pretrial hearing on defendant's motions to suppress.

9. Criminal Law § 75.7— narcotics—statement that defendant lived in house—prior to Miranda warning—harmless error

The trial court in a prosecution for possession of marijuana with intent to sell or deliver and trafficking in cocaine erred by admitting defendant's statement that he lived in the

house in which the narcotics were found where all the occupants of the residence were taken to the living room, were set down under the guard of officers, and an officer asked if anyone lived there; however, the admission of that testimony was harmless beyond a reasonable doubt as there was other evidence admitted without objection that defendant was a resident of the premises searched.

10. Criminal Law § 91.6— defendant's statement—release to defendant on Friday before trial on Monday—statement not suppressed

There was no error in a prosecution for possession of marijuana with intent to sell or deliver and trafficking in cocaine from the trial court's refusal to suppress testimony regarding a statement allegedly made by defendant where the statement was disclosed to defendant on Friday afternoon preceding the scheduled suppression hearing on Monday, even though defendant had made a discovery request some four and one-half months earlier. Although defendant had reason to request a continuance, the court did not abuse its discretion in refusing to grant the request; moreover, there was evidence presented to the judge that defendant had agreed to have all suppression motions heard at the Monday hearing even after he had been made aware of the statement.

11. Searches and Seizures § 45— suppression hearing—severance of trial from codefendants—not entitled to another suppression hearing

Defendant in a prosecution for possession of marijuana with intent to sell or deliver and trafficking in cocaine was not entitled to a second hearing on his motion to suppress based on the severance of his trial from the trials of the other defendants.

12. Criminal Law § 96— testimony improperly admitted—withdrawn—no error

Defendant in a prosecution for possession of marijuana with intent to sell or deliver and trafficking in cocaine was not irreparably prejudiced by testimony regarding marijuana found in a car outside his house and the display during officers' testimony of the bags found in the car where the trial court refused to allow the admission of the bags and their contents into evidence and instructed the jury not to consider the mari-

juana found outside the house in deliberating on the marijuana charge. The evidence was excluded because the State failed to link its possession or control to the defendant, not because the search of the car was unconstitutional, and there was no reason not to apply the general rule that an instruction that evidence is not to be considered accompanied by the withdrawal of that evidence cures any error in its admission.

13. Criminal Law §§ 73.2, 33— narcotics found in house—testimony as to defendant's correspondence while on pretrial release—admissible

There was no error in a prosecution for possession of marijuana with intent to sell or deliver and trafficking in cocaine in admitting the testimony of a pretrial release officer about where correspondence directed to defendant was sent while defendant was on pretrial release. The evidence was relevant in that it tended to show that defendant lived at the house at the time of the search and arrest, and was admissible under the business records exception to the hearsay rule because the witness testified that the record was kept in the ordinary course of business. While the witness was not the records custodian for the entire office, she had custody and control of defendant's file. N.C.G.S. § 8C-1, Rule 803(6).

14. Narcotics § 4— possession of marijuana—trafficking in cocaine—evidence sufficient

The trial court did not err by failing to dismiss charges of possession of marijuana with intent to sell or deliver and trafficking in cocaine where there was substantial evidence of all the material elements of the offenses charged and where defendant's constitutional rights were not violated. N.C.G.S. § 15A-954(a)(4).

APPEAL by defendant from *Downs, Judge*. Judgment entered 21 January 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 February 1989.

Defendant was tried and convicted of possession of marijuana with intent to sell or deliver and trafficking in cocaine. The charges arose from a search pursuant to a search warrant of the house at 6619 Somersworth Drive in which defendant lived, where the police found marijuana and cocaine. Defendant challenged the legality of the search and moved to suppress the evidence seized during

the search. Defendant also moved to suppress inculpatory statements he made to the police during the search. After a pretrial hearing on the motions to suppress, the court concluded that the search was legal and that defendant voluntarily gave statements after he had been made aware of his right to remain silent and of his right to counsel. From judgment imposed on the guilty verdicts, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General Grayson G. Kelley, for the State.

Linwood O. Foust and David F. Williams for defendant-appellant.

EAGLES, Judge.

I.

Defendant argues that his motion to suppress evidence was erroneously denied. Defendant asserts five bases for his argument that the search of the house and car in the front yard was unlawful. First, defendant argues that there was no affidavit accompanying the application for a search warrant when it was presented to the magistrate as required by G.S. 15A-244. Second, defendant argues that even if the officers' sworn statement in the application is taken into account, there was insufficient evidence for the magistrate to issue the search warrant. Third, defendant asserts that the application and search warrant were not filed with the clerk as required by G.S. 15A-245(b) and, therefore, the evidence seized was obtained as a result of a "substantial violation" of Chapter 15A and must be suppressed pursuant to G.S. 15A-974. Fourth, defendant argues that the search of the car in the front yard exceeded the scope of the search authorized by the warrant. Finally, defendant asserts that the officers unlawfully broke into the house and used unnecessary force to obtain admission to the premises to serve the search warrant. We are not persuaded by defendant's arguments and affirm the trial court's denial of defendant's motion to suppress.

A. LACK OF AFFIDAVIT

[1] Defendant argues that because a separate paper identified as an affidavit was not submitted with the officers' sworn application, the requirements of G.S. 15A-244 were not met and the search warrant was improperly issued. G.S. 15A-244(3) requires that the

statement in the application that probable cause exists "be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause." Neither defendant nor the State have cited any reported North Carolina case directly on this point. However, there are cases where this court has stated that a sworn application which "particularly [sets] forth the facts and circumstances establishing probable cause" would be sufficient for the magistrate to determine whether probable cause exists. *See State v. Heath*, 73 N.C. App. 391, 326 S.E. 2d 640 (1985) (where one officer made sworn application for a search warrant and presented along with the application two unsworn statements, the court refers to the sworn statement in the application as the only "affidavit" which the magistrate could consider under G.S. 15A-244). Defendant's argument would require that an officer submit a separate sworn writing labeled "Affidavit" even when its contents would be a verbatim duplication of the sworn statement in the application. We disagree and find no merit in that argument.

B. INSUFFICIENT BASIS FOR PROBABLE CAUSE

[2] Defendant next argues that, even if the sworn application is sufficient under the statute, the information provided to the magistrate was insufficient to find probable cause. Defendant asserts that the sworn statement made by the officer was too conclusory to allow the magistrate to make an independent finding of probable cause. Further, defendant argues that the officers supplied false information in the application in order to establish probable cause. Finally, defendant argues the reliability of the confidential informant was not sufficiently shown.

Probable cause means reasonable grounds to believe that the proposed search will reveal the presence of the objects sought upon the premises to be searched and that those objects will aid in the apprehension or conviction of the offender. *State v. Campbell*, 282 N.C. 125, 128-29, 191 S.E. 2d 752, 755 (1972). Probable cause cannot be shown "by affidavits which are purely conclusory." *Campbell*, 282 N.C. at 130, 191 S.E. 2d at 756. "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." *Id.* at 131, 191 S.E. 2d at 756, *citing United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965). The affidavit signed by the officers in this case stated that

> We . . . have been informed by a reliable and confidential informant that he has been inside the above address within the past 48 hours and has observed cocaine inside the residence and cocaine was being sold at that time by the above occupant [defendant]. The informant is familiar with how cocaine is packaged and sold on the streets and that he has used cocaine in the past. We have known this informant for four weeks and information provided by this informate [sic] has resulted in the seizure of controlled substances included in the N.C. Controlled Substances Act and led to the arrest of least nine individuals for violations of the N.C. Controlled Substance Act.

We do not agree with defendant's argument that the affidavit is too conclusory for a magistrate to make an independent assessment of probable cause. The affidavit contains underlying circumstances that support the informant's basis of knowledge and his reliability. The informant is said to have told the officers he was inside the house within the preceding 48 hours and while there he saw cocaine being sold. These statements constitute sufficient basis on which the magistrate could find probable cause to issue the search warrant.

Defendant also argues the officers supplied false information in their application in order to provide a basis for finding probable cause. G.S. 15A-978(a) permits a defendant to challenge the validity of a search warrant by attacking the good faith of the affiant in providing information relied upon to establish probable cause. "[I]t does not permit a defendant to attack the factual accuracy of the information supplied by an informant to the affiant." *State v. Winfrey*, 40 N.C. App. 266, 268-69, 252 S.E. 2d 248, 249, *disc. rev. denied*, 297 N.C. 304, 254 S.E. 2d 922 (1979). The basis for defendant's argument here is a two paragraph excerpt from an officer's supplemental report. The two paragraphs were deleted from a copy of the report that was given to the defendant but were subsequently provided to the defendant. The defendant argues that the officers knew this informant had not been inside the house in the past forty-eight hours. Defendant bases his argument on the fact that the only information in the report about the informant is that he rode past the premises with the officers while telling the officers about the occupants and the sale of cocaine within the house. Because the supplemental report does not contain an explicit recitation that the informant had been inside the house as the officers' affidavit stated, defendant argues the affidavit con-

tained false information. We do not agree that this variance between the documents shows the officers were acting in bad faith when they provided sworn information to the magistrate.

Defendant's final argument on the lack of probable cause issue is that the informant was not demonstrably reliable. The affidavit submitted by the officers stated that the informant had been known by them for four weeks and had supplied information that led to the arrest of nine individuals for violation of the N.C. Controlled Substance Act. "The fact that statements from the [informant] in the past had led to arrests is sufficient to show the reliability of the [informant]." *State v. Arrington*, 311 N.C. 633, 642, 319 S.E. 2d 254, 260 (1984). Defendant's argument is without merit. The information given to the magistrate here was sufficient to find probable cause for the issuance of the search warrant.

C. FAILURE TO FILE

[3] Defendant's third argument on the motion to suppress is based on his contention that the application and search warrant were not filed with the clerk as required by statute. G.S. 15A-245(b) provides that "[t]he issuing official must retain a copy of the warrant and warrant application and must promptly file them with the clerk." Defendant argues that the application and warrant were never filed with the clerk, contrary to the trial court's finding. Defendant asserts there was no evidence on which the trial court could base its finding that the application and warrant had been filed.

Even assuming *arguendo* that there was no evidence on which the court could find that the application and the warrant had been filed, this does not require that the seized evidence be suppressed. G.S. 15A-974 states that "[u]pon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or (2) It is obtained as a result of a substantial violation of the provisions of this Chapter." On this record the failure to timely file these documents with the clerk after the warrant was issued does not rise to the level of a constitutional violation that would require suppression under G.S. 15A-974(1). Further, evidence will not be suppressed pursuant to G.S. 15A-974(2) unless the evidence was obtained "as a result of" a violation of Chapter 15A. *State v. Richardson*, 295 N.C. 309, 322, 245 S.E. 2d 754, 763 (1978). Since the filing of the application and warrant had no bearing on the evidence seized, the court is not required to suppress the evidence un-

der G.S. 15A-974(2). We hold that on this record defendant's motion to suppress on the basis that the magistrate failed to file the documents with the clerk was properly denied.

D. EXCEEDED SCOPE OF WARRANT

[4] Defendant also argues that the officers exceeded the scope of the warrant by searching a car parked in the front yard, just off the driveway. The car was registered in the name of a woman who lived with the defendant at 6619 Somersworth Drive, the premises named in the search warrant. Therefore, defendant argues that evidence of the marijuana found in the trunk of the car should have been suppressed. Defendant's argument is without merit. As a general rule, "if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car." *State v. Reid*, 286 N.C. 323, 326, 210 S.E. 2d 422, 424 (1974). *See also State v. Courtwright*, 60 N.C. App. 247, 298 S.E. 2d 740, *rev. denied*, 308 N.C. 192, 302 S.E. 2d 245 (1983); *State v. Logan*, 27 N.C. App. 150, 151, 218 S.E. 2d 213, 214-15 (1975). The car that was searched was parked in the front yard of the premises, fifteen feet from the front door. The car was within the curtilage of the house and was subject to search under the warrant.

E. EXCESSIVE FORCE TO ENTER

[5] Defendant's fifth and final argument concerning the motion to suppress is based on his assertion that the police used excessive force to gain entry to the house. G.S. 15A-251(1) lists the circumstances under which an officer, after announcing his identity and purpose, may break and enter the premises to execute a warrant. The officer must reasonably believe admittance is being denied or unreasonably delayed or that the premises is unoccupied. G.S. 15A-251(1). If the method of entry by police officers renders a search illegal, the evidence obtained thereby is not competent evidence at defendant's trial. *State v. Mitchell*, 22 N.C. App. 663, 207 S.E. 2d 263 (1974). At the *voir dire* hearing on defendant's motion to suppress, one of the officers who executed the search warrant testified that he knocked on the door of the house and announced he was a police officer and had a search warrant. The officer also testified that "[j]ust a couple of seconds" later, another officer kicked open the door. Other testimony from the officer was that during the time between the announcement and the opening of the door he heard the sounds of people running and faintly

heard the word "police." He also testified that he ordered the door opened "because evidence of this nature . . . is easily disposed of, and quick entry is safer for the officers." The State argues that this "quick movement from inside the house," as the officer described it, gave the officer reason to believe that admittance was being denied or unreasonably delayed. Defendant argues that the trial court based its ruling on the legality of the search on the officer's peculiar fear of drug searches.

This court has stated that "[w]hat is a reasonable time between notice and entry depends on the particular circumstances in each case." *State v. Edwards*, 70 N.C. App. 317, 320, 319 S.E. 2d 613, 615 (1984), *reversed on other grounds*, 315 N.C. 304, 337 S.E. 2d 508 (1985). The evidence here indicated circumstances under which the police officers could have reasonably believed that they were being denied access and that evidence could be destroyed. The trial court had a reasonable basis for concluding that the search was conducted in accordance with G.S. 15A-251 and defendant's motion was properly denied.

II.

[6] Defendant argues that the trial court committed reversible error in denying his motion for disclosure of the identity of the confidential informant. Defendant asserts that his case is "on all fours" with *State v. Johnson*, 81 N.C. App. 454, 344 S.E. 2d 318, *disc. rev. denied*, 317 N.C. 339, 346 S.E. 2d 151 (1986). We disagree. In *Johnson*, the defendant was charged with several counts of possession with intent to sell or deliver and delivery of various controlled substances. The facts tended to show that defendant had sold LSD and given meprobamate to a detective and the confidential informant. The trial court denied defendant's motion for disclosure of the informant. This court ordered a new trial, stating that since the informant was a participant in the crimes for which defendant was being tried, the disclosure of the identity of the informant was essential to a fair determination of defendant's case. *Id.* at 457, 344 S.E. 2d at 320. Here, there is sworn testimony from the officer who had contact with the informant and who participated in the search that the informant was not on the premises at any time during the search. The charges against defendant were based on the seizure of cocaine and marijuana in the house in which the defendant admitted residing. The charges were not based on or proved by any information the informant purportedly gave the

officers. "In North Carolina, participation is the essential factor" and when the informant was not present at the time of the commission of the alleged offense, there is no necessity for revealing the confidential informant's name. *State v. Parks*, 28 N.C. App. 20, 26, 220 S.E. 2d 382, 386 (1975), *disc. rev. denied*, 289 N.C. 301, 222 S.E. 2d 701 (1976). Defendant has failed to make a sufficient showing that the circumstances of this case require the disclosure of the informant. *State v. Watson*, 303 N.C. 533, 279 S.E. 2d 580 (1981). Therefore, defendant's motion to compel disclosure of the confidential informant was properly denied.

III.

[7] Defendant's third argument is that the trial court erred in refusing to hear a renewed motion to suppress the evidence found in the search. Defendant asserts that he was entitled to another hearing because of newly discovered evidence. The "new evidence" was a two paragraph excerpt from the arresting officer's "Supplemental Report" that had been withheld from defendant. Defendant relies on G.S. 15A-975(c) which states that

> [i]f, after a pretrial determination and denial of the motion [to suppress], the judge is satisfied . . . that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion . . . during trial.

Defendant asserts that the two paragraphs contain information that is essential to a fair determination of the motion to suppress. The State contends that the two paragraphs reveal nothing pertinent to defendant's defense and nothing that would have altered the trial court's ruling on defendant's motion to suppress.

The two paragraphs at issue are as follows:

> On 10/24/86 Officer D. A. Price and myself received information from a confidential and reliable informant that Cocaine was being sold from 6619 Somersworth Dr. We have received information in the past from this informant that has resulted in the arrest of at least nine individuals and the conviction of at least one under N.C. Controlled Substance Act.
>
> On this occasion the informant rode with us and pointed out the house at 6619 Somersworth Dr. and described the

> occupants as a B/M, approximately 5'6" tall, 160 lbs., about 39 years of age, going by the name of Doug and also a B/F, thin build, approximately 5'2"-5'4" tall, with a light to medium complexion. The informant stated that Doug and also the B/F was selling Cocaine from the residence, but the main dealer in the house was Doug. The informant stated that Doug does not sell street users, however, he does sell to dealers on the street. The informant states that as a rule the occupants will not sell outside the house but prefers [sic] to have individuals that they know come to the house and the transactions take place inside. The informant states that the occupants are one of the main suppliers to the street dealers in the West Charlotte area.

We agree with the State that these two paragraphs are not "additional pertinent facts" that have any bearing on the defendant's motion to suppress. All of the information in these paragraphs was brought out through testimony of the officers at the pre-trial suppression hearing. The trial court acted properly within its discretion in refusing to allow defendant another suppression hearing.

IV.

[8] The defendant argues that the trial court committed reversible error in refusing to grant the defendant a *voir dire* hearing to determine the admissibility of an inculpatory statement. Defendant relies on *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976) to argue the trial court was required to hold a *voir dire* hearing. However, the record shows that all of defendant's arguments regarding the use of his statements as evidence were heard at a pretrial hearing on defendant's motions to suppress. Defendant's motions were denied at the suppression hearing. Defendant was not entitled to another hearing on his motion, and his assignment of error is overruled.

[9] We note that it was error for the court to deny defendant's motion to suppress the defendant's statement that he lived in the house that was made prior to defendant's being read the *Miranda* warnings and prior to defendant's waiving his rights. The officer testified that "all the occupants of the residence were taken to the living room and were sat [sic] down . . ., under the guard of Officer Davis and myself and the rest of the officers. At that point I asked if anyone there lived at the residence." The occupants were not free to leave and the question was likely to produce

an incriminating response. This constituted custodial interrogation. However, the admission of this testimony was harmless beyond a reasonable doubt as there was other evidence admitted without objection that defendant was a resident of the premises searched.

V.

[10] Defendant's next argument is that the trial court erred in refusing to suppress the introduction of testimony regarding a recorded statement allegedly made by defendant. The defendant asserts that the State did not timely disclose the existence of the statement and the court did not allow the defendant an opportunity to examine the statement. We disagree and overrule this assignment of error.

The record shows that the suppression hearing was scheduled to be heard on a Monday and that the statement attributed to defendant was disclosed to defendant on the Friday afternoon immediately preceding the hearing date. Defendant had made a discovery request some four and one-half months earlier. Although such late disclosure of evidence would give defendant reason to request a continuance, we cannot say the court abused its discretion in refusing to grant the request. Further, there was evidence presented to the judge that, even after defendant had been made aware of the statement, he agreed to have all suppression motions heard at the Monday hearing.

VI.

[11] Defendant's next argument is that he was entitled to a second hearing on his motion to suppress, and that he was irreparably prejudiced by the testimony about the seven pounds of marijuana found in the car parked in the yard. Defendant argues that he is entitled to another hearing solely because his trial was severed from the other defendants' trials after the initial joint hearing on the motions to suppress. Defendant has cited no cases in support of his argument and we are not persuaded.

[12] Defendant also asserts that he was irreparably prejudiced by testimony regarding the marijuana found in the car. After the State had been allowed to elicit testimony from the two officers regarding the marijuana and had displayed the bags found in the car during the officers' testimony, the trial court refused to allow the admission of the bags and their contents into evidence. The court instructed the jury not to consider the marijuana found out-

side the house in deliberating on the charge of possession of marijuana. We disagree with defendant's assertion that the prejudice to him was irreparable. The general rule is that an instruction that evidence is not to be considered accompanied by the withdrawal of that evidence (if already admitted) cures any error in its admission. *State v. Brown*, 266 N.C. 55, 57, 145 S.E. 2d 297, 299 (1965). We see no reason why the general rule would not apply here since the error in allowing the State's witnesses to refer to the marijuana was not of constitutional dimension. As we have noted, the search of the car was not unconstitutional and the trial court did not exclude from evidence the marijuana found in the car on the basis that the search was unconstitutional. The evidence was excluded because the State failed to link its possession or control to the defendant. We find defendant's argument to be without merit.

VII.

[13] Defendant's next argument is based on testimony of a pretrial release officer about where correspondence directed to the defendant was sent while defendant was on pretrial release. Defendant argues that the witness' testimony was irrelevant and inadmissible. We disagree.

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, Rule 401. Evidence that shortly after his arrest for these charges, the defendant gave as his address 6619 Somersworth Drive, Charlotte, tends to show that defendant lived at the house at the time of the search and his arrest. The evidence is clearly relevant.

Defendant also asserts that because the witness was not present when the defendant filled in the form and was not the record keeper for the pretrial release office, the witness' testimony was inadmissible hearsay. The witness' testimony is admissible under the exception to the hearsay rule permitting admission of business records. G.S. 8C, Rule 803(6). The witness testified that the record was kept in the ordinary course of the pretrial release office's business. She was qualified to testify on this matter because, while she was not the records custodian for the entire pretrial release office, she had custody and control over defendant's file.

VIII.

[14] Defendant's final argument is that the trial court erred in denying his motion to dismiss. Defendant bases his argument on the alleged insufficiency of the evidence and on G.S. 15A-954. We disagree with defendant and overrule this assignment of error.

In reviewing a trial court's denial of defendant's motion to dismiss in a criminal case, the test is whether there is substantial evidence of all the material elements of the offense. *State v. Locklear*, 304 N.C. 534, 538, 284 S.E. 2d 500, 502 (1981). The evidence is to be considered in the light most favorable to the State. *Id.* We find that the evidence here, when considered in the light most favorable to the State, constituted substantial evidence of all the material elements of the offenses charged.

Defendant also relies on G.S. 15A-954(4) which states that a trial court must dismiss the charges against a defendant if "[t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." Based on our conclusions with regard to the other issues raised by defendant, we find no merit to defendant's argument. Because defendant's constitutional rights have not been violated, his argument must fail.

Because defendant failed to argue in his brief his remaining seventeen assignments of error, they are deemed abandoned. Rule 28(b), N.C. Rules App. Pro.

After careful consideration of the record on appeal and the arguments of the defendant, we find no error.

No error.

Judges COZORT and GREENE concur.

ANDERSON TRUCKING SERVICE, INC. v. KEY WAY TRANSPORT, INC.

No. 8814SC768

(Filed 6 June 1989)

1. **Rules of Civil Procedure § 60.2— relief from default judgment— inexcusable neglect—disinterested registered agent—failure to monitor corporate affairs**

The trial court did not err in concluding that defendant foreign corporation was not entitled to relief from a default judgment under Rule 60(b)(1) because its failure to appear was the result of inexcusable neglect in failing to appoint a registered agent with some interest in the corporation and in failing to monitor its corporate affairs to ensure that it was notified of claims against it where defendant had no registered agent in this state to receive service of process although it did business in this state; the summons and complaint were served upon defendant's registered agent in Maryland by certified mail; the registered agent had had no interest in the corporation for eight years and had requested more than once to be replaced; the agent mailed the summons and complaint to defendant, but they were apparently lost in the mail and not received by defendant; a copy of plaintiff's motion for default judgment and notice of hearing were also mailed to the registered agent, but these were not received by defendant; and defendant failed to appear at the default judgment hearing.

2. **Rules of Civil Procedure § 60.2— foreign corporation—service on registered agent—loss of summons and complaint in mail— no extraordinary circumstance—relief from default judgment not required**

Loss in the mail of the summons and complaint when they were mailed by defendant foreign corporation's registered agent to defendant did not constitute an "extraordinary circumstance" responsible for defendant's failure to appear so that justice demanded that a default judgment against defendant be set aside under Rule 60(b)(6) where defendant corporation had exhibited a longstanding pattern of irresponsibility and disregard of legal matters by maintaining a registered agent for service of process who no longer had an interest in the corporation and who had requested more than once

to be replaced, and where defendant failed to respond to two communications about the pending suit, only one of which was allegedly lost in the mail.

3. Constitutional Law § 24.7; Process § 13— foreign corporation— service of process on registered agent—absence of actual notice—due process

Defendant foreign corporation was not deprived of due process by its lack of actual notice of plaintiff's action against it where the summons and complaint were served by certified mail upon the corporation's registered agent in Maryland since (1) the method of service used was reasonably calculated to give actual notice to defendant, and (2) service of process on defendant's registered agent was binding upon defendant when the agent was served, not when this service actually came to the attention of an officer or agent charged with defending actions against defendant.

APPEAL by defendant from *Henry V. Barnette, Jr., Judge.* Order entered 8 March 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 February 1989.

Newsom, Graham, Hedrick, Bryson & Kennon, by Charles F. Carpenter, for plaintiff-appellee.

Spears, Barnes, Baker, Hoof & Wainio, by Robert F. Baker, for defendant-appellant.

BECTON, Judge.

Defendant Key Way Transport, Inc. ("Key Way") appeals from denial of its motion to set aside a $309,926 default judgment entered in favor of plaintiff Anderson Trucking Service, Inc. ("Anderson Trucking"). The trial judge denied relief from the default judgment on the ground that Key Way's failure to appear in the action was due to its own "inexcusable neglect," namely, (1) maintaining for several years a registered agent for service of process who had no interest in the company and who requested that he be replaced, and (2) failing to monitor its corporate affairs. Key Way contends on appeal that the default judgment should have been set aside because it had no actual notice of the claim since, although the Summons and Complaint were served upon its registered agent, the documents were subsequently lost in the mail when forwarded

by the agent to Key Way's president. For the reasons that follow, we affirm the order of the trial court.

I

The record on appeal reveals that Key Way, owned by Cowan Enterprises, is a foreign corporation, incorporated in the State of Maryland. Key Way does not dispute that it conducted business in North Carolina but maintained no registered agent for service of process here. However, Key Way did have a registered agent listed in Maryland's official corporate records; that agent was Russell Lee Siegel, Key Way's original owner.

Mr. Siegel incorporated the company in Maryland in 1978, naming himself as its registered agent. Through no action on his part, and against his wishes, Mr. Siegel remained Key Way's registered agent even after he sold the company to Cowan Enterprises in 1979. More than once, and as late as 1982, Mr. Siegel asked Key Way's president, Joseph Cowan, to name someone else as the registered agent. Mr. Cowan failed to do so. Although Mr. Siegel no longer had any interest in Key Way, he continued to occasionally receive mail as the company's registered agent.

On 26 June 1987, Anderson Trucking filed the present action, alleging intentional interference with a third party contract, and a summons was issued against Key Way. The same day, having found no registered agent for the company in North Carolina, Anderson Trucking mailed the Summons and Complaint to Key Way's registered agent at the address listed in the State of Maryland's corporate records. The papers were sent by certified mail, return receipt requested, to Key Way, "c/o Russell Lee Siegel—Registered Agent for Service of Process, 8216 Bletzer Street, Baltimore, Maryland 21222."

John Gunn, Mr. Siegel's employee authorized to sign for any certified mail addressed to him, received and signed for the Summons and Complaint on 3 July 1987. Mr. Gunn immediately gave the papers to Mr. Siegel, who then forwarded them to Key Way's correct address. The papers were sent by regular mail to "Key Way Transport, Inc., to the attention of Joseph Cowan, 820 South Oldham Street, Baltimore, Maryland 21224."

The Summons and Complaint apparently were lost in the mail, never reaching Mr. Cowan or Key Way. As a result, Key Way failed to respond or to appear in the action. Anderson Trucking

obtained an entry of default on 4 August 1987, and on 22 September, moved for judgment by default.

Anderson Trucking mailed a copy of the Motion for Default Judgment and a Notice of Hearing to Key Way in care of Mr. Siegel at the Bletzer Street address. It is not clear from the record whether Mr. Siegel received the Motion and Notice of Hearing, or whether he forwarded those documents to Key Way. In any event, Key Way did not appear at the hearing. On 1 October 1987, after taking evidence, the trial judge entered judgment by default in the amount of $309,926 against Key Way.

The suit came to Key Way's attention on 21 October 1987 when the Durham County Sheriff's Department notified the company concerning execution on the judgment. Key Way immediately moved to set aside the entry of default and default judgment. Four hearings on the matter were held in November 1987 and in January and March 1988. The motion for relief was denied 8 March 1988.

The trial judge made the following conclusions of law, to which Key Way assigns error on appeal:

> 6. The actions of [Key Way] in failing, since 1979, to the date of this action, to change its registered agent from Russell Lee Siegel who had previously asked to be removed as registered agent and who had no further interest in [Key Way's] operation, to someone more closely associated with [Key Way] by employment or by financial interest, or to take adequate steps to monitor its corporate affairs to ensure that Notices or summonses received by its registered agent were properly noted and acted upon, constitutes *inexcusable neglect* not entitling it to relief from the prior judgment and Order . . . pursuant to rule 60(b)(1) of the [R]ules of Civil Procedure.
>
> 7. [Key Way] has neither demonstrated that *extraordinary circumstances* exist nor has [Key Way] made a showing that *justice demands* the relief sought, and therefore [Key Way] is not entitled to any equitable relief pursuant to Rule 60(b)(6) of the Rules of Civil Procedure.

(Emphasis added.)

Key Way contends on appeal that the trial judge erred in concluding that Key Way's failure to defend the action was the re-

sult of its own "inexcusable neglect." Key Way argues that its failure to appear was due to error on the part of the postal service, a circumstance beyond Key Way's control and completely unrelated to Mr. Siegel's continued position as named registered agent. Key Way further contends that the loss in the mail of the Summons and Complaint constituted an "extraordinary circumstance" and, accordingly, that "justice demanded" the judgment be set aside. Finally, Key Way contends that because it had no actual notice of the claim, the judge's denial of its motion was an abuse of discretion and violated Key Way's due process rights.

II

We first consider Key Way's contentions that the trial judge abused his discretion by denying relief from the default judgment pursuant to subsections (b)(1) and (b)(6) of Rule 60.

Rule 60(b), "a grand reservoir of equitable power," *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E. 2d 706, 708 (1976), permits relief from default judgment under subsection (b)(1) when the judgment resulted from "[m]istake, inadvertence, surprise, or excusable neglect," and under subsection (b)(6) if it appears that "[a]ny other reason [exists] justifying relief from the operation of the judgment." N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 60(b)(1), 60(b)(6) (1983). The decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge, and will not be overturned on appeal absent a clear showing of abuse of discretion. *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 425, 349 S.E. 2d 552, 554 (1986); *Huggins v. Hallmark Enter., Inc.*, 84 N.C. App. 15, 25, 351 S.E. 2d 779, 785 (1987).

A. Relief under Rule 60(b)(1)

[1] Key Way contends that its failure to appear was due to the loss of the Summons and Complaint in the mail, and, therefore, that it should be relieved from the default judgment on grounds of "surprise" or "excusable neglect" within the meaning of Rule 60(b)(1). However, a party whose failure to appear is due to its own "inexcusable" neglect is not entitled to relief from judgment by default on the basis of either surprise or excusable neglect. *See, e.g., City of Durham v. Keen*, 40 N.C. App. 652, 660, 253 S.E. 2d 585, 590 (1979) (relief will be denied when party fails to show excusable neglect); *Endsley v. Wolfe Camera Supply Corp.*, 44 N.C. App. 308, 310, 261 S.E. 2d 36, 38 (1979) ("surprise" is

"some condition or situation in which a party . . . is unexpectedly placed to his injury, *without any fault or negligence on his own, which ordinary prudence could not have guarded against*" (emphasis added) (citations omitted)).

Whether neglect is "excusable" or "inexcusable" is a question of law which "depends upon what, under all the surrounding circumstances, may be reasonably expected of a party" to litigation. *McInnis*, 318 N.C. at 425, 349 S.E. 2d at 555. The trial judge's conclusion in this regard will not be disturbed on appeal if competent evidence supports the judge's findings, and those findings support the conclusion. *In re Hall*, 89 N.C. App. 685, 687, 366 S.E. 2d 882, 884, *disc. rev. denied*, 322 N.C. 835, 371 S.E. 2d 277 (1988). Once excusable neglect has been shown as a matter of law, "whether the judge shall then set aside the judgment or not rests 'in his discretion . . . .'" *Morris v. Liverpool, London & Globe Ins. Co.*, 131 N.C. 212, 213, 42 S.E. 577, 578 (1902); *accord McInnis*, 318 N.C. at 425, 349 S.E. 2d at 554.

In the case before us, the trial judge found that Key Way failed for eight years to designate a new registered agent, and further failed, for at least five years, to honor Mr. Siegel's request to be replaced by another registered agent. The judge also found that neither the Summons and Complaint nor the Motion and Notice of Hearing were received by Mr. Cowan or any other employee of Key Way. Based on these findings, the judge concluded as a matter of law that Key Way's failure to appoint a registered agent with some interest in the company, and its accompanying failure to monitor its corporate affairs, together constituted inexcusable neglect. We hold that the evidence and findings support that conclusion.

The settled rule in North Carolina is that a party served with a summons must give the matter the attention a person of ordinary prudence would give to important business, and failure to do so is not excusable neglect. *See, e.g., E. Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co.*, 82 N.C. App. 746, 748, 348 S.E. 2d 165, 167 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E. 2d 745 (1987). A logical extension of that rule is that a corporation which fails to pay due attention to the possibility that it could be involved in litigation, as here, by failing to take steps to ensure that it is notified of claims pending against it, is guilty of inexcusable neglect.

In this case, Key Way's failure to adequately monitor its corporate affairs is glaring. Not only did it fail to change registered agents in Maryland, it failed altogether to name one in this State as required by N.C. Gen. Stat. Secs. 55-138 and 55-141 (1982). Furthermore, in our view, had Key Way established some means to ensure that it was promptly informed of important business matters coming to Mr. Siegel's attention, the loss of the Summons and Complaint in the mail would not have gone unnoticed, and it would have received the Motion for Default Judgment and Notice of Hearing. As a result, Key Way would have appeared in the action, and would not have suffered the prejudice of which it now complains.

We hold that Key Way's own neglect, not any intervening negligence of the postal service, was responsible for its failure to appear in the action. *See Hester v. Miller*, 41 N.C. App. 509, 513, 255 S.E. 2d 318, 321, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 913 (1979). *Cf. Morris*, 131 N.C. at 213-14, 42 S.E. at 578 (failure by foreign corporation's agent for service of process to notify it of service was "gross and inexcusable neglect" which was imputed to corporation since "[w]ith the slightest attention to the case, it should have been known that a complaint was filed. . . ."); *Townsend v. Carolina Coach Co.*, 231 N.C. 81, 84, 56 S.E. 2d 39, 41 (1949) (neglect of agent, a non-employee authorized by law to receive service, not imputed to domestic corporation). We find especially telling Key Way's failure to receive the Motion and Notice of Hearing, since this failure was wholly unrelated to the alleged loss of the Summons and Complaint in the mail.

The trial judge committed no error in denying Key Way's motion for relief under Rule 60(b)(1).

B. Relief under Rule 60(b)(6)

[2] Key Way contends that the trial judge abused his discretion by refusing to grant equitable relief from the judgment under Rule 60(b)(6). Key Way argues that the loss of the Summons and Complaint in the mail was an extraordinary circumstance, and, therefore, that justice demanded the judgment be set aside.

A default judgment may be set aside under Rule 60(b)(6) only upon a showing that (1) extraordinary circumstances were responsible for the failure to appear, and (2) justice demands that relief. *See Huggins*, 84 N.C. App. at 24-25, 351 S.E. 2d at 785. The decision to grant this rule's exceptional relief is discretionary with the trial

judge. *Id.* at 25, 351 S.E. 2d at 785. Because this court "cannot substitute 'what it consider[s] to be its own better judgment' for a discretionary ruling of a trial court," we may not overturn the judge's ruling unless it was " 'manifestly unsupported by reason.' " *Id.* (citations omitted).

While the law does not favor default, preferring instead that controversies be resolved on their merits, "it is also true that rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity." *Howell v. Haliburton*, 22 N.C. App. 40, 42, 205 S.E. 2d 617, 619 (1974). Likewise, courts justifiably disapprove of a corporation's failure to properly maintain a registered agent because that requirement is "designed to inform potential litigants of necessary information," *Huggins*, 84 N.C. App. at 25, 351 S.E. 2d at 785, thereby protecting the corporation's interests and guarding against judgment by default, as well as reducing the chance that the corporation will avoid paying a judgment by evading service of process. *See, e.g., id.; S.C. Ins. Co. v. Hallmark Enter., Inc.*, 88 N.C. App. 642, 648, 364 S.E. 2d 678, 681, *disc. rev. denied*, 322 N.C. 482, 370 S.E. 2d 228 (1988).

Had this simply been a "lost mail" case, particularly in light of the large judgment awarded, we might be inclined to say that extraordinary circumstances existed and that justice demanded relief from the judgment. *Cf. Townsend*, 231 N.C. at 85, 56 S.E. 2d at 41 (citing with approval W. Va. case in which relief from default was granted because summons was lost in mail). We will not do so when, as here, the evidence suggests that the corporation exhibited a longstanding pattern of irresponsibility and disregard of legal matters and failed to respond to *two* communications about a pending suit, only one of which allegedly was lost in the mail. Under circumstances such as this, we cannot say that the trial judge's discretionary ruling allowing the judgment to stand was "manifestly unsupported by reason." *Accord, Kennedy v. Starr*, 62 N.C. App. 183, 186-87, 302 S.E. 2d 497, 500, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983).

The trial judge committed no error in refusing to set aside the default judgment under Rule 60(b)(6).

III

[3] We next consider Key Way's argument that its lack of actual notice of the claim against it deprived it of due process of law.

A. Actual Notice Not Required to Satisfy Due Process

Proper service of process upon a corporate defendant is a prerequisite to personal jurisdiction; without it, judgment entered by default violates due process and is void. *See generally Huggins*, 84 N.C. App. at 21, 351 S.E. 2d at 783; *Royal Business Funds Corp. v. S.E. Dev. Corp.*, 32 N.C. App. 362, 366-67, 232 S.E. 2d 215, 218, *disc. rev. denied*, 292 N.C. 728, 235 S.E. 2d 784 (1977). However, a party failing to receive *actual notice* of a claim against it suffers no due process violation so long as the notice given was of a nature *reasonably calculated* to provide actual notice and an opportunity to defend. *Royal Business Funds*, 32 N.C. App. at 369, 232 S.E. 2d at 219 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 873 (1950)).

Because Key Way had no registered agent in this State to receive service of process on its behalf, Anderson Trucking had the option of (1) serving the North Carolina Secretary of State, *see* N.C. Gen. Stat. Secs. 55-143, 55-144 (1982) (service of process upon Secretary of State effective against foreign corporation doing business in this State which fails to maintain registered agent here); (2) serving an officer, director, or managing agent of Key Way, *see* N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 4(j)(6) (1983); or (3) serving Key Way's out-of-state registered agent appointed to receive service of process. *See id.*

In our view, by serving Key Way's agent *named to receive service of process*, Anderson Trucking chose the method of service most likely to actually notify Key Way of the claims against it. Thus, we hold that the service by certified mail upon Key Way's registered agent certainly was "reasonably calculated to give actual notice" of Anderson Trucking's claim, and, therefore, that Key Way's due process rights were not violated. *Accord Chadbourn, Inc. v. Katz*, 285 N.C. 700, 707, 208 S.E. 2d 676, 680 (1974).

B. Service upon Registered Agent Effective Against Corporation

We further hold that service upon Mr. Siegel was effective service upon Key Way. First, it makes no difference, as Key Way suggests, that the Summons and Complaint addressed to Mr. Siegel were initially received by Mr. Gunn. Mr. Gunn was authorized by Mr. Siegel to receive mail on his behalf. *See* N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 4(j)(1), 4(j)(6) (1983) (permitting service upon addressee's appointed agent). *See also* N.C. Gen. Stat. Sec. 1A-1,

R. Civ. P. 4(j2)(2) (1983) (presumption that person receiving Summons by certified mail was agent of addressee authorized to accept service of process). Furthermore, Rule 4(j)(6) permits a corporation to be served through its agent "in a manner specified by any statute"; Mr. Siegel was properly served by mail pursuant to Rule 4(j)(1)(c). *Accord Great Dane Trailers, Inc. v. N. Brook Poultry, Inc.*, 35 N.C. App. 752, 755, 242 S.E. 2d 533, 535 (1978) (given interplay of Rules 4(j)(6) and 4(j)(1), leaving copies of Summons and Complaint with registered agent's spouse constituted effective service upon corporation).

Second, under the present rules, service of process upon a corporation's registered agent binds that corporation *when the agent is served*, not when, as Key Way urges, the service actually comes to the attention of an officer or agent charged with defending actions against the corporation. *See* N.C. Gen. Stat. Sec. 55-15(a) (1982) (service upon registered agent binds corporation), N.C. Gen. Stat. Sec. 55-2 (1982) (ch. 55 provisions regarding "corporations" also apply to foreign corporations); N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 4(j2)(2) (1983) (service by certified mail complete when Summons and Complaint are delivered to address). *See, e.g., Royal Business Funds*, 32 N.C. App. at 366, 232 S.E. 2d at 218 (service upon statutory agent effective against corporate defendant despite corporation's non-receipt of forwarded notice). Although it was not required to, Key Way had the option of naming a registered agent responsible for defending the corporation. Instead, it listed a person with no interest in the corporation's business or legal affairs. That improvident choice cannot now insulate Key Way from the effect of valid service of process. *Accord S.C. Ins. Co.*, 88 N.C. App. at 648, 364 S.E. 2d at 681 (corporation's failure to properly list registered agent for service of process did not excuse failure to receive notice of suit against it).

We conclude that no deprivation of due process occurred here.

IV

The trial judge's order denying Key Way Transport's motion to set aside the default judgment is

Affirmed.

Judges PARKER and ORR concur.

DAVID P. ZAGAROLI v. JAMES S. POLLOCK; SARAH H. POLLOCK; AND HICKORY MARINA, INC.

No. 8825SC910

(Filed 6 June 1989)

1. **Trespass § 7— marina on power company lake—peremptory instruction for owner of submerged land—no error**

In a trespass action in which plaintiff sued defendants, claiming that a marina owned and operated by defendants in Lake Hickory was located on or above plaintiff's submerged property, the trial court did not err by giving a peremptory instruction on the issue of trespass where none of defendants' evidence contradicted plaintiff's evidence in regard to the location of the real property and only one inference could be drawn from the evidence.

2. **Evidence § 25— trespass action—survey map—admissible**

There was no error in a trespass action in the admission of a survey map where defendants failed to request a limiting instruction or to object specifically to the admission of the map for substantive purposes; the map was used primarily to illustrate witnesses' testimony even though it was introduced for substantive purposes; and the surveyor who drew the map testified as to how he found some of the corners of plaintiff's property and used the deed to plaintiff, old surveys, and adjoining landowners' boundary lines to help him draw the map.

3. **Appeal and Error § 24— denial of motion for directed verdict—evidence presented—motion not renewed—no appeal**

Defendants could not argue on appeal that the trial court erred by denying their motion for a directed verdict when they presented evidence and did not renew their motion.

4. **Trespass § 11— marina over submerged land—judgment against individual defendants—motion to set aside**

In a trespass action involving a marina owned and operated by defendants on Lake Hickory on and above submerged land claimed by plaintiff, the trial court abused its discretion by failing to set aside its judgment against Mr. Pollock, since there was no evidence of any legal responsibility for the operation of a marina other than as president of the corporation,

but did not abuse its discretion as to Mrs. Pollock, who was the owner of the boathouse, slips, and walkways and who was responsible along with the corporate defendant for the operation of the marina.

5. **Trespass § 6— marina on power company lake—fair rental value—opinion by owner of submerged land**

The trial court did not err in a trespass action arising from the operation of a marina over plaintiff's submerged land by admitting plaintiff's testimony as to the fair rental value of the property where plaintiff demonstrated sufficient personal knowledge to enable him to testify regarding his opinion and the opinion was helpful to the jury. N.C.G.S. § 8C-1, Rules 701 and 704.

6. **Waters and Watercourses § 6; Eminent Domain § 3.4— taking under Federal Power Act—no eminent domain proceeding—limits of taking**

In a trespass action involving the operation of a marina on Lake Hickory over plaintiff's submerged land by defendants with a permit from Duke Power Company, the trial court did not err by refusing to rule as a matter of law that the Federal Power Act granted Duke Power and its licensee the exclusive right to determine the use of the lake's surface waters. Neither Duke Power nor its predecessor in title took the land by eminent domain and therefore obtained nothing more than a flooding easement over plaintiff's land; Duke Power may place limitations on the landowner's use of his property in accordance with federal law, but the Federal Power Act does not give Duke Power the authority to grant defendants the right to use plaintiff's property without the assent of the plaintiff.

APPEAL by defendants from *Lamm, Judge*. Judgment entered 29 March 1988 in Superior Court, CATAWBA County. Heard in the Court of Appeals 16 March 1989.

This is a trespass case. Plaintiff sued defendants claiming that a marina owned and operated by defendants was located on or above plaintiff's submerged property. Plaintiff alleges he owns land that is now covered in part by Lake Hickory. Defendants answered asserting that the marina was erected and maintained in compliance with a permit granted to defendants by Duke Power Company.

Lake Hickory is a flooded portion of the Catawba River under the control of Duke Power Company pursuant to the Federal Power Act. 16 U.S.C. section 791(a) *et seq.* The evidence at trial tended to show that plaintiff's predecessor in title owned land that Duke Power's predecessor in title wanted to flood. In 1928 plaintiff's predecessor in title conveyed to the power company "all riparian rights pertaining to the hereinafter described land, including the right, privilege, and easement to back, pond, raise or divert the waters of the Catawba River and its tributaries upon, over, or away from the same. . . ." The land was then described by metes and bounds and the two tracts were approximately 20 acres in area. In 1987 plaintiff obtained title to a 6 5/6 acre parcel of land which was a portion of the land that was subject to the 1928 easement.

In April of 1985 defendant Hickory Marina, Inc. obtained from Duke Power a permit for the commercial use of a

> tract of land in Hickory Township, Catawba County, North Carolina, lying within the bed of Lake Hickory, containing 1.8 acres, as shown on plat thereof dated July 19, 1983, marked Oxford File No. 1066. . . .

The permitted use of the area was for a "commercial boat marina and recreation area." The individual defendants are the officers and only shareholders of Hickory Marina, Inc.

There was evidence introduced pertaining to the location of plaintiff's property in relation to defendant's property and the lake. The evidence was that portions of the marina's boat docks, piers and walkways encroached on plaintiff's submerged and dry land. Plaintiff sought recovery of the reasonable rental value of the land during the period of trespass and the removal of fixtures, structures, and personal property of the defendants from plaintiff's land. At the close of plaintiff's evidence defendants moved for a directed verdict. The trial court denied the motion. At that time plaintiff also moved for a directed verdict which the court took under consideration until the close of all the evidence. At the close of all the evidence plaintiff renewed his motion for directed verdict which the court granted on the issue of defendants' trespass. The trial court gave the jury a peremptory instruction on trespass and the jury answered in plaintiff's favor. The jury set damages at $9,000. Defendants appeal.

Cagle and Houck, by Joe N. Cagle and William J. Houck, for plaintiff-appellee.

Rudisill and Brackett, by J. Steven Brackett, and Sigmon, Clark and Mackie, by E. Fielding Clark, II, for defendant-appellants.

EAGLES, Judge.

Defendants have presented seven arguments to this court for review. First, defendants argue that the trial court erred in failing to grant defendants' motions to dismiss for plaintiff's failure to prove title. Alternatively, defendants argue the trial court erred in failing to submit the issue of whether the land upon which the marina docks, boathouses, etc. were placed was the land described in plaintiff's deed. Second, defendants argue the trial court committed reversible error in admitting into evidence a survey map. Defendants' third argument is that the trial court erred when it failed to rule as a matter of law that defendants had the right to locate boat docks on or over property claimed by plaintiff based upon defendants' permit from Duke Power Company. Fourth, defendants assert the trial court erred when it failed to allow defendants' request for an instruction on trespass. Defendants also argue that the trial court erred when it failed to dismiss the case against the individual defendants and when it failed to rule on defendants' motion to set aside the jury's verdict as to the individual defendants. Defendants' sixth argument is based on the trial court's allowing into evidence opinion testimony from the plaintiff regarding the fair rental value of the property. Finally, defendants argue that the trial court erred as a matter of law when it failed to rule that the Federal Power Act granted Duke Power Company and its permittees the exclusive right to determine the use of the surface waters of Lake Hickory. After careful consideration of the record and arguments of the parties, we reverse in part and affirm in part.

I

[1] Defendants' first argument is that the trial court erred in failing to grant defendants' motion to dismiss or, alternatively, the court erred in failing to submit to the jury the issue of whether the plaintiff was the owner of the land in question. Defendants assert that both the title and location of the property purportedly belonging to plaintiff were in issue in this case and plaintiff failed

to meet his burden of proving the location of his property. Defendants' argument is without merit.

Plaintiff presented evidence consisting of deeds in his chain of title, testimony of the attorney who performed the title search prior to plaintiff's purchase of the property, testimony of a surveyor who surveyed the land, testimony of a diver who observed the boat docks and slips, and testimony of plaintiff's predecessor in title. All of the evidence presented by plaintiff tended to show that the boat docks and slips were attached to either plaintiff's dry land or plaintiff's land that was underwater. Plaintiff had the burden of proving title to the property in question. Although the trial court stated that a directed verdict was granted in favor of the plaintiff on the issue of trespass, the court gave a peremptory instruction to the jury on that issue. This is proper when there is no conflict in the evidence and but one inference can be drawn from the evidence. *See Cutts v. Casey*, 278 N.C. 390, 418-19, 180 S.E. 2d 297, 312 (1971). None of defendants' evidence contradicted the evidence of plaintiff in regard to the physical location of plaintiff's real property. Defendants merely questioned the surveyor's practices in determining the corners and lines called for in the plaintiff's deed. If the jury found the evidence presented to be true, only one inference could be drawn. The one permissible inference would be that plaintiff owned the land in question and defendants' property was situated thereon. The peremptory instruction was appropriate.

II

[2] Defendants' second argument is that the trial court erred in admitting into evidence a survey map, exhibit #10. Defendants assert the map was not the result of a survey of the property described in plaintiff's deed but was "a map of a partial survey . . . nothing more than a written declaration by [the surveyor] of a tract which he thought belonged to [the plaintiff]." Further, defendants argue the map could not properly be admitted as substantive evidence, but only as illustrative evidence. Defendants' arguments are without merit.

To be admissible, maps, surveys and the like must be authenticated and verified as accurate and true by a qualified witness. In North Carolina, such exhibits are admissible for illustrative, not substantive purposes. *Searcy v. Logan*, 226 N.C. 562, 566, 39 S.E. 2d 593, 595 (1946). However, there is no reversible error where

maps and surveys are admitted for substantive purposes absent a timely request for limiting instructions made by the objecting party. *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 24, 293 S.E. 2d 240, 247, *rev. denied*, 306 N.C. 559, 294 S.E. 2d 371 (1982). The fact that defendants in this case failed to request such a limiting instruction or to object specifically to the admission of the map for substantive purposes prevents our finding reversible error. We also note that, even though introduced for substantive purposes, the map was used primarily to illustrate witnesses' testimony.

Defendants' argument that the map was "not the result of a survey" is not supported by the record. The surveyor who drew the map and went out to the property testified how he found some of the corners of plaintiff's property and used the deed to the plaintiff to draw the map. The surveyor also testified that he used old surveys and adjoining landowners' boundary lines to help him draw the map. The testimony of the surveyor was sufficient to allow the admission of the map.

III

[3] Defendants' third argument is that the trial court committed reversible error in failing to rule as a matter of law that the Marina's permit from Duke Power gave defendants the right to locate the boat docks and other structures where they were found. Defendants list two exceptions under their assignment of error: first, the denial of defendants' directed verdict motion made at the close of plaintiff's evidence; and, second, the granting of plaintiff's directed verdict motion made at the close of all the evidence. We are not persuaded.

It appears from the record that defendants failed to renew their motion for directed verdict after they presented evidence. By introducing evidence, defendants waived their motion for directed verdict made at the end of plaintiff's evidence. *Rice v. Wood*, 82 N.C. App. 318, 346 S.E. 2d 205, *cert. denied*, 318 N.C. 417, 349 S.E. 2d 599 (1986). Defendants, therefore, cannot base this assignment of error on the court's denial of their motion for directed verdict made at the close of plaintiff's evidence.

The second basis for defendants' assignment of error on this issue is the granting of plaintiff's directed verdict motion. As discussed in section I above, the court's action in regard to the motion

was not error. The trial court correctly gave a peremptory instruction on the issue of trespass.

IV

Defendants next argue that the trial court erred when it failed to instruct the jury on the elements of trespass as requested. Based on our discussion in section I, above, we conclude that defendants' argument is without merit. The trial court correctly gave a peremptory instruction on the issue of trespass.

V

[4] Defendant next argues that the trial court erred in failing to dismiss the case against the individual defendants, and, alternatively, erred in failing to rule on the motion to set aside the verdict as to the individual defendants. Defendants assert that the trial court abused its discretion in failing to either dismiss the case against the individual defendants or set aside the verdict against them.

The record does not disclose a motion to dismiss made by the individual defendants based on lack of evidence relating to them. However, the transcript does reveal that the individual defendants made a motion to set aside the verdict. The transcript also reveals that the trial court did not rule on the motion at the time it was made. The trial court advised the defendants' counsel to have the motion calendared for subsequent hearing in the event plaintiff would not agree to a judgment against the corporate defendant only. There is nothing in the record to show defendants calendared their motion for hearing. Accordingly, we treat the signing of the judgment against all named defendants as an implicit denial of defendants' motion.

Our review of a trial court's discretionary ruling denying a motion to set aside a verdict is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E. 2d 599, 602 (1982). On this record, we find the trial court did not abuse its discretion in failing to set aside the verdict against the individual defendant Mrs. Pollock. The evidence in this case regarding the operation of the marina shows that both the corporate defendant, Hickory Marina, Inc., and the individual defendant, Mrs. Pollock, were responsible for the marina's operation. Defendants' own exhibits show that Mrs. Pollock was the owner of the boat-

houses, slips and walkways. Hickory Marina, Inc. was the holder of the permit from Duke Power. However, there is no evidence tending to show any legal responsibility for the marina's operation on the part of Mr. Pollock, other than as president of Hickory Marina, Inc. Therefore, we hold that the failure to set aside the judgment as to Mr. Pollock individually was an abuse of discretion; the judgment as it relates to Mr. Pollock is reversed.

VI

[5] Defendants' sixth argument is that there was no competent evidence upon which the jury could base an award of damages. Defendants assert that opinion testimony of the plaintiff regarding the fair rental value of the property was erroneously introduced. Defendants base their argument on G.S. 8C-1, Rule 701 and G.S. 8C-1, Rule 704. Defendants' argument is without merit.

Rule 701 of the North Carolina Rules of Evidence allows opinion testimony from lay witnesses only when "rationally based on the perception of the witness." Defendants argue there was no basis for plaintiff's opinion. The record shows otherwise. Plaintiff testified that he was a real estate developer and that he had owned and developed other lakefront property. Plaintiff testified as to the amount he paid for the property he owned. He also testified as to the amount of revenue generated for defendants from rentals over the disputed property. Plaintiff demonstrated sufficient personal knowledge to enable him to testify regarding his opinion.

Rule 704 of the North Carolina Rules of Evidence deals with admission of opinion evidence on ultimate issues. Defendants argue that since the fair rental value of the property in a trespass case is an ultimate issue for the jury, plaintiff's lay opinion was inadmissible. Defendants' argument is without merit. Rule 704 states that "[t]estimony in the form of opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." G.S. 8C-1, Rule 704. The rule does allow admission of lay opinion on the ultimate issue if the opinion is "helpful to the jury" and not merely "choosing up sides." *Mobley v. Hill*, 80 N.C. App. 79, 86, 341 S.E. 2d 46, 50 (1986). In this case, opinion testimony regarding the fair market value of the property trespassed upon was certainly helpful to the jury and was not merely choosing sides. The court correctly overruled defendants' objection to the testimony.

VII

[6] Defendants' final argument is that the trial court erred when it failed to rule as a matter of law that the Federal Power Act, 16 U.S.C. section 791(a), *et seq.*, granted Duke Power, and its licensee Hickory Marina, Inc., the exclusive right to determine the use of the lake's surface waters. We disagree with defendants' argument and overrule this assignment of error.

Defendants are correct in asserting that the Federal Power Act vests substantial authority in the power companies who obtain licenses from the Federal Energy Regulatory Commission (FERC) to operate hydroelectric dams. Duke Power is such a licensee. However, the Federal Power Act did not abolish private proprietary rights. *Federal Power Comm. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 250-51, 98 L.Ed. 666, 676, 74 S.Ct. 487, 494 (1954). Although a FERC licensee may exercise the power of eminent domain over lands which will make up the bed of a lake associated with a hydroelectric dam, 16 U.S.C. section 814, neither Duke Power nor its predecessor in title took the land in question by eminent domain. Without the exercise of the power of eminent domain, on this record Duke Power and its predecessor in title obtained nothing more than a flooding easement over land owned by plaintiff. Under the Federal Power Act Duke Power may place limitations on the landowner's use of his property in accordance with federal law. However, the Federal Power Act does not give Duke Power the authority to grant defendants the right to use plaintiff's property without the assent of the plaintiff. To hold otherwise would in effect authorize the taking of property without just compensation.

For the reasons stated, the judgment as to the individual defendant Mr. Pollock is reversed; in all other respects the judgment is affirmed.

Reversed in part; affirmed in part.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. DAVID EDWARD MOORE

No. 8818SC804

(Filed 6 June 1989)

1. **Criminal Law § 75.8— second interrogation—readvisement of constitutional rights—findings supported by evidence**

The trial court's finding that defendant was readvised of his constitutional rights prior to a second interrogation was supported by substantial competent evidence and is binding and conclusive on appeal.

2. **Criminal Law § 75.3— confession not coerced**

Defendant's confession was not obtained as the result of coercive police conduct where defendant was twenty-five years old at the time of his arrest; defendant was in the interview room for approximately eight hours but was not constantly interrogated and was permitted to rest; although defendant's breath smelled of alcohol, his mental and physical abilities were not appreciably impaired; the fact officers confronted him with the evidence against him and expressed disbelief in his initial account did not constitute coercion; and the interrogating officers did not abuse defendant or deprive him of any requested comforts.

3. **Criminal Law § 34.8— prior rape—admissibility to show intent, plan and design**

In a prosecution for first degree burglary and first degree rape in which the victim was a motel guest, evidence tending to show that defendant committed another rape at the same motel two weeks prior to the charged offenses was admissible to show intent, plan and design where the perpetrator of both rapes forcibly entered motel rooms at night occupied by women who were alone and raped the women with accompanying threats of physical violence. N.C.G.S. § 8C-1, Rule 404(b).

4. **Criminal Law § 138.40— mitigating circumstance—acknowledgment of wrongdoing—effect of motion to suppress confession**

A defendant who moved to suppress a confession was not entitled to use the confession as evidence to prove the voluntary acknowledgment of wrongdoing mitigating circumstance. The Court of Appeals will not determine whether this rule placed an impermissible burden on defendant's exercise

of his constitutional rights where no constitutional issue was raised in the trial court.

Judge BECTON concurring in the result.

APPEAL by defendant from *Morgan (Melzer A., Jr.), Judge.* Judgments entered 29 February 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 February 1989.

Defendant was tried and convicted of first degree burglary and first degree rape. The State's evidence tended to show that on 22 March 1987 defendant broke into the victim's motel room and raped her. Defendant presented no evidence. The trial court made findings in aggravation and mitigation of punishment and sentenced defendant to consecutive terms of life for rape and thirty years for burglary. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Melissa L. Trippe, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

PARKER, Judge.

Defendant brings forward four assignments of error. Defendant's first assignment of error is that the trial court erred in denying his motion to suppress evidence of incriminating statements made by defendant while in police custody. His second assignment of error is that the trial court erred in admitting evidence of a prior crime committed by defendant. Defendant also assigns error to the trial court's instructions concerning the purposes for which the jury could consider the evidence of the prior crime. Defendant's fourth assignment of error is that the trial court erred in failing to find as a mitigating factor that defendant voluntarily acknowledged his wrongdoing at an early stage in the proceedings.

Defendant moved at trial to suppress evidence of statements he made while in police custody on the grounds that the statements were involuntary and obtained in violation of his State and federal constitutional rights. The State sought to present evidence of three separate statements. The first statement was allegedly made while defendant was in custody in the back seat of a patrol car soon after his arrest at approximately 3:45 A.M. on 22 March 1987.

Defendant made the second statement during police interrogation at approximately 6:10 A.M. Defendant signed a waiver of rights form before making the statement and he also signed a transcript of the statement as recorded by a police officer. In the second statement, defendant contended that the victim had agreed to have sex with him in exchange for money.

After taking defendant's statement, the police interviewed the victim. The victim told the police that defendant broke into her motel room and forcibly raped her. At approximately 1:00 P.M., the police confronted defendant with the victim's version of the facts, told him they thought he lied in his previous statement, and also confronted him with the facts of another rape which had occurred on 7 March 1987 at the same motel. Defendant then allegedly confessed to both crimes and stated that he was a "sick man" with a drinking problem which caused him to commit the crimes. Defendant refused to sign a transcript of the third statement, stating that he wished to consult a lawyer before doing so.

Defendant moved at trial to suppress all three statements. The trial court conducted a *voir dire* on the matter and made findings of fact and conclusions of law as to the admissibility of the statements. The court ruled that the first statement made by defendant in the patrol car was inadmissible because the police did not adequately apprise defendant of his right to counsel. With regard to the second and third statements, the trial court found that the statements were made freely and voluntarily after defendant was fully advised of his constitutional rights and, therefore, the statements were admissible. The court did not allow the State to introduce the third statement in written form but permitted police officers to testify as to what defendant told them.

Although defendant has excepted to the admission of both statements, his arguments on appeal concern only the third statement, his confession to the crimes. Therefore, the admission of the second statement will not be reviewed on appeal. *See* Rule 28(b)(5), N.C. Rules App. Proc. We also note at this time that defendant objected to the admission of his confession to the prior crime on the additional ground that it was inadmissible under Rule 404(b) of the N.C. Rules of Evidence. That issue will be considered later in this opinion. We presently consider only the question of whether the third statement should have been excluded because it was obtained in violation of defendant's constitutional rights.

[1] In the proceedings below, much time was devoted to determining whether defendant was readvised of his constitutional rights prior to the interrogation that began at approximately 1:00 P.M. It was established that defendant knowingly waived his rights prior to the 6:10 A.M. interrogation. Under some circumstances the police must readvise a defendant of his rights before subsequent interrogations. *See State v. McZorn*, 288 N.C. 417, 433-35, 219 S.E. 2d 201, 211-12 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3210, 49 L.Ed. 2d 1210 (1976). The trial court in this case found as a fact that defendant was readvised of his rights. Defendant has, for the most part, abandoned this issue on appeal but he does state in his brief that there were some discrepancies in the evidence on this point. We find that the trial court's finding is supported by substantial competent evidence and, therefore, it is binding and conclusive on appeal. *State v. James*, 321 N.C. 676, 685-86, 365 S.E. 2d 579, 585 (1988).

[2] Defendant's principal argument is that his confession was involuntary, and thus inadmissible, because it was obtained as a result of mental or psychological pressure. *See State v. Morgan*, 299 N.C. 191, 198, 261 S.E. 2d 827, 831-32, *cert. denied*, 446 U.S. 986, 100 S.Ct. 2971, 64 L.Ed. 2d 844 (1980). Whether the police exerted such pressure as to render defendant's confession involuntary must be determined from the totality of the circumstances. *Id.* The State bears the burden to show by a preponderance of the evidence that the confession was voluntary. *State v. James*, 321 N.C. at 685, 365 S.E. 2d at 585. The trial court must make findings of fact and conclusions of law that are determinative on the issue of voluntariness. *Id.*

The relevant factual findings made by the trial court in this case may be summarized as follows: The police arrested defendant in the victim's motel room and placed him in a patrol car at approximately 3:45 A.M. Officer A. D. Robertson questioned defendant for a short time while he was in the car. The officer brought defendant to the police department and placed him in a locked interview room at approximately 4:05 A.M. Defendant was wearing only a pair of slacks, which is how he was clothed at the time of his arrest. His other clothing had been found at the crime scene and seized as evidence. At approximately 5:45 A.M., defendant banged on the door and asked to use the restroom. The officer allowed defendant to use the restroom and returned him to the interview room. Shortly thereafter, Detective Bill Smith arrived

and entered the interview room with Officer Robertson to interrogate defendant. Defendant's breath smelled of alcohol and he appeared nervous, but his speech was not slurred and he gave coherent answers to the detective's questions. Smith advised defendant of his rights and defendant signed a waiver of rights and a written transcript of his statement. The interrogation lasted until approximately 7:30 A.M.

Following the initial interrogation, defendant remained in the interview room. Sometime between noon and 1:00 P.M., Detective Smith entered the interview room with Detective Ed Hill. Detective Hill noticed a smell of alcohol in the room but defendant appeared to be unimpaired. Hill readvised defendant of his rights, told him that his previous statement was "a bunch of crap," and confronted him with the victim's account and the facts of the previous incident. Defendant cried as he confessed to the crimes.

The trial court found that the officers made no threats or promises to defendant, that defendant did not request a lawyer until after he confessed, and that, although it would have been appropriate to offer him food, he requested none and never indicated that he was cold or hungry. The court also found that defendant consumed no alcoholic beverages after 1:00 A.M., he was not physically sick at the time of his confession, and his emotional state while confessing did not detract from the voluntariness of his statements.

Under these circumstances, we find no error in the trial court's denial of defendant's motion to suppress the statements. The trial court's findings are supported by competent evidence. Defendant's reliance on *State v. Hunt*, 64 N.C. App. 81, 306 S.E. 2d 846, *disc. rev. denied*, 309 N.C. 824, 310 S.E. 2d 354 (1983) is misplaced. In *Hunt* the defendant was sixteen years old and, after denying any involvement in the crime, told the police that he did not wish to answer any more questions until he saw his parents. The police nevertheless continued to interrogate him, told him he was lying, gave him a voice stress test and told him it showed he was lying, told him it would be easier on him if he told the truth, and told him that his father would want him to tell about the crime. *State v. Hunt*, 64 N.C. App. at 86, 306 S.E. 2d at 849.

No such coercive tactics were employed by the police in this case. Defendant was twenty-five years old at the time of his arrest. Although defendant was in the interview room for approximately

eight hours, he was not constantly interrogated and was permitted to rest. Defendant's consumption of alcohol did not affect the voluntariness of his statements because it did not appreciably impair him mentally or physically. *See State v. Perdue*, 320 N.C. 51, 59-60, 357 S.E. 2d 345, 350-51 (1987). The fact that the officers confronted defendant with the evidence against him and expressed disbelief in his initial account does not constitute coercion. *See State v. Chamberlain*, 307 N.C. 130, 145, 297 S.E. 2d 540, 549 (1982); *State v. Small*, 293 N.C. 646, 653, 239 S.E. 2d 429, 435 (1977). The interrogating officers did not abuse defendant nor deprive him of any requested comforts. *See State v. Booker*, 309 N.C. 446, 306 S.E. 2d 771 (1983). Accordingly, we hold that the trial court did not err in concluding that defendant's statements were made freely and voluntarily and were not obtained as a result of coercive police conduct. Defendant's first assignment of error is overruled.

[3] Defendant next contends that the trial court erred in admitting evidence tending to show that defendant committed a rape at the same motel two weeks prior to the charged offenses. The evidence consisted of testimony of the victim of the prior crime and defendant's confession to the prior crime. The admissibility of defendant's confession is governed by the same rules that control the admissibility of other evidence of the prior crime. *See State v. Simpson*, 297 N.C. 399, 406, 255 S.E. 2d 147, 152 (1979). The trial court ruled that the evidence was admissible under Rules 404(b) and 403 of the N.C. Rules of Evidence.

Under Rule 404(b), evidence of other crimes is not admissible to prove the character of a person, but such evidence may be admissible for other purposes. In this case, the jury was instructed that the evidence could be considered only for the limited purposes of showing the presence of defendant's intent to commit burglary and his plan or design with regard to the crimes charged. Rule 404(b) expressly authorizes the admission of such evidence for those purposes.

Defendant contends that the circumstances of the other crime were not sufficiently similar to the crimes charged to be admissible under Rule 404(b). We find no need to recount the details of the crimes, for we agree with defendant that there are no strikingly peculiar similarities in the manner of their commission. Nevertheless, in both crimes the perpetrator forcibly entered motel rooms at night occupied by women who were alone and raped the women

with accompanying threats of physical harm. The crimes occurred only two weeks apart at the same motel.

Our Supreme Court recently upheld the admission of similar evidence to show intent, plan and design in a case with similar facts. *State v. Bagley*, 321 N.C. 201, 362 S.E. 2d 244 (1987), *cert. denied*, --- U.S. ---, 108 S.Ct. 1598, 99 L.Ed. 2d 912 (1988). In *Bagley*, as in this case, identity was not at issue. Although the Supreme Court found that the crimes were characterized by a "remarkably odd and strikingly similar" *modus operandi*, the other crime had been committed ten weeks after the charged offense. *State v. Bagley*, 321 N.C. at 207, 362 S.E. 2d at 248. In the present case, the lack of a strikingly similar *modus operandi* is more than offset by the proximity of the two incidents in time and place. In addition, the evidence in this case has greater relevance than the evidence of the subsequent crime in *Bagley* because the defendant in *Bagley* was not charged with burglary, which is a specific intent crime, *State v. Joyner*, 301 N.C. 18, 30, 269 S.E. 2d 125, 133 (1980), and the other crime in this case was committed prior to the charged offenses. *See State v. Bagley*, 321 N.C. at 214, 362 S.E. 2d at 252 (Exum, C.J., dissenting).

Defendant also contends that the trial court erred in ruling that Rule 403 did not require exclusion of the evidence because its probative value was not outweighed by the danger of unfair prejudice. This ruling was a matter within the trial court's discretion, and we find no abuse of discretion in this case. *See State v. Bagley*, 321 N.C. at 208, 362 S.E. 2d at 248. The limiting instruction given by the trial court reduced the possibility that any unfair prejudice would result from the admission of the evidence. *Id.* Defendant's second assignment of error is overruled.

Defendant next assigns error to the trial court's instruction regarding the evidence of the prior crime. Defendant contends that, even if the evidence was properly admitted, it should have been considered only on the issue of intent and not to show plan or design. Defendant did not specifically object to the instruction at trial. He argues that his objection to the evidence was sufficient to challenge the instruction and, in any event, the instruction was plain error not requiring a specific objection. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

The limiting instruction in this case is substantially the same as the instruction implicitly approved by the Supreme Court in

State v. Bagley, supra. In light of that decision and our holding in this case that the evidence was admissible to show plan or design, the instruction is not erroneous and clearly does not amount to plain error. Therefore, the assignment of error is overruled.

[4] Defendant next contends that the trial court erred in failing to find as a statutory factor in mitigation of punishment that, at an early stage of the criminal process, defendant voluntarily acknowledged his wrongdoing to police officers. G.S. 15A-1340.4(a)(2)(1). Defendant contends that he is entitled to a finding of this mitigating factor by virtue of his confessions, which the trial court found to be voluntary. Defendant concedes that the Supreme Court recently held that a defendant who moves to suppress a confession is not entitled to use the confession as evidence to prove the mitigating factor of voluntary acknowledgment of wrongdoing. *State v. Smith*, 321 N.C. 290, 362 S.E. 2d 159 (1987). Relying on *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138 (1968), defendant argues that denying his entitlement to a finding in mitigation of punishment on the grounds that he asserted his constitutional rights places an impermissible burden on the exercise of those rights. He also argues that the Supreme Court has not addressed this constitutional issue and, therefore, this Court may decide the question as a matter of first impression.

The transcript of the sentencing hearing reveals that this issue was not raised in the court below. Defendant's trial counsel conceded that decisions of our Supreme Court precluded the sentencing judge from finding the factor, and counsel did not make any constitutional argument. This Court will not decide a constitutional issue that has not been raised before the trial court. *State v. Robertson*, 57 N.C. App. 294, 296, 291 S.E. 2d 302, 303-04, *disc. rev. denied and appeal dismissed*, 305 N.C. 763, 292 S.E. 2d 16 (1982). Defendant's fourth assignment of error is overruled.

For the foregoing reasons, we find that defendant's trial and sentence are free of reversible error.

No error.

Judge ORR concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Because, and only because, of our Supreme Court's holdings in *State v. Bagley*, 321 N.C. 201, 362 S.E. 2d 244 (1987), and *State v. Smith*, 321 N.C. 290, 362 S.E. 2d 159 (1987), I am compelled to concur in the result.

WESTOVER PRODUCTS, INC., PLAINTIFF v. GATEWAY ROOFING, INC., JAMES A. MOSER AND CLAY A. MOSER, DEFENDANTS v. GATEWAY ROOFING CO., INC., THIRD PARTY PLAINTIFF v. WESTOVER PRODUCTS, INC., THE CARLISLE CORPORATION, KIDDE, INC. D/B/A WALTER KIDDE & COMPANY, J. M. THOMPSON COMPANY, THIRD PARTY DEFENDANTS

No. 8818SC881

(Filed 6 June 1989)

1. **Negligence § 29.1— leaking roof—negligent design—summary judgment improper**

The trial court should not have granted summary judgment for defendant Carlisle Corporation, the manufacturer of roofing materials, in an action arising from a leaking roof manufactured by Carlisle and installed by defendant Gateway on Kidde's building, where Carlisle owed a duty of care to Gateway through privy of contract and a duty of care to Kidde because a reasonable person would have understood that failure of Carlisle to use reasonable care would cause injury to Kidde; the president of Gateway stated through affidavits that the roof system was defective in design and that the methods used by Carlisle precluded the installation of the roof system in a workmanlike and watertight manner; and Carlisle presented pleadings, affidavits and depositions which it claims show that it neither provided defective materials and design nor was negligent in providing instruction, training and supervision of installation procedures by Gateway. It is for a jury to determine whether to believe Gateway and Kidde or Carlisle.

2. **Sales § 17.2— leaking roof—breach of implied warranties—not waived by rejection of express warranty—genuine issue of fact as to breach**

There were genuine issues of material fact as to a roof manufacturer's breach of implied warranties in an action arising

from a leaking roof, even though the building owner had rejected a five-year express warranty on the roof, because the offer and rejection of the express warranty did not automatically waive the implied warranty and the roof installer's president stated in an affidavit that the roof system was defectively designed and could not be installed in a workmanlike and watertight manner. N.C.G.S. § 25-2-316, N.C.G.S. § 25-2-314.

3. **Rules of Civil Procedure §§ 8.1, 12.1— failure to state a claim—not raised until appeal—precluded**

Defendant Carlisle was precluded from contending that appellants' claims of negligence and breach of implied warranty were insufficient as a matter of law and did not comply with N.C.G.S. § 1A-1, Rule 8(a), where defendant did not make a motion under N.C.G.S. § 1A-1, Rules 12(b)(6) or 12(e) and was precluded from making those motions on appeal.

4. **Sales § 22— leaking roof—North Carolina products liability statute—issues of fact concerning failure to observe routine care and installation**

The trial court improperly granted summary judgment for defendant Carlisle in an action arising from a leaking roof manufactured by Carlisle and installed on Kidde's building where, although Carlisle argued that there was ample evidence of Kidde's failure to observe routine care and maintenance of the roof, there was also evidence that the roof and design were defective, and Carlisle could not use N.C.G.S. § 99B-4 as a bar based on Gateway's improper installation of the roof because it contracted to instruct Gateway on installation procedures and in fact assisted Gateway in the installation of the roof on the Kidde building.

5. **Sales § 17.1— leaking roof—breach of express warranty—rejection of warranty—summary judgment improper**

Summary judgment was not appropriate on the issue of express warranty in an action against a roof manufacturer arising from a leaking roof where, although defendant manufacturer argued that it had offered an express warranty which was rejected, there was evidence that information and technical assistance from the manufacturer were relied upon in choosing the roof design. That reliance would establish an express warranty under N.C.G.S. § 25-2-313.

WESTOVER PRODUCTS, INC. v. GATEWAY ROOFING, INC.

[94 N.C. App. 63 (1989)]

APPEAL by third-party defendant and third-party plaintiff from *Walker, Judge.* Judgment entered 30 March 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 March 1989.

On 30 September 1982 Kidde, Inc. (Kidde) contracted with J. M. Thompson Company (Thompson) for the construction of a building. On 3 November 1982 Thompson entered into a subcontract with Gateway Roofing Company, Inc. (Gateway) for the installation of a 45 millimeter mechanically fastened roof system according to the plans and specifications prepared by Grove Manufacturing Company (Grove) (Grove, a subsidiary of Kidde, provided architectural and engineering services for the construction of the building).

Gateway was an authorized applicator for Carlisle Corporation (Carlisle), a rubber and tire manufacturer which also manufactures roofing materials and supplies roofing designs. Westover Products, Inc. (Westover) is a distributor of Carlisle roofing materials, and supplied Gateway for the Kidde project.

The Carlisle roof system chosen for the Kidde building by Grove, with technical assistance from Carlisle, was a mechanically attached roofing system ("M.A.R.S."). This particular system is a rubber roofing membrane mechanically fastened to a building by a system of batten bars. The batten bars are narrow rubber strips laid on top of the membrane and secured by metal screws which puncture the membrane and are screwed into the steel roof deck below. The bottom of the batten bars are coated with sealant before being placed upon the membrane, and sealant is also applied over the top of each screw.

The contract between Carlisle and Gateway states that Carlisle will provide Gateway with instruction and training for proper installation of Carlisle systems to assure adequate quality and uniformity. The contract also states that at Carlisle's discretion it will furnish Gateway technical assistance and advice for the purpose of evaluating watertight integrity of the installation of roofing systems. Such assistance was supplied on the Kidde project.

The M.A.R.S. roof installed on the Kidde building leaked immediately upon its completion. Numerous attempts were made by Gateway (with Carlisle's assistance) to remedy the leaks. The leaks have never been completely remedied and still persist.

Apparently Gateway never paid Westover for the Carlisle materials for the Kidde project. Westover filed suit in Guilford

County Superior Court for the balance due on the materials. Gateway filed a Chapter 11 bankruptcy and the case was remanded to the United States Bankruptcy Court for the Middle District of North Carolina.

Gateway answered Westover's claim and filed a counterclaim as well as a third-party complaint against Westover, Carlisle, Kidde and Thompson. The third-party complaint alleges, *inter alia*, that the Carlisle roof was defective in design and installation procedures, that Westover and Carlisle were negligent, and that Thompson and Kidde were unlawfully withholding payments on the Kidde project.

Kidde filed an answer, counterclaim, and crossclaim. It alleged that the defective roof was caused by faulty design, manufacture and selection of the roof system and that Carlisle was negligent and breached express and implied warranties.

Gateway's counterclaim and third-party complaint (and thus Kidde's counterclaim and crossclaim) were severed from the main action on the debt and remanded to the Guilford County Superior Court.

Carlisle filed a motion for summary judgment. The trial court granted summary judgment for Carlisle on the claims asserted by Kidde, Westover, and Gateway. From that judgment Kidde and Gateway appeal.

Wishart, Norris, Henninger & Pittman, by David O. Lewis, for third party defendant appellant Kidde; and Block, Meyland & Lloyd, by Gary R. Wolf and Michael R. Pendergraft, for third party plaintiff Gateway.

Womble, Carlyle, Sandridge & Rice, by Michael E. Ray, Ellis B. Drew, III and Karen E. Carey, for third party defendant appellee Carlisle Corporation.

ARNOLD, Judge.

[1] Appellants argue that the trial court committed reversible error in granting Carlisle's motion for summary judgment because genuine issues of material fact exist between the parties. More particularly, they first contend genuine issues of material fact exist as to Kidde's allegations of negligence by Carlisle.

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.G.S. § 1A-1, Rule 56(c); *see Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Once a party moving for summary judgment has made and supported his motion, the burden shifts to the non-movant to introduce evidence of specific facts showing there is a genuine issue for trial. *Ward v. Durham Life Ins. Co.*, 90 N.C. App. 286, 368 S.E. 2d 391 (1988). The non-movant does not have to establish that he would prevail on the issue involved, he only has to show that the issue exists. *Id.*

Kidde and Gateway claim that Carlisle owes duties to both arising out of Carlisle's design of the M.A.R.S. system (which duties they claim encompass the mechanics of fastening the membrane to the building as well as the layout and installation methods in application).

> Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law . . . . The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm. A duty of care may arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.

Olympic Products v. Roof Systems, Inc., 88 N.C. App. 315, 322, 363 S.E. 2d 367, 371, *disc. rev. denied*, 321 N.C. 744, 366 S.E. 2d 862 (1988) (quotations and citations omitted).

Privity of contract is not required in order to recover against a person who negligently performs services for another and thus injures a third party. There is a duty to protect third parties where a reasonable person would recognize that if he does not use ordinary care and skill in his own conduct, he will cause damages or injury to the person or property of the other. *See Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580, *disc. rev. denied*, 298 N.C. 295, 259 S.E. 2d 911 (1979).

In the case *sub judice* Carlisle owed a duty of care to Gateway through privity of contract. Carlisle owed a duty to Kidde because a reasonable person would have understood that if Carlisle did not use reasonable care in its conduct, it would cause injury to Kidde. *See id.*

Carlisle was granted summary judgment based upon the pleadings, affidavits and depositions which it claims show that it neither provided defective materials and design, nor was it negligent in providing instruction, training, and supervision of installation procedures by Gateway. James A. Moser, president of Gateway, however, stated through affidavit that the M.A.R.S. system was defective in design, and the methods used by Carlisle preclude the installation of a M.A.R.S. system roof in a workmanlike and watertight manner.

"If different material conclusions can be drawn from the evidence, then summary judgment should be denied." *Herbert v. Browning-Ferris Industries*, 90 N.C. App. 339, 341, 368 S.E. 2d 416, 417 (1988). We hold that different material conclusions could be drawn from the evidence presented through affidavits by Gateway and Kidde. Moser, even though an agent of Gateway, had been in the roofing business for twenty years and stated that the M.A.R.S. system was defective. It is for a jury to determine whom to believe, Gateway and Kidde or Carlisle. Summary judgment is therefore inappropriate on the negligence claims against Carlisle.

[2] Appellants next argue that genuine issues of material fact exist as to Kidde's allegations of breach of implied warranties. Carlisle maintains, *inter alia*, that it tendered an express warranty to Kidde which was rejected, and this rejection defeats any implied warranty claim.

N.C.G.S. § 25-2-314 provides in part:

> (1) Unless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . . (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description . . . .

N.C.G.S. § 25-2-316 reads in pertinent part:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the

language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

Carlisle's offer and Kidde's rejection of a five-year express warranty of the roof installed for Kidde do not fall within the exclusion provisions of N.C.G.S. § 25-2-316. A five-year warranty would have far exceeded the protection offered by U.C.C. § 2-314, but the offer and rejection of it do not automatically waive the implied warranty. We conclude that there was an implied warranty of merchantability when Carlisle contracted with Gateway to provide a roofing system for Kidde. We also conclude that because of the affidavit of Moser, Gateway's president, there is a genuine issue of material fact as to whether Carlisle breached the implied warranty. *See Herbert*, 90 N.C. App. 339, 368 S.E. 2d 416; *see also Ward*, 90 N.C. App. 286, 368 S.E. 2d 391.

[3] Carlisle contends that appellants' claims of negligence and breach of implied warranty are insufficient as a matter of law and do not comply with Rule 8(a) of the North Carolina Rules of Civil Procedure.

Gateway's third-party complaint and Kidde's crossclaim against Carlisle were initiated in United States Bankruptcy Court. Gateway's third-party complaint (and thus Kidde's claim) was severed from

the main action on the debt and remanded to the Guilford County Superior Court.

Rules 8(a) of Federal Rules of Civil Procedure and the North Carolina Rules of Civil Procedure differ in their requirements for pleadings. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). The Federal rule requires a pleading to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rules of Civ. Proc. Rule 8(a); *see id.* The North Carolina rule requires "[A] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C.G.S. 1A-1, Rule 8(a)(1). Merely asserting a grievance is not enough to comply with the North Carolina Rule 8(a). *Sutton*, 277 N.C. 94, 176 S.E. 2d 161.

The first avenue by which a party may properly address the failure to state a claim is through Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 12. A motion under Rule 12(b)(6), however, cannot be raised for the first time on appeal. *Collyer v. Bell*, 12 N.C. App. 653, 184 S.E. 2d 414 (1971).

The other way to address failure to properly state a claim is through Rule 12(e) of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 12(e). Rule 12(e) is a way a party may move for a more definite statement of the claim before interposing his responsive pleading. *Id.* If a party pleads responsively without moving for a more definite statement, he waives his right to do so.

In the case *sub judice*, Carlisle neither made a motion under 12(b)(6), nor a motion under Rule 12(e). *See* N.C.G.S. 1A-1, Rule 12. It is therefore precluded from making these motions on appeal. *See Collyer*, 12 N.C. App. 653, 184 S.E. 2d 414; *see id.*

[4] Carlisle also contends that appellants' claims fail under Chapter 99B, North Carolina's Products Liability statute.

N.C.G.S. § 99B-3 reads in pertinent part:

> (a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modifica-

> tion occurred after the product left the control of such manufacturer or such seller . . . .

Subsection (b) provides that for the purpose of this section, alteration or modification "includes failure to observe routine care and maintenance." *Id.*

Carlisle particularly argues that there was ample evidence of Kidde's failure to observe routine care and maintenance of the roof. That may well be, but there is also evidence of record that the roof and design were defective. Appellants do not have to show that they will prevail at trial, they only have to show that there is a genuine issue of material fact. *See Ward*, 90 N.C. App. 286, 368 S.E. 2d 391 (1988).

Carlisle also argues that the roof was not properly installed by Gateway and thus under Chapter 99B-4 Carlisle is not liable. N.C.G.S. § 99B-4 reads in pertinent part:

> 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 . . . .

Carlisle would be able to use 99B-4 as a bar to appellants' arguments had it not contracted to instruct Gateway on installation procedures, and had it not in fact assisted Gateway in the installation of the roof on the Kidde building. *See id.*

[5] Appellants lastly argue that genuine issues of material fact exist as to Kidde's allegations of breach of express warranty. Carlisle counters by arguing that it offered Kidde an express warranty which was rejected.

N.C.G.S. § 25-2-313 reads in pertinent part:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part

of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

The critical inquiry here is whether the seller's statements were regarded by the buyer as his reason for purchasing the goods. *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E. 2d 588 (1982).

Rex Benchoff, architect and engineer for Grove, stated in his deposition that Grove relied upon information and technical assistance by Carlisle in choosing the M.A.R.S. roof design. Under N.C.G.S. § 25-2-313, Grove's reliance would establish an express warranty by Carlisle. Summary judgment is not appropriate here, where there is evidence of such reliance.

Reversed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. CHONG SUN FRANCE, DEFENDANT

No. 884SC818

(Filed 6 June 1989)

1. Criminal Law § 75.23— statements to television crew—admission not unfairly prejudicial

Evidence of defendant's statements to a television crew as she was being transported from the police station to the county jail after her arrest, including statements that she had killed her son and was crazy, was not unfairly prejudicial so as to require its exclusion under N.C.G.S. § 8C-1, Rule 403 where an officer had testified previously that defendant stated that she "killed him," the officer described defendant as "very hysterical and hateful" in her dealings with police officers at the scene, and other witnesses gave testimony to the effect that the child's death was caused by putting him in a dresser drawer and closing it.

2. Homicide § 21.7— second degree murder—child abuse—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for second degree murder and felonious child abuse of her son where it tended to show that defendant locked the twenty-nine-month-old victim and his fifteen-month-old sister in the bedroom of her apartment when she went to work; the son was dead when she returned from work; medical and scientific evidence indicated that the child died from asphyxiation rather than from crushing injuries which would be expected if a television set and dresser had fallen on the child as described by defendant; and the child's asphyxiation could have been caused by putting him in a dresser drawer and closing it.

3. Homicide § 15.5— cause of death—expert testimony—personal knowledge

A physician had sufficient personal knowledge to state his opinion as to whether the death of a child could have been caused by a television set and a dresser falling on him where the physician conducted the autopsy on the child and personally observed the television set, the dresser, and reenactment tests performed by the police department and a city engineer. N.C.G.S. § 8C-1, Rule 703.

APPEAL by defendant from *Reid (David E., Jr.), Judge*. Judgment entered 21 December 1987 in Superior Court, ONSLOW County. Heard in the Court of Appeals 22 February 1989.

Defendant was found guilty by a jury of second degree murder and felonious child abuse. The trial court arrested judgment in the felonious child abuse case and sentenced defendant to twenty years for the second degree murder conviction. Defendant appeals.

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

Edward G. Bailey for defendant-appellant.

LEWIS, Judge.

Defendant brings forward four assignments of error. First, she contends the trial court erred in allowing a police detective to testify regarding defendant's statements recorded by a television

news crew. Second, defendant assigns error to the denial of her motion to dismiss the charges. Finally, defendant assigns error to the trial court allowing a doctor to answer two questions regarding the cause of death. We have reviewed defendant's assignments of error and conclude she received a fair trial, free from prejudicial error.

The State's evidence showed that upon arrival at defendant's motel apartment around 3:25 a.m. on 28 May 1987, Officer Fisher of the Jacksonville Police Department found the body of defendant's two and one-half year old son, Moses, lying on the bed. Officer Fisher and Sergeant Cobun testified that the television set was on the dresser and pieces of glass from a mirror were in the carpet and in a bag in the kitchen. Defendant told police officers that she fed Moses and his 15-month-old sister, Esther, around 6:30 p.m. on 27 May. After feeding the children, she went to work. She left the children alone in the bedroom and locked the bedroom door so the children would not go in the kitchen and hurt themselves. Only defendant and the two children lived in the apartment. Defendant said that when she returned home around 2:00 a.m. on 28 May, she found Esther asleep on the bed. The dresser and television set were overturned and Moses was lying on the floor partially inside the second dresser drawer with the television set on top of him. She picked up Moses and put him on the bed. Then she put the television set and dresser back in place and cleaned up the room. She waited a while before calling the police because she did not know what to do. Defendant testified in her own behalf to these same essential facts.

The State's evidence further showed that Moses died of asphyxiation as the result of compression of his abdomen and chest. Based on information that Moses ate dinner at 6:30 p.m., the doctor performing the autopsy, Dr. Gable, estimated that Moses died between 6:30 p.m. and 7:00 p.m. on 27 May. On cross-examination, Dr. Gable testified Moses may have died as late as 7:30 p.m. Dr. Gable testified that in his opinion, the television set and dresser falling on the child would have produced crushing-type injuries. Moses' body had no crushing-type injuries but only pressure-type injuries. There were no abnormalities of the bones. In Dr. Gable's opinion, Moses' death could have been caused by closing him up in a dresser drawer. Dr. Gable could not determine whether the pressure-type injuries occurred before or after Moses' death.

Both the State and defendant put on extensive evidence of reenactment experiments as to the possibility of a 28-pound child pulling over the television set and dresser. The State presented without objection evidence of reenactment tests performed by the Jacksonville City Engineer and police officers. The engineer testified that in his opinion a child of Moses' weight and age could not have pulled over the dresser with the television set sitting on it. Defendant's expert engineer testified without objection that in his reenactment test a child of similar weight and age standing on a chair in front of the dresser did move the television set across the top of the dresser.

The evidence showed that Moses was two years, five months old at his death. He weighed 28 pounds and was 38 inches (three feet two inches) tall. The dresser was 33½ inches (two feet nine and one-half inches) in height, 19 inches (one foot seven inches) deep, and weighed 99 pounds. With the television set on it, the dresser and the television set weighed 152 pounds. The top of the second dresser drawer was 27¾ inches (two feet three and three-fourths inches) from the floor.

The State's theory of the case is that Moses died from asphyxiation after defendant put Moses in one of the dresser drawers and closed it. Further, she may have placed the television set on Moses' chest and abdomen after Moses was dead. Defendant's theory is that Moses climbed into the second dresser drawer and caused the television set and dresser to fall over and pin him underneath.

[1] Defendant first assigns error to certain testimony of Detective Shingleton. After defendant's arrest, a local television station recorded defendant's statements to the press while she was in custody. Concluding that the prejudicial effect of a kicking episode on the tape would outweigh its probative value, the trial court granted defendant's motion *in limine* to prohibit showing the videotape to the jury. However, the court allowed Detective Shingleton to testify that defendant made the following statements which were recorded by the television crew: "I did it. I did it. Okay, you stupid idiot. He thinks I did it, hunh?" and "You guys are sick. Why don't you get out of here? Can you kill your son, hunh? Can you kill your son? I'm crazy. You know I killed my son. I'm crazy." Detective Shingleton testified defendant made these statements as she was being transported from the police station to the county

jail after her arrest. She was under arrest and in custody but the statements were made without questioning or interrogation from any law enforcement personnel. On cross-examination, the detective described defendant as "angry," "mad," and "crying without tears" when she made the statements.

Defendant contends the evidence should have been excluded under G.S. 8C-1, Rule 403 as it caused "unfair prejudice." We disagree. "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." G.S. 8C-1, Rule 403. " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E. 2d 350, 357 (1986), *quoting* Commentary, G.S. 8C-1, Rule 403 (Cum. Supp. 1985). "Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect. Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E. 2d 885, 889 (1986). Whether to exclude evidence under Rule 403 is within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). In this case, the evidence of defendant's statements on the videotape are prejudicial to defendant's case; the detective testified that defendant said she killed her son. However, we cannot say the evidence is *unfairly* prejudicial. Officer Fisher had previously testified without objection that defendant stated "It's my fault. I killed him." Officer Fisher described defendant as "very hysterical and hateful" in her dealings with the police officers at the scene. There was also testimony from the State's other witnesses to the effect that Moses' death was caused by putting him in the dresser drawer and closing it. The trial court did not err in admitting the detective's testimony. This assignment of error is overruled.

[2] Defendant's second assignment of error is to the denial of her motion to dismiss at the close of all the evidence. Defendant contends the evidence presented at trial was insufficient to support verdicts of guilty of second degree murder and felonious child abuse. We disagree. A motion to dismiss is properly denied if there is substantial evidence of each element of the crime charged or of a lesser included offense and substantial evidence that defendant

committed the offense. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 66, 196 S.E. 2d at 652, *quoting State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980). In ruling on this motion, the trial court must consider all the evidence in the light most favorable to the State and give the State every reasonable inference which can be drawn from the evidence. *Id.* The court must consider all evidence which is admitted which is favorable to the State, but inconsistencies in the evidence are not sufficient to warrant dismissal as they are for the jury to resolve. *Id.* The test in ruling on a motion to dismiss is the same whether the evidence is direct, circumstantial or both. *Id.*

"Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E. 2d 188, 190 (1983). Intent to kill is not a necessary element of second degree murder, but there must be some intentional act which proximately causes death and is sufficient to show malice. *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983).

The felony child abuse statute relevant to this case provides:

> A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class H felony.

G.S. 14-318.4(a). In *State v. Campbell*, 316 N.C. 168, 340 S.E. 2d 474 (1986), our Supreme Court held the circumstantial evidence was sufficient to survive the defendant's motion to dismiss. The evidence showed an uninjured two-year-old child was left in the sole custody and control of the defendant. A social worker testified the child was unable to put her hands more than two inches below the top edge of the bathtub. The child suffered extensive first, second and third degree burns on her hands with clear lines of demarcation from healthy skin at the wrist. A doctor testified that, although he could only guess at the length of time necessary to cause these particular burns, the child's hands would have had to have been in the water for ten to fifteen seconds to cause the type of burns the child suffered if the water was not boiling

hot. The social worker also testified to bruises on the child which would support a reasonable inference the defendant grasped the child to hold her hands under the water. *Id.* The issue is not whether the State proved the defendant intended to cause the child serious injury but whether the State showed the defendant intentionally inflicted injury which proves to be serious. *Id.*

We hold the evidence in this case was sufficient to survive defendant's motion to dismiss. The evidence showed that defendant was Moses' parent and that the child was under age 16. The evidence also showed that defendant locked the children in the apartment and unlocked the door when she returned from work. The State presented medical and scientific evidence which tended to show Moses could not have died in the manner described by defendant. The State's witness, Dr. Gable, testified Moses died from asphyxiation and not from the crushing injuries he would expect if the television set and dresser had fallen on the child as described by defendant. Dr. Gable also testified that Moses' asphyxiation could have been caused by putting Moses in the dresser drawer and closing it. Viewing the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, and despite contrary evidence presented by defendant, the evidence of second degree murder and felony child abuse is sufficient to survive defendant's motion to dismiss.

[3] Finally, defendant assigns error to the testimony of Dr. Gable, the physician performing the autopsy. Defendant objected to the following questions: "Could the death of this child have been caused by putting the child in a drawer of the chest of drawers and pushing it shut?" and ". . . do you have an opinion as to whether the death of this child was caused by having . . . the t.v. and dresser falling over on him?" Defendant contends the expert was allowed to render an opinion based on facts not in evidence or within his personal knowledge. We find no error. Our Rules of Evidence provide that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing." G.S. 8C-1, Rule 703. The facts upon which Dr. Gable based his opinion were both within his personal knowledge and admitted into evidence. Dr. Gable testified to the condition of the body during the autopsy. He also testified that he personally observed the television set, the dresser and reenactment tests performed by the Jacksonville city engineer and the police department. Dr. Gable gave his opinion

as to whether Moses' particular head and back injuries could have been caused if the television set and dresser had fallen on the child. We believe Dr. Gable had sufficient personal knowledge for his opinion regarding the cause of death.

Defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

MYRTLE G. STRICKLAND, WIDOW OF ARNOLD G. STRICKLAND, DECEASED, EMPLOYEE-PLAINTIFF v. CENTRAL SERVICE MOTOR COMPANY, EMPLOYER, AND AETNA CASUALTY AND SURETY COMPANY, CARRIER, DEFENDANTS

No. 8810IC814

(Filed 6 June 1989)

1. **Master and Servant § 94— workers' compensation—death benefits—automobile accident going to work—findings supported by evidence**

In an action in which plaintiff sought workers' compensation benefits for the death of her husband on his way to work, the Industrial Commission's finding that decedent did not regain consciousness from the time of the accident until he was in the emergency room was supported by the evidence, despite a gap in the firsthand testimony, because inferences of fact drawn from circumstances are permissible and there was evidence to support the Commission's finding; the finding that decedent was unconscious prior to impact was supported by evidence; the presumption of compensability does not arise because there was evidence that decedent died other than by compensable cause; and the conclusion that decedent's death was not the direct and natural result and was not accelerated or aggravated by the injury he sustained as a result of the accident was supported by the findings.

2. **Master and Servant § 93.3— workers' compensation—death benefit—automobile accident—expert medical testimony**

In an action by the plaintiff to recover workers' compensation benefits for the death of her husband in an automobile

accident while going to work, the Industrial Commission did not err by allowing a neurologist to give opinion testimony, even though the neurologist was not found to be an expert in the field of ruptured berry aneurysms and even though the opinion was based on assumptions allegedly unsupported by the evidence. A medical witness need not be an expert in a particular subject to give an opinion on it, and findings supporting the assumptions were found elsewhere in the opinion to be supported by the evidence.

ON writ of certiorari of plaintiff from the Industrial Commission. Opinion and award of the full Commission filed 22 October, 1987. Heard in the Court of Appeals 24 February 1989.

This is a workers' compensation case in which plaintiff seeks workers' compensation death benefits for the death of her husband. The parties stipulated that: (1) an employment relationship existed between the plaintiff's decedent and the defendant employer; (2) the parties were subject to and bound by the provisions of the Workers' Compensation Act; and (3) the Aetna Casualty and Surety Insurance Company was the compensation carrier on the risk.

Deputy Commissioner Page heard the case, made findings of fact, and concluded that the decedent sustained an injury from an accident arising out of and in the course of his employment and that the injury consisted of lacerations and abrasions of his left temple. However, the deputy commissioner concluded that decedent's death was not the direct and natural result of the injury nor was his death accelerated by the injury. Accordingly, the deputy commissioner denied plaintiff's claim for death benefits. Plaintiff appealed to the full Commission which adopted as its own the opinion and award of the deputy commissioner and affirmed the award. From the Commission's denial of benefits, plaintiff appeals.

The evidence disclosed that at the time of the accident Arnold Strickland was 56 years of age and had been employed by the defendant for approximately 15 years, the last 9 of which he had been service manager. Decedent drove a company-owned car to and from work. On the morning of 26 June 1984 while driving to work, decedent was involved in a two-vehicle collision. Decedent was traveling south in the southbound lane and the other vehicle was traveling north. The driver of the other vehicle, a Ms. Grimes, testified she saw decedent crossing over the center line and into

the oncoming lane of traffic. Ms. Grimes stated that decedent's head was down and that she attempted to attract his attention by sounding her horn. Ms. Grimes testified that decedent never looked up. Ms. Grimes drove her vehicle off the road to the right in a vain attempt to avoid a collision. The vehicles collided. The state trooper who investigated the collision testified that he found no skid marks on the pavement, indicating that decedent never attempted to stop his car or return to his lane prior to the collision.

There was conflicting evidence whether decedent was ever conscious at the scene. Ms. Grimes testified that when she approached decedent's car after the accident she observed him sitting upright behind the wheel with his head slumped down and his eyes closed. All medical personnel who treated decedent at the scene testified that they never observed decedent in a conscious state. Mrs. Strickland's deposition testimony was that someone, whose name she does not know, telephoned her on the morning of the accident. Mrs. Strickland testified that the caller had said that "Arnold had told her to call me. That he was all right. That there had been an accident." There was also evidence that the emergency room physician, Dr. Smith, had noted on the emergency room record information that decedent had briefly been conscious at the scene. The doctor's record note did not disclose and he could not remember from whom he had obtained that information.

Decedent was taken to the hospital where he was examined by Dr. Smith. Dr. Smith testified that decedent had abrasions to the left side of his forehead but no sign of deep bruising of the head. Decedent's physical condition upon arrival to the emergency room exhibited decorticate posturing which generally signals loss of function of the cortex of the brain. Decedent was unconscious during the one to one and one-half hours he was in the emergency room, except for a period of thirty seconds to a minute. During this brief period of consciousness decedent responded to Dr. Smith and said he "felt fine." Decedent then lapsed back into unconsciousness and Dr. Smith testified that decedent's condition became progressively worse. Because the hospital where decedent was being treated had no neurosurgical capability, decedent was transferred to Pitt Memorial Hospital and was placed under the care of Dr. Leonard.

Upon his arrival at Pitt Memorial decedent exhibited bilateral decerebrate posturing which signals brain stem dysfunction. This

indicates that decedent's condition had deteriorated from the time he had been seen in the emergency room to the time he arrived at Pitt Memorial. Decedent remained unconscious until he died on 8 October 1984. Decedent's death certificate reveals the immediate cause of death was respiratory and cardiac arrest which was the consequence of a ruptured anterior aneurysm.

Mast, Morris, Schulz, and Mast, by John W. Morris, for plaintiff-appellant.

Yates, Fleishman, McLamb and Weyher, by Bruce Berger, for defendant-appellee.

EAGLES, Judge.

Plaintiff assigns as error the Commission's findings of fact that decedent did not regain consciousness at the scene and that decedent was unconscious before the collision. Plaintiff also challenges the Commission's conclusion that death was not accelerated and that decedent's condition was not aggravated by the collision. Finally, plaintiff asserts that the Commission erred in allowing Dr. Freedman, a neurologist, to testify as an expert. We hold that the Commission's findings of fact are supported by the evidence and that the conclusions of law are supported by the findings. Additionally, the Commission did not err in allowing a neurologist to testify as an expert. Accordingly, we affirm the opinion and award.

[1] The Commission's findings of fact are conclusive on appeal if supported by competent evidence. This is so even though there may be evidence which would support findings to the contrary. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The Workers' Compensation Act vests the Commission with full authority to find facts. The Commission is the sole judge of credibility and the weight to be given the witnesses' testimony. *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). Here, our function is not to weigh the evidence but is to determine whether the record contains any competent evidence tending to support the findings. *Id.*

The Commission found that "[t]he deceased employee plaintiff did not . . . regain consciousness from the time of the accident until he was in the . . . Emergency Room some thirty minutes later." Plaintiff contends that there was no evidence presented by defendant regarding decedent's state of unconsciousness for a

few minutes at the scene of the accident. Because of this "gap" in evidence, plaintiff argues there is no competent evidence on which the Commission could base its finding that decedent never regained consciousness at the scene. Further, defendant argues that this was a critical finding, necessary to support the hypothetical situation that was the basis of expert opinion given by defendant's witness. Plaintiff also contends that there is uncontroverted evidence that decedent was conscious for a brief time at the scene. We do not agree with plaintiff's argument. Although there is a gap in firsthand testimony about decedent's state of consciousness, inferences of fact from circumstances when reasonably drawn are permissible. The fact that other reasonable inferences could have been drawn by the trier of fact is no indication of error. If there is any evidence of substance which directly or by reasonable inference tends to support the Commission's findings, this court is bound by the finding. *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980). There was evidence before the Commission to support its finding that decedent was never conscious at the scene. Although plaintiff presented evidence to the contrary, the Commission has full authority to weigh the evidence and find the facts.

The Commission also found that decedent was unconscious prior to the collision. Plaintiff asserts that there was no positive proof of decedent's state of consciousness prior to impact since he was alone in the car. Plaintiff relies on *Sloan v. Light Co.*, 248 N.C. 125, 102 S.E. 2d 822 (1958), and contends there is a presumption that decedent was conscious prior to the accident since he was conscious when he left home. In *Sloan*, the Court stated that "a factual situation once proven is presumed to continue in existence unless there is proof to the contrary." *Id.* at 133, 102 S.E. 2d at 828. Plaintiff also relies on *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E. 2d 582 (1988) to argue that the presumption of compensability applies. We are not persuaded. Even if decedent is presumed to have remained conscious until proven otherwise, there was evidence from which the Commission could find that decedent was unconscious prior to the collision. Evidence that supports this finding consists of Ms. Grimes' testimony regarding decedent's initial inattentiveness, her unsuccessful attempts to attract his attention and that decedent was "looking down." In addition, the state trooper testified that there was no indication decedent applied his brakes or otherwise attempted to avoid the collision.

Plaintiff's reliance on *Pickrell* is misplaced. The presumption of compensability is applicable only where there is no evidence indicating that decedent died other than by a compensable cause. *Id.* at 371, 368 S.E. 2d at 587. In the present case there is evidence that decedent died other than by a compensable cause, i.e., ruptured anterior aneurysm. Therefore, the compensability presumption does not apply here.

The Commission concluded that decedent's death "was not the direct and natural result nor was it accelerated or aggravated by the injury he sustained as a result of the accident," i.e., abrasions and lacerations of his left temple. Plaintiff assigns error to this conclusion. The question before us is whether the Commission's findings of fact justify the legal conclusion. *Hansel, supra; Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969). We hold that the findings support the conclusion that death was not accelerated or aggravated by the injury. There was ample evidence presented and findings made regarding the rupture of decedent's aneurysm prior to the collision. Additionally, there was evidence that as a result of the collision decedent suffered no broken bones and only superficial abrasions on his forehead. Plaintiff relies heavily on the evidence that the windshield of the car in which decedent was traveling was broken. However, there was no evidence nor finding that the cause of the break was contact with decedent's head. In light of the uncontroverted evidence presented regarding the lack of any deep bruising or swelling of decedent's head, it is unlikely that the broken windshield was caused by contact with decedent's head. Plaintiff's assignment of error is overruled.

[2] Finally, plaintiff asserts the Commission erred in allowing a neurologist to give opinion testimony. First, plaintiff argues that the neurologist was not found to be an expert in the field of ruptured berry aneurysms and was therefore not competent to offer opinions in conflict with those of the treating neurosurgeon. Second, plaintiff argues the opinion testimony must be stricken from the record because it was based on assumptions not supported by the evidence. We find no merit to plaintiff's arguments. "A medical witness need not, as a matter of law, be a specialist in a particular subject to give an opinion on it." *Robinson v. J. P. Stevens and Co., Inc.*, 57 N.C. App. 619, 624, 292 S.E. 2d 144, 147 (1982). It was entirely proper for the Commission to include the testimony of a neurologist in its determination of the facts and evidence. Plaintiff's assertion that the neurologist's opinion was based on as-

sumptions not supported by the evidence depends on our disapproving the Commission's findings that decedent was unconscious prior to the collision and remained unconscious until he was at the hospital. Based on our disposition of those arguments, we find no merit here.

Because plaintiff has failed to argue the remaining seven assignments of error listed in the record, they are deemed abandoned. Rule 28(b), N.C. Rules App. Pro.

For the reasons stated, we affirm the opinion and award of the Industrial Commission.

Affirmed.

Judges COZORT and GREENE concur.

PAIGE B. HICKS v. FOOD LION, INC.

No. 889SC879

(Filed 6 June 1989)

1. **Rules of Civil Procedure § 56.7— trial on merits—denial of summary judgment not appealable**

The denial of defendant's motion for summary judgment is not reviewable on appeal from a final judgment rendered after a trial on the merits.

2. **Negligence § 57.6— fall by store customer—milk on floor—sufficient evidence of negligence**

Plaintiff's evidence was sufficient for the jury in an action to recover for injuries sustained in a fall in defendant's grocery store where the evidence would permit, but not compel, a jury to find that plaintiff slipped and fell on milk that had been spilled near a check-out lane, and that fifteen to thirty minutes before the accident another customer had notified a store employee about the spilled milk, notwithstanding various witnesses had somewhat differing descriptions of the milk.

3. **Negligence § 58— customer's failure to see milk on floor—no contributory negligence as matter of law**

Plaintiff was not contributorily negligent as a matter of law in failing to see milk spilled on the floor of defendant's gro-

cery store as she went from one check-out lane to another where the milk blended in with the color of the floor, and plaintiff was required to keep a lookout at eye level to keep from bumping into racks of magazines and candy separating the check-out lanes.

APPEAL by defendant from *Crawley, Jack B., Judge.* Judgment entered 31 March 1988 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 15 March 1989.

This is a civil action in which plaintiff sought damages for injuries sustained when she slipped and fell in defendant's grocery store in some milk which she alleged defendant negligently failed to remove from the floor.

Davis, Sturges & Tomlinson, by Charles M. Davis, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III and E. Clementine Peterson, for defendant-appellant.

JOHNSON, Judge.

Plaintiff's evidence, viewed in the light most favorable to her, tended to show the following: On 31 January 1986 at approximately 8:00 p.m., plaintiff entered defendant's grocery store to purchase two items. After selecting them, she proceeded to the sixth or seventh check-out lane carrying her groceries and six dollars in her hands. There she got in line behind another customer. She then looked to her right over the magazine racks and noticed that the next lane had no one waiting. Plaintiff turned out of the lane she was in, took three or four steps toward the lane to her right, slipped, and fell flat on the floor. She was approximately three feet back from the check-out counter when she fell. Plaintiff testified that the floor was a whitish color and that she never saw any milk on it either before or after her fall. However, witnesses to the incident saw smeared milk on the floor near her.

On the evening of plaintiff's accident, Hurley Ayscue and his wife also entered the defendant's store to shop. Mr. Ayscue later testified that when he and his wife approached the check-out lanes to pay at approximately 7:30 p.m., he observed a big puddle of milk on the floor near the third lane on the side toward the produce. From our review of plaintiff's exhibits two, three and four,

photographs of the vicinity of defendant store's check-out lanes, we understand the witness to be referring to lane five. He warned his wife about the milk and said to one of the cashiers, "there is some milk on the floor, you better get it up before somebody slips on it." The Ayscues completed their purchase and left the store before plaintiff's accident.

Two other customers who were present when plaintiff fell testified at trial. Dan Denton, who was in line three or four counters over from plaintiff, saw her fall and went immediately to help. He stated that when he bent over the plaintiff, he saw a milklike substance that had been slid through on the floor beside plaintiff.

Elaine Denton, who was paying for groceries when plaintiff fell, did not actually see the accident. When she heard the noise, she turned and went to assist plaintiff. Mrs. Denton also saw smeared milk on the floor. In her deposition, the witness characterized the milk as "just a spot" which had been smeared. She also said, "[i]t looked like there had been a puddle and it looked like it had been smeared by her foot in the process of sliding." At trial, the witness was unsure of the amount of milk on the floor.

Plaintiff instituted this action by the filing of her complaint on 12 September 1986. Defendant's answer denied negligence and alleged in the alternative that plaintiff was contributorily negligent in failing to keep a proper lookout. Prior to trial, defendant moved, pursuant to G.S. sec. 1A-1, Rule 56, for summary judgment. The motion was denied. At the close of all the evidence, the following issues were submitted and answered by the jury:

> 1. Was the plaintiff, Paige B. Hicks, injured or damaged by the negligence of the defendant, Food Lion, Inc.?
>
> ANSWER: Yes
>
> 2. Did the plaintiff, Paige B. Hicks, by her own negligence, contribute to her injury or damage?
>
> ANSWER: No
>
> 3. What amount, if any, is the plaintiff, Paige B. Hicks, entitled to recover for personal injuries[?]
>
> ANSWER: $36,919.14

Judgment was rendered on the verdict.

In this appeal, defendant contends that the trial court erred in denying its motions for summary judgment, directed verdict and judgment notwithstanding the verdict on the grounds that there is no genuine issue of material fact regarding negligence and contributory negligence, and that defendant is entitled to judgment as a matter of law.

[1] We first address the appealability of the denial of defendant's summary judgment motion. The purpose of summary judgment is to provide an expeditious method of reaching a decision on the merits without a trial when no material facts are in dispute. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972). After trial, that purpose can no longer be served. Therefore, denial of defendant's motion for summary judgment is not reviewable on appeal from a final judgment rendered after a trial on the merits. *MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E. 2d 271 (1983). Defendant presents identical arguments as to the denial of its motions for directed verdict and judgment notwithstanding the verdict. We shall consider them as to these motions only.

In ruling on a motion for directed verdict or for judgment notwithstanding the verdict made by a defendant pursuant to G.S. sec. 1A-1, Rule 50, the court must consider the evidence in the light most favorable to the plaintiff and resolve all conflicts in his favor. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). The plaintiff must receive the benefit of every inference which may reasonably be drawn in his favor. *Id.* The granting of either motion is appropriate only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

A proprietor does not insure his customers against slipping and falling. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E. 2d 537 (1967). However, the store owner has a duty to keep the areas where patrons are expected to go reasonably safe and to warn of hidden dangers or unsafe conditions of which he knows, or in the exercise of reasonable supervision, should know. *Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33 (1952). If a plaintiff is injured by an unsafe condition created by a third party or an independent agency, the plaintiff must show that the proprietor had notice, express or implied, of the condition in time to remove the danger or give proper warning of it. *Dawson v. Light Co.*, 265 N.C. 691,

144 S.E. 2d 831 (1965); *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281 (1963); *Stafford v. Food World*, 31 N.C. App. 213, 228 S.E. 2d 756, *disc. rev. denied*, 291 N.C. 324, 230 S.E. 2d 677 (1976). We believe that, viewing the evidence in the light most favorable to plaintiff and allowing her the benefit of all reasonable inferences therefrom, plaintiff established a *prima facie* case of negligence, and that the trial court was correct in denying defendant's motions for directed verdict and judgment notwithstanding the verdict.

[2] The thrust of defendant's argument is that plaintiff failed to present evidence that defendant store had either constructive or actual notice of the milk on the floor. It contends that there was no evidence that plaintiff slipped in the same milk of which defendant had been notified by Hurley Ayscue. We disagree.

Plaintiff's evidence would permit, but not compel, a jury to find the following facts: that plaintiff slipped and fell on milk that had been spilled near a check-out lane; and that about fifteen to thirty minutes before the accident, another customer, Hurley Ayscue, notified an employee of the defendant about the spilled milk. We do not find plaintiff's evidence fatally flawed because the various witnesses had somewhat differing descriptions of the milk. The Dentons, who recalled seeing less milk than Hurley Ayscue, only saw the spill after plaintiff had slid through it when her clothes may well have absorbed part of it. Hurley Ayscue saw the milk before plaintiff's fall. There was also testimony of grocery cart tracks through the milk which would have affected its appearance. Similarly, slight discrepancy in testimony as to the exact location of the milk would not prevent the jury from reasonably inferring that the milk of which Mr. Ayscue warned defendant's employee was the same that plaintiff slipped in.

In finding defendant negligent, the jury may also have been influenced by the testimony of defendant's store manager. He stated that prior to plaintiff's fall on the evening in question, he had not been notified of any milk spilled on the floor. From this, the jury could have inferred that the milk of which Hurley Ayscue notified one of defendant's cashiers fifteen to thirty minutes before plaintiff's fall had never been cleaned up. We believe there was sufficient evidence, viewed in the light most favorable to plaintiff, for a jury to reasonably conclude that defendant had actual notice of the milk upon which plaintiff slipped.

[3] We turn now to defendant's contention that its motions for directed verdict and judgment notwithstanding the verdict should have been granted because plaintiff was contributorily negligent as a matter of law in failing to look where she was going and in failing to notice what she could reasonably be expected to see.

It is well settled in North Carolina that a claimant's negligence action will be barred if he failed to exercise ordinary care for his own safety, and that failure contributed to his injury. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). Our Supreme Court has stated that the issue before a trial court when a defendant moves for a directed verdict on the grounds of plaintiff's contributory negligence is whether " 'the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.' " *Rappaport v. Days Inn*, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979), *quoting Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E. 2d 506, 510 (1976).

Applying these principles to the facts of the case *sub judice*, it is our opinion that plaintiff was not contributorily negligent as a matter of law. There was evidence that the floor where plaintiff fell was a whitish color similar to the color of milk, which would have caused the milk to blend in with the floor somewhat. *Morgan v. Tea Co.*, 266 N.C. 221, 145 S.E. 2d 877 (1966); *Long v. Food Stores, Inc.*, 262 N.C. 57, 136 S.E. 2d 275 (1964). Also, although the milk was visible, several witnesses stated that they did not see the milk until they were standing right over plaintiff after her fall. We also believe it is important that when plaintiff failed to see the milk, she was in the process of turning from one check-out lane to another. This movement would have made it less likely, in our opinion, for plaintiff to have seen the milk than if she had been walking straight ahead toward it.

Defendant complains that the milk would not have been hidden from plaintiff's view if she had looked down. Our Supreme Court has addressed this question in a similar context. In holding that a trial court erred in directing a verdict against a plaintiff on the issue of contributory negligence when plaintiff failed to see a platform extension that protruded into the aisle near the floor, the Court stated that "[t]he question is not whether a reasonably

prudent person would have seen the platform had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor." *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E. 2d 559, 563 (1981).

In the case *sub judice*, we cannot say that the plaintiff failed to use ordinary care as she changed lanes because she failed to look down at the floor. It was necessary for her to maneuver so that she did not bump into the racks of magazines and candy separating the check-out lanes, which required plaintiff to keep a lookout at eye level.

Defendant has failed to establish that plaintiff was contributorily negligent as a matter of law. The trial court did not err in denying defendant's motions based on this argument.

For all the foregoing reasons we find no error in the trial of this matter.

No error.

Judges ARNOLD and PHILLIPS concur.

IN RE: APPLICATION OF B. C. RAYNOR; ROBERT A. BRYAN, W. JOSEPH BRYAN, FLORA BRYAN, ALICE B. JOHNSON, JOHN G. PECK, PAMELA R. PECK, JOSEPH C. PLEASANTS, AND CAROLYN H. PLEASANTS v. BOBBY C. RAYNOR AND THE TOWN OF GARNER, NORTH CAROLINA

No. 8810SC1058

(Filed 6 June 1989)

1. Municipal Corporations § 30.21— extraterritorial jurisdiction zoning proposals—adequacy of notice of public hearing

There was sufficient notice of a public hearing on 7 September 1982 to apprise those who might have been affected of the nature and character of the extraterritorial jurisdiction zoning proposals where affected landowners were notified by mail; notice of the hearing was published in the local newspaper on 25 August and 1 September 1982; and the notice stated that the purpose of the hearing was to consider "proposed zonings and proposed long-range land use plans within the area

recently added to the Town's extraterritorial jurisdiction," then gave the boundaries of the affected area. N.C.G.S. § 160A-364.

2. Municipal Corporations § 30.21— meetings of Town Planning Board and Board of Aldermen—sufficiency of notice to landowners

There was no merit to plaintiffs' contention that meetings of a Town Planning Board and the Board of Aldermen were not given sufficient public notice where a public hearing was held with regard to proposed R-40 zoning in an extraterritorial area (R-40 permitting single family homes requiring lots of at least 40,000 square feet and permitting individual mobile homes on lots of the requisite size with approval of the Town Board of Adjustment); at the end of the meeting, the mayor stated that the zoning matter would be referred to the Planning Board for recommendation; every landowner affected by the zoning proposal was informed by letter that the Planning Board would make a recommendation to the Board of Aldermen; it was clear from the letter and from the public hearing that the decision as to the zoning of the area was not final at the close of the hearing; plaintiffs should have been on notice that the ultimate decision was to be made at a later time; defendant landowner wrote the Town a letter requesting that his affected property be zoned R-5 (residential zoning allowing placement of mobile homes within a mobile home park on lots with a minimum of 5,000 square feet); the Planning Board and Board of Aldermen held regularly scheduled meetings and considered the zoning proposal and special requests from landowners; and the changes, including defendant's R-5 zoning, in the overall zoning of the area were not substantial.

APPEAL by plaintiffs from *Stephens, Judge*. Judgment entered 16 June 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 18 April 1989.

In March of 1982 the Town of Garner extended its extraterritorial zoning jurisdiction (ETJ) pursuant to N.C.G.S. § 160A-360. Part of this extension encompassed property owned by plaintiffs and defendant Bobby Raynor. On 25 August 1982 landowners who were affected by the extension were notified by mail of a public hearing on 7 September 1982 to consider proposed zoning of the property affected. Notice of the public hearing was also published in the *Garner News* on 25 August and 1 September 1982.

The public hearing was held on 7 September 1982 and several concerned property owners addressed the group gathered. Several persons who spoke desired zoning for their property different than the proposed R-40 zoning (R-40 is zoned for single-family residences requiring lots of at least 40,000 square feet per housing unit; individual mobile homes may be allowed if placed on a lot of the requisite size, and if approved by the Garner Board of Adjustment). Defendant Raynor did not speak at the public hearing to request a different zoning of his property. At the conclusion of this hearing, Garner's Mayor Doughtry referred the matter to the Garner Planning Board for a recommendation to the Garner Board of Aldermen who were ultimately to decide the zoning for the affected property.

The Planning Board held a regularly scheduled meeting on 15 September 1982 and one of the topics discussed was the ETJ zoning proposals. Prior to that meeting defendant Raynor wrote the Town to request that his affected property be zoned R-5 (residential zoning allowing placement of mobile homes within a mobile home park on lots with a minimum of 5,000 square feet).

On 21 September 1982 the Garner Board of Aldermen met at a regularly scheduled meeting and considered the ETJ zoning recommendations made by the Planning Board. The Planning Board had recommended that the majority of the ETJ be zoned R-40, but it also recommended that several landowners, including defendant Raynor, be granted different zoning as they had requested. The Board of Aldermen approved the recommendations of the Planning Board and thus defendant Raynor's property was zoned R-5.

On 20 March 1987 defendant Raynor applied for a conditional-use permit to construct a mobile home park on the property zoned R-5 in 1982. Because their property abutted defendant Raynor's property, plaintiffs filed a petition with the Town to "down-zone" Raynor's property from R-5 to R-40. The Town Board held a public hearing on the request and a related request by plaintiffs to deny Raynor's application for a conditional-use permit.

At the conclusion of the hearing the Town referred plaintiffs' petition to the Planning Board whose members voted unanimously to recommend to the Aldermen that the petition be denied. On 21 July 1987 the Board of Aldermen accepted the Planning Board's recommendation and denied plaintiffs' petition to "down-zone" Raynor's property.

Plaintiffs then instituted this action claiming, *inter alia*, that proper notice of the actions by the Garner Planning Board and Board of Aldermen was lacking and thus their actions were void. Both defendants moved for summary judgment based on the statute of limitations and the trial court granted these motions. From that judgment, plaintiffs appeal.

Hunter, Wharton & Lynch, by John V. Hunter, III, for plaintiff appellants.

Hatch, Little & Bunn, by David H. Permar and Catherine Thompson-Rockermann, for defendant appellee Bobby C. Raynor.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by William E. Anderson, for appellee Town of Garner.

ARNOLD, Judge.

Plaintiffs argue that summary judgment on the basis of the statute of limitations was inappropriate, and the trial court erred in granting defendants' motions. More particularly, plaintiffs argue that because there was no public notice of the meetings of the Planning Board and Board of Aldermen on 15 September and 21 September 1982 respectively, plaintiffs did not know that Raynor's property had been zoned differently than R-40, and thus they should not be precluded from their action by the statute of limitations.

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 judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c).

Pursuant to N.C.G.S. § 160A-360, a town's municipal powers may be exercised over extraterritorial areas not to exceed one mile beyond the town's city limits (or not more than three miles if the town is larger than 10,000 people and smaller than 25,000 residents). This extraterritorial jurisdiction may be obtained with the approval of the board or boards of the county commissioners with jurisdiction over the area. N.C.G.S. § 160A-360.

N.C.G.S. § 160A-364 provides that before adopting or amending any ordinance authorized by Article 19 (which includes § 160A-364), the town council shall hold a public hearing on the matter.

> A notice of the public hearing shall be given once a week for two successive calendar weeks in a newspaper having general circulation in the area. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing.

N.C.G.S. § 160A-364.

Once a city or town has placed within its jurisdiction extraterritorial areas, methods of procedure for zoning are as follows:

> The city council shall provide for the manner in which zoning regulations and restrictions and the boundaries of zoning districts shall be determined, established and enforced, and from time to time amended, supplemented or changed, in accordance with the provisions of this Article. The procedures adopted pursuant to this section shall provide that whenever there is a zoning classification action involving a parcel of land, the owner of that parcel of land as shown on the county tax listing, and the owners of all parcels of land abutting that parcel of land as shown on the county tax listing, shall be mailed a notice of the proposed classification by first class mail at the last addresses listed for such owners on the county tax abstracts; provided that this sentence does not apply in the case of a total rezoning of all property within the corporate boundaries of a municipality. The person or persons mailing such notices shall certify to the City Council that fact, and such certificate shall be deemed conclusive in the absence of fraud.

N.C.G.S. § 160A-384 (this statute was amended in 1985, and prior to that the second and third sentences requiring notice by first-class mail to all abutting property owners was not present).

[1] As part of their argument for lack of notice, plaintiffs contend that the notice given for the public hearing was insufficient under North Carolina law. We do not agree.

"To be adequate, the notice of public hearing required by G.S. 160A-364 must fairly and sufficiently apprise those whose rights may be affected of the nature and character of the action proposed." *Sellers v. City of Asheville*, 33 N.C. App. 544, 549, 236 S.E. 2d 283, 286 (1977). In *Sellers* three notices were published by the Town of Asheville. The first and second notices only stated that there was to be a public hearing pursuant to N.C.G.S. § 160A-

364 on a named city ordinance. The third notice, only one day prior to the hearing, stated that the ordinance at issue affected "the territory beyond the corporate limits for a distance of one mile in all directions." *Id.* at 546, 236 S.E. 2d at 285.

In the case *sub judice* the following notice was published in the *Garner News* on 25 August and 1 September 1982:

> Notice is hereby given that the Garner Board of Aldermen and the Garner Planning Board will conduct a joint hearing on Tuesday, September 7, 1982, at 7:30 p.m. in the Garner Town Hall to consider proposed zonings and proposed long-range land use plans within the area recently added to the Town's extraterritorial jurisdiction. This extraterritorial jurisdiction extension encompasses an area of approximately 1 mile in width ringing the present Garner ETJ between Jones Sausage Road east and south across U.S. 70 and White Oak Road to N.C. 50. The boundaries of this area may be roughly described, starting at Jones Sausage Road and as Auburn Church Road and Big Branch south to U.S. 70, from U.S. 70 along lot lines to White Oak and south Jones Sausage Road; then along Clifford Road and lot lines south of the trailer park off New Bethel Church Road to N.C. 50, and then north along N.C. 50 to present jurisdictional limits, an area of approximately 4236 acres. This extension has been approved by both the Town and Wake County.
>
> Those persons interested in these items are invited to attend the hearing. Additional information is on file in the Planning Office at Garner Town Hall and is available during regular office hours.

We conclude that the notice in the case *sub judice* is distinguishable from the notice in the *Sellers* case, and we hold that there was sufficient notice of the public hearing on 7 September to apprise those who might have been affected of the nature and character of the ETJ zoning proposals. *See Sellers*, 33 N.C. App. 544, 236 S.E. 2d 283; *see also Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E. 2d 527 (1978).

[2] Plaintiffs also contend that even if the meeting of 7 September 1982 were given proper public notice, the subsequent meetings of the Town Planning Board, and Board of Aldermen, were not given sufficient public notice.

In *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E. 2d 352 (1971), several developers petitioned the City of Charlotte for a rezoning of property they owned from single-family residence zoning to a commercial zoning which would allow the developers to construct a shopping center. Homeowners adjacent to the developers' property filed a protest petition with the City, and a joint public hearing was held before the Charlotte-Mecklenburg Planning Commission and the City Council.

Part of the developers' proposal included a "buffer zone" consisting of a lake and walkways to be placed between the shopping center and the homeowners' property. The homeowners rejected the idea of a shopping center completely and were not appeased by the proposed buffer zone.

After the public hearing, the Planning Commission requested that the developers alter their plan to increase the size of the buffer zone. The developers complied with this request, and at a later, regularly scheduled meeting held without public notice, the City Council approved the modified petition. *Id.* The homeowners subsequently brought suit claiming, *inter alia*, that there had been insufficient notice of the City Council's meeting. In addressing that issue, our Supreme Court stated:

> [T]he general rule as applied to Chapter 160, Article 14, is that there must be compliance with the statutory requirements of notice and public hearing in order to adopt or amend zoning ordinances. Ordinarily, if the ordinance or amendment as finally adopted contains alterations substantially different (amounting to a new proposal) from those originally advertised and heard, there must be additional notice and opportunity for additional hearing. However, no further notice or hearing is required after a properly advertised and properly conducted public hearing when the alteration of the initial proposal is insubstantial. Alteration of the initial proposal will not be deemed substantial when it results in changes favorable to the complaining parties. Moreover, additional notice and public hearing ordinarily will not be required when the initial notice is broad enough to indicate the possibility of substantial change and substantial changes are made of the same fundamental character as contained in the notice, such changes resulting from objections, debate and discussion at the properly noticed initial hearing.

Heaton, 277 N.C. at 518, 178 S.E. 2d at 359-360.

It is our opinion that the changes in the overall zoning of the ETJ made by the Garner Board of Aldermen upon the recommendation of the Town Planning Board were not substantial. The vast majority of the over 4,000 acres affected by the territorial extension were zoned R-40. For this Court to conclude that a town must zone only one zoning classification in an area the size involved here, and not have the ability to make exceptions from the general zoning classification proposed, would totally ignore the exigencies of municipal zoning.

This result is not at all harsh to the plaintiffs. At the conclusion of the public hearing on 7 September 1982, Garner Mayor Doughtry stated that the matter of zoning the ETJ would be referred to the Planning Board for a recommendation. Every landowner affected by the ETJ was informed by letter that the Planning Board would make a recommendation to the Board of Aldermen based upon the public hearing. It was clear from the letter, and the hearing, that the decision as to the zoning of the ETJ was not final at the close of the hearing. Plaintiffs should have been on notice that the ultimate decision was to be made at a later time.

Also, the fact that plaintiffs were given a full public hearing on their petition to "down-zone" Raynor's property in March of 1987 further shows that plaintiffs have not been denied the opportunity to remedy their own lack of diligence.

We conclude that the nine-month statute of limitations under N.C.G.S. § 160A-364.1 bars plaintiffs' action and thus summary judgment for the defendants was proper.

Affirmed.

Judges GREENE and LEWIS concur.

IN RE FORECLOSURE OF FIRST RESORT PROPERTIES

[94 N.C. App. 99 (1989)]

IN THE MATTER OF: THE FORECLOSURE OF THE DEED OF TRUST EXECUTED BY FIRST RESORT PROPERTIES OF N.C., INC. TO SAMUEL H. POOLE, TRUSTEE, AND CHARLES BILLINGS AND WIFE, JANICE BILLINGS, BENEFICIARIES, RECORDED IN BOOK 362, PAGE 546, MOORE COUNTY REGISTRY

No. 8820SC1022

(Filed 6 June 1989)

Uniform Commercial Code § 34— checks from bank to attorney—endorsement payable to petitioner—endorsement by petitioner in blank—payment of underlying promissory notes

Where petitioner made loans to a corporation and received notes of $79,300 and $90,000 secured by deeds of trust on two condominium units; a savings and loan association transferred funds in the amount of $169,300 to a bank; the bank issued checks for $79,300 and $90,000 payable to an attorney; annotations on the checks stated that they were issued in payment of the amounts due on the condominium loans; the attorney endorsed both checks payable to the debtor corporation; the checks were then endorsed by the corporation's vice-president payable to the order of petitioner; petitioner endorsed the checks in blank; petitioner received a check for $64,300 and a deposit slip showing a $105,000 deposit into the corporation's account; and the notes and deeds of trust have not been canceled, it was *held* that (1) the checks were negotiable instruments, (2) petitioner was a holder of the checks, (3) the checks were taken as full payment for the entire debt evidenced by the promissory note, (4) there was payment in full of the promissory note obligations under N.C.G.S. § 25-3-802(1)(a), and (5) actions to foreclose the deeds of trust were thus properly dismissed.

Judge GREENE dissenting.

APPEAL by petitioners from *Helms (William H.), Judge*. Order entered 6 June 1988 in Superior Court, MOORE County. Heard in the Court of Appeals 13 April 1989.

Jack E. Carter for petitioners-appellants Charles and Janice Billings.

Parham, Helms and Kellam, by Raymond L. Lancaster and William H. Trotter, Jr., for respondent-appellee Berkeley Federal Savings and Loan Association.

LEWIS, Judge.

This appeal, No. 8820SC1022, concerns a proceeding to foreclose on a Deed of Trust securing a debt plus interest of $79,300.00. A companion appeal, No. 8820SC1023, relates to a proceeding to foreclose on a Deed of Trust securing a debt plus interest of $90,000.00. On behalf of petitioners, the substitute trustee petitioned the Clerk of Superior Court of Moore County for foreclosure of both Deeds of Trust. On 29 February 1988, the clerk entered an order allowing foreclosure on both Deeds of Trust. Berkeley Federal Savings and Loan Association and Charles Gordon Brown, trustee, gave notice of appeal to the superior court.

The parties submitted the following written stipulations, which apply to both Deeds of Trust, to the superior court:

> 1. That on February 1, 1984 Petitioners Charles and Janice Billings made loans to First Resort Properties of N.C., Inc. in the amount of of [sic] $59,300.00 and $70,000.00.
>
> 2. That in return for the money lent, First Resort gave Petitioners promissory notes in the amount of $79,300.00 and $90,000.00 respectively.
>
> 3. That the promissory note for $79,300.00 was secured by a Deed of Trust on a piece of real property located in Moore County, North Carolina known as unit 109 Foxgreen Villas Condominiums and now known as unit 309 Foxgreen Villas Condominiums; and the $90,000.00 loan was secured by a Deed of Trust on a piece of real property located in Moore County, North Carolina known as Unit 1 of Foxcroft Villas Condominiums and now known as Unit 235 Foxcroft Villas Condominiums.
>
> 4. That both Deeds of Trust were recorded in the Moore County Public Registry.
>
> 5. That Berkeley Federal Savings and Loan Association transferred funds in the amount of $169,300.00 to Mid-South Bank in Sanford, North Carolina and Mid-South Bank issued checks payable to James E. Holshouser, Jr., attorney, in the amount of $79,300.00 and $90,000.00.
>
> 6. That the front of the $79,300.00 check from Mid-South to Holshouser had been annotated by Mid-South Bank 'Payoff

of Unit 309'; and the front of the $90,000.00 check from Mid-South to Holshouser had been annotated 'Payoff of Unit 235'.

7. That James E. Holshouser, Jr. endorsed both checks payable to First Resort Properties, Inc., the debtor on both notes and Deeds of Trust.

8. That in the presence of Holshouser the two checks were endorsed by John Mitchell, Jr., Vice-president of First Resort Properties, Inc. payable to the order of Charles Billings.

9. That both checks contained the purported signature of Charles Billings and said signature has been analyzed by handwriting experts and the Court may find as a fact that said signatures are the signatures of Charles Billings.

10. That the $79,300.00 check and the $90,000.00 check were paid by Mid-South Bank on March 6, 1984.

11. That from the proceeds of the above-described checks, Charles Billings received an official check in the amount of $64,300.00 and a deposit was made to the account of First Resort Properties, Inc. in the amount of $105,000.00; both said transactions occurring on March 6, 1984.

12. That Charles Billings was furnished a copy of the deposit slip showing the deposit of $105,000.00 to the account of First Resort Properties, Inc. at the time he received the official check of $64,300.00.

13. That at all times Charles Billings was acting as agent for his wife Janice Billings with regard to any transaction surrounding this claim.

14. That the notes and Deeds of Trust dated February 1, 1984 have not been cancelled.

15. That the sole issue for the Court to determine is whether or not the endorsement of Charles Billings on the $79,300.00 and $90,000.00 checks constitute payment and satisfaction of the notes and Deeds of Trust dated February 1, 1984.

Based upon these stipulations, the promissory notes and the Deeds of Trust, the trial court made findings of fact and conclusions of law. On 6 June 1988, the trial court vacated the clerk's orders allowing foreclosure and dismissed both foreclosure actions. Petitioners appeal.

Petitioners bring forward three assignments of error. First, they contend the trial court erred in concluding the note had been paid in full in that there is no evidence to show the checks or their proceeds were received by petitioners. Second, they assign error to the court's conclusion that endorsement of the checks constitutes satisfaction of the indebtedness. Finally, plaintiffs contend the trial court erred in concluding the note was paid in full in that there is insufficient evidence to show the parties intended the underlying debt to be satisfied. We have reviewed petitioners' assignments of error and conclude the trial court's order should be affirmed.

Petitioners contend the Mid-South checks were not taken in satisfaction of the entire debt evidenced by the promissory notes. They contend the debts were satisfied only to the extent of $64,300.00 ($32,150.00 per note), the amount of the official check Charles Billings admits receiving. Respondent contends that Charles Billings' endorsement of the Mid-South checks, payable for the exact amount of the indebtedness and marked on the front as payment for the two condominium loans, evidences payment in full.

The North Carolina Uniform Commercial Code provides:

> Any writing to be a negotiable instrument within [Article Three] must
>
> (a) be signed by the maker or drawer; and
>
> (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article; and
>
> (c) be payable on demand or at a definite time; and
>
> (d) be payable to order or to bearer.

G.S. 25-3-104(1). Article Three also "applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this article but which is not payable to order or to bearer." G.S. 25-3-805. The checks issued by Mid-South Bank payable to James E. Holshouser, Jr. are negotiable instruments within the scope of Article Three. "Unless otherwise agreed where an instrument is taken for an underlying obligation . . . the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against

the underlying obligor." G.S. 25-3-802(1)(a). Therefore, if the Mid-South checks were taken to pay off the two promissory notes on the condominiums, the debt on the two promissory notes is discharged pro tanto, to the extent of payment made.

"The liability of any party is discharged to the extent of his payment or satisfaction to the holder." G.S. 25-3-603(1). To the extent payment was made to a holder of the Mid-South checks, liability on the checks is discharged. Charles Billings was a holder of the Mid-South checks. The checks were endorsed to him and he endorsed the checks in blank. Annotations on each check note that the check was in payment of the amounts due on the condominium loans. Petitioners contend that since there is no stipulation that Charles Billings was ever in possession of the Mid-South checks, the trial court could not conclude he was a holder of the checks. We disagree. It is true that "[i]t is the fact of possession which is significant in determining whether a person is a holder, and the absence of possession defeats that status." *In re Foreclosure of Connolly v. Potts*, 63 N.C. App. 547, 550, 306 S.E. 2d 123, 125 (1983). However, the stipulations show that Charles Billings signed the backs of the Mid-South checks and received a check for $64,300.00 and a deposit slip showing a $105,000.00 deposit into First Resort Properties, Inc.'s account. The evidence is sufficient to show that Charles Billings was a holder of the checks and that he received payment on the checks. Therefore, there has been payment in full of the underlying obligation pursuant to G.S. 25-3-802(1)(a). The underlying debts have been discharged and the foreclosure actions were properly dismissed.

The judgment of the trial court is affirmed.

Affirmed.

Judge ARNOLD concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The trial judge conducted a hearing, without a jury, as required by N.C.G.S. Sec. 45-21.16(d) (1984). Pursuant to N.C.G.S. Sec. 1A-1, Rule 52(a)(1) (1983), the trial court entered findings of fact entirely consistent with the stipulated findings submitted to

the court. Based on those findings, the court entered the following conclusion:

> 1. That the receipt and endorsement by Charles Billings of the two (2) official Mid-South checks in the amounts of $90,000.00 and $79,300.00 respectively, constituted payment in full of the debts evidenced by the Notes secured by the Deeds of Trust referenced hereinabove, which Petitioners have sought to foreclose by this proceeding.

As the findings of fact are based on stipulated facts, they are supported by competent evidence in the record and are therefore conclusive on appeal. *See Heating & Air Conditioning Assoc., Inc. v. Myerly*, 29 N.C. App. 85, 89, 223 S.E. 2d 545, 548, *disc. rev. denied*, 290 N.C. 94, 225 S.E. 2d 323 (1976). However, as the court's conclusion involved legal questions, this court must determine *de novo* whether the undisputed facts are legally sufficient to support the conclusion. *Jones v. Andy Griffith Products, Inc.*, 35 N.C. App. 170, 174, 241 S.E. 2d 140, 142, *disc. rev. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978) (appellate court must determine if facts are "legally sufficient to support the conclusion"); *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E. 2d 761, 783 (1973) (conclusion involving interpretation of contract relating to intention of parties is a question of law, "subject to review on appeal"); *see Eaton v. Courtaulds of North America, Inc.*, 578 F. 2d 87, 90 (5th Cir. 1978) (conclusion of trial court as to contract interpretation is to be "considered afresh by [the appellate court] as a matter of law").

Without question, pursuant to the Uniform Commercial Code, the *checks* issued by the bank were negotiable instruments, Billings was the holder of those *checks* and liability on the *checks* was discharged upon payment of those checks by the issuing bank. That, however, does not resolve the question of whether the checks were "taken" as full payment for the underlying obligation on the notes and deed of trust. N.C.G.S. Sec. 25-3-802(1)(a) (1986) (where an instrument is taken for an underlying obligation, the obligation is pro tanto discharged). That question is not answered by the Uniform Commercial Code and can only be resolved by resort to traditional contract law. Under contract law, payment occurs where there is a delivery of money or its equivalent and acceptance "with intent in whole or in part" to pay the debt. *Wilkerson v. Metropolitan Life Ins. Co.*, 206 N.C. 882, 887, 175 S.E. 172, 174 (1934). On this issue, the debtor, First Resort Properties, had the burden of proof.

70 C.J.S. *Payment* Sec. 69, p. 57 (1987) ("burden of proving payment is on the party who alleges it").

In reviewing the undisputed facts, Billings' endorsement of the checks, with their notations, does not in my opinion rebut the presumption of nonpayment arising from Billings' possession of the uncanceled notes and deed of trust. *See* 70 C.J.S. *Payment* Sec. 73, p. 62 (1987) (presumption of nonpayment created by creditor's possession of the uncanceled note and deed of trust). Furthermore, the facts reveal Billings only received $64,300.00 of the $169,300.00 owed on the notes. Accordingly, I am of the opinion that the undisputed facts support a conclusion that full payment was *not* made and accepted and I would reverse the order of the trial court and allow the foreclosure proceeding to proceed. *See Continental Casualty Co. v. Funderburg*, 264 N.C. 131, 134, 140 S.E. 2d 750, 753 (1965) (Supreme Court rejected conclusion of trial court relating to intention of parties and entered different conclusion).

DELLINGER SEPTIC TANK CO., INC. v. GRIFFIN M. SHERRILL, ROGER G. SHERRILL, AND LONNIE R. SHERRILL, D/B/A G. M. SHERRILL & SONS, AND ROLON CONSTRUCTION CO., INC.

No. 8827SC940

(Filed 6 June 1989)

1. **Fraudulent Conveyances § 3.3— conveyance with intent to defraud creditor—other indebtedness—relevant**

The trial court did not err in an action to set aside a conveyance of personal property on the grounds that it was made with intent to defraud plaintiff by admitting testimony concerning indebtedness between plaintiff and defendants other than a 1981 judgment, which was the only debt alleged in this complaint. The existence of other debts is relevant to the issue of intent and the financial circumstances of the debtor at the time of the conveyance are relevant to the determination of whether the conveyance was fraudulent. N.C.G.S. § 39-15, N.C.G.S. § 8C-1, Rule 403.

2. **Fraudulent Conveyances § 3.4— conveyance with intent to defraud creditor—evidence sufficient**

The trial court correctly denied defendants' motions for a directed verdict and judgment n.o.v. in an action to set aside

a conveyance of personal property on the grounds that it was made with intent to defraud plaintiff where the question of voluntary transfer is superfluous because defendant Lonnie Sherrill is both a grantor and the president of the grantee corporation and would necessarily have had notice of any intent attributed to the grantor, and there was sufficient evidence to support the jury's finding that the conveyance was made with the actual intent to defraud plaintiff in that plaintiff's evidence tended to show that defendants owed several debts to plaintiff which they were unable to pay. Although the jury did not specifically find that defendants did not retain sufficient property to pay their debts, the evidence allowed the jury to infer that defendants actually intended to defraud creditors.

APPEAL by defendants from *Lewis (Robert D.), Judge.* Judgment entered 23 March 1988 in Superior Court, LINCOLN County. Heard in the Court of Appeals 22 March 1989.

Plaintiff instituted this action to set aside a conveyance of personal property on the grounds that the conveyance was made with the intent to defraud plaintiff. On 4 March 1981, plaintiff obtained a judgment against the individual defendants in the amount of $16,552.58. At that time the individual defendants were engaged in the business of installing septic tanks under the name of G. M. Sherrill & Sons. In connection with their business, defendants owned the following equipment: a 1977 GMC truck, a 1976 John Deere backhoe and loader, a 1973 Caterpillar loader, a 1979 Ford truck, and a 1974 Rogers trailer.

Plaintiff attempted to collect on the judgment in 1981 but did not succeed. Thereafter, defendants Griffin M. Sherrill and Roger G. Sherrill left the business of G. M. Sherrill & Sons. In December 1985, defendant Rolon Construction Co., Inc. (hereinafter "Rolon") was incorporated. Defendant Lonnie R. Sherrill is the president of Rolon. In January 1986, the equipment that had been owned in connection with G. M. Sherrill & Sons was transferred to Rolon. After a second unsuccessful attempt to collect on its judgment in May 1986, plaintiff filed this action to set aside the conveyance of the equipment to Rolon.

The case was tried before a jury which answered the submitted issues as follows:

1. Was anything of reasonable value given by Rolon Construction, Company, Inc. for the conveyances by GM Sherrill & Sons, to Rolon Construction on or about January 23, 1986?

Answer: No

2. Was the conveyance from GM Sherrill & Sons to Rolon Construction Company, Inc. made with the actual intent to defraud their creditor, Dellinger Septic Tank Co., Inc.?

Answer: Yes

3. If so, did Rolon Construction Company, Inc. have actual notice of the intent to defraud Dellinger Septic Tank Co., Inc.?

Answer: Yes

Based upon the jury's findings, the trial court concluded that the conveyance was fraudulent and entered judgment declaring the conveyance to be void and of no effect. Defendants appeal.

Thomas J. Wilson, Jr. for plaintiff-appellee.

James W. Stancil for defendant-appellants.

PARKER, Judge.

Defendants first assign error to the admission of certain testimony over their objection and the trial court's denial of their motion to strike the testimony. Defendants' remaining assignments of error are directed to the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict.

[1] Plaintiff's only witness was its president, Gary Dellinger. The testimony to which defendants objected concerned defendants' indebtedness to plaintiff. Defendants objected to and moved to strike Mr. Dellinger's testimony that plaintiff originally filed a lawsuit against defendants to recover the sum of $32,000; that plaintiff had taken a backhoe as part payment for defendants' debt; that defendants had allowed plaintiff to hold a tractor as collateral on the debt; and that defendants owed approximately $5,000 on an account with plaintiff which plaintiff unsuccessfully tried to collect in December 1985.

Defendants contend that the testimony in question is irrelevant and inadmissible because it concerns indebtedness other than the judgment plaintiff obtained in 1981, which was the only debt alleged

in plaintiff's complaint. Defendants also contend that the testimony should have been excluded under Rule 403 of the N.C. Rules of Evidence because its probative value is outweighed by the danger of unfair prejudice. These contentions are without merit.

A conveyance is void if it is made with the intent to delay, hinder, or defraud creditors. G.S. 39-15. There are various methods by which a creditor may prove that a conveyance is fraudulent. *See Bank v. Evans*, 296 N.C. 374, 376-77, 250 S.E. 2d 231, 233 (1979). Depending upon the method of proof, a creditor seeking to void a debtor's conveyance may be required to prove either (i) that the debtor did not retain property sufficient to pay his debts existing at the time of the conveyance or (ii) that the debtor conveyed the property with the actual intent to defraud creditors. *Id.* Thus, the financial circumstances of the debtor at the time of the conveyance are relevant to the determination of whether the conveyance is fraudulent. *See Bank v. Lewis*, 201 N.C. 148, 156, 159 S.E. 312, 317 (1931). General Statute 39-17 provides in pertinent part: "the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred . . . ."

Therefore, any indebtedness of defendants in this case at the time of the conveyance is a relevant circumstance. Plaintiff's evidence tended to show that defendants owed debts to plaintiff other than the 1981 judgment and that they had not been able to pay those debts. Plaintiff's failure to allege the debts in its complaint is of no consequence. A party is not required to plead evidence. *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 629, 304 S.E. 2d 164, 181 (1983). Furthermore, the existence of the other debts is relevant on the issue of defendants' intent, and intent may be proved by evidence of "other acts" of defendants. Rule 404(b), N.C. Rules Evid. In this regard, Mr. Dellinger's testimony that he tried to collect the $5,000 owing on defendants' account shortly before the conveyance occurred is especially relevant to show defendants' intent in making the conveyance.

Having found the testimony in question to be relevant, we find no error in the trial court's failure to exclude it under Rule 403 of the N.C. Rules of Evidence. The evidence was not unfairly prejudicial and the trial court did not abuse its discretion in failing

to exclude it. *See State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986).

[2] Defendants next contend that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict. Both motions present the same question: Whether the evidence, taken in the light most favorable to plaintiff, is sufficient as a matter of law to justify a verdict in plaintiff's favor. *Perry v. Williams*, 84 N.C. App. 527, 528, 353 S.E. 2d 226, 227 (1987). In determining the sufficiency of the evidence, plaintiff is entitled to the benefit of every reasonable inference that can be drawn from the evidence and all conflicts must be resolved in plaintiff's favor. *Id.* Defendants contend that there was not sufficient evidence to support the jury's findings that (i) Rolon did not give anything of reasonable value for the conveyance of the equipment and (ii) the conveyance was made with the actual intent to defraud plaintiff.

The question of whether Rolon gave anything of reasonable value for the conveyance is determinative of the element of voluntariness. A conveyance is voluntary if it is not supported by valuable consideration. *Bank v. Evans*, 296 N.C. at 378, 250 S.E. 2d at 234. If a conveyance is voluntary, it is also fraudulent when either (i) the grantor does not retain sufficient property to pay existing debts or (ii) the conveyance is made with the actual intent to defraud creditors. *Id.* at 376-77, 250 S.E. 2d at 233. Even if supported by valuable consideration, however, a conveyance is fraudulent if the grantor actually intended to defraud creditors and the grantee participated in or had notice of the grantor's intent. *Id.*

The jury in this case found that the conveyance was both voluntary and made with actual intent to defraud of which the grantee had notice. Although there was evidence tending to show that defendants did not retain sufficient property to pay their existing debts, this issue was not submitted to the jury. Whether defendants retained sufficient property is a jury question. *See Supply Corp. v. Scott*, 267 N.C. 145, 153-54, 148 S.E. 2d 1, 6-7 (1966). Therefore, the jury's finding of actual intent is essential to plaintiff's success in this case.

Defendants concede in their brief that, because defendant Lonnie Sherrill is both a grantor and the president of the grantee corporation, the grantee would necessarily have notice of any intent attributed to the grantor. Thus, if the evidence is sufficient to sustain the finding of actual intent, the trial court's judgment is

correct without regard to whether the conveyance was voluntary. Accordingly, the question of voluntariness is superfluous in the context of this case, and we need not consider the sufficiency of the evidence to support the jury's finding on that issue.

The only question remaining is whether there was sufficient evidence to support the jury's finding that the conveyance was made with the actual intent to defraud plaintiff. Questions of fraudulent intent ordinarily go to the jury on circumstantial evidence. *Smith-Douglass v. Kornegay; First-Citizens Bank v. Kornegay*, 70 N.C. App. 264, 266, 318 S.E. 2d 895, 897 (1984). Intent to defraud creditors may be shown by the acts and conduct of the parties from which the intent reasonably may be inferred. *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 130, 252 S.E. 2d 826, 833 (1979).

In the present case, the evidence was amply sufficient to support the jury's verdict. As we have already noted, plaintiff's evidence tended to show that defendants owed several debts to plaintiff which they were unable to pay. Although the jury did not specifically find that defendants did not retain sufficient property to pay their debts, this evidence allowed the jury to infer that defendants actually intended to defraud creditors. *See Distributing Corp. v. Schofield*, 44 N.C. App. 520, 528-29, 261 S.E. 2d 688, 693 (1980); *Edwards v. Bank*, 39 N.C. App. 261, 272, 250 S.E. 2d 651, 659 (1979). Such an inference is also supported by plaintiff's evidence that it attempted to collect a $5,000 account balance shortly before the conveyance occurred.

In addition, although we have held that the issue of voluntariness is not essential in this case, the consideration for the conveyance is another circumstance from which intent may be inferred. Defendants contend that there was valuable consideration in that Rolon agreed to assume defendants' indebtedness to a third party in the amount of $93,000. This indebtedness was evidenced by a promissory note which was secured by the equipment conveyed.

Assumption of a debt may constitute adequate consideration for a conveyance, but the grantee's inability to pay the debt renders the consideration inadequate. *Distributing Corp. v. Schofield*, 44 N.C. App. at 527, 261 S.E. 2d at 693. In this case, the note calls for monthly payments of $888.76, but Rolon is not making regular payments on the note. The noteholder, who is related to the individual defendants, is allowing Rolon to pay off the debt by do-

ing work for him. This arrangement, together with the relationship of all parties to the transaction, is further evidence from which the jury could reasonably infer fraudulent intent. *See Nytco Leasing v. Southeastern Motels*, 40 N.C. App. at 130, 252 S.E. 2d at 833. Accordingly, the trial court correctly denied defendants' motions for directed verdict and judgment notwithstanding the verdict.

For the foregoing reasons, we find no error in the proceedings below.

No error.

Judges PHILLIPS and COZORT concur.

WILSON HEIGHTS CHURCH OF GOD, PLAINTIFF v. OMEGA R. AUTRY, MILDRED B. HOUGH, LILLIE ANN ELLIOT, CARY F. MAXWELL, EDWARD ANDREW LINDSAY, LLOYCE AUTRY, INDIVIDUALLY, AND FREELANDER, INC., DEFENDANTS v. JESSE L. MOSS, ADDITIONAL DEFENDANT; OMEGA R. AUTRY, THIRD PARTY PLAINTIFF v. DEXTER CARR, INDIVIDUALLY, D/B/A REVELATIONS COMPANY, THIRD PARTY DEFENDANT

No. 8826SC782

(Filed 6 June 1989)

1. **Appeal and Error § 6.2— summary judgment settling fewer than all claims of all parties—appeal proper**

Summary judgment entered by the trial court in favor of third party defendant was immediately appealable, though it settled fewer than all the claims of all the parties and the trial judge failed specifically to certify that there was no just reason for delay, where the issues giving rise to third party plaintiff's claim against third party defendant grew solely from her exclusive dealings with him and were completely separate from those between plaintiff and defendant.

2. **Equity § 2— laches—summary judgment improper where genuine issue of fact existed**

The trial court erred in entering summary judgment for defendant based on his affirmative defense of laches where plaintiff filed her claim within the applicable statute of limitations, and defendant failed to assert or provide any supporting

evidence that he suffered any inequity or that plaintiff delayed unnecessarily in filing her claim.

3. **Brokers and Factors § 6.3— services rendered by broker—improper practices of broker—action to recover fees not barred**

The fact that a broker has rendered the agreed upon services to a prospective borrower will not estop the borrower from seeking recovery under the provisions of N.C.G.S. § 66-111; therefore, the trial court erred in entering summary judgment for defendant on the ground that plaintiff was estopped from contesting any compensation which she had paid to defendant because she had received the benefits of her dealings with him.

4. **Rules of Civil Procedure § 56— summary judgment motion hearing—unpled affirmative defenses heard for first time—no notice to plaintiff**

While unpled affirmative defenses may be heard for the first time during a summary judgment motion hearing, both parties must be aware of the defense. There was no evidence that plaintiff had any notice of defendant's defense that plaintiff was not the real party in interest, and the trial court therefore should not have considered such defense.

APPEAL by third party plaintiff from *Snepp (Frank W., Jr.), Judge*. Judgment entered 5 February 1988 and Order entered 25 March 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 March 1989.

Plaintiff, Wilson Heights Church of God (Wilson Heights), filed an action against defendants, trustees of Wilson Heights, seeking monetary, injunctive and declarative relief and alleging that defendants willfully and without authority transferred real property owned by plaintiff to individual defendant and third party plaintiff, Omega Autry (Autry), who in turn used the property as collateral for a loan granted by defendant, Freelander, Inc. (Freelander). Autry by way of answer and counterclaim alleged that the property was transferred and the loan was secured in an effort to pay off a tax lien on plaintiff's property and that plaintiff was thus liable for a pro rata share of the loan principal and interest payments. Additionally, Autry filed a third party claim against loan broker, Dexter Carr (Carr) d/b/a Revelations, Inc. Autry charged Carr with unfair and deceptive trade practices under G.S. 75-1.1 and violations of various disclosure and registration requirements for loan brokers

under G.S. 66-106 through 66-109. Carr answered alleging *inter alia* laches and estoppel.

On 5 February 1988, the trial court denied Autry's summary judgment motion as to Carr but granted Carr's summary judgment motion as to Autry. Autry's subsequent motions to amend, to set aside judgment and for relief from judgment were denied. Autry appeals.

R. Lee Myers and G. Patterson Williams, III, for Third Party plaintiff-appellant.

No appearance for Dexter Carr, Third Party defendant.

LEWIS, Judge.

Autry brings forward two assignments of error. She first contends that the trial court erred in denying her motion for summary judgment and granting summary judgment in favor of third party defendant Carr. Autry also contends that the trial court erred in denying her subsequent motions to amend, to set aside the judgment and for relief from judgment.

[1] Initially, we note that the summary judgment entered for defendant by Judge Snepp involves less than all the parties or claims arising in this action. Thus, the first issue we must address and one not raised by either party is whether summary judgment granted only as to Carr is immediately appealable or subject to dismissal under G.S. 1A-1, Rule 54(b). G.S. 1A-1, Rule 54(b) provides in pertinent part:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties *only if* there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review

> either by appeal or otherwise except as expressly provided by these rules or other statutes.

(Emphasis added.) In the case before us the trial judge failed to specifically certify that there was "no just reason for delay" for appellate review, thus the appeal is considered interlocutory. *Federal Land Bank v. Lieben*, 86 N.C. App. 342, 357 S.E. 2d 700 (1987). However, our courts have held that actions "not properly certified by the trial judge pursuant to Rule 54(b) are nonetheless immediately appealable if denial of an immediate appeal would affect a substantial right and work an injury to the appellant. G.S. 1-277." *Harris v. DePencier*, 52 N.C. App. 161, 163, 278 S.E. 2d 759, 760 (1981).

The "substantial right test" for appellate review requires the court to consider the particular facts of the case and the procedural context in which the order was entered. *Federal Land Bank, supra.* Here, the issues giving rise to Autry's claim against Carr grew solely from her exclusive dealings with him. She seeks damages for alleged statutory violations by Carr occurring in the course of these dealings. The primary lawsuit initiated by Wilson Heights involves the separate, unrelated dispute over the transfer and ownership of certain property. Under these facts, we believe a "substantial right" of plaintiff has been affected and is appealable under G.S. 1-277 and 7A-27. Summary judgment here denies plaintiff a trial on its claim against defendant and in effect determines the claim for defendant. *See Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976).

Having determined that the summary judgment entered by the court in favor of defendant is immediately appealable, we now hold that such a judgment was not proper in this case. 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). A party moving for summary judgment has the burden of showing that there is no triable issue of fact and that she is entitled to judgment as a matter of law. *Edwards v. Akion*, 52 N.C. App. 688, 279 S.E. 2d 894, *aff'd*, 304 N.C. 585, 284 S.E. 2d 518 (1981). A defendant may meet this burden by proving that an essential element of a plaintiff's claim is missing or that a plaintiff cannot surmount an affirmative defense which bars the claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). Carr has failed to meet his burden.

[2] Carr alleges in his answer the affirmative defenses of laches and estoppel. Neither defense entitles defendant to summary judgment in this case. Carr asserts that Autry waited more than two years to bring an action against him during which time she never once expressed dissatisfaction with his services. The applicable statute of limitations is three years. *See* G.S. 1-52(2). Autry allegedly sought Carr's services in the summer of 1985 and filed her third party claim in September of 1987 thus within the allotted time limitation. However, laches is an equitable remedy which defendant may properly assert even if the action was brought within the applicable period of time. *See McRorie v. Query*, 32 N.C. App. 311, 232 S.E. 2d 312, *disc. rev. denied*, 292 N.C. 641, 235 S.E. 2d 62 (1977). The court in *McRorie*, in addressing whether the defense of laches was proper in that case, noted:

> The question is primarily whether the delay in acting results in an inequity to the one against whom the claim is asserted. . . . Also to be considered is whether the one against whom the claim is made had knowledge of the claimant's claim and whether the one asserting the claim had knowledge or notice of the defendant's claim and had been afforded the opportunity of instituting an action.

Id. at 323, 232 S.E. 2d at 320. Carr has failed to assert or provide any supporting evidence that he suffered any inequity or that Autry delayed unnecessarily in filing her claim; thus a genuine issue of fact remains as to whether laches would successfully bar her claim.

[3] Carr further asserts that because Autry received the benefits of her dealings with him, she is estopped from contesting any compensation she paid to him. We do not agree. Autry seeks among other things in her complaint reimbursement of the $6,000.00 commission paid to Carr due to his alleged violations under G.S. 66-106 through 66-109. This remedy is allowed under G.S. 66-111(a) which states that "the prospective borrower may void the contract, and shall be entitled to receive from the broker all sums paid to the broker, and recover any additional damages." This language obviously contemplates that a borrower has received some form of "benefit" or service for which a broker received compensation. Therefore it logically follows that the fact that a broker did render the agreed upon services to a prospective borrower would not estop the borrower from seeking recovery under the provisions of G.S. 66-111. To hold otherwise would render meaningless the

language of that statute. Carr has failed to meet his burden of establishing affirmative defenses which would bar recovery.

[4] Autry contends in her brief that the actual basis for the trial court's granting summary judgment to Carr was that she was not a real party in interest. Although the court's judgment did not state the specific grounds for dismissal of Autry's claim, we are of the opinion that summary judgment on the ground alleged by plaintiff would not be proper in this case. Carr did not raise the "real party" issue in his pleadings. Autry argues that in fact the first time Carr raised the issue was during the motion hearing. While unpled affirmative defenses may be heard for the first time during the summary judgment motion hearing, both parties must be aware of the defense. *Gillis v. Whitley's Discount Auto Sales*, 70 N.C. App. 270, 319 S.E. 2d 661 (1984); *Dickens v. Puryear*, 45 N.C. App. 696, 263 S.E. 2d 856 (1980), *rev'd on other grounds*, 302 N.C. 437, 276 S.E. 2d 325 (1981). There is no evidence Autry had any notice of this defense prior to the motion hearing. Given the apparent lack of notice as to Carr's "real party" defense and the provisions of Rule 56(c) which set forth the forms of evidence which the court may properly consider in determining if summary judgment is warranted, this defense should not have been considered, if it was, by the trial court in granting summary judgment.

Autry also assigns as error the trial court's denial of her motions to amend, to set aside the judgment and for relief from judgment. Given our determination that summary judgment for Carr was improper in the first instance, we do not reach this assignment.

Finally, Autry assigns as error the denial of her motion for summary judgment. Denial of summary judgment is interlocutory in nature and not appealable under G.S. 1-277 and 7A-27 unless a substantial right of plaintiff is affected if appeal is not heard before final judgment. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92, --- S.E. 2d --- (1980). Since plaintiff here will ultimately have the opportunity to have her claim heard at trial, we find Autry's appeal on this issue interlocutory and dismiss this portion of her appeal.

For the reasons stated herein the court's summary judgment in favor of Carr is reversed and Autry's appeal of the court's denial of her motion for summary judgment is dismissed.

Reversed in part; dismissed in part.

Chief Judge HEDRICK and Judge WELLS concur.

CITY OF WILSON v. CAROLINA BUILDERS OF WILSON, INC.

No. 887DC669

(Filed 6 June 1989)

1. **Negligence § 2— negligence arising from breach of contract— absence of personal or property injury**

An alleged breach of contract by plaintiff city in underbilling defendant for electricity could not serve as a basis for defendant's counterclaim premised on negligence where the alleged breach neither resulted in personal injury to defendant nor physical injury to defendant's property.

2. **Municipal Corporations § 4.4— underbilling for utilities—collection of correct amount—validity of ordinance**

An ordinance allowing a city to collect any deficiencies in utility payments due to underbillings for a maximum period of twelve months was valid on its face.

3. **Municipal Corporations § 4.4— underbilling for utilities—collection of correct amount—offset for negligence not available**

A counterclaim based on negligence is not available to offset a municipality's recovery for deficient utility payments where the deficiency is caused by the utility's underbilling the customer.

APPEAL by plaintiff from *Sumner (Quentin T.), Judge.* Judgment entered 28 March 1988 in District Court, WILSON County. Heard in the Court of Appeals 24 January 1989.

Plaintiff, a municipal corporation organized under the laws of North Carolina, instituted this civil action to recover charges for electricity furnished to defendant. Plaintiff is the sole supplier of electricity within the city limits of the City of Wilson. In September 1987 plaintiff discovered that it had been billing defendant for its electricity at an incorrect rate. The multiplier used on defendant's meter was a multiplier of 40 when the actual multiplier

should have been 80. As a result, defendant had been billed at one-half the rate which it should have been paying. Upon discovering the mistake, plaintiff forwarded a corrected bill to defendant. Defendant refused to pay.

Defendant denied liability and counterclaimed for damages, alleging plaintiff's negligence and unfair trade practices. Defendant also subsequently added a count for gross negligence to its counterclaim. On account of amendments to the complaint reducing the amount at issue below ten thousand dollars, defendant's motion to transfer the action from Superior Court to District Court was allowed. After numerous motions and pleadings, the court had before it for consideration (i) plaintiff's motion for summary judgment on its complaint, (ii) plaintiff's motion for judgment on the pleadings on defendant's counterclaim, (iii) defendant's motion for summary judgment on its counterclaim, and (iv) plaintiff's motion to continue hearing on defendant's summary judgment motion.

After hearing, the court granted plaintiff's motion for summary judgment on its claim, denied plaintiff's motion for a continuance, denied plaintiff's motion for judgment on the pleadings as to defendant's counterclaim and granted defendant's motion for summary judgment on its counterclaim. From the denial of its motion for continuance and from the allowance of summary judgment on defendant's counterclaim, plaintiff appeals.

Rose, Jones, Rand & Orcutt, P.A., by Bobby F. Jones and James P. Cauley, III, for plaintiff-appellant.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson, for defendant-appellee.

Poyner & Spruill, by John R. Jolly, Jr., Nancy Bentson Essex, and Mary Beth Johnston, for Electricities of North Carolina, Inc., amicus curiae.

North Carolina League of Municipalities, by General Counsel S. Ellis Hankins, and Assistant General Counsel Laura L. Kranifeld, amicus curiae.

PARKER, Judge.

Plaintiff brings forward four assignments of error on appeal. First, plaintiff asserts the trial court erred in denying plaintiff's motion for judgment on the pleadings and granting summary

judgment for defendant on its counterclaim because plaintiff was entitled to judgment as a matter of law. Second, plaintiff contends the trial court erred in granting summary judgment for defendant on its counterclaim because defendant had not demonstrated its entitlement to summary judgment and because genuine issues of material fact exist. Finally, plaintiff asserts the trial court abused its discretion in denying plaintiff's motion for a continuance. After review, we agree the trial court erred in granting summary judgment on defendant's counterclaim and reverse.

[1] Plaintiff first contends that defendant's counterclaim premised on negligence cannot lie against plaintiff. Defendant asserts that in a cause of action for tort, a contract between the parties creates "the relation out of which arises the common-law duty to exercise ordinary care." *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E. 2d 893, 898 (1955). The North Carolina courts have only recognized breach of contract as the basis for an action in tort where a promisor's negligent or willful act or omission in the course of performance of the contract results in personal injury or physical damage to property. *Ports Authority v. Roofing Co.*, 294 N.C. 73, 81-82, 240 S.E. 2d 345, 350-51 (1978). The decisions fall into four categories:

> (i) injury to the person or property of someone other than the promisee;
>
> (ii) injury to the property of the promisee, other than the property which was the subject of the contract, or personal injury to the promisee;
>
> (iii) loss of, or damage to, the promisee's property which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm; and
>
> (iv) willful injury to or conversion of the property of the promisee, which was the subject of the contract, by the promisor.

See id. In the present case plaintiff's alleged breach of contract, its underbilling of defendant, neither resulted in personal injury to defendant nor physical injury to defendant's property. Therefore, defendant's cause of action, if any, cannot properly sound in tort.

[2] Plaintiff next argues that to allow the counterclaim to affect plaintiff's recovery violates the legislative intent expressed in the Wilson City ordinance. Wilson City Ordinance 31-11 (as amended

3 March 1988) allows the municipality to collect any deficiencies in utility payments due to underbillings for a maximum period of twelve months. Ordinances which are properly adopted are presumed to be valid and reasonable regulations. *Gene's Inc. v. Charlotte*, 259 N.C. 118, 121, 129 S.E. 2d 889, 892 (1963); *State v. Hundley*, 195 N.C. 377, 379-80, 142 S.E. 330, 331, 57 A.L.R. 506, 509 (1928). Nothing appearing of record suggests the ordinance was not properly adopted, and defendant does not challenge the adoption of the ordinance.

General Statute 160A-312 gives a municipality the authority to regulate by reasonable rules any public enterprise belonging to the municipality. *See also* G.S. 160A-314(a). A facility to produce or distribute electricity is within the definition of public enterprise. G.S. 160A-311. Since the legislature grants this regulative authority to the municipality, a municipality in promulgating such regulations acts merely as an agent of the General Assembly. *Candler v. Asheville*, 247 N.C. 398, 101 S.E. 2d 470 (1958). The courts cannot inquire into the motives which prompted a municipality to enact an ordinance which is valid on its face, *Clark's v. West*, 268 N.C. 527, 530, 151 S.E. 2d 5, 7-8 (1966); therefore, the court cannot frustrate the operation of such an ordinance by judicial action.

[3] Plaintiff also argues that the trial court erred in granting defendant's offset because to allow defendant an offset is prohibited preferential treatment. Public utilities, including utilities owned by cities, may not discriminate in the distribution of services or the setting of rates. *Dale v. Morganton*, 270 N.C. 567, 571-72, 155 S.E. 2d 136, 141 (1967); *Wall v. City of Durham*, 41 N.C. App. 649, 659, 255 S.E. 2d 739, 745, *disc. rev. denied*, 298 N.C. 304, 259 S.E. 2d 918 (1979). As plaintiff notes, a majority of jurisdictions which have considered the issue of underbilling by utilities have held that to disallow recovery for underbilling would amount to discriminatory charges. *E.g., Corp. De Gestion Ste-Foy v. Fla. Power & Light*, 385 So. 2d 124 (Fla. App. 1980); *Sigal v. City of Detroit*, 140 Mich. App. 39, 362 N.W. 2d 886 (1985); *West Penn. Power Co. v. Nationwide Mutual Ins. Co.*, 209 Pa. Super. 509, 228 A. 2d 218 (1967); *Memphis Light, Gas & Water v. Auburndale Sch.*, 705 S.W. 2d 652 (Tenn. 1986); *Chesapeake & Potomac Tel. Co. of Virginia v. Bles*, 218 Va. 1010, 243 S.E. 2d 473 (1978). The issue of whether a claim of negligence is available to set off a municipality's recovery for deficient utility payments where the deficiency is caused by the utility's underbilling the customer is one of first

impression in North Carolina. Our courts' decisions regarding recovery of underbilled freight charges by common carriers, however, provide guidance on this issue.

In *R.R. v. Paving Co.*, 228 N.C. 94, 44 S.E. 2d 523 (1947), the defendant prepaid the plaintiff to transport 498 carloads of stone to a designated location. Later plaintiff sought to recover from defendant for switching charges which had not been included in the original cost. Defendant asserted that plaintiff should be estopped from recovering for these additional charges since defendant had used these costs in setting the contract price with its customer and had already received payment in full on the contract. In ruling that the common carrier could not be estopped from recovering the additional charges, the North Carolina Supreme Court stated:

> [U]nder well settled principles of law and in accord with the statutes enacted to prevent rebates and discrimination among shippers, and to provide equal and impartial service to all alike, it was the duty of the plaintiff as a common carrier of freight to collect the full amount at the correct rate for transportation, and where a lawful charge therefore was negligently omitted, or rate misquoted, resulting in undercharge, the carrier was equally bound to exhaust all legal remedies to require payment in full of the proper charge.

Id. at 97, 44 S.E. 2d at 525 (citations omitted). *See also Matthews v. Transit Co.*, 37 N.C. App. 59, 245 S.E. 2d 407, *disc. rev. denied*, 295 N.C. 647, 248 S.E. 2d 251 (1978).

In our view, the duty of a municipal electric company to serve the public in a non-discriminatory manner is analogous to the duty of a common carrier to provide "equal and impartial service." Accordingly, we hold that the municipality cannot be prevented from collecting the correct amount for the services provided to defendant, whether by a defense based on estoppel or a counterclaim based on negligence. *Accord Denver & Rio Grande Western R.R. v. Marty*, 143 Colo. 496, 353 P. 2d 1095, 88 A.L.R. 2d 1370 (1960) (counterclaim for damages not proper); *Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co.*, 275 Wis. 554, 83 N.W. 2d 147 (1957) (set off and counterclaim not proper).

Since we have ruled that, as a matter of law, defendant was not entitled to recover on its counterclaim, we deem it unnecessary to address plaintiff's remaining assignments of error.

Reversed.

Judges EAGLES and LEWIS concur.

ROBERT LINCOLN v. MICHAEL R. GRINSTEAD

No. 8814SC809

(Filed 6 June 1989)

1. **Rules of Civil Procedure § 37— discovery sanctions—dismissal of counterclaim—no abuse of discretion**

The trial court did not abuse its discretion in a conversion action arising from a repossession by dismissing defendant's counterclaim as a sanction for failure to comply with discovery in light of the substantial period of time defendant was given to respond to interrogatories, almost three weeks beyond the thirty days allowed by Rule 33. N.C.G.S. § 1A-1, Rule 37(b)(2)(c).

2. **Chattel Mortgages § 16; Trover and Conversion § 2— repossession of motor vehicle—failure to dispose of repossessed vehicle—conversion**

The trial court properly imposed liability on defendant for conversion of a motor vehicle where defendant, although not the record owner of the vehicle, was a party to a sales agreement which created a security interest in the vehicle enforceable against plaintiff and was therefore a secured party within the meaning of N.C.G.S. § 25-9-105(m). Defendant was subject to the provisions of N.C.G.S. § 25-9-505, which provides for compulsory disposition of collateral, and defendant admittedly failed to dispose of the repossessed collateral in the manner provided by statute.

3. **Chattel Mortgages § 1; Trover and Conversion § 4— repossessed truck—value of truck when converted**

The trial court in an action for conversion arising from a repossession did not err by finding that the reasonable value of the truck was $7,000 on the date it was repossessed where defendant sold the vehicle to plaintiff for approximately $8,500 on 4 May 1986; plaintiff testified that he installed $1,525 in stereo equipment soon thereafter; plaintiff alleged that the

value of the truck was approximately $9,000; and the vehicle was repossessed on 26 March 1987, less than one year after the sale. Although defendant contends that the truck was damaged when it was repossessed, the trial court had ample evidence from which to determine the truck's value as of the date of the conversion.

APPEAL by defendant from *Bowen, Wiley F., Judge.* Judgment entered 4 April 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 21 February 1989.

Defendant appeals from a $7,000.00 judgment entered against him for converting plaintiff's vehicle for his own use within the meaning of G.S. sec. 25-9-505(1).

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by Kevin W. Butterfield, for plaintiff-appellee.

Ward & Reinhardt, by J. Randolph Ward, for defendant-appellant.

JOHNSON, Judge.

We note at the outset that Attorney Ward was not counsel for defendant-appellant at the trial level.

The sales transaction which forms the basis of this appeal is as follows. On 5 June 1986 defendant and his wife transferred a 1975 Ford pick-up truck to plaintiff in exchange for $7,000.00, a promise to deliver two pistols having an approximate value of $250.00 each, and a $1,000.00 note secured by the vehicle. This deal was evidenced by a conditional sales agreement. On 16 March 1987 defendant carried out a "self-help repossession" pursuant to G.S. sec. 25-9-503, and with the aid of a Mr. Wood, whose services he contracted for this purpose, seized the truck from plaintiff's residence and had it delivered to defendant's home. He contended that plaintiff had failed to make payments on the note as he had agreed. Plaintiff counterargued that because the vehicle's transmission totally failed within one month of purchase, he refused to perform under the terms of their sales agreement.

On 6 April 1987 plaintiff instituted a civil action alleging breach of warranty, fraud, and unfair and deceptive trade practices against defendant. He amended his complaint on 8 July 1987 to include a cause of action for conversion.

In his answer defendant generally denied all the material allegations of plaintiff's complaint and asserted a counterclaim for damages to the vehicle. He alleged that $5,000.00 was required in order to restore the truck to its condition on the date of the sale. Defendant failed to answer plaintiff's amended complaint which included a fifth cause of action for conversion. Defendant's counterclaim and affirmative defenses were stricken on 21 March 1988 as a sanction for his failure to comply with an order compelling discovery.

[1] By Assignment of Error one, defendant asserts as error the trial court's dismissal of his counterclaim for his failure to comply with the discovery order. We find no error.

G.S. sec. 1A-1, Rule 37(b)(2)(c) states, in pertinent part, the following:

> If a party . . . fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> c. An order 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.

G.S. sec. 1A-1, Rule 37(d) similarly states the following:

> If a party . . . fails . . . (ii) 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 subdivisions a, b, and c of subsection (b)(2) of this rule. . . .

In reviewing a trial court's discretionary choice of sanctions to impose where a party fails to comply with an order to answer interrogatories, the governing standard is that of abuse of discretion. *Silverthorne v. Land Co.*, 42 N.C. App. 134, 256 S.E. 2d 397 (1979). The decision will remain undisturbed unless a clear abuse of that discretion is shown. *Id.* Sanctions directed to the case's outcome, including default judgments and dismissals, although reviewed according to the abuse of discretion standard, are to

be evaluated in light of the leading policy concern surrounding discovery rules, which is to encourage trial on the merits. *American Imports, Inc. v. Credit Union*, 37 N.C. App. 121, 245 S.E. 2d 798 (1978).

The record reveals that in January 1988 plaintiff served defendant with some forty-five interrogatories as per G.S. sec. 1A-1, Rule 33. For no apparent reason, defendant failed to respond. On 4 March 1988, over forty days after the interrogatories had been served, plaintiff filed a motion for an order compelling discovery pursuant to G.S. sec. 1A-1, Rule 37. On 14 March 1988 the trial court filed an order at 4:18 p.m. ordering defendant to submit his answers on or before 5:00 p.m. that same day. Defendant still failed to comply, and on 18 March 1988 plaintiff filed a motion for imposition of sanctions in which he stated that he received defendant's handwritten, unresponsive, and incomplete answers on 15 March 1988.

The court's exercise of its authority to impose sanctions for defendant's deliberate failure to comply with discovery in no manner constituted an abuse of discretion. In defendant's own words "orders to compel discovery should provide a time interval reasonably calculated to permit the compelled party to fully comply." In light of the substantial period of time defendant was given to respond to the interrogatories, almost three weeks beyond the thirty days allowed by Rule 33, we find that the trial court properly imposed sanctions for his failure to answer as required. *See Hammer v. Allison*, 20 N.C. App. 623, 202 S.E. 2d 307 (1974) and *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 362 S.E. 2d 868 (1987) where this Court upheld the dismissal of plaintiffs' causes of action for their failure to answer interrogatories. We can find no error.

[2] Defendant next argues that the trial court committed error by treating him as the converter of the motor vehicle which was repossessed pursuant to a lien in favor of his wife alone. He specifically contends that because (1) the repossessed vehicle was titled in his wife's name only, (2) his son was the "de facto" owner of the vehicle, and (3) a professional repossessor actually picked up the vehicle from plaintiff's residence, no action for conversion nor an action pursuant to G.S. sec. 25-9-507 could be maintained against him. We disagree.

G.S. sec. 25-9-505(1) provides that

> [i]f the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods or sixty percent (60%) of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part *a secured party* who has taken possession of collateral must dispose of it under G.S. 25-9-504, and if he fails to do so within 90 days after he takes possession, the debtor at his option may recover in conversion or under G.S. 25-9-507(1) on secured party's liability.

A secured party is defined by G.S. sec. 25-9-105(m) as "a lender, seller *or other person in whose favor there is a security interest*, including a person to whom accounts or chattel paper have been sold." (Emphasis supplied.) "Security interest means an interest in personal property or fixtures which secures payment or performance of an obligation. . . ." G.S. sec. 25-1-201(37).

Upon review of these definitions provided by statute, it becomes immediately apparent that "secured party" is not synonymous with "titleholder" and that holding title is not a prerequisite to being a secured party within the context of G.S. sec. 25-9-505(1).

The record evidence reveals that defendant negotiated with plaintiff throughout the financial transaction regarding the sale of the vehicle; represented to plaintiff that the vehicle's transmission was in good condition; signed the sales agreement conveying the truck to plaintiff; completed repossession forms with the Department of Motor Vehicles; and hired Mr. Wood to repossess the vehicle. The balance owed on the vehicle was $1,000.00 cash, and two pistols valued at $250.00 each. The plaintiff had signed a note for the $1,000.00 balance which was secured by the vehicle.

We believe that defendant, although not the record owner, was a party to a sales agreement which created a security interest in the vehicle, which was enforceable against the plaintiff. He was thus a secured party within the meaning of G.S. sec. 25-9-105(m) and therefore was subject to the provisions of G.S. sec. 25-9-505, which provides for "compulsory disposition of collateral." Because defendant admittedly failed to dispose of the repossessed collateral in the manner provided by statute, a requirement which was also communicated to him by a DMV officer, the court properly imposed liability against him for conversion of the vehicle. Defendant's second question for review is therefore overruled.

[3] By his last Assignment of Error, defendant argues that the court erred by finding as a fact that the reasonable value of the motor vehicle was $7,000.00 on the date it was repossessed. We disagree.

We note at the outset that defendant has advanced no authority in support of this position. This issue is therefore subject to dismissal pursuant to Rule 28(a)(5) of the N.C. Rules of App. P. However, we choose to review the question in spite of the rule violation.

It has been established that the measure of damages recoverable for conversion is the value of the goods converted at the time and site of the conversion. *Crouch v. Trucking Co.*, 262 N.C. 85, 136 S.E. 2d 246 (1964). On 4 May 1986 defendant sold the vehicle to plaintiff for approximately $8,500.00. Plaintiff testified that he installed $1,525.00 in stereo equipment soon thereafter. In plaintiff's amended complaint, which defendant failed to answer, plaintiff alleged that the value of the truck was approximately $9,000.00. The vehicle was repossessed on 16 March 1987, less than one year after the sale. Although defendant now argues that the truck was damaged when it was repossessed, we hold that the trial court had ample evidence from which to determine the truck's value as of the date of conversion and did not err in setting its value.

Therefore, we overrule defendant's last question for review and affirm this order in all respects.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RAYMOND EARL FENN

No. 887SC769

(Filed 6 June 1989)

1. Rape and Allied Offenses § 18— indecent liberties—date of offense—variance between indictment and evidence

The trial court did not err in a prosecution for taking indecent liberties with a child by denying defendant's motion to

set aside the verdict as being against the greater weight of the evidence where the State was allowed to present evidence that the offense occurred on a Friday in September rather than "on or about 12 September 1986" as alleged in the indictment. The prosecutrix's testimony was consistent with the "on or about 12 September 1986" date and a child's uncertainty regarding the exact date of the offense in child sexual abuse cases bears upon the weight and not the admissibility of the evidence. Moreover, defendant failed to demonstrate how he was prejudiced in preparing his defense.

2. **Rape and Allied Offenses § 19— indecent liberties—cross-examination concerning prior sexual behavior—door opened by State—not admissible**

The trial court did not err in a prosecution for taking indecent liberties with a child by excluding questions defendant sought to ask the prosecutrix regarding her past sexual behavior even after the State opened the door because defendant did not request an in camera hearing to determine the admissibility and relevance of prior inconsistent statements or other impeachment evidence concerning the victim's statements regarding her past sexual behavior. N.C.G.S. § 8C-1, Rule 412.

3. **Rape and Allied Offenses § 19; Bills of Discovery § 6— indecent liberties—discovery—testimony of ultrasound expert**

There was no abuse of discretion in a prosecution for taking indecent liberties with a child in allowing an ultrasound technician to testify concerning a matter not provided in discovery where the State tendered the ultrasound technician as an expert, the defense objected that the evidence had not been made available according to their discovery request, and the trial court granted a recess in order to allow counsel time to meet the evidence. Moreover, the witness testified as to her qualifications and the testimony assisted the jury in evaluating two facts in issue. N.C.G.S. § 15A-910, N.C.G.S. § 8C-1, Rule 702.

APPEAL by defendant from *Watts, Thomas S., Judge.* Judgment entered 11 March 1988. Heard in the Court of Appeals 21 February 1989.

Defendant appeals from a judgment imposing a ten-year term of imprisonment pursuant to a jury verdict of guilty of taking indecent liberties with a child as charged in the indictment.

Attorney General Lacy H. Thornburg, by Associate Attorney General David F. Hoke, for the State.

Farris and Farris, P.A., by Robert A. Farris, Jr. and Thomas J. Farris, for defendant-appellant.

JOHNSON, Judge.

The evidence adduced at trial tended to show that on or about 12 September 1986 the thirteen-year-old prosecutrix was visiting her grandmother for the weekend. On that Friday leading into the weekend, the prosecutrix left her grandmother's house with two of her uncles, one of whom was defendant, at defendant's request and with her grandmother's permission. He asked if the prosecutrix could help him clean up defendant's girlfriend's yard. En route, defendant dropped the other uncle off at his stop and the prosecutrix and defendant continued on their way. The prosecutrix testified that defendant drove around quite a bit and "kept going down all these roads and [she] didn't know where [she] was." She testified further that defendant stopped the car on a dirt road, took off her pants, removed his pants half way and had sexual intercourse with her. She also stated that she tried to fight him, screamed, and tried to open the door. When someone approached them from behind in another vehicle defendant pulled his pants on and drove away. Defendant then warned the prosecutrix that if she ever told anyone "something bad would happen to [her] and [her] family."

After stopping by his girlfriend's house for a short while defendant then dropped the prosecutrix off at her grandmother's house. When she arrived, she cried, changed her clothes which were bloody, and threw them away. The prosecutrix told no one what had happened.

About six months later on 19 March 1987 the prosecutrix became ill and discovered that she was pregnant. She then told her mother of the September incident with her uncle. Her mother then arranged for the child to have an abortion.

[1] By this appeal defendant first argues that the trial court erred by denying his motion to set aside the verdict as being against

the greater weight of the evidence. Specifically, defendant contends that he was deprived of a full opportunity to prepare his defense because the State was allowed to present evidence that the offense occurred on a Friday in September rather than "on or about 12 September 1986" as stated in the indictment. We find no error.

The defendant correctly asserts that the prosecutrix was unable to recall the exact date of the offense. This fact was borne out on both direct and cross-examination. However, her testimony was consistent with the "on or about 12 September 1986" date stated in the indictment. Furthermore, our Supreme Court has consistently held in cases involving child sexual abuse that a child's uncertainty regarding the exact date of the offense bears upon the weight and not the admissibility of the evidence. *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983).

In *Effler*, defendant contended, as the defendant in the case *sub judice* similarly contends, that he was deprived of the right to a fair trial because the bill of particulars stated that the offense occurred in the afternoon hours, whereas the evidence adduced at trial indicated that the offense occurred between 6:30 p.m. and 9:00 p.m. The Court, *citing State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962), stated that "nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense." *Effler* at 749, 309 S.E. 2d at 207.

The cases which defendant cites in support of his position are distinguishable from the case at bar in that they do not involve young children and the policy considerations applicable to such cases. Due to their age, children cannot be expected to specifically remember dates and times.

Defendant also has failed to demonstrate how his case was prejudiced because of the discrepancy regarding the actual date of the offense. Defendant filed no motion for a bill of particulars in preparing his defense and, more importantly, was well aware of the fact that the prosecutrix was having trouble remembering the exact date of the offense. He cross-examined her as follows:

Q. You're sure this happened on a Friday?

A. Yes.

Q. Friday was a school day, wasn't it? And you didn't go to school, did you? You say you went to your grandmothers? [sic]

A. Yes.

Q. Wasn't it a school day?

A. I don't remember but . . .

Q. Didn't school take in in August of 1986?

MISS FRESHWATER: OBJECTION. If he'd let the witness finish her answer to the question.

THE COURT: She may explain her answer.

A. I don't remember if it was a school day. I don't know what day the school started. I don't remember when it started.

Q. You know it started before Labor Day, didn't it?

MISS FRESHWATER: OBJECTION, Your Honor, to the form of that question. It's argumentative.

THE COURT: OVERRULED.

Q. Don't you?

A. Well sometimes we had school that starts after Labor Day because of sometimes the tobacco season goes in late and I think during that year that was the year we started late because they had a lot of tobacco season going in. But I know this year we did start in the last of August, but I think in '86 we started kinda late because of the tobacco season. Because a lot of my friends were staying out that week because they had to help finish with the tobacco.

Q. Dee Dee, are you saying that on September 12th, 1986 you hadn't started school yet?

A. I don't remember.

Because defendant has failed to demonstrate how he was prejudiced in preparing his defense, we overrule his first question for review.

[2] Next, defendant argues that the court erred by excluding questions he sought to ask the prosecutrix regarding her past sexual behavior. We disagree. Defendant erroneously relies upon a concurring opinion of *State v. Stanton*, 319 N.C. 180, 353 S.E. 2d 385

(1987) to support his position. First, it is important to note that an opinion concurring in the result carries no mandatory weight. Second, the analysis upon which defendant relies did not lead those justices concurring in the result to a finding of prejudicial error. The concurring opinion stated that G.S. sec. 8C-1, Rule 412 should prevent inquiry regarding either a lack of prior sexual activity or the existence of prior sexual activity by the victim with persons other than the defendant.

Defendant extends this analysis and argues that by inquiring into the prosecutrix's lack of sexual activity the State opened the door and the defense should then have been allowed to cross-examine her regarding her sexual activity. This question was recently addressed against defendant in *State v. Degree*, 322 N.C. 302, 367 S.E. 2d 679 (1988). In *Degree*, our Supreme Court held that once the State opens the door into a victim's sexual activity the defendant may request an in camera hearing so that the court may determine the admissibility and relevance of prior inconsistent statements or other impeachment evidence concerning the victim's statements regarding her past sexual behavior if it exists. In the absence of such a request, a fishing expedition into the victim's past sexual behavior will not be permitted, as it is prohibited by G.S. sec. 8C-1, Rule 412.

Since defendant requested no such hearing and embarked upon essentially the same line of questioning as that in *Degree*, we hold that the trial court properly excluded such testimony. Therefore, his second assignment of error is overruled.

[3] Lastly, defendant argues that the trial court erroneously allowed the medical technician to testify concerning a matter not provided in discovery and for which no foundation was laid. We cannot agree.

G.S. sec. 15A-910 designates the possible measures a trial court may take when a party fails to comply with discovery. One such measure is the granting of a continuance or recess to allow the opposing party to prepare to meet the evidence which had been improperly withheld. G.S. sec. 15A-910(2). The statute bestows the trial judge with broad discretionary powers to "rectify the situation if a party fails to comply with discovery orders or provisions of the discovery Article." Official Commentary to G.S. sec. 15A-910. The particular remedy the trial court chooses is not reviewable

on appeal absent a showing of abuse of discretion. *State v. Dukes*, 305 N.C. 387, 289 S.E. 2d 561 (1982).

In the case *sub judice* when the State tendered the ultrasound technologist as an expert in ultrasound, the defense objected on the ground that the evidence had not been made available as per their discovery request. On *voir dire*, the trial court concluded that the State had not carried "out its continuing duty to disclose[,] with regard to this evidence[,] with particular reference to the results of the test, either incorporated by means of a photograph or the notes made by this witness[,] [that] some basis of identification of those test results would be involved." The trial court then granted a recess in order to allow counsel time to meet the evidence. *See* G.S. sec. 15A-910(2). We find that no abuse of discretion was committed by the trial court.

Insofar as this question for review concerns the witness' qualification as an expert witness, we refer defendant to G.S. sec. 8C-1, Rule 702 which states, in pertinent part, that a witness may be qualified as "an expert by knowledge, skill, experience, training, or education . . ." Further, they may testify on matters which "will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." *Id.*

The witness testified as to her qualifications which included an undergraduate degree, completion of a medical science training program which specialized in ultrasound training, and six years of experience in the field. She testified that based upon the test performed on 19 March 1987 the gestational age of the fetus was approximately twenty-four weeks, thus placing the time of conception at around the date the indictment stated the charged offense was committed. This testimony would therefore assist the jury in evaluating two facts in issue: (a) whether intercourse occurred and (b) the time at which the alleged offense was committed. We therefore find that the court did not abuse its discretion in allowing the witness to testify.

It is for the aforementioned reasons that in the trial of defendant's case we find

No error.

Judges ARNOLD and PHILLIPS concur.

LINDA B. GRAGG v. JOHN D. GRAGG AND WILLIAM D. GRAGG

No. 8829DC633

(Filed 6 June 1989)

1. **Trusts § 13.2— purchase money resulting trust—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in an action to establish a purchase money resulting trust where plaintiff wife and defendant husband promised the husband's father that they would repay a down payment which he made on a house for them and that they would make monthly payments on a loan which he assumed to finance the rest of the purchase price; title was taken in the father's name; plaintiff and defendant subsequently made monthly payments throughout the ten or eleven years they lived in the house; and title was never transferred to plaintiff and defendant.

2. **Trusts § 13.2— purchase money resulting trust—promise prior to transfer of deed as sufficient consideration**

A promise alone made prior to the transfer of a deed to the grantee is sufficient consideration for a purchase money resulting trust.

3. **Trusts § 18— purchase money resulting trust—consideration furnished after deed transferred to grantee—admissibility of evidence**

In an action to establish a purchase money resulting trust, the trial court did not err in admitting evidence of consideration furnished by plaintiff and defendant after the deed was transferred to the grantee, though it is true that consideration furnished only after title has passed is not singularly sufficient to provide the consideration necessary to create a resulting trust, since the evidence here was offered to illustrate the parties' intent and to show that the promise which constituted the consideration was performed.

APPEAL by defendants from *Gash, Robert T., Judge*. Judgment entered 18 March 1988 in District Court, HENDERSON County. Heard in the Court of Appeals 14 February 1989.

Plaintiff commenced this civil action on 15 November 1984 against John D. Gragg seeking an absolute divorce, custody of

their minor child, child support and equitable distribution of their marital assets. As the complaint pertained to equitable distribution, plaintiff specifically sought the imposition of a purchase money resulting trust against real property she had shared with defendant John Gragg as their marital home.

Stepp, Groce & Cosgrove, by Timothy R. Cosgrove, for plaintiff-appellee.

Atkins & Craven, by Lee Atkins and Susan S. Craven, for defendant-appellants.

JOHNSON, Judge.

Plaintiff and defendant, John D. Gragg (Dennis), were married in July 1975 and divorced in January 1988. Due to their inability to obtain the proper financing for the purchase of a home while they were married, they asked Dennis' father William Gragg for financial help. William Gragg saw the house they intended to purchase and agreed to make the down payment as a loan to his son and daughter-in-law and to assume the loan on the balance of the purchase price. This agreement was conditioned upon his son and daughter-in-law's promise to repay the loan for the down payment in addition to making the monthly payments on the loan he and his wife assumed for them.

William Gragg and his wife purchased the house in October of 1977. They paid the $3,400.00 down payment and assumed the $14,205.00 loan secured by a deed of trust on the house. According to plaintiff's testimony, she and her husband expected Mr. and Mrs. Gragg to later place title into their names, and that she and Dennis reimbursed his father for the down payment by giving him a Toyota or Datsun truck. According to Dennis and his father, the parties agreed that the title would be switched only if Dennis and plaintiff repaid the down payment within two years of the date of purchase. The evidence is conflicting as to whether or not they ever repaid Mr. and Mrs. Gragg for the down payment.

The parties do agree, however, that plaintiff and Dennis moved into the house in 1977 and lived there together until February 1982 when Dennis moved out. During this time, Dennis and plaintiff paid the monthly payments to his father in cash and he used these funds to make the monthly payments to the bank.

The parties also agree that when plaintiff and Dennis moved into the house, it was in a state of disrepair. The couple made substantial improvements to the house including painting, wallpapering, installing storm windows, carpeting and flooring, and graveling the driveway. Plaintiff performed the bulk of the outside maintenance chores and both did the work and provided the funds for the improvements.

After plaintiff and Dennis separated in February 1982, plaintiff and their child continued to live in the house until June 1983. During this time they continued to make the monthly house payments to William Gragg in the same manner as before. From June 1983 until March 1984, the house was unoccupied and Dennis continued to make the monthly payments to his father. In March 1984 Dennis moved back into the house and made the payments until 3 March 1988 when his father paid the balance due on the note of $4,123.96 from his own funds.

At the trial of this matter, the sole issue before the jury was whether the real property was held under a purchase money resulting trust by defendant William Gragg as trustee for his son and daughter-in-law. The jury answered the question affirmatively in favor of the plaintiff, and the trial court entered judgment imposing a purchase money resulting trust against the real property and ordering William Gragg to convey legal title to plaintiff Linda Gragg and defendant Dennis Gragg. From this judgment, defendants appeal.

[1] By this appeal, defendants present three questions for this Court's review. Defendants first argue that the trial court erred by denying their motions for a directed verdict and for a judgment notwithstanding the verdict because the consideration in the form of a promise given at the time title passed was insufficient to support the creation of a purchase money resulting trust as a matter of law. We disagree.

Both a motion for a directed verdict and for a judgment notwithstanding the verdict present the question of whether the evidence considered in the light most favorable to the nonmovant is legally sufficient to be submitted to the jury and to support a verdict for the nonmovant. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981). The question is the same for both the trial and appellate courts. *Alston v. Herrick*, 76 N.C. App. 246, 332 S.E. 2d 720 (1985).

The theory upon which plaintiff brought this action was that of a purchase money resulting trust. A purchase money resulting trust is created when

> a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. Under such circumstances equity creates a trust in favor of such other person commensurate with his interest in the subject matter. A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another.

Teachey v. Gurley, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938).

In *Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979), our Supreme Court first considered the question of whether a promise to pay money to a third party for the purchase of land made before title passes to the grantee, and subsequent payment pursuant to that promise made to the grantee after delivery of the deed, is sufficient consideration to vest the procurer of the transaction with equitable title to the property. This is the identical question which the case *sub judice* poses. The Court answered, *citing* Bogert, Trusts and Trustees sec. 456 (2d ed. 1977), that "[t]here is no difference in principle between paying money toward the purchase price at the time of the delivery of a deed and contracting at that time to pay the same sum later and then paying it as promised." *Cline* at 346, 255 S.E. 2d at 406.

In *Ray v. Norris*, 78 N.C. App. 379, 337 S.E. 2d 137 (1985), this Court held, citing *Cline*, *supra* that

> "[t]he person claiming the benefit of a resulting trust need not be obligated directly to the grantee's lender; it is sufficient if he is obligated to the *grantee*, pursuant to a promise made before title passes, to make payments to the grantee which will enable the grantee to pay the remainder of the purchase price. In such a case, the grantee is considered to have made a loan of credit to the one who promises to, and actually does, provide the funds to pay the remainder of the purchase price." *Norris* at 383, 337 S.E. 2d at 140-41 (citations omitted).

Evaluating plaintiff's evidence in light of these established principles, we conclude that plaintiff's evidence was sufficient to

be submitted to the jury on the question of whether she could show the existence of a purchase money resulting trust. Plaintiff testified that she and Dennis "went and talked to his daddy after [they] had looked at the house twice and his daddy offered to loan [them] the money for a down payment, if [they] kept the monthly payments up." She stated further that the agreement between the parties was such that William Gragg "would put the down payment on it in his name and he would hold the deed and then after Dennis got situated into a job he would switch it over to both [their] names."

On cross-examination, William Gragg testified to the following:

Q. But you do not deny there was an agreement originally between the three of you that you would hold title because they couldn't get financing; wasn't that the agreement?

A. That is right . . .

. . .

Q. Yet your son and Linda made each and every one of those payments to you through that whole ten years or eleven years?

A. I got it from Dennis. I don't know where he got it.

The aforementioned evidence considered in the light most favorable to the plaintiff, *Everhart, supra,* establishes that party C (William Gragg) purchased property in his name pursuant to a promise by party A (Linda Gragg) and party B (Dennis Gragg) to repay the down payment and to provide him with the monthly payments to be made to the bank on the loan.

We are convinced that such evidence was sufficient to withstand defendants' motion for a directed verdict, and was properly submitted to the jury for its consideration. Therefore, defendants' first assignment of error is overruled.

[2] By their next question defendants contend that the trial court erred by instructing the jury that a promise alone is sufficient consideration for a purchase money resulting trust. Because we have determined that a promise alone made prior to the transfer of the deed to the grantee is sufficient consideration, *Cline, supra; Norris, supra,* we must disagree with this argument. Also, after having considered the instructions given in their entirety, we find no error. *See Cline* at 347, 255 S.E. 2d at 406.

[3] Lastly, defendants contend that the trial court erred by admitting evidence of consideration furnished by the plaintiff and Dennis Gragg after the deed was transferred to the grantee. It has been established that evidence "of the grantee and the parties' conduct both before and after title passes [is] admissible to show the intent of the payor at the time the deed was made." *Mims v. Mims*, 305 N.C. 41, 58, 286 S.E. 2d 779, 790 (1982). Defendants argue that the evidence of consideration paid after the deed was transferred is irrelevant and prejudicial to his case. While it is true that consideration furnished only after title has passed is not singularly sufficient to provide the consideration necessary to create a resulting trust, *Cline, supra*, the evidence of which defendants complain was introduced to illustrate the parties' intent and to show that the promise which constituted the consideration was performed. Therefore, we overrule defendants' final question for review.

For all the aforementioned reasons, in the trial of this matter we find

No error.

Judges ARNOLD and PHILLIPS concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA v. DOVER ELEVATOR COMPANY

No. 8810SC734

(Filed 6 June 1989)

Master and Servant § 23.1 — employer's violation of "general duty" clause — workers exposed to electrical hazard — burden of proof on Commissioner of Labor

Because § 1910.303(g)(2) of the National Electric Code, a specific regulation, did not comprehensively cover all hazards which could be associated with the exposure of live parts of electrical equipment, the Commissioner was not precluded by that section from citing defendant for violation of N.C.G.S. § 95-129(1), the general duty clause, based on allegations that defendant exposed its workers to hazards resulting from the use of a "temporary run station" having live parts unguarded by approved enclosures and operating on less than 50 volts;

however, the Commissioner had the burden of proving that the employer failed to render its workplace free of a hazard, that the hazard was recognized and was causing or was likely to cause death or serious physical harm, and there were feasible means by which the employer could have eliminated or materially reduced the hazard.

APPEAL by Commissioner of Labor from *Stephens (Donald W.), Judge*. Order entered 11 April 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 26 January 1989.

Attorney General Lacy H. Thornburg, by Associate Attorney General Melissa L. Trippe, for the State.

Smith Helms Mullis & Moore, by Jon Berkelhammer, for respondent-appellee.

GREENE, Judge.

On 12 August 1985, the North Carolina Department of Labor Occupational Safety and Health Division (Commissioner) issued a citation to Dover Elevator Company (Dover). After the hearing examiner first dismissed the citation, the Review Board vacated that dismissal and remanded to the hearing examiner. On remand, the hearing examiner found a violation of N.C.G.S. Sec. 95-129(1) (1985) (general duty clause) and on appeal the Review Board reversed. The Commissioner appealed, pursuant to N.C.G.S. Sec. 95-141 (1985), to the superior court which affirmed the decision of the Review Board. The Commissioner then appealed, pursuant to N.C.G.S. Sec. 150A-52 (1978) (Chapter 150A recodified as Chapter 150B effective 1 January 1986), to this court.

The citation issued by the Commissioner reads as follows:

North Carolina General Statutes Section 95-129(1): Condition(s) of employment and a place of employment free from recognized hazard(s) likely to cause death, serious injury or serious physical harm were not furnished for each employee, in that:

the electrical switching device known as a temporary run station had been modified in that the back cover of the device was missing exposing the electrical contacts to physical damage where this device was being used in lieu of regular switches on state elevator #1762 located in Moses

> Cone Hospital, Greensboro, N.C. and where malfunction of device could cause death or serious physical harm.

The undisputed facts reveal that on 12 June 1985 while Dover was in the process of remodeling elevators at Moses Cone Hospital in Greensboro, North Carolina, it used "temporary run stations" to move various elevators "up and down." A "temporary run station" is an electically controlled switch which operates on less than fifty (50) volts of electricity. One of the "temporary run stations" had been supplied by one of Dover's employees and was not of the type ordinarily used by Dover, in that it did not have a metal cover on the back of the switch. Instead, this particular "temporary run station" was wrapped with six hundred volt electrical tape. On 12 June 1985, one of Dover's employees was killed when his body was pinned between the top of one of the elevator cabs and the doorway header of the elevator shaft. Just prior to his death, the employee had been instructed to raise the elevator cab, which required the use of the "temporary run station" which had no metal cover. An investigation after the incident revealed that when this "temporary run station" was turned on, the elevator moved up without the necessity of engaging the "up" switch.

Dover's defense to the citation was that the "temporary run station" was in compliance with the National Electric Code and therefore the Commissioner was precluded from citing Dover with a violation of the general duty clause.

This appeal is governed by the Administrative Procedure Act and specifically Chapter 150A as the citation was filed prior to 1 January 1986. *See Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 579, 281 S.E. 2d 24, 28 (1981) (review from final decisions in contested cases made under OSHANC shall be in accordance with Chapter 150A). Accordingly, this court "may reverse or modify" the Review Board only if

> the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) in excess of statutory authority or jurisdiction of the agency; or
>
> (3) made upon unlawful procedures; or

(4) affected by other error of law; or

(5) unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) arbitrary or capricious.

N.C.G.S. Sec. 150A-51 (1978). The proper scope of review is further determined by the "nature of the contended error." *McWhirter Grading Co.*, 303 N.C. at 580, 281 S.E. 2d at 29. The Commissioner contends the decision of the Review Board is "affected by . . . error of law" and must be reversed.

The Commissioner's contention raises the issue of whether Dover's compliance with the National Electric Code, a specific standard, preempts the Commissioner's enforcement of the general duty clause.

The general duty clause provides:

Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees.

N.C.G.S. Sec. 95-129(1) (1985).

The National Electric Code provides in pertinent part:

. . . live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures . . .

29 C.F.R. Sec. 1910.303(g)(2) (1988).

Pursuant to N.C.G.S. Sec. 95-131, all federal occupational safety or health standards, rules or regulations, unless alternate State rules, regulations or standards are set as permitted in Section 131(a), promulgated under the Federal Occupational Health and Safety Act, "shall in all respects be the rules and regulations of the Commissioner of [North Carolina]." N.C.G.S. Sec. 95-131 (1985). Furthermore, federal court decisions interpreting these federal rules and regulations "have been followed by North Carolina courts when interpreting [the Occupational Safety and Health Act of North Carolina]." *Brooks v. Butler*, 70 N.C. App. 681, 684, 321 S.E. 2d

440, 442 (1984), *disc. rev. denied*, 313 N.C. 327, 329 S.E. 2d 385 (1985). Accordingly, the National Electric Code which has been made a part of the National Occupational Safety and Health Act, 29 C.F.R. 1926.400 (1988), is by virtue of N.C.G.S. Sec. 95-131(a), a North Carolina standard. Furthermore, Section 1910.5 of the federal regulations, treated as a state regulation by virtue of N.C.G.S. Sec. 95-131(a), provides in pertinent part:

> (c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. . . .
>
> (c)(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry . . . to the extent that none of such particular standards applies. . . .
>
> . . . .
>
> (f) An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirements of [the general duty clause], but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.

29 C.F.R. 1910.5 (1988).

The federal courts have consistently interpreted Section 1910.5 to mean that the mere presence of a specific safety regulation does not itself render inapplicable the general duty clause. *E.g., L. R. Willson and Sons, Inc. v. O.S.H.R.C.*, 698 F. 2d 507, 511 (D.C. Cir. 1983). The plain language of 29 C.F.R. 1910.5 makes it clear that a specific standard preempts the general duty clause only if " 'a condition, practice, means, method, operation, or process' is already dealt with by a specific standard." *L. R. Willson and Sons, Inc. v. Donovan*, 685 F. 2d 664, 669 (D.C. Cir. 1982). In other words, does the specific standard guard against the particular hazard for which the employer is cited under the general duty clause.

The question presented in this case is whether Section 1910.303(g)(2) of the National Electric Code, a specific regulation, comprehensively covers all hazards that could be associated with

the exposure of live parts of electrical equipment. We conclude it does not. The regulation itself sets a specific standard *only* for the operation of electric equipment operating at fifty (50) volts or more. As to the operation of electric equipment of less than fifty (50) volts, the hazard presented in this case, the regulation is silent and therefore presents no standard.

The failure of the Commissioner to establish a specific safety regulation for hazards does not relieve the employer from its general obligation to provide employees "conditions of employment . . . free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm." *See Willson*, 698 F. 2d at 512 (specific regulation relating to hazards of falls by employees from thirty feet or more did not preclude secretary's citation under general duty clause for hazards to employees working at less than thirty feet). Accordingly, the Commissioner was not precluded by Section 1910.303(g)(2) of the National Electric Code from citing Dover for violation of the general duty clause based on allegations that Dover exposed its workers to hazards resulting from the use of a "temporary run station" having live parts unguarded by approved enclosures and operating on less than fifty (50) volts.

In conclusion, the Review Board order dismissing the citation is reversed and the case is remanded to the Review Board with instructions to address the merits of the general duty clause violation. On remand, the Commissioner has the burden of proving: (1) the employer failed to render its workplace free of a hazard; (2) the hazard was recognized; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means by which the employer could have eliminated or materially reduced the hazard. *See Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E. 2d 342, 345 (1988). Whether or not a hazard exists or is recognized must be determined by "the standard of a reasonable prudent person. Industry custom and practice are relevant and helpful but are not dispositive." *Id.*

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

RUBY D. LAMM v. BISSETTE REALTY, INC., AND DANIEL P. WETHERINGTON AND JUDY A. WETHERINGTON

No. 887SC961

(*Filed 6 June 1989*)

Negligence § 57.4— invitee—fall on stairs—violation of building code—negligence per se—proximate cause and contributory negligence—questions of material fact

In an action to recover for injuries received when plaintiff invitee slipped and fell while stepping from the last step of the stairway leading from defendants' office building, the evidence on motion for summary judgment showed that defendants were negligent per se because the stairway to their building violated the State Building Code in that it did not have a handrail on one side and the risers were not of uniform height. However, genuine issues of material fact were presented as to whether defendants' negligence was a proximate cause of plaintiff's injuries and whether plaintiff was contributorily negligent.

Judge LEWIS dissenting.

APPEAL by plaintiff from *Watts, Judge*. Order entered 14 June 1988 in Superior Court, WILSON County. Heard in the Court of Appeals 23 March 1989.

On 3 February 1987 plaintiff entered an office building owned by defendants Daniel and Judy Wetherington and managed by defendant Bissette Realty, Inc. As plaintiff exited the building she slipped and fell while stepping off of the bottom step of the building's porch.

The porch has two steps and three "risers" from the ground level to the top of the porch. The first riser from the ground to the first step is seven and one-half inches high, and the other two risers are six and one-half inches high. There are no handrails on either side of the steps and porch.

When the building was constructed the first riser was approximately eleven and one-half inches high, so an asphalt ramp was built to make the first riser approximately the same height as the other two.

Plaintiff suffered a trimalleolar fracture of the right ankle because of her fall. She instituted this action to recover for personal injuries allegedly caused by defendants' negligence. Defendants moved for summary judgment which was granted. Plaintiff appeals.

Mast, Morris, Schulz & Mast, by Bradley N. Schulz and George B. Mast, for plaintiff appellant.

Poyner & Spruill, by George L. Simpson, III and Mary Beth Johnston, for defendant appellees.

ARNOLD, Judge.

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c); *Stoltz v. Burton*, 69 N.C. App. 231, 316 S.E. 2d 646 (1984). The moving party has the burden of establishing the absence of any triable issue of fact. *Id.* at 233, 313 S.E. 2d at 647.

Although summary judgment is generally not appropriate in negligence cases, it is appropriate in cases where it appears the plaintiff cannot recover even if the facts as alleged by him are true. *Frendlich v. Vaughan's Foods of Henderson, Inc.*, 64 N.C. App. 332, 307 S.E. 2d 412 (1983); *Cox v. Haworth*, 54 N.C. App. 328, 283 S.E. 2d 392 (1981). Summary judgment is also proper in negligence cases where the evidence fails to show negligence by the defendant, or where contributory negligence is clearly established, or where the established negligence on defendant's part is not the proximate cause of the injury. *Hale v. Duke Power*, 40 N.C. App. 202, 252 S.E. 2d 265, *cert. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979).

A *prima facie* case of negligence liability is alleged when a plaintiff shows that: defendant owed him a duty of care; defendant's conduct breached that duty; the breach was the actual and proximate cause of plaintiff's injury; and damages resulted from the injury. *Southerland v. Kapp*, 59 N.C. App. 94, 295 S.E. 2d 602 (1982).

The owner of a place of business which is open to public patronage is under a duty to keep the approaches and entrances to his business in a reasonably safe condition for the use of customers entering or leaving the premises. *Garner v. Greyhound*,

250 N.C. 151, 155, 108 S.E. 2d 461, 464 (1959). Plaintiff was a "business invitee" of the defendants and thus owed her a duty of care.

Once it is determined that a duty is owed by one party to another, then it must be determined whether that duty was breached. *See Southerland*, 59 N.C. App. 94, 295 S.E. 2d 602.

Section 1007.3(b) of the North Carolina State Building Code states in pertinent part that "[A]ll exit stairs . . . shall have a handrail on at least one side." Section 1115.3(b) of that same code states that "[Treads] shall be of uniform width and risers of uniform height in any one flight of stairs."

It is clear from the record on appeal that the porch to defendants' office building did not have handrails, and that the risers were not uniform in height. The entrance, therefore, is in violation of the North Carolina building code.

"The violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence per se, . . . and such negligence is actionable if it is the proximate cause of injury to the plaintiff." *Ratliff v. Power Co.*, 268 N.C. 605, 610, 151 S.E. 2d 641, 645 (1966).

> . . . The question as to whether the violation of a statute, or ordinance, especially one intended to safeguard the citizens of a town and their property, is negligence *per se*, or only evidence of negligence, has been discussed extensively by this Court in several cases, but the law of this State was finally settled in *Leathers v. Tobacco Co.*, 144 N.C. 330, 57 S.E. 11, 9 L.R.A., N.S., 349, where it was held that it is negligence *per se*, and as a matter of law, and the rule in regard to it, as stated by Judge Thompson in his treatise on Negligence (vol. 1, § 10), was adopted, and is substantially as follows: When the legislature of a State, or the council of a municipal corporation, having in view the promotion of the safety of the public, or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcilable with reason, is that a failure to do the act commanded, or doing the act prohibited, is negligence as mere matter of law, or otherwise called negligence *per se*; and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill. So that if it is the proximate cause of hurt or damage to another,

> and if that other is without contributory fault, the case is decided in his favor, and all that remains is to assess his damages. The jury, of course, must find the facts. . . .

Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 12, 220 S.E. 2d 536, 540 (1975) (Chief Justice Branch (then Justice) quoting Justice Walker in *Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425 (1920)).

We conclude that because defendants violated the State building code they were negligent *per se*. *See Lindstrom v. Chestnutt*, 15 N.C. App. 15, 189 S.E. 2d 749, *cert. denied*, 281 N.C. 757, 191 S.E. 2d 361 (1972). The question now becomes whether defendants' negligence is the proximate cause of plaintiff's injuries, and whether plaintiff was contributorily negligent. These are material issues of fact and cannot be determined as a matter of law.

Defendants argue that plaintiff believes that she fell because of the slope of the asphalt, and therefore her belief negates the issue of proximate cause. It is particularly this type of issue that must be determined by a jury. Plaintiff may not know exactly why she fell, but she did fall. Defendants were negligent, but it cannot be said, as a matter of law that defendants' negligence was not the proximate cause of plaintiff's injury.

Reversed.

Judge GREENE concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent from the majority opinion. I see no basis for a finding of proximate cause under the facts presented in this case.

In her complaint, plaintiff alleges negligent design, construction and maintenance of the stairway and ramp area, a gently-sloped asphalt area leading from the steps to the parking lot. Plaintiff testified at deposition that she "just slipped on that slick asphalt slanting" but admitted there was no foreign or slippery substance on the asphalt. Plaintiff said: "My foot slipped on that asphalt is what throwed (sic) me." The day of the incident was cold, bright and dry. The evidence also shows that plaintiff had walked up

and down the same place approximately 30 days earlier and again only 15 minutes before she fell.

There is no evidence that the absence of a handrail, as required next to the steps by the building code, had anything to do with plaintiff's fall. Nor is there evidence that the design, construction or maintenance of the steps or slope brought about plaintiff's fall. The assertions of negligence *per se* resulting from the violations of the building code are irrelevant. As a matter of law, plaintiff has not shown that negligent design, construction or maintenance of the steps and ramp proximately caused her injuries. I would affirm the trial court's order granting summary judgment for defendants.

JOHN R. GORDON AND WIFE, DORIS GORDON, PLAINTIFF-APPELLEES v. ROBERT L. HOWARD AND WIFE, MARY ANN HOWARD, DEFENDANT-APPELLANTS

No. 8821SC735

(Filed 6 June 1989)

1. **Contracts § 21.3— agreement to purchase lot—letter not repudiation**

Where plaintiffs had contracted to purchase a certain lot in a subdivision being developed by defendants, a letter sent by the male plaintiff to defendants stating that plaintiffs had decided not to purchase the lot and asking for a refund of their earnest money did not constitute an anticipatory repudiation of the contract but constituted an offer to withdraw from the contract conditioned upon a return of plaintiffs' earnest money. Even if defendants would have been justified in treating the letter as a repudiation, they did not do so where defendants refused to return the earnest money, declared the parties to have a bona fide contract, and instructed their attorney to demand a closing, and plaintiffs are thus entitled to specific performance of the contract.

2. **Interest § 1— specific performance—interest on earnest money—improper award**

The trial court erred in awarding plaintiffs interest on their earnest money deposit with defendants where the court ordered specific performance and not monetary relief. N.C.G.S. § 24-5.

APPEAL by defendants from Judgment of *Judge Judson D. DeRamus, Jr.*, entered 25 March 1988 in FORSYTH County Superior Court. Heard in the Court of Appeals 15 February 1989.

House & Blanco, P.A., by John S. Harrison for plaintiff appellees.

Nifong, Ferguson & Sinal by Paul A. Sinal; and David F. Tamer for defendant appellants.

COZORT, Judge.

Plaintiffs brought an action for specific performance of an agreement wherein plaintiffs agreed to buy and defendants to sell a tract of land in a subdivision being developed by defendants. Defendants alleged that plaintiffs were not entitled to relief because they had breached the parties' agreement by anticipatory repudiation, and, further, that defendants were entitled to the $10,000 deposit paid by plaintiffs as earnest money. The trial court ruled in plaintiffs' favor. Defendants appeal. We affirm the trial court's ruling for plaintiffs but vacate that portion of the court's order awarding plaintiffs interest on the $10,000 deposit.

On or about 23 August 1984, plaintiffs and defendants entered into a contract wherein plaintiffs agreed to purchase from defendants a certain tract of land in Forsyth County identified as Lot 22 in the Glen Kerry subdivision. Pursuant to the contract, plaintiffs paid defendants the sum of $10,000 as earnest money. A balance of $40,000 was to be paid at closing. On or about 22 July 1985, defendants contacted plaintiffs about scheduling a closing. Thereafter, plaintiff John Gordon sent to defendant Robert Howard the following letter, dated 26 July 1985, which was introduced at trial as Plaintiff's Exhibit 4:

> Dear Bob:
>
> I have received the restrictions regarding Glenn Kerry which was dropped by our house the other night.
>
> My purpose in writing is to tell you that my wife and I have decided not to purchase lot number 22 in Glenn Kerry. We had our house remodeled last fall and we like it so much, particularly since we have planned to further improve it, that we are happy just staying where we are. Therefore, kindly return my $10,000 deposit.

Last week, we took ownership of a beautiful new 3 bedroom, 3 bath condominium at Surfside Beach, South Carolina, right below Myrtle Beach, that we intend to spend a lot of time at. We have also sold our cottage at Lake Norman and have since then purchased a condo which is currently under construction called Portside. This will have three bedrooms, two full baths and will let us enjoy Lake Norman, without having to cut the grass and all the other routine maintenance. I am very sorry we can't go through with this but at our age and with our house being so comfortable and particularly since we have these two beautiful new condos becoming available to us, it would just be ridiculous to put money into another home, because we plan to spend a lot of time at these places for reasons that I am gradually phasing into a semi-retirement status.

Very truly yours,

WINSTON PRINTING COMPANY

John R. Gordon
Board Chairman/CEO

After defendants did not respond to that letter, Mr. Gordon telephoned Mr. Howard in late October or early November of 1985 to discuss the matter. In that conversation, according to plaintiffs, Mr. Howard stated that he considered the parties to have a bona fide contract and that defendants would not return the earnest money deposit. Mr. Gordon therefore replied that, in view of defendants' position, plaintiffs would perform the contract as soon as the access road to Silas Creek Parkway was opened. Thereafter, on 6 November 1985, Mr. Gordon wrote his attorney a letter in which he informed his attorney that defendants had refused to return the deposit but that, as the lot had increased in value, he was "not real worried about it," and that he planned to list the land value among his personal assets. In October of 1986, plaintiffs saw that the Silas Creek Parkway access road had opened and made a request to defendants that they close their transaction for the purchase of Lot 22. Defendants refused, stating that, eight to ten months earlier, they had instructed their attorney to send a letter declaring that the earnest money would be forfeited unless the parties closed on the property. Plaintiffs denied having received any such letter, and defendants failed at trial to introduce any

evidence that such a letter was in fact mailed to plaintiffs or even that such a letter existed.

Defendants' position at trial was that defendants had contacted plaintiffs to schedule a closing and that, after receiving the 26 July letter, they had instructed their attorney to demand that plaintiff close or the earnest money would be forfeited. Defendants denied that plaintiffs ever told them that plaintiffs would honor their contract and close as soon as the Silas Creek Parkway access road was completed. Defendants admitted that the fair market value of Lot 22 had risen to $85,000-$90,000 and that they had decided to keep the lot and build their own home on it.

Based on this evidence, the trial court found, *inter alia*, that the 26 July 1985 letter was not a repudiation of the contract but "constituted an offer by Plaintiffs to withdraw from the contract, and imposed a condition on any such withdrawal from the contract, namely, a return of the earnest money deposit"; that plaintiffs reasonably expected a response to the letter but that defendants did not respond; and that in the October 1985 conversation in which defendants refused to return the earnest money, plaintiffs made clear their intention to perform the contract upon the opening of the access road to Silas Creek Parkway. The court further found that plaintiffs had never received any demand from defendants that plaintiffs close on the property, that defendants had not changed their position following the receipt of the 26 July 1985 letter, nor had they suffered any detriment, and that defendants' conduct in requesting their attorney to demand a closing or forfeiture showed that defendants had elected not to treat plaintiffs' actions as a repudiation of the contract. The court thus ruled that plaintiffs were entitled to specific performance of the land sale agreement.

[1] On appeal, defendants contend that the 26 July 1985 letter constituted anticipatory repudiation as a matter of law, thus terminating defendants' liability under the contract. This contention is unsound for two reasons.

First, in order to constitute anticipatory repudiation, the words or conduct evidencing an intention to breach the contract must be a "positive, distinct, unequivocal, and absolute refusal" to perform the contract when the time fixed for performance arrives. *Messer v. Laurel Hill Associates*, 93 N.C. App. 439, 443, 378 S.E. 2d 220, 223 (1989) (quoting *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917)). In the case before us, plaintiffs did clearly

state in the letter that they did not want to purchase Lot 22. Equally clear, however, was their request for a refund of the $10,000 in earnest money. There was, therefore, no unequivocal and absolute refusal to perform the contract. The trial court properly found that plaintiffs' letter constituted an offer to withdraw from the contract which was conditioned upon a return of the earnest money.

Second, even if defendants would have been justified in treating the letter as a repudiation, they did not do so. As our Supreme Court stated in *Edwards v. Proctor*,

> [i]t may be observed, however, that the renunciation itself does not *ipso facto* constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party.

Id. at 44, 91 S.E. at 585 (quoting 6 Ruling Case Law § 385). The trial court found that, during the parties' October 1985 telephone conversation, defendants refused to return the earnest money and declared the parties to have a bona fide contract. The court further found that, in thereafter instructing their attorney to demand a closing, defendants had elected not to treat the letter as a repudiation of the contract. These findings are supported by the evidence and are binding on this Court. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975). There being no repudiation by plaintiffs and, further, no breach, we hold that the trial court properly ruled that plaintiffs were entitled to specific performance.

[2] Defendants have also assigned error to that portion of the trial court's order awarding plaintiffs interest at the legal rate, on the earnest money deposit, from 1 November 1986 until delivery of a good and sufficient deed. We agree with defendants that an award of interest is inappropriate when the court has ordered specific performance and not monetary relief. *See* N.C. Gen. Stat. § 24-5 (1988).

We therefore affirm that portion of the judgment below ordering defendants to deliver a good and sufficient deed to plaintiffs. We vacate that portion of the order awarding interest on the earnest money deposit.

Affirmed in part; vacated in part.

Judges EAGLES and GREENE concur.

BENNY WADE TATE AND WIFE, CYNTHIA ALEXANDER TATE v. STANLEY CHAMBERS, D/B/A CHAMBERS HOME MOVERS, ARCHIE ROSS, AND CHARLES (BUTCH) BRIDGES

No. 8827SC957

(Filed 6 June 1989)

Principal and Agent §§ 5, 6— damage to mobile home during move— no agency by apparent authority, actual authority, or ratification

In an action to recover for damages to a mobile home sustained during its move by two of the defendants, the trial court properly entered summary judgment for defendant Chambers since the evidence was insufficient to show (1) agency by apparent authority where plaintiff contracted with one defendant upon his assurances that he was experienced and had insurance and, prior to moving day, Chambers had never been mentioned by any of the parties; (2) agency by actual authority where Chambers testified that the defendants did not work for him, and statements by one defendant were not sufficient alone to establish agency; and (3) agency by ratification where there was no evidence that defendants promised to move the mobile home on behalf of Chambers, and there was therefore no question of ratification.

APPEAL by plaintiffs from *Gaines (Robert E.)* and *Ferrell (Forrest A.), Judges*. Orders entered 24 October 1987 and 10 May 1988 and judgment entered on 23 May 1988 in Superior Court, GASTON County. Heard in the Court of Appeals 11 April 1989.

Kelso & Ferguson, by Lloyd T. Kelso, for plaintiffs-appellants.

Terry D. Horne for defendant-appellee Stanley Chambers, d/b/a Chambers Home Movers.

LEWIS, Judge.

On 24 June 1987, plaintiffs filed a complaint against Stanley Chambers d/b/a Chambers Home Movers (Chambers), Archie Ross (Ross), and Charles Bridges (Bridges). Chambers did not file a timely answer or other responsive pleading, and the clerk ordered an entry of default on 4 August 1987. Plaintiffs filed a motion for default judgment that same day, and on 15 October 1987, Chambers moved for a continuance of the scheduled hearing on the motion

for default judgment. On 20 October 1987, Chambers moved to set aside the entry of default. On 24 October 1987, Judge Gaines signed an order setting aside the entry of default and allowing Chambers time to file responsive pleadings. On 27 April 1988, plaintiffs moved to amend their complaint to add a claim for unfair and deceptive trade practices under G.S. 75-1.1. Judge Ferrell denied this motion *nunc pro tunc* 10 May 1988. On 23 May 1988, Judge Ferrell granted Chambers' motion for summary judgment. Plaintiffs appeal.

In their brief, plaintiffs assign error to the order setting aside the entry of default. They also contend the trial court erred in denying their motion to amend their complaint. Plaintiffs have not excepted to either order. The scope of our review is limited to those exceptions set out in the record on appeal or in the transcript, if one is filed, and made the basis of an assignment of error. App. R. 10(a). We do not consider these assignments of error. We note, however, that we do not find an abuse of discretion in either order.

Plaintiffs have properly preserved for appeal their assignment of error to the granting of Chambers' motion for summary judgment. The evidence before the trial court showed that Chambers was in the business of moving mobile homes. On previous occasions, Chambers had hired Ross and Bridges to help him move mobile homes. The two men acquired their uniforms through Chambers. The uniforms had the name "Chambers Home Movers" on them. Chambers testified that the uniforms were not supposed to have the business name on them and that he had the names removed. Chambers provided Ross with a truck that had on it magnetic signs bearing the name "Chambers Mobile Home Movers." Before the events in question, Chambers had asked Ross to take the signs off the truck after Ross damaged two mobile homes. Chambers allowed Ross to retain possession of the truck and the signs because he was busy and assumed Ross, a friend, would take off the signs as requested.

Plaintiffs owned a 1980 American Heritage mobile home. Benny Wade Tate (Tate) testified the mobile home was in excellent condition when plaintiffs bought it on 23 December 1986. Plaintiffs wanted to move the mobile home from Brevard to Cherryville. Tate stated his primary concern in selecting a mover was that it be experienced, licensed and insured. Ross and Tate talked on 22 May 1987. Ross told Tate he moved mobile homes all the time

and that he was insured because insurance was required in the mobile home moving business. Tate testified he relied on Ross' representations and they agreed on a price and moving date. Ross told Tate he would check with his partner, whom he did not name, and make sure everything was all right; Ross did call later and confirm the details of the move.

When plaintiffs met them on the appointed day, both Ross and Bridges were wearing shirts with the name "Chambers Home Movers." The truck did not have signs on it at that time. It took more than one day to move the mobile home, and on the second day, the truck had the Chambers' magnetic signs on it. On that same day, Tate heard Ross tell a North Carolina Department of Transportation official that Chambers Home Movers was Ross' business. The mobile home allegedly sustained damage during the move. Ross told Tate that he would not turn in an insurance claim for the damage. Ross also told Tate he worked for Chambers.

Plaintiffs contend summary judgment for Chambers was error because the evidence raises a genuine issue of material fact as to whether Ross and Bridges were Chambers' agents when they moved plaintiffs' mobile home.

> A principal is liable upon a contract duly made by his agent with a third person (1) when the agent acts within the scope of his actual authority; (2) when the contract, although unauthorized, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority.

Investment Properties v. Allen, 283 N.C. 277, 285-86, 196 S.E. 2d 262, 267 (1973). Plaintiffs contend the evidence supports each type of agency. We disagree.

Plaintiffs have not shown Ross and Bridges' apparent authority to act for Chambers in moving the mobile home. Plaintiffs' own evidence shows Tate contracted with Ross upon Ross' assurances that he was experienced and had insurance. Prior to moving day, Chambers had never been mentioned by any of the parties. In *Investment Properties v. Allen, supra*, the plaintiffs relied upon a brother's assurances that he would pay for improvements to property owned by his sister if the sister would not execute a new contract. Our Supreme Court held that the plaintiffs could not require the sister to pay for the improvements.

> When a party contracts with a known agent personally on his own credit alone, he will not be allowed afterwards to charge the principal. Having dealt with the agent as a principal he cannot set up an agent's apparent authority, on which he did not rely, so as to establish rights against a principal.

Id. at 288, 196 S.E. at 269. In this case, the evidence showed that Ross and Bridges wore Chambers' uniforms and had Chambers' signs on the truck. There was also evidence that Ross told a transportation official that Chambers Home Movers was his business. After the move was completed and Ross refused to pay for the damage, Ross told Tate that he worked for Chambers. However, the evidence is not sufficient to show agency by apparent authority. Plaintiffs contracted with Ross upon Ross' own qualifications, and they may not now hold Chambers liable under the contract with Ross.

Likewise, there is no competent evidence that Ross and Bridges had actual authority to act for Chambers. Chambers testified that both men had worked for him in the past but that they were not working for him on this job. Ross' statement to the transportation official that the business was his and his statement to Tate after the move that he worked for Chambers are not sufficient alone to establish agency. "Extra-judicial statements of an alleged agent are not competent against the principal unless the fact of agency appears from other evidence, and also unless it appears from other evidence that the statements were within the actual or apparent scope of the agent's authority." *Orr v. Orgo*, 12 N.C. App. 679, 680, 184 S.E. 2d 369, 369 (1971). As discussed above there is no other competent evidence of agency. Plaintiffs have not presented evidence of actual authority.

Finally, plaintiffs have not shown agency by ratification. There is no evidence to establish that Ross and Bridges promised to move the mobile home on behalf of Chambers. Therefore there is no question of ratification since " 'ratification is not possible unless the person making the contract, in doing so, purported to act as the agent of the person . . . claimed to be the principal.' " *Investment Properties v. Allen*, 283 N.C. at 288, 196 S.E. 2d at 269, *quoting Patterson v. Lynch, Inc.*, 266 N.C. 489, 492-93, 146 S.E. 2d 390, 393 (1966) (citations omitted).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as

to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c).

> A defending party may show as a matter of law that he is entitled to summary judgment in his favor by showing there is no genuine issue of material fact concerning an essential element of the claimant's claim for relief and that the claimant cannot prove the existence of that element.

Best v. Perry, 41 N.C. App. 107, 109, 254 S.E. 2d 281, 283 (1979). Plaintiffs have not shown that Ross and Bridges acted as agents for Chambers in any capacity. Summary judgment for Chambers is affirmed.

Affirmed.

Judges ARNOLD and GREENE concur.

MARY ADELAIDE AUSTELL CRAVER AND HUSBAND, RICHARD D. CRAVER v. MARY FRANCES NAKAGAMA AND HUSBAND, SAMUEL NAKAGAMA; AND BETTY L. BURTON, SINGLE

No. 8827SC853

(Filed 6 June 1989)

Partnership § 1— funeral home inherited by partners—commercial partnership—partnership name and goodwill as assets of partnership

A partnership of three women who inherited a funeral home was a commercial partnership rather than a professional partnership, and the partnership name and goodwill could be sold with the remaining assets of the partnership upon dissolution, since it was the skill and judgment of the partnership's employees, not the partners themselves, which provided the basis for the funeral home's reputation and business; the partners themselves were not involved in the daily operation of the business; and the mere fact that the partnership's books did not carry goodwill or the partnership name as an asset did not mean that the family name was a personal asset of the partners.

CRAVER v. NAKAGAMA

[94 N.C. App. 158 (1989)]

APPEAL by petitioners Craver and respondents Nakagama from *Lewis (Robert D.), Judge.* Judgment entered 17 March 1988 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 15 March 1989.

This is a special proceeding brought by petitioners Mary Adelaide Austell Craver (Craver) and her husband, Richard D. Craver against Mary Frances Nakagama (Nakagama), and her husband Samuel Nakagama, and Betty L. Burton (Burton) to wind up their partnership in the Lutz-Austell Funeral Home. Craver, Nakagama, and Burton are the only partners in this business partnership. Each of the partners inherited their respective interests in the partnership.

The Lutz-Austell Funeral Home has provided funeral services in Shelby, North Carolina since 1932. Roscoe Lutz and Charles Austell began the partnership with an oral agreement. Upon Roscoe Lutz's death in 1951 Charles Austell continued to operate the business. Austell died in January 1967. Since that time the funeral home has been managed and operated by licensed funeral directors and embalmers employed by the partnership.

Upon the filing of respondents' pleadings the clerk of superior court transferred the case to the superior court in accordance with G.S. 1-399. On 29 January 1988 the parties entered into a consent agreement agreeing that the sole issue to be determined at trial was whether the name Lutz-Austell Funeral Home could be sold as a partnership asset. The trial court empaneled a jury to decide the issue. The jury's verdict determined that the partnership name was a partnership asset. Respondent Burton moved for judgment notwithstanding the verdict which the trial court granted. From the judgment entered, the petitioners Craver and respondents Nakagama appeal.

Richard D. Craver for petitioner-appellants Craver.

Robinson, Bradshaw & Hinson, by Garland S. Cassada and Jane S. Ratteree for respondent-appellants Nakagama.

Weinstein & Sturges, by Fenton T. Erwin, Jr., L. Holmes Eleazer, Jr., and Judith A. Starrett for respondent-appellee Burton.

EAGLES, Judge.

The Cravers and Nakagamas appeal the trial court's grant of respondent Burton's motion for judgment notwithstanding the

verdict. The issue is whether the name Lutz-Austell Funeral Home and its concomitant goodwill is a partnership asset which may be sold in conjunction with the physical assets owned by the partnership. Specifically, the issues before us are whether the providing of funeral services here constitutes a profession and whether there is any business goodwill which is partnership property. In addition, appellants argue that the trial court erred in concluding as a matter of law that the partnership name could not be partnership property since there was no evidence that the name was either contributed to the capital of the partnership or that it was carried on the partnership's books as an asset. We hold that the trial court erred in granting Burton's motion and, accordingly, we reverse the trial court's judgment and reinstate the jury's verdict.

The trial court may grant a motion for judgment notwithstanding the verdict only when the evidence, considered in the light most favorable to the non-movant, is insufficient as a matter of law to sustain a verdict for the non-movant. *Smith v. Price*, 315 N.C. 523, 340 S.E. 2d 408 (1986). Considered in the light most favorable to the Cravers and the Nakagamas, the facts show the following. Mrs. Craver inherited a fifty percent interest in the partnership from her father, Charles Austell, who was one of the founding partners of the Lutz-Austell Funeral Home. Mary Nakagama and Betty Burton each inherited a twenty-five percent interest in the partnership. Burton's father was Roscoe Lutz, the other founding partner of the business. Nakagama inherited her interest when her previous husband, William Lutz, died in 1982. William Lutz was the son of Roscoe Lutz.

Since Charles Austell's death in 1967 the day to day operations of the business have been managed by properly licensed employees hired by the partners. None of these key employees have been partners in the business. None of the current partners are licensed as funeral directors or embalmers. Mrs. Craver is a bank officer, Mrs. Nakagama is a stockbroker, and Mrs. Burton is a teacher.

The existence of goodwill is a question of fact for the fact finder. *In re Brown*, 242 N.Y. 1, 150 N.E. 581 (1926). Generally, a partnership's name is an inseparable part of the business' goodwill which may be sold along with the physical assets of the business. *O'Hara v. Lance*, 77 Ariz. 84, 267 P. 2d 725 (1954); 59A Am. Jur. 2d, Partnership, section 899. However, partners may agree that goodwill is not to be considered partnership property. *In re Brown* at 6, 150 N.E. at 582.

On the other hand, a professional partnership whose reputation rests solely on the individual skill of the partners has no goodwill that can be distributed once the partnership dissolves. *Cook v. Lauten*, 1 Ill. App. 2d 255, 117 N.E. 2d 414 (1954); 59A Am. Jur. 2d, Partnership, section 338. This is because the business conducted in professional partnerships is said to be personal with the client depending upon the individual skill, judgment and reputation of the partner with whom the client is dealing. *See Spaulding v. Benenati*, 57 N.Y. 2d 418, 442 N.E. 2d 1244, 456 N.Y.S. 2d 733 (1982). Any value attributable to the individual partner's skill or judgment disappears at the partner's death. *Id.* Finally, we note that, in North Carolina, a partnership is dissolved upon the death of one of the partners unless the partnership agreement states otherwise. G.S. 59-61(4); *Bennett v. Trust Co.*, 265 N.C. 148, 143 S.E. 2d 312 (1965).

The Lutz-Austell Funeral Home partnership actually has been a series of different partnerships. The current partnership arrangement began in 1982 when Mrs. Nakagama inherited her share of the partnership. The record here does not indicate any written partnership agreement.

Assuming *arguendo* that providing funeral services constitutes a profession, we hold here that the current Lutz-Austell Funeral Home partnership no longer constitutes a professional partnership, but rather constitutes a commercial partnership whose goodwill is a partnership asset. The evidence shows that it is now the skill and judgment of the partnership's employees, not the partners themselves, which provides the basis for Lutz-Austell's current reputation and business. The partners are not involved in the daily operation of the business. Any value which may have been attributed to the skill of the founding partners disappeared at their deaths. *Spaulding, supra.* Since Charles Austell's death in 1967, the partners' activities have been like partners' activities in a commercial partnership, such as approving the acquisition of new equipment and determining employee salaries. We hold that after 1967 the partnership name was no longer descriptive of the people running the business, but rather it began to "acquire[ ], through the incrustations of time, a veneer of associations artificial and impersonal." *In re Brown* at 9, 150 N.E. at 583.

The trial court further ruled as a matter of law that the family name was a personal asset of the partners because there was no

specific partnership agreement contributing the name to the partnership's capital account and there was no evidence that the name was carried on the partnership books as an asset. We hold that these events do not control the issue here.

As Professor Bromberg states in his treatise,

> [t]he partnership books should be entitled to little weight in this regard. Under tax and financial accounting theories, which determine the content of most books, goodwill may be included in a balance sheet only if it is purchased, and a retiring partner or decedent's representative usually claims self-generated goodwill.

Brombert and Ribstein on Partnership, section 7.13 (1988). Accordingly, the mere fact that the partnership's books do not carry goodwill or the partnership name as an asset does not entitle respondent Burton to her motion for judgment notwithstanding the verdict as a matter of law.

In addition, we hold that due to the partners' failure to account for the partnership name and goodwill in a written or oral partnership agreement, we must rely on the common law principles enunciated earlier. Having determined that this partnership was a commercial partnership rather than a professional partnership, we follow the general rule that the partnership name and goodwill may be sold with the remaining assets of the partnership upon dissolution.

Reversed.

Judges COZORT and GREENE concur.

WESTOVER PRODUCTS, INC., PLAINTIFF v. GATEWAY ROOFING, INC., JAMES A. MOSER AND CLAY A. MOSER, DEFENDANTS v. GATEWAY ROOFING CO., INC., THIRD PARTY PLAINTIFF v. WESTOVER PRODUCTS, INC., THE CARLISLE CORPORATION, KIDDE, INC. D/B/A WALTER KIDDE & COMPANY, J. M. THOMPSON COMPANY, THIRD PARTY DEFENDANTS

No. 8818SC882

(Filed 6 June 1989)

1. **Rules of Civil Procedure § 56.1— summary judgment hearing— insufficient notice—notice requirement waived**

Although one third party defendant failed to comply with the notice requirements of N.C.G.S. § 1A-1, Rule 56 prior to a hearing on its oral summary judgment motion, the third party defendant against whom summary judgment was entered waived the notice requirement where it participated in the hearing and did not object to the lack of notice or request additional time; and the hearing in which third party defendant made its oral motion was held to hear another third party defendant's argument for summary judgment so that argument could have been made against the oral motion.

2. **Rules of Civil Procedure § 56— summary judgment—no supporting materials—no opportunity to be heard—summary judgment proper**

There was no merit to one third party defendant's argument that the trial court erred in granting a summary judgment motion because such defendant was given no opportunity to be heard on the merits of the motion and because no materials were submitted by the parties in support or opposition to the motion, since the trial court could have granted the third party defendant summary judgment based on materials presented by other third party defendants even without a motion therefor.

3. **Uniform Commercial Code § 12; Negligence § 30.1— sale of roofing materials—no breach of implied warranties—no negligence—summary judgment proper**

There was no merit to the third party defendant's argument that there were genuine issues of material fact of another third party defendant's negligence and breach of implied warranties in the sale of roofing products where defendant supplied no installation expertise but only non-defective goods and

thus breached no implied warranty of merchantability; there was no evidence that one defendant relied on the supplier defendant's advice in its selection of the particular roofing system, and thus there was no implied warranty of particular purpose by the supplier; and defendant could not have been negligent in supplying the products since there was no evidence that the products were defective. N.C.G.S. §§ 25-2-314, 25-2-315.

APPEAL by third-party defendant from *Walker, Judge*. Judgment entered 30 March 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 March 1989.

On 30 September 1982 Kidde, Inc. (Kidde) contracted with J. M. Thompson Company (Thompson) for the construction of a building. On 3 November 1982 Thompson entered into a subcontract with Gateway Roofing Company, Inc. (Gateway) for the installation of a 45 millimeter mechanically fastened roof system according to the plans and specifications prepared by Grove Manufacturing Company (Grove) (Grove, a subsidiary of Kidde, provided architectural and engineering services for the construction of the building).

Gateway was an authorized applicator for Carlisle Corporation (Carlisle), a rubber and tire manufacturer which also manufactures roofing materials and supplies roofing designs. Westover Products, Inc. (Westover) is a distributor of Carlisle roofing materials, and supplied Gateway for the Kidde project.

The Carlisle roof system chosen for the Kidde building by Grove, with technical assistance from Carlisle, was a mechanically attached roofing system ("M.A.R.S."). This particular system is a rubber roofing membrane mechanically fastened to a building by a system of batten bars. The batten bars are narrow rubber strips laid on top of the membrane and secured by metal screws which puncture the membrane and are screwed into the steel roof deck below. The bottom of the batten bars are coated with sealant before being placed upon the membrane, and sealant is also applied over the top of each screw.

The contract between Carlisle and Gateway states that Carlisle will provide Gateway with instruction and training for proper installation of Carlisle systems to assure adequate quality and uniformity. The contract also states that at Carlisle's discretion, it will furnish Gateway technical assistance and advice for the pur-

pose of evaluating watertight integrity of the installation of roofing systems. Such assistance was supplied on the Kidde project.

The M.A.R.S. roof installed on the Kidde building leaked immediately upon its completion. Numerous attempts were made by Gateway (with Carlisle's assistance) to remedy the leaks. The leaks have never been completely remedied and still persist.

Apparently Gateway never paid Westover for the Carlisle materials for the Kidde project. Westover filed suit in Guilford County Superior Court for the balance due on the materials. Gateway filed a Chapter 11 bankruptcy and the case was remanded to the United States Bankruptcy Court for the Middle District of North Carolina.

Gateway answered Westover's claim and filed a counterclaim as well as a third-party complaint against Westover, Carlisle, Kidde and Thompson. The third-party complaint alleges, *inter alia*, that the Carlisle roof was defective in design and installation procedures, that Westover and Carlisle were negligent, and that Thompson and Kidde were unlawfully withholding payments on the Kidde project.

Kidde filed an answer, counterclaim, and crossclaim. It alleged that the defective roof was caused by faulty design, manufacture and selection of the roof system, and that Carlisle was negligent and breached express and implied warranties.

Gateway's counterclaim and third-party complaint (and thus Kidde's counterclaim and crossclaim) were severed from the main action on the debt and remanded to the Guilford County Superior Court.

Carlisle filed a motion for summary judgment against Gateway, Westover, and Kidde. Kidde appeared at the hearing on Carlisle's motion to defend against summary judgment. Westover made an oral motion for summary judgment against Kidde at the hearing, and the trial court granted the motion. From that judgment Kidde appeals.

Wishart, Norris, Henninger & Pittman, by David O. Lewis, for third party defendant appellant Kidde.

Shope and McNeil, by Richard I. Shope, for third party defendant appellee Westover.

ARNOLD, Judge.

[1] Kidde first argues that the trial court committed reversible error in granting Westover's motion for summary judgment because it failed to comply with the notice requirements of N.C.G.S. § 1A-1, Rule 56 prior to any hearing on the motion.

Rule 56(c) provides that a motion for summary judgment shall be served at least ten (10) days prior to any hearing on the motion. N.C.G.S. § 1A-1, Rule 56(c). Notice may be waived, however, by participation in the hearing and by a failure to object to the lack of notice or failure to request additional time by the non-moving party. *Raintree Corp., Inc. v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978); *Story v. Story*, 27 N.C. App. 349, 219 S.E. 2d 245 (1975).

Kidde neither objected to Westover's lack of notice, nor did it request additional time. Furthermore, the hearing in which Westover made its oral motion was held to hear Carlisle's argument for summary judgment.

Kidde could have argued against Westover's motion. This fact is illustrated by Kidde's brief on appeal in which it refers this Court to Kidde's brief in its appeal of summary judgment in favor of Carlisle. Kidde states that the record evidence in the other case clearly establishes that the roof system sold by Westover was defective. The evidence of record on appeal was made entirely of the evidence presented by Carlisle in support of summary judgment and by Kidde in opposition.

We conclude that although no notice under Rule 56(c) was given to Kidde, it waived the notice requirement. *See Raintree Corp., Inc.*, 38 N.C. App. 664, 248 S.E. 2d 904.

[2] Kidde next argues that the trial court committed reversible error in granting Westover's motion for summary judgment because Kidde was given no opportunity to be heard on the merits of the motion, and because no materials were submitted by the parties in support or opposition to the motion. Rule 56(c) states that 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.G.S. § 1A-1, Rule 56(c) (emphasis added). Summary judgment may be granted to any party whether they move for it or not. *See McNair Const. Co., Inc. v. Fogle Bros. Co.*, 64

N.C. App. 282, 307 S.E. 2d 200, (1983), *disc. rev. denied*, 312 N.C. 84, 321 S.E. 2d 897 (1984).

The trial court in the case *sub judice* could have granted Westover summary judgment based on the materials presented by Carlisle and Kidde even without Westover's motion. *See id.* We reject Kidde's argument, therefore, that the trial court committed error in granting Westover's oral motion.

[3] Kidde lastly argues that there were genuine issues of material fact of Westover's negligence and breach of implied warranties.

N.C.G.S. § 25-2-314 provides in part:

> (1) Unless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> * * * *
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and . . . .

Westover was the wholesale supplier of the Carlisle materials used by Gateway on the Kidde project. From the evidence of record on appeal, Westover provided neither technical assistance nor installation training and instruction to Gateway. Likewise, no evidence on appeal shows that the Carlisle materials were in any way defective. It was the design and installation of the M.A.R.S. system that apparently caused the problems.

Westover only supplied the non-defective Carlisle goods and thus breached no implied warranty of merchantability. *See id.*

No evidence on appeal shows that Kidde relied in any way upon Westover's advice in Kidde's selection of the M.A.R.S. system. It was Carlisle whom Kidde relied upon, and thus there was no implied warranty of particular purpose by Westover. *See* N.C.G.S. § 25-2-315.

Since there is no evidence on appeal that the Carlisle products were defective, Westover could not have been negligent in supplying them. We therefore conclude that the trial court committed no error in granting summary judgment for Westover.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

AUDREY S. CAMERON v. DONALD P. CAMERON

No. 8811DC806

(Filed 6 June 1989)

1. **Divorce and Alimony § 24.1— amount of child support—earning capacity considered over actual income—improper test**

The trial court erred in setting an amount for child support based on defendant's earning capacity as opposed to his actual earnings where the evidence tended to show that defendant had farmed for seventeen years, had purchased a substantial amount of farm equipment for use in his farming operation, and had experienced a net loss from farming for the last three years but had made a profit in the past; defendant took a job as a contract mail carrier working three days a week in order to supplement his farming income and meet his obligation to support his child; and there was no evidence that defendant was engaging in any tactics to avoid paying child support.

2. **Divorce and Alimony § 27— modification of child support—payment of attorney fees ordered—insufficient findings**

The trial court's findings were insufficient to support its award of attorney fees to plaintiff in a child support modification action where the court found only that plaintiff did not have the ability to defray the expenses of adequate representation, that the attorney provided valuable services, and that the attorney spent in excess of five hours representing plaintiff, but the court made no findings concerning the attorney's skill and hourly rate and the nature or scope of the services rendered.

APPEAL by defendant from *Willis, O. Henry, Judge.* Order entered 28 December 1987 and signed 11 July 1988 in District Court, HARNETT County. Heard in the Court of Appeals 14 March 1989.

Defendant appeals from an order granting plaintiff custody of the couple's minor child, and ordering defendant to pay child support and plaintiff's attorney's fees. He contests the order as it relates to the amount of child support awarded and the payment of attorney's fees.

Johnson and Johnson, P.A., by W. Glenn Johnson for plaintiff-appellee.

Moretz & Silverman, by J. Douglas Moretz for defendant-appellant.

JOHNSON, Judge.

Plaintiff and defendant were married on 28 October 1967. One child was adopted during this marriage. On or about 1 November 1984 the parties entered into a separation agreement. Pursuant to the agreement, defendant consented to pay $200.00 per month as child support, $300.00 per month for the house payment and one-half of the maintenance expenses on the marital home.

On or about 4 September 1987 plaintiff commenced the action from which this appeal was taken seeking a court ordered adjudication of child custody and an order setting the amount of child support defendant should be required to pay. In this action, plaintiff also requested attorney's fees.

When the matter was heard on 28 December 1987, the trial court determined that based upon defendant's *earning capacity* as opposed to his *actual earnings*, defendant should be required to pay $259.00 per month for child support. This was a $59.00 monthly increase from the amount defendant had agreed to pay as per the separation agreement. The court also required defendant to make the $300.00 monthly house payment and to pay one-half of the maintenance on the home. Therefore, the only monetary change between the defendant's obligations pursuant to the separation agreement and the court order is a $59.00 increase in the monthly child support payment.

On appeal, defendant presents two questions for review. He contends that the trial court committed reversible error in setting the amount of child support, and in granting attorney's fees to the plaintiff. Because we agree that the trial court erred in making both awards, we reverse and remand.

In finding of fact number fifteen the trial court stated the following:

> The defendant is a farmer and a truck driver. During the years 1984, 1985 and 1986, the defendant had a net loss from his farming operation. During 1987 the defendant had an estimated profit of Fifteen Hundred Dollars ($1,500) resulting from his farming operation. The defendant is earning approximately Eleven Thousand Dollars ($11,000) per year as a contract mail carrier working three (3) days per week at this time. [The defendant is capable of driving a truck five (5) days per week and of earning Eighteen Thousand Dollars ($18,000.00) per year as a result thereof.]

The court then set the amount of child support in finding of fact number eighteen as follows:

> [On the basis of the estate, earnings [,] condition and accustomed standard of living of each of the parties and of Leigh Howell Cameron, the defendant has the ability to contribute the sum of Two Hundred Fifty-Nine Dollars ($259.00) per month for the use, support and benefit of Leigh Howell Cameron, minor child. This amount is in addition to the $300.00 per month house payments and other amounts which the defendant is paying pursuant to paragraph 3 of the separation agreement which has been entered into evidence as defendant's exhibit 9.]

[1] G.S. sec. 50-13.4(c) provides that an order setting the amount of child support should be based upon a child's reasonable needs with due regard given to the "estates, earnings, conditions, [and] [the] accustomed standard of living of the child and the parties . . ." Ordinarily, in determining a party's ability to support the child, the court should consider the party's present earnings. *Powell v. Powell*, 25 N.C. App. 695, 214 S.E. 2d 808 (1975). Where, however, evidence exists that a party is intentionally failing to realize his earning capacity or engaging in excessive spending to avoid the support obligation, the court may base its award on earning capacity. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976).

In the case *sub judice*, we have no evidence that defendant was engaging in any tactics to avoid paying child support. The evidence reveals that defendant has been a farmer for seventeen years; that he has purchased a substantial amount of farm equipment for use in his farming operation; and that he has experienced a net loss from farming for the last three years but has made a profit from this business in the past. Defendant testified that he took the job with Leonard Pender, a private citizen with a contract to transport mail for the U. S. Postal Service in order to supplement his farming income and meet his obligation pursuant to the separation agreement to pay $200.00 per month child support.

This evidence does not authorize a support award based upon earning capacity.

> If the [parent] is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should *be based on the amount which defendant is earning when the award is made*. To base an award on capacity to earn rather than actual earnings, there should be a finding, based on evidence that the [parent] is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support . . .

Holt v. Holt, 29 N.C. App. 124, 126, 223 S.E. 2d 542, 544 (1976) *quoting Robinson v. Robinson*, 10 N.C. App. 463, 468, 179 S.E. 2d 144, 147 (1971) (emphasis added). All the evidence in the case *sub judice* points to a genuine effort by defendant to engage in his chosen profession and to support his family as well. Therefore, we reverse this award of child support and remand this case so the court may make a determination based upon defendant's present earnings.

[2] By his second and last Assignment of Error, defendant contends that the trial court erroneously ordered payment of plaintiff's attorney's fees. We agree.

G.S. sec. 50-13.6 provides the rules by which a trial court may order the payment of counsel fees in child custody and support actions.

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for

> custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; . . .

The trial court must make specific findings of fact relevant to: (1) The movant's ability to defray the cost of the suit, specifically that the movant is unable to employ counsel so that he may proceed to meet the other litigant in the suit; (2) whether the movant has initiated the action in good faith; (3) the attorney's skill; (4) the attorney's hourly rate charged; and (5) the nature and extent of the legal services performed. *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E. 2d 581 (1986); *In re Baby Boy Scearce*, 81 N.C. App. 662, 345 S.E. 2d 411 (1986).

In the case at bar the trial court failed to make the specific findings of fact as required by statute and case law. The court only found that plaintiff did not have the ability to defray the costs and expenses to employ adequate representation; that the attorney had provided valuable services; and that the attorney expended in excess of (5) hours representing plaintiff. The court then ordered defendant to pay $375.00 "as partial payment" of attorney's fees.

We hold that these findings are inadequate to support an award for payment of attorney's fees, and the trial court committed an abuse of discretion by doing so. *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E. 2d 47 (1985); *Rogers v. Rogers*, 39 N.C. App. 635, 251 S.E. 2d 663 (1979). In *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982), the Court held that a bald statement that a party has insufficient means to defray the expenses of the suit is not a finding of fact at all but a conclusion of law. We have before us little more than that. Therefore, we vacate the order awarding attorney's fees to plaintiff and remand this case so that the findings of fact required by statute may be made.

On remand, the trial court is directed to submit an order containing specific findings so that a determination as to the reasonableness of the fee awarded may also be made. *Atwell, supra.* As the present order is written, we have no evidence before us to indicate the attorney's skill, hourly rate, nor the nature or scope

of the services rendered. Because no evidence supports the amount awarded, that portion of the order must also be vacated.

Vacated and remanded.

Judges PHILLIPS and PARKER concur.

IN RE: APPLICATION OF B. C. RAYNOR; ROBERT A. BRYAN, W. JOSEPH BRYAN, FLORA BRYAN, ALICE B. JOHNSON, JOHN G. PECK, PAMELA R. PECK; JOSEPH C. PLEASANTS, AND CAROLYN H. PLEASANTS v. B. C. RAYNOR, BOARD OF ALDERMEN OF THE TOWN OF GARNER, AND THE TOWN OF GARNER, NORTH CAROLINA

No. 8810SC1059

(Filed 6 June 1989)

1. Municipal Corporations § 30.6— conditional use permit to build mobile home park—meeting without notice to petitioners—application amended—amendment favorable to petitioners

Where respondent sought a conditional use permit to construct a mobile home park on his property, a public hearing was held to discuss the application, issues raised at the public hearing were discussed at several regularly scheduled meetings of the Board of Aldermen, and respondent suggested adding two more conditions to his application at one of these meetings, there was no merit to petitioners' contention that respondent's appearance before the aldermen without notice to them and without their presence was an improper presentation of evidence and was a denial of their right to cross-examine witnesses and present evidence at every stage of the review proceedings, since the procedural requirements established by the Town specifically allowed an applicant for a conditional use permit to amend his application based upon events at the required public hearing, and respondent was simply attempting to address several concerns voiced at the hearing by adding two more conditions to his application; the conditions proposed by respondent were beneficial to petitioners; and the offer of two additional conditions to be placed upon an application for a conditional use permit was not an introduction of evidence.

2. Appeal and Error § 7— landowners potentially harmed by construction of mobile home park—standing to appeal

As individual landowners whose property would be potentially harmed in value by respondent's mobile home court, petitioners had standing to raise in superior court the question as to whether proper procedure had been followed in the hearings before the Board of Aldermen, and petitioners had standing on appeal.

APPEAL by plaintiffs from *Stephens, Judge.* Order entered 15 June 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 18 April 1989.

On 21 September 1982 the Town of Garner zoned property owned by Dr. Bobby Raynor R-5, which allows the construction of mobile home parks if a conditional use permit is granted by the Town.

On 20 March 1987 Dr. Raynor applied for a conditional use permit to build a mobile home park on his property. Petitioners filed a petition with the Town to "down-zone" Dr. Raynor's property from R-5 to R-40 (which would only allow single-family residential homes to be placed on lots with a minimum square footage of 40,000 feet). The Garner Planning Board and Board of Aldermen held a joint public hearing to discuss the application of Dr. Raynor and the petition to down-zone his property.

No decision was made at the public hearing either to down-zone Dr. Raynor's property, or to grant his application. The issues raised at the public hearing, however, were discussed at several regularly scheduled meetings of the Aldermen. One of these meetings was held on 31 August 1987 and Dr. Raynor proposed adding two more conditions to his application to address concerns expressed at the public hearing. Petitioners were not present at this meeting of the Aldermen, and they were not informed of the proposed additional conditions.

The Board of Aldermen voted to approve Dr. Raynor's conditional use permit and to deny petitioners' request to down-zone his property at a public meeting held on 8 September 1987. Petitioners were present at this meeting, and only then did they learn that Dr. Raynor had offered two additional conditions to his application.

Petitioners petitioned the superior court for a writ of certiorari to review the granting of Dr. Raynor's conditional use permit by the Aldermen. Judge Donald Stephens granted the writ, but subsequently granted a motion for summary judgment by defendants. From that judgment, petitioners appeal.

Hunter, Wharton & Lynch, by John V. Hunter III, for petitioner appellants.

Hatch, Little & Bunn, by David H. Permar and Catherine Thompson-Rockermann, for respondent appellee B. C. Raynor.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by William E. Anderson, for appellee Town of Garner.

ARNOLD, Judge.

[1] Petitioners contend that all interested persons are entitled to a fair opportunity to be heard in quasi-judicial proceedings, and their right to be heard was denied when Dr. Raynor attended the meeting of the Aldermen without notice to petitioners.

Pursuant to N.C.G.S. § 160A-381 any city may regulate the areas within its jurisdiction through zoning ordinances.

> The [zoning] regulations may . . . provide that the board of adjustment or the city council 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 . . . . When issuing or denying special use permits or conditional use permits, the city council shall follow the procedures for boards of adjustment . . ., and every such decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari.

N.C.G.S. § 160A-381.

" '[I]n passing upon an application for a special permit, a [Board of Aldermen] may not violate at will the regulations it has established for its own procedure; it must comply with all provisions of the applicable ordinance.' " *Piney Mt. Neigborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 253, 304 S.E. 2d 251, 256 (1983) (quoting *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129, 135 (1974)).

Hearing procedures for appeals and applications to the Board of Aldermen established by the Town of Garner read in pertinent part:

Section 101. Hearing Required on Appeals and Applications.

(b) While a public hearing is not routinely required to obtain a CUP [conditional use permit], a public hearing may be called for by the Administrator to consider a CUP application if he determines that it involves:

* * * *

(3) A development of land, regardless of its size, if it has the potential to pose peculiar traffic or other public safety, health or welfare impacts to surrounding properties, or if it is likely to have other impacts that differ substantially from those presented by other uses that are permissible in the zoning district in question.

* * * *

Section 104. Modification of Application at Hearing.

(a) The applicant may agree to modify his application, including the plans and specifications submitted, in response to questions or comments by persons appearing at the hearing or to suggestions or recommendations by the Board of Aldermen or Board of Adjustment.

(b) Unless such modifications are so substantial that the Board cannot reasonably be expected to perceive the nature and impact of the proposed changes without revised plans before it, the Board may approve the application with the stipulation that the permit will not be issued until plans reflecting the agreed upon changes are submitted to the Planning Office.

Concerning the process of review of an application for a special use permit, this Court has stated:

When a town council conducts a quasi-judicial hearing to determine facts prerequisite to issuance of a permit, it can dispense with no essential element of a fair trial. The applicant must have the opportunity to give evidence, cross-examine witnesses, and inspect documents; and unsworn statements may not be used to support findings absent waiver or stipulation.

Neighborhood Assoc., 63 N.C. App. at 254, 304 S.E. 2d at 257 (quotations and citations omitted).

Petitioners argue that Dr. Raynor's appearance before the Aldermen without notice to petitioners, and without their presence, was an improper presentation of evidence to the Board. Further, they contend that their right to cross-examine witnesses and present evidence at every stage of the review proceedings was denied by Dr. Raynor's actions. We disagree.

First, the procedural requirements established by the Town of Garner specifically allow an applicant for a conditional use permit to amend his application based upon events at the required public hearing. Dr. Raynor was simply attempting to address several concerns voiced at the hearing by his two conditions which are as follows:

> (a) Applicant will comply with any transportation facility fee ordinance in effect at the time building permits are issued. If no transportation facility fee ordinance is in effect at the time building permits are issued, then the applicant will pay $10 per unit to the Town of Garner, which sums shall be used for improvements to the intersection of Ackerman Road and Hebron Church Road.
>
> (b) The exact number of units will be adjusted, either up or down, to ensure that no units are located in the floodway and that all units are located above the 100-year flood level.

Second, the conditions proposed by Dr. Raynor were beneficial to petitioners. Petitioners cannot claim with merit that they were harmed by the voluntary addition of the two conditions by Dr. Raynor.

Finally, we conclude that the offer of two additional conditions to be placed upon an application for a conditional use permit is not an introduction of evidence. Municipal boards are not strictly bound by the formal rules of evidence, which is in accordance with their quasi-judicial nature. *See Burton v. New Hanover City Zoning Bd.*, 49 N.C. App. 439, 271 S.E. 2d 550 (1980), *cert. denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981). All that is required is that the party whose rights are being determined has the opportunity to cross-examine adverse witnesses and to offer evidence in support of his position and in rebuttal of his opponents' contentions. *Id.* Evidence, as a conceptual element of proof, is "any matter of fact, the effect, tendency, or design of which is to produce in the mind

a persuasion of the existence or nonexistence of some matter of fact." Black's Law Dictionary, 4th Ed.

Dr. Raynor was not trying to prove any fact or show that his proposed mobile home park would be anything other than what petitioners claimed it would be. His voluntary amendment of his application was only an alteration of his planned park to make the development more acceptable to petitioners.

[2] In responding to petitioners' arguments on appeal, defendants argue that petitioners have no standing in superior court, and thus no standing on appeal.

Only aggrieved parties may appeal the denial or grant of a conditional use permit. *Pigford v. Bd. of Adjustment*, 49 N.C. App. 181, 270 S.E. 2d 535 (1980), *disc. rev. denied*, 301 N.C. 722, 274 S.E. 2d 230 (1981). In *Neighborhood Assoc.* this Court held that a property association had standing to seek judicial review of a municipality approval of a special use permit. 63 N.C. App. 244, 304 S.E. 2d 251. Justice Whichard (then Judge) stated that "[I]f the individual members [of the Association] were the petitioners here, they would clearly have an interest in the property affected by the housing project as residents of the neighborhood where the project is to be located, and they would be potentially aggrieved by any decline in the use or value of their property that resulted from the housing project." *Id.* at 247, 304 S.E. 2d at 253; *compare*, *Pigford*, 49 N.C. App. 181, 270 S.E. 2d 535. We conclude, therefore, that as individual landowners whose property would be potentially harmed in value by Dr. Raynor's mobile home court, petitioners had standing to bring this matter before the superior court and thus have standing on appeal.

No error.

Judges GREENE and LEWIS concur.

BALES v. EVANS

[94 N.C. App. 179 (1989)]

N. D. BALES, PLAINTIFF v. E. R. EVANS, JR. AND E. R. EVANS & SONS, INC., DEFENDANTS

No. 886SC723

(Filed 6 June 1989)

1. Quasi Contracts and Restitution § 2.1— sale of equipment—equipment used and returned—quantum meruit—evidence sufficient

The evidence was sufficient to support an award of damages on quantum meruit where Evans expressed an interest in purchasing plaintiff's pan, a piece of equipment used to move topsoil and level landscape; plaintiff demonstrated the pan to Evans who then asked if he could try it out on defendant's farm for a day and pay plaintiff's asking price of $10,000 or return the pan; when plaintiff subsequently called Evans to verify his intentions, he was told that Evans wanted the pan; plaintiff replaced a seat and a dust catcher on the pan at Evans' request; Evans transported the pan on a trailer to defendant's farm on 6 May 1985; plaintiff went to the farm the next day, observed Evans and an employee operating the pan, and operated the pan without problems to show defendant's employee how to use the equipment; defendant did not return the pan or bring plaintiff the purchase money nor did he contact plaintiff or leave a message on plaintiff's telephone answering machine; plaintiff on several occasions went to defendant's farm and observed defendant's employee operating the pan; Evans was at the farm on two of those occasions and told plaintiff each time that he wanted to keep the pan a day or two longer; plaintiff did not object, but testified that he had had no choice as he did not have a way to transport the pan back home; defendant kept the pan from 6 May 1985 to 17 June 1985; defendant's employee went to plaintiff's residence a few days before the pan was returned to plaintiff and told plaintiff that they wanted to return the pan but could not get it started; plaintiff went to defendant's farm and discovered that the pan, which had been full of fuel when defendant took it, was empty and that the starter had burned out, possibly from repeated attempts to start the engine without fuel; plaintiff got the pan running and defendant returned it several days later; Evans subsequently contacted plaintiff

and asked for a bill for the use of the pan; and plaintiff sent defendant a bill for $15,840 which defendant refused to pay.

2. Quasi Contracts and Restitution § 2.2— use of equipment—measure of recovery—no error

The trial court did not err in an action for quantum meruit arising from the aborted sale of landscaping equipment known as a pan by denying defendant's motion for a new trial and motion to alter or amend the judgment on the ground that the jury verdict of $4,000 was excessive, contrary to law, and in disregard of the instructions of the court. Defendant contended that the jury ignored the court's instructions in awarding damages in that the value actually realized and retained by defendant was the eight or ten hours that defendant actually operated the pan, but plaintiff had introduced testimony of an equipment operator who stated that it is appropriate to charge for the number of days equipment is kept rather than the hours in actual use when equipment is leased without an operator; furthermore, the jury could have disbelieved testimony from defendant's witnesses that the pan was only in operation for eight or ten hours, given the number of weeks the pan supposedly sat idle on defendant's farm and defendant's delay in contacting plaintiff regarding his decision not to purchase the pan.

APPEAL by defendant E. R. Evans & Sons, Inc., from Judgment of *Judge Frank R. Brown* entered 22 February 1988 in NORTHAMPTON County Superior Court. Heard in the Court of Appeals 26 January 1989.

Dixon, Duffus & Doub by Curtis C. Coleman, III, for plaintiff appellee.

Taylor & McLean by Mitchell S. McLean for defendant appellant.

COZORT, Judge.

This appeal addresses the sufficiency of the evidence to support the jury's award of $4,000.00 in damages based on a quantum meruit theory of recovery. We find no error and affirm.

Plaintiff is a self-employed individual who does mechanic's work and moves mobile homes. The corporate defendant (hereinafter "de-

fendant") is engaged in farming operations and owns rental property and concrete companies. Plaintiff's complaint contained, *inter alia*, allegations that defendant breached a contract to purchase plaintiff's "pan," a piece of equipment used to move topsoil and level landscape, and, alternatively, that plaintiff was entitled to recover on quantum meruit for defendant's use of the pan. At the close of plaintiff's evidence, the trial court directed a verdict for the individual defendant on all claims, and directed a verdict for the corporate defendant on all claims except quantum meruit. After hearing all the evidence, the jury found that plaintiff delivered the pan to defendant under circumstances such that defendant should be required to pay for it, and that plaintiff was entitled to recover the sum of $4,000.00.

[1] On appeal, defendant first contends that the trial court erred in denying its motions for directed verdict and for judgment notwithstanding the verdict. In considering a motion for judgment notwithstanding the verdict, the trial court applies the same test that it applies in considering a motion for directed verdict: whether the evidence, considered in the light most favorable to plaintiff, is sufficient for submission to the jury. *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 745, 253 S.E. 2d 625, 627 (1979).

In order to recover on quantum meruit, a plaintiff must show that services were rendered (or property was delivered) to defendant, the services (or property) were knowingly and voluntarily accepted, and the services (or property) were not given gratuitously. *See Environmental Landscape Design Specialist v. Shields*, 75 N.C. App. 304, 306, 330 S.E. 2d 627, 628 (1985). There must be circumstances tending to show that, at the time the services were rendered or the property delivered to defendant, both parties understood that payment was expected. *See Twiford v. Waterfield*, 240 N.C. 582, 585, 83 S.E. 2d 548, 551 (1954).

Taken in the light most favorable to plaintiff, the evidence tends to show the following: Evans, defendant's president and principal stockholder, expressed an interest in purchasing plaintiff's pan. Plaintiff demonstrated the pan to Evans, who then asked if he could try it out on defendant's farm for a day and, "if it operated okay," he would pay plaintiff's asking price of $10,000.00, and, if not, he would return the pan. Soon afterwards, having received a telephone call from a man in Virginia who wanted to lease the

pan, plaintiff called Evans to verify his intentions; plaintiff was told that he should not lease the pan because Evans wanted it. At Evans' request, plaintiff replaced a seat and a dust catcher on the pan. On or about 6 May 1985, Evans transported the pan on a trailer to defendant's farm. The next day plaintiff went to the farm and observed Evans and an employee operating the pan. Plaintiff also operated the pan, without problems, for "about three-quarters of the day" moving dirt, grading a ditch line, and showing defendant's employee how to use the equipment.

Thereafter, defendant did not return the pan or bring plaintiff the purchase money, nor did he contact plaintiff or leave a message on plaintiff's telephone answering machine. On several occasions, however, plaintiff went to defendant's farm and observed defendant's employee operating the pan. Evans was at the farm on two of those occasions; each time he told plaintiff that he wanted to keep the pan a day or two longer. Plaintiff admitted that he did not object, but testified that he had no choice, as he did not have a way to transport the pan back home.

Defendant kept the pan from 6 May 1985 to 17 June 1985. A few days before the pan was returned to plaintiff, defendant's employee went to plaintiff's residence and told plaintiff that they wanted to return the pan but could not get it started. Upon arriving at defendant's farm and examining the machine, plaintiff discovered that the pan, which had been full of fuel when defendant took it, was empty and that the starter had burned out, possibly because of repeated attempts to start the engine without fuel. Plaintiff worked on the pan, got it running, and, several days later, defendant returned it. Evans subsequently contacted plaintiff and asked for a bill for the use of the pan. Plaintiff sent defendant a bill for $15,840.00. Defendant refused to pay.

We believe this evidence is sufficient to support an award of damages on quantum meruit. Although the parties originally may have contemplated a sale agreement, the circumstances support a finding that plaintiff reasonably expected that defendant would pay for the use of the pan from 6 May until 17 June, and that defendant knew or should have known of plaintiff's expectation of payment. Defendant's request for a bill underscores that finding.

Defendant argues, however, that he did not actually use the pan for more than eight or ten hours, and that he returned the pan as soon as possible after encountering numerous problems

with it. These contentions raise questions of credibility and reasonableness and are for the jury to decide, not the court. *Wilkins v. Taylor*, 76 N.C. App. 536, 538, 333 S.E. 2d 503, 504 (1985). The trial court properly denied defendant's motion for judgment notwithstanding the verdict.

[2] Defendant next assigns error to the trial court's denial of its motion for a new trial and motion to alter or amend judgment on the ground that the jury verdict of $4,000.00 was excessive, contrary to law, and in disregard of the instructions of the court. Defendant specifically argues that the jury ignored the court's instructions in awarding damages of $4,000.00, because the value "actually realized and retained" by defendant was the eight or ten hours that defendant actually operated the pan. This argument is meritless.

The measure of recovery on quantum meruit is the reasonable value of the services that are accepted by and that benefit defendant. *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 312 S.E. 2d 215 (1984). In the instant case, the trial court properly instructed the jury that, in determining the amount of recovery, the jury should consider "only the evidence presented to you which bears on the reasonable value of the pan actually realized and retained by the defendant." *See* N.C.P.I.—Civ. 736.01.

Plaintiff introduced the testimony of an equipment operator who stated that, when equipment is leased without an operator, it is appropriate to charge for the number of days the equipment is kept, not the hours in actual use. Furthermore, the jury could have disbelieved testimony from defendant's witnesses that the pan was in operation only for eight or ten hours, particularly given the number of weeks the pan supposedly sat idle on defendant's farm and defendant's delay in contacting plaintiff regarding his decision not to purchase plaintiff's pan. This assignment of error is therefore overruled.

We also overrule defendant's assignment of error to the trial court's taxing of deposition expenses against defendant as court costs awarded to plaintiff. The taxing of costs, including deposition expenses, is in the discretion of the trial court and is not reviewable on appeal. *See Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E. 2d 512, 516 (1982).

Plaintiff filed in this Court a motion to impose monetary sanctions, alleging that defendant's appeal is frivolous. We do not agree. The motion is denied.

No error.

Judges PHILLIPS and GREENE concur.

J. W. CROSS INDUSTRIES, INC., PLAINTIFF v. WARNER HARDWARE COMPANY, INC., DEFENDANT

No. 8813DC1343

(Filed 6 June 1989)

Ejectment § 3— nonpayment of rent—no excusal for nonpayment

The trial court properly directed a verdict for plaintiff in a summary ejectment proceeding where plaintiff alleged that it leased the property in question to defendant at a stated monthly rental; defendant failed to pay the rent of January 1988; plaintiff sent defendant notice of its intention to terminate the lease and take possession of the property pursuant to the terms of the lease; and evidence with regard to negotiations between the parties for reacquisition of the property from defendant did not raise an inference that plaintiff intended to excuse defendant from making the payments due under the lease or that plaintiff did not intend to declare the lease forfeited if defendant failed to pay the rent.

APPEAL by defendant from *Hooks, Judge*. Judgment entered 24 May 1988 in District Court, BLADEN County. Heard in the Court of Appeals 17 May 1989.

This is a summary ejectment proceeding instituted by plaintiff to recover possession of certain property leased by plaintiff to defendant. The lease provides that defendant must pay $1,000.00 per month in rent, and if defendant fails to pay its monthly rental payment by the fifteenth day of each month, plaintiff, after giving written notice to defendant, may terminate the lease and take possession of the premises. Defendant filed answer, admitting exe-

cution of the lease and the nonpayment of the January 1988 rent, but denying that plaintiff was entitled to possession. Plaintiff's motion for directed verdict was granted, and the court entered judgment declaring that "[p]laintiff is entitled to immediate possession of the . . . premises and defendant shall immediately vacate and surrender the . . . premises to plaintiff." Defendant appealed.

Carter & Carter, by James Oliver Carter, for plaintiff, appellee.

William R. Shell and W. Leslie Johnson, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

Defendant assigns error to the judgment directing a verdict for plaintiff. Defendant contends the evidence presented raised an issue of fact that should have been decided by the jury.

Usually a motion for a directed verdict under Rule 50(b)(1) of the North Carolina Rules of Civil Procedure is made against the party with the burden of proof. *Financial Corp. v. Harnett Transfer*, 51 N.C. App. 1, 275 S.E. 2d 243, *disc. rev. denied*, 302 N.C. 629, 280 S.E. 2d 441 (1981). A party having the burden of proof may not have its motion for a directed verdict granted when its right to recover depends on the credibility of its witnesses. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). "A directed verdict for the party with the burden of proof, however, is not improper where his right to recover does not depend on the credibility of his witnesses and the pleadings, evidence, and stipulations show that there is no issue of genuine fact for jury consideration." *Financial Corp. v. Harnett Transfer*, 51 N.C. App. 1, 5, 275 S.E. 2d 243, 246, *disc. rev. denied*, 302 N.C. 629, 280 S.E. 2d 441 (1981).

In the present case, the trial court directed a verdict for plaintiff even though plaintiff had the burden of proof. This was proper since plaintiff's evidence did not involve the credibility of its witnesses, and none of defendant's evidence raised a genuine issue of material fact to be considered by the jury. Plaintiff alleged in its complaint that it leased the property in question to defendant at a monthly rental of $1,000.00, that defendant had failed to pay the rent of January 1988, and that it sent defendant notice of its intention to terminate the lease and take possession of the property pursuant to the terms of the lease. In its answer, defendant admitted that the January rent was not paid, thus a directed verdict for plaintiff was proper.

Defendant, however, argues the trial court erred in not considering the evidence offered by defendant with respect to negotiations between defendant and plaintiff in which the assets of Bladen Ace Hardware, operated by defendant on the premises owned by plaintiff and leased to defendant, would be reacquired by plaintiff on 1 January 1988. These negotiations did not result in an agreement being executed. The court's exclusion of the proffered evidence would be reversible error only if such evidence raised an inference from which the jury could find that plaintiff waived or was estopped to pursue its rights under the lease.

According to the doctrine of waiver, a person may waive practically any right he has unless forbidden by law or public policy. *Carrow v. Weston*, 247 N.C. 735, 102 S.E. 2d 134 (1958). The essential elements of waiver are the existence at the time of the alleged waiver of a right, advantage or benefit, the knowledge, actual or constructive, of the existence thereof, and an intention to relinquish such right, advantage or benefit. *Fetner v. Granite Works*, 251 N.C. 296, 111 S.E. 2d 324 (1959). The question of intent to excuse nonperformance is ordinarily a question of fact and may rarely be inferred as a matter of law. *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962).

"The foundation of estoppel *in pais* is error and inadvertance on one side and fault or dereliction on the other." *Davis v. Montgomery*, 211 N.C. 322, 323, 190 S.E. 489 (1937). Equitable estoppel exists when: 1) a party falsely represents or conceals a material fact, when he has knowledge, actual or constructive, of the truth; 2) that party intends for the representation or concealment to be acted upon; and 3) the other party reasonably relied or acted upon it to his prejudice. The party asserting estoppel must have been without knowledge, or the means to know, the real facts and must not have been culpably negligent in informing himself. *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967).

While this boilerplate law cited by defendant with respect to waiver and estoppel is correct, unfortunately for defendant it has no application to the facts in this case. The course of conduct between the parties with respect to the negotiations for the reacquisition of the property from defendant does not raise an inference that plaintiff intended to excuse defendant from making the payments due under the lease, or that plaintiff did not intend to declare the lease forfeited if defendant failed to pay the rent. No construc-

tion of the evidence that was excluded raises an inference that plaintiff's silence amounted to a misrepresentation of a material fact reasonably calculated to mislead defendant in not paying the rent due. None of the evidence raises an inference that plaintiff intended to relinquish its rights under the lease.

Thus, we hold that under the circumstances of this case, the evidence excluded was not relevant and raised no genuine issue as to any material fact to any defense to plaintiff's claims.

Affirmed.

Judges ARNOLD and WELLS concur.

CHARLES MORROW v. BONNIE K. MORROW, AND RONALD C. KIRK, AS SUBSTITUTED DEFENDANT

No. 8819DC1276

(Filed 6 June 1989)

Judgments § 17.1; Husband and Wife § 10.1— memorandum of judgment/order—standard separation agreement—void for indefiniteness

The trial court erred in a divorce action by denying plaintiff's Rule 60 motion and by allowing defendant's Rule 70 motion to direct plaintiff to sign a "standard separation agreement" where the parties had signed a "memorandum of judgment/order" which stated that the parties were entitled to a divorce and agreed to execute a standard separation agreement, defendant died, and plaintiff demanded his statutory spousal share. The provision in the memorandum of judgment/order stating that each party was entitled to a divorce from bed and board was merely a recitation and was under no circumstances a judgment of divorce; North Carolina law does not recognize any particular form as a standard separation agreement; and it follows that, if the memorandum of judgment/order was void for indefiniteness, then there was no authority to order the parties to comply with its terms.

APPEAL by plaintiff from *Montgomery, Judge*. Order entered 7 April 1988 in District Court, ROWAN County. Heard in the Court of Appeals 15 May 1989.

This is a civil action wherein plaintiff sought a divorce from bed and board from defendant pursuant to G.S. 50-7. Plaintiff's complaint was filed on 12 September 1986, but defendant filed no answer. The matter came before Judge James Dooley on 25 November 1986, and the record discloses that on that date the following "Memorandum of Judgment/Order" was entered:

> THIS CAUSE having been settled between the above parties upon the following terms:
>
> 1. Each party shall be entitled to a divorce from bed and board from each other and agree to execute a standard separation agreement.
>
> A typewritten Order containing appropriate findings of fact and conclusions of law and reflecting said terms will be prepared by *Hancock* and submitted for signing by the undersigned Judge no later than *2 weeks*. The parties stipulate that the signing of this memorandum constitutes entry the Judgment/Order in this action, that this Memorandum is enforceable by the Court, that the typewritten Judgment/Order may be signed out of term and out of county, that the further signatures of the parties and their attorneys will be be [sic] necessary, and that said attorneys will be released as attorneys of record upon signing of the typewritten Judgment/Order.
>
> This the *25* day of *Nov*, 19*86*.
>
> s/ *James Dooley*
> Judge Presiding
> James Dooley
>
> s/ *Charles E. Morrow*
> Plaintiff
>
> s/ *Bonnie K. Morrow*
> Defendant
>
> s/ *R. Darrell Hancock*
> Attorney for Plaintiff
>
> s/ *Mona Lisa Wallace*
> Attorney for Defendant

On 12 December 1986, 17 days after the "Memorandum of Judgment/Order" was entered, defendant died. Plaintiff demanded his statutory spousal share. Ronald C. Kirk, executor of defendant's estate, was substituted as defendant on 23 September 1987.

Defendant, on 28 September 1987, filed a motion under Rule 70 to require plaintiff to execute a "standard separation agreement" as provided by the "Memorandum of Judgment/Order." On 2 October 1987, plaintiff filed a motion under Rule 60 to have the "Memorandum of Judgment/Order" declared void. On 7 April 1988, the trial court entered an order making detailed findings of fact and conclusions of law. The court denied plaintiff's Rule 60 motion and allowed defendant's Rule 70 motion which directed plaintiff to sign a "standard separation agreement." Plaintiff appealed.

George R. Hundley for plaintiff, appellant.

Jack E. Carter for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff assigns error to denial of his Rule 60(b)(4) motion to be relieved from the "Memorandum of Judgment/Order" and the court's allowing defendant's Rule 70 motion ordering plaintiff to "sign the separation agreement. . . ."

Plaintiff argues, among other things, that the provision in the "Memorandum of Judgment/Order" requiring him to "sign the separation agreement" is void for vagueness and that the court had no authority to order him to sign a separation agreement pursuant to the void "Memorandum of Judgment/Order." We focus our attention therefore on the question of whether the provision in the "Memorandum of Judgment/Order" entered on 25 November 1986 requiring plaintiff to sign a "standard separation agreement" is so vague and uncertain as to be impossible to enforce.

A judgment must be complete and certain, indicating with reasonable clearness the decision of the court, so that such judgment may be enforced. *Bank v. Robertson*, 39 N.C. App. 403, 250 S.E. 2d 727 (1979). If the parties are unable to ascertain the extent of their rights and obligations, a judgment may be rendered void for uncertainty. *Id.* This is equally true with judgments to which the parties have consented. *Hardy v. Crawford*, 62 N.C. App. 689, 303 S.E. 2d 388 (1983). Such indefinite judgments, although consented to by the parties, are void if they are indefinite, and they have no effect in future proceedings. *Id.*

In the present case, although Judge Montgomery found as a fact "[t]hat there is such a thing as a standard separation agreement," this finding has no support in our law. While we recog-

nize that some of the form books in general use by the profession contain forms for separation agreements, and members of our profession might from time to time refer to such forms as "standard separation agreements," our law does not recognize that any particular form is a "standard separation agreement" or that all separation agreements shall contain the same provisions. Thus, when the court in the "Memorandum of Judgment/Order" provided that plaintiff and defendant would sign a "standard separation agreement," neither the judge nor the parties nor the parties' attorneys knew with any certainty what specific or precise provisions such instrument would contain. It follows therefore that if the "Memorandum of Judgment/Order" was void, Judge Montgomery had no authority to order the parties to comply with any of its terms.

The provision in the "Memorandum of Judgment/Order" stating that "[e]ach party shall be entitled to a divorce from bed and board from each other" is merely a recital, and is under no circumstances a judgment of divorce from bed and board. This recital, together with other provisions written into the form, merely indicates the parties intended to settle the case then before the court by entering into a separation agreement in lieu of proceeding with the trial of the case for divorce from bed and board.

Finally, we note that the "Memorandum of Judgment/Order" in this case is a form apparently being used by some of the district judges in our state. Nothing we have said herein is to be construed in any way to discourage use of such forms. Indeed, we believe the practice will be helpful to all parties in certain cases, but as demonstrated by this case, it is important that all parties understand the proper use of these forms and the full legal significance of a "Memorandum of Judgment/Order" pending the preparation and signing of the formal judgment. As demonstrated by this case, the "Memorandum of Judgment/Order" must be sufficiently definite and certain so that it can be enforced.

For the reasons stated above, the order denying plaintiff's Rule 60(b)(4) motion is reversed, and the order granting defendant's Rule 70 motion is vacated, and the cause is remanded to District Court, Rowan County for entry of an order declaring the "Memorandum of Judgment/Order" entered on 25 November 1986 to be void.

Reversed, vacated, and remanded.

Judges ARNOLD and WELLS concur.

IN THE MATTER OF: THE ESTATE OF FANNIE LEE KESSINGER, DECEASED

No. 881SC927

(Filed 6 June 1989)

Judicial Sales § 3— private sale—upset bid after allotted time but before confirmation—upset bid not proper

The trial court did not err in confirming a private sale of estate property to a named person, and the court did not abuse its discretion in failing to consider an upset bid where neither the upset bidder's deposit with the estate attorney, nor the attorney's telephone notice to the clerk, amounted to an upset bid within the meaning of N.C.G.S. § 1-339.37 because it was not a timely deposit with the clerk.

APPEAL by Lilly Wyonnia (Doll) Gray, executrix of the estate of Fannie Lee Kessinger (deceased), from *Tillery, Judge*. Order entered 21 April 1988. Heard in the Court of Appeals 21 March 1989.

On 19 January 1988, pursuant to N.C.G.S. § 28A-15-1. and § 1-339.33, executrix filed a petition seeking the sale of estate assets, a strip of land adjacent to U.S. 158 Bypass in Nags Head, North Carolina. On the same day, the Clerk of Superior Court entered an order of private sale of the real property and immediately thereafter the executrix, pursuant to N.C.G.S. § 1-339.35 filed a report of private sale to Carolista C. Fletcher, the adjacent property owner, for the sum of $5,000.00. The report of private sale stated:

> 3. The closing date shall be January 19, 1988. As provided by N.C. General Statue [sic] 51-339.25 [sic], this sale shall not be final until the expiration of the time period for upset bids and a deed shall be recorded on the date of confirmation of this sale.

On 20 January 1988, Burton H. Jones deposited $5,500.00 with the estate attorney Leonard G. Logan, Jr. as an upset bid. Logan telephoned the Clerk of Superior Court to inform her of the upset bid. Neither Logan nor Jones deposited any monies with the Clerk of the Superior Court until 1 February 1988. It is undisputed that the final day for upset bids as provided by N.C.G.S. § 1-339.25 was 29 January 1988. Before 5:00 p.m. on 29 January 1988 Fletcher checked with the office of the Clerk of Superior Court and learned that no upset bid had been filed.

On 1 February 1988, executrix filed with the Clerk of Superior Court a petition for resale of real property at private sale reporting the upset bid of $5,500.00 attempted by Jones. The clerk issued an order for resale of real property at private sale on 1 February 1988, authorizing the resale to Jones subject to written notification to Fletcher, and, further finding that the sale should not be ordered confirmed until the expiration of ten days.

On 3 February 1988, Fletcher filed a motion with the clerk requesting that the Jones upset bid be set aside as not timely filed, and that the private sale to Fletcher be confirmed. As requested, the clerk of court entered an order rejecting the upset bid and confirming the private sale to Fletcher. This order was affirmed on 17 April 1988 by Superior Court Judge Tillery. From this order executrix appeals.

Leonard G. Logan, Jr. for appellant.

Aycock, Spence & Graham, by W. Mark Spence, for appellee.

ARNOLD, Judge.

Executrix contends that the superior court erred in confirming the private sale to Carolista Fletcher, and that it failed to properly exercise its discretion by not considering the Jones bid. We disagree.

By the terms of the "Report of Private Sale," the sale to Fletcher was not to be final "until the expiration of the time period for upset bids and a deed [is] recorded on the date of confirmation of this sale." The time period for upset bids expired on 29 January 1988. Essentially, executrix contends that although the period for upset bids had expired it was still in the clerk's, and ultimately the superior court's, discretion whether to enter the order of confirmation. N.C.G.S. § 1-339.25 provides:

> (a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) . . . such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and . . . the timely deposit with the clerk of the required amount,

> together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid . . . .

By definition, neither Jones's deposit with Logan, nor Logan's telephone notice to the clerk, amounted to an upset bid because it was not a "timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable."

The statutory scheme further provides:

> § 1-339.37. Private sale; confirmation.
>
> If no upset bid for property sold at private sale is submitted within ten days after the report of sale is filed, the sale may then be confirmed, and the provisions of G.S. 1-339.28(a) and (b) are applicable to such confirmation whether the property sold is real or personal. . . .

There had been no upset bid as defined by N.C.G.S. § 1-339.25, therefore the sale could be confirmed by the clerk of the superior court to be subsequently approved by "the resident judge of the district. . . ." N.C.G.S. § 1-339.28(a)(b). Thus, despite the fact that the judge's order merely affirmed the clerk's actions in conformance with the statutory scheme, and despite Fletcher's understandable reliance on the statutory scheme, executrix contends that the court failed in its discretion to consider the untimely attempt by Logan to assert an upset bid by Jones. Executrix correctly asserts the rule:

> Before confirmation, the prospective purchaser has no vested interest in the property. His bid is but an offer subject to the approval of the court. *Page v. Miller*, 252 N.C. 23, 113 S.E. 2d 52 (1960). The court in exercising its sound discretion may reject the bid at any time before confirmation. *Harrell v. Blythe*, 140 N.C. 415, 53 S.E. 232 (1906). But, upon confirmation the sale becomes final [citations omitted] and the vested interest of the purchaser is not lightly to be put aside.

In re Green, 27 N.C. App. 555, 557-58, 219 S.E. 2d 552, 553-554, (1975), *rev. denied, appeal dismissed*, 289 N.C. 140, 220 S.E. 2d 798 (1976). The issue in *Green* was whether the clerk was authorized to refuse to file a valid order of confirmation. Here we are asked to decide whether before confirmation, but after the upset bid period has expired, a clerk, and ultimately a superior court judge, have improperly exercised their discretion because they refused

to consider an untimely bid. Executrix argues that Judge Tillery should have heard evidence concerning the value of the property and potential value to the estate and the incompetent beneficiary.

The fact that Jones offered more money is not by itself enough to ignore the statutory scheme in this case. *See Coping v. Hillsboro Clay Manufacturing Co.*, 153 N.C. 329, 69 S.E. 250 (1910). Further, "[a] decree of confirmation entered by a court of competent jurisdiction may not be set aside as to the purchaser, when the proceedings are merely irregular except for mistake, fraud or collusion." *Wadsworth v. Wadsworth*, 260 N.C. 702, 708, 133 S.E. 2d 681, 686 (1963).

Judge Tillery found, and we agree, that there was "no mistake, fraud, undue influence, unfair advantage or other irregularities found as to any party to this proceeding." We find that confirmance of the sale to Fletcher was within the letter of the law, and the sound discretion of the clerk and the resident judge.

The order of the trial court is

Affirmed.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. TED GARFIELD STEVENS

No. 8830SC827

(Filed 6 June 1989)

1. Robbery § 4.3— use of butcher knife—sufficiency of evidence of armed robbery

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery pursuant to N.C.G.S. § 14-87 where it tended to show that defendant had a ten-inch butcher knife in his possession and he used it in a threatening manner to accomplish the robbery.

2. **Robbery § 1.2; Automobiles and Other Vehicles § 134— armed robbery—unauthorized use of vehicle—conviction for both proper**

Defendant could properly be convicted of armed robbery and unauthorized use of a motor vehicle arising from the same transaction where the crime of robbery took place in a supermarket; he took the keys from an employee; and he made his getaway in the employee's vehicle.

3. **Automobiles and Other Vehicles § 134— variance between indictment and proof immaterial**

Any variance between the allegations of the indictment that defendant took and carried away a 1983 Datsun automobile belonging to a named person without her permission and the verdict finding defendant guilty of the unauthorized use of a Nissan automobile was immaterial.

APPEAL by defendant from *Snepp, Judge*. Judgments entered 22 March 1988 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 8 May 1989.

Defendant was charged with the armed robbery of $1,898.00 from Ingles Grocery Store whereby the life of Delora Jean Treadway was endangered and threatened in violation of G.S. 14-87, and with felonious larceny of an automobile, the personal property of Delora Jean Treadway, in violation of G.S. 14-72.2(a). The evidence presented at trial tends to show the following:

On 6 December 1987, as the employees were closing Ingles Grocery Store, defendant accosted Steve Brock in the storeroom, grabbed him by the sweater and held a knife to his chest. While holding the knife, defendant forced all of the employees into an office and had one employee, Delora Jean Treadway, tie the others' hands behind their backs, open the safe and remove the money. Defendant took the money and Treadway's car keys, tied Treadway's hands and fled the scene. A few minutes later, defendant returned and asked Treadway which key started the car. After ascertaining which key started the car, defendant drove away in Treadway's car and was apprehended a short distance away from the store.

Defendant was found guilty of robbery with a dangerous weapon for which he was sentenced to 18 years imprisonment. Defendant

was also found guilty of unauthorized use of a motor vehicle and was sentenced to two years imprisonment to run concurrently with his sentence for armed robbery.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State, appellee.

John I. Jay for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant assigns error to the denial of his motion to dismiss, his objection to the verdict finding him guilty of armed robbery, and the entry of judgment on the verdict. These assignments of error raise only the question of whether the evidence was sufficient to support the verdict of guilty of armed robbery. Defendant argues "[t]here is absolutely no evidence that a firearm was used." This argument is fatuous. The record is replete with evidence that defendant had in his possession a ten-inch butcher knife which he used in a threatening fashion to accomplish the robbery of the money. While it is obvious that a knife is not a "firearm," it is a "dangerous weapon" as described by G.S. 14-87. The robbery described in the bill of indictment was accomplished by the use and the threatened use of a dangerous weapon to take the money from the employees of the store, including Delora Jean Treadway, named in the bill of indictment. *See State v. Thompson*, 57 N.C. App. 142, 291 S.E. 2d 266 (1982). These assignments of error have no merit.

Defendant also assigns error to the trial court's failure to submit to the jury the possible verdict of the lesser included offense of common law robbery. This record contains absolutely no evidence of common law robbery of money from the presence of Delora Jean Treadway. This assignment of error likewise has no merit.

[2] Defendant next argues that he suffered "conviction for the same crime twice by being convicted of armed robbery and the unlawful use of a conveyance." We disagree. Defendant was not charged with the armed robbery of an automobile. He was charged with the larceny of the automobile after the crime of armed robbery had been completed. We agree that larceny is a lesser included offense of armed robbery and that defendant could not be convicted for robbing someone of the automobile and also the larceny of the automobile. However, he can be convicted of the larceny of the

automobile as a separate crime. *See State v. White*, 322 N.C. 506, 369 S.E. 2d 813 (1988). Defendant's contentions are without merit.

[3] Defendant's Assignments of Error Nos. 2, 6 and 7 all raise the question whether the evidence is sufficient to support the verdict finding him guilty of unauthorized use of a motor vehicle. Defendant was charged with the larceny of a 1983 Nissan automobile, the personal property of Delora Jean Treadway.

The unauthorized use of a motor conveyance may be a lesser included offense of larceny where there is evidence to support the charge. *State v. Coward*, 54 N.C. App. 488, 283 S.E. 2d 536 (1981). It is well-settled that the evidence in a criminal case must correspond with the allegations in the indictment which are essential and material to charge the offense. *State v. Simmons*, 57 N.C. App. 548, 291 S.E. 2d 815 (1982). The Supreme Court of the United States, in *Berger v. U.S.*, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314, 1318 (1935), stated:

> The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecutionn for the same offense.

"A variance will not result where the allegations and proof, although variant, are of the same legal significance." *State v. Craft*, 168 N.C. 208, 212, 83 S.E. 772, 774 (1914). If a variance in an indictment is immaterial, it is not fatal. *Id.*

Any variance in the present case in the allegations of the indictment and the evidence adduced at trial is immaterial. Evidence tending to show that defendant took and carried away a 1983 Datsun automobile belonging to Delora Jean Treadway without her permission is sufficient to support the verdict finding defendant guilty of the unauthorized use of a Nissan automobile.

Defendant had a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and WELLS concur.

CORNELIA BELK GANT v. NCNB NATIONAL BANK OF NORTH CAROLINA

No. 8826SC906

(Filed 6 June 1989)

1. **Guaranty § 2— duty to reveal to guarantor financial condition of debtor—sufficiency of complaint**

In an action arising out of a contract of guaranty signed by plaintiff in favor of defendant guaranteeing loans by defendant to a company owned by plaintiff's husband, plaintiff's complaint was sufficient to state a claim for relief, even if it was labeled improperly, where plaintiff alleged that defendant knew she was unaware of the financial condition of the principal debtor and knew that she was relying on defendant's "good faith and financial expertise" in making the loans; and plaintiff alleged that defendant at all times knew or had sufficient information to know the principal debtor was insolvent.

2. **Rules of Civil Procedure § 15— amendment of complaint after dismissal**

Where an amendment to a complaint is to cure clearly typographical errors which were not the basis of dismissal, defendant is not prejudiced by the allowance of the amendment.

3. **Fraud § 9— no allegations as to time, place, or persons making misrepresentations—insufficiency of complaint to allege fraud**

The trial court properly dismissed plaintiff's claim of fraud since the complaint contained no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the fraudulent misrepresentations to plaintiff, and it is insufficient to allege conclusorily that a corporation made fraudulent misrepresentations.

APPEAL by plaintiff from *Snepp, Judge*. Order entered 7 June 1988, effective as of 17 May 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 March 1989.

This case arose out of a contract of guaranty signed by plaintiff in favor of defendant, guaranteeing loans made by defendant to a company owned by plaintiff's husband. Plaintiff's complaint alleged a breach by defendant of its duty of good faith, fraud, negligence and wrongful withholding of stock certificates. Defendant moved to dismiss for failure to state a claim upon which relief can be

granted. G.S. 1A-1, Rule 12(b)(6). Defendant's motion was granted and plaintiff appeals.

James, McElroy and Diehl, by William K. Diehl, Jr. and J. Mitchell Aberman for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah and Fouts, by Charles T. Hagan, III and J. Alexander S. Barrett for defendant-appellee.

EAGLES, Judge.

[1] Plaintiff argues on appeal that the trial court erred in dismissing her complaint. After careful consideration of the record on appeal and the applicable law, we agree in part.

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In order to withstand the motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim. *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983). The question before us is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1977).

The crux of plaintiff's complaint is that defendant failed to fulfill its obligation to inform her of the financial condition of the company whose loans she guaranteed. Although there is no fiduciary relationship between creditor and guarantor, *International Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 220, 316 S.E. 2d 619, 621, *disc. rev. denied*, 312 N.C. 493, 322 S.E. 2d 556 (1984), in some instances a creditor owes a duty to the guarantor to disclose information about the principal debtor.

> If the creditor knows, or has good grounds for believing that the surety [or guarantor] is being deceived or misled, or that he is induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good and fair dealing demand that he should make such disclosure to him; and if he accepts

> the contract without doing so, the surety [or guarantor] may afterwards avoid it.

Trust Co. v. Akelaitis, 25 N.C. App. 522, 526, 214 S.E. 2d 281, 284 (1975), quoting 10 Williston, Contracts, section 1249 (3d ed. 1967).

Plaintiff has alleged the defendant knew that she was unaware of the financial condition of the principal debtor and knew she was relying on defendant's "good faith and financial expertise" in making the loans. Further, plaintiff alleged the defendant at all times knew or had sufficient information to know the principal debtor was insolvent. Plaintiff has alleged sufficient facts to state a claim against defendant, whether the cause of action is ultimately determined to be one for negligence or "breach of duty of good faith," as plaintiff has labeled her claims. Allegations of sufficient facts to state any legal claim are all that is generally required to withstand a Rule 12(b)(6) motion.

[2] We also note that plaintiff's allegations of negligence contain language regarding "plaintiff's negligence" and defendant's "fraud." Defendant asserts that these errors in pleading are sufficient in themselves to warrant dismissal of plaintiff's claim. The record does not indicate the trial court based its order of dismissal on these clearly typographical errors, which were purportedly cured by plaintiff's motion to amend the complaint. We agree with defendant's assertion that plaintiff may not amend its complaint after an order of dismissal has been entered. *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E. 2d 378 (1987). However, in this case, where the amendment is to cure clearly typographical errors that were not the basis of dismissal, we see no prejudice to defendant.

[3] Plaintiff has also alleged a cause of action based on fraud. The essential elements of actionable fraud are well established.

> There must be a misrepresentation of material fact, made with knowledge of its falsity and with intent to deceive, which the other party reasonably relies on to his deception and detriment. Equally well-established is the requirement that the plaintiff allege all material facts and circumstances constituting the fraud with particularity in the complaint. Mere generalities and conclusory allegations of fraud will not suffice. [Citations omitted.]

Moore v. Wachovia Bank & Trust Co., 30 N.C. App. 390, 391, 226 S.E. 2d 833, 834-35 (1976). The pleader must state with particularity the time, place and content of the false representation.

Here because plaintiff has failed to allege the circumstances constituting fraud with sufficient particularity, the trial court was correct in granting defendant's Rule 12(b)(6) motion on the fraud claim. The fatal deficiency in plaintiff's allegations is that the complaint contains no facts whatsoever setting forth the time, place or specific individuals who purportedly made the fraudulent misrepresentations to plaintiff. It is not sufficient to allege conclusorily that a corporation made fraudulent misrepresentations. *See Coley v. NCNB*, 41 N.C. App. 121, 254 S.E. 2d 217 (1979).

Plaintiff has also asserted a claim for wrongful withholding of stock certificates. In the complaint plaintiff alleges that the defendant is wrongfully withholding the stocks plaintiff pledged in guarantee of the loans. Return of the stocks, plus damages, is what plaintiff is seeking and this "cause of action" is in reality a remedy plaintiff is requesting, not an independent cause of action. Plaintiff has not cited any case where an independent cause of action for wrongful withholding of stock certificates has been recognized and we decline to recognize one here. Plaintiff is merely seeking a remedy.

For the reasons stated, the trial court's order of dismissal is affirmed in part and reversed in part, and the case remanded for proceedings on the breach of duty of good faith claim and the negligence claim.

Affirmed in part, reversed in part and remanded.

Judges WELLS and GREENE concur.

ALTHEA RIDDICK, PETITIONER-APPELLEE v. ATLANTIC VENEER, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLANTS

No. 883SC1347

(Filed 6 June 1989)

Master and Servant § 111 — appeal untimely filed — refusal of Commission to hear — abuse of discretion

The Employment Security Commission clearly abused its discretion by refusing to allow claimant's appeal from a deci-

sion of a claims adjudicator where plaintiff was notified of the denial of her claim for unemployment compensation benefits by letter mailed 13 January 1988, the letter advised petitioner that her right to appeal would expire on 25 January 1988, petitioner mailed a letter giving notice of appeal on 20 January 1988, and the letter was postmarked 20 January 1988 but was not received in the Raleigh office of the Commission until 26 January 1988. The Commission's regulations allow it to grant extensions of time and to permit acts to be done after the expiration of the time allowed where the failure to act was the result of excusable neglect; the petitioner's mailing the letter more than five days in advance of the due date, if neglect at all, was clearly excusable.

APPEAL by Employment Security Commission of North Carolina (Commission) from *Reid, David E., Jr., Judge.* Order entered 29 September 1988 in Superior Court, CRAVEN County. Heard in the Court of Appeals 18 May 1989.

This is an appeal from an order of the superior court reversing the decision of the Employment Security Commission dismissing claimant's appeal from a decision of a claims adjudicator for claimant's failure to give timely notice of appeal from the adjudicator's decision.

Pamlico Sound Legal Services, by Daniel V. Besse, for petitioner-appellee.

T. S. Whitaker, Chief Counsel, and C. Coleman Billingsley, Jr., for respondent-appellant Employment Security Commission of North Carolina.

No brief for Atlantic Veneer, respondent.

JOHNSON, Judge.

Petitioner was advised by a claims adjudicator of the Commission by letter mailed 13 January 1988 of the denial of her claim for unemployment compensation benefits. The letter advised petitioner that her right to appeal this determination would expire on 25 January 1988. Petitioner mailed a letter giving notice of appeal on 19 January 1988. The letter was postmarked 20 January 1988 but was not received in the Raleigh office of the Commission until 26 January 1988. Petitioner's appeal was dismissed by the

Commission because she failed to file notice of appeal within ten days as required by G.S. sec. 96-15(b)(2). She then filed a petition for judicial review in Craven County Superior Court where Judge David Reid entered an order reversing the Commission's dismissal of petitioner's appeal. The Commission appealed.

The Commission argues the superior court lacked authority to allow a late appeal from the adjudicator's determination. We disagree.

G.S. sec. 96-15(b)(2) provides that a determination of a claims adjudicator is final "unless within 10 days after the date of notification or mailing of the conclusion, whichever is earlier, a written appeal is filed pursuant to such regulations as the Commission may adopt." The regulations adopted by the Commission provide that an appeal from an adjudicator's decision or notification must be received in an office of the Commission within ten days from the earlier of the mailing of the adjudicator's decision or notification of decision. E.S.C. Reg. 13.16(B). The Commission's regulations further allow it to grant extensions of time and to permit acts to be done after the expiration of the time allowed "where the failure to act was a result of excusable neglect." E.S.C. Reg. 21.11(E). The Commission thus has the discretion to allow a late appeal. It recognized this discretionary authority by finding and concluding that claimant had failed to show excusable neglect. This ruling, as a discretionary one is fully reviewable on appeal. *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 349 S.E. 2d 842 (1986).

The Commission argues that it did not abuse its discretion in refusing to allow claimant's late appeal. It cavalierly argues claimant assumed the risk of untimely delivery when she mailed the notice of appeal and that she could have hand delivered the notice to the local Commission office in the town where she had commuted to work daily. This argument disregards the facts that the Commission itself relied upon the mails to deliver its determination to the claimant and that the notice of decision itself states that notice of appeal may be filed by mailing the notice to the Raleigh office. We agree with Judge Reid that claimant acted as an ordinary and prudent person in transacting her business. She had a reasonable expectation that intrastate delivery of her letter would occur within five days or less. Her mailing the letter more than five days in advance of the due date, if neglect at all, was clearly excusable. The Commission clearly abused its discretion in refusing to allow claimant's appeal.

The order is

Affirmed.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. JESSE HANIBLE

No. 885SC1052

(Filed 6 June 1989)

Criminal Law § 122.1— jury's request to have transcript read—request denied—failure of court to exercise discretion—testimony not critical to determination of guilt

Even if the trial court erred in failing to exercise its discretion in denying the jury's request to have a certain portion of the testimony read back to it, such error was not prejudicial since the testimony related to events occurring after defendant fired the murder weapon; the requested testimony would not exonerate defendant; and the testimony therefore was not critical to the jury's determination of defendant's guilt. N.C.G.S. § 15A-1233(a).

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 29 April 1988 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 17 May 1989.

Defendant was charged in a proper bill of indictment with the murder of Alfonzo Goodman on 8 August 1987. Defendant was found guilty of voluntary manslaughter and appealed from a judgment imposing a prison sentence of six years.

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

Assistant Appellate Defender Teresa A. McHugh, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant first contends the trial court erred in not exercising its discretion in denying the jury's request to have portions of

the transcript read to it. In this regard, the record discloses the following:

> COURT: I understand you have a request.
>
> FOREMAN: Yes, Your Honor. We would like to hear Mr. Hanible, a transcript of Mr. Hanible's and Mr. Windon's testimony from the time Jessie [sic] fired the gun until they returned to the drinkhouse.
>
> COURT: Let me make this observation for you. I hesitate to have the reporter read back what he has in his notes because sometimes they may not be accurate.
>
> You will have to recall that I told you that it is your duty to recall the evidence as best as you can; so I am afraid that is what you will have to do.

G.S. 15A-1233(a) in pertinent part provides:

> If 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 *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980), the trial judge denied the jury's request to have the testimony of the defendant's alibi witness read to it. The trial judge stated:

> No sir, the transcript is not available to the jury. The lady who takes it down, of course, is just another individual like you 12 people. And what she hears may or may not be what you hear, and 12 of you people are expected, through your ability to hear and understand and to recall evidence, to establish what the testimony was. No, I hope you understand. She takes it down and the record, after she submits it to the varous individuals, if it needs to be submitted is gone over and then they themselves can object to what she had in the record as not being what the witness says, and so on and so forth. For that reason I do not allow records to even be read back to the jury, because she may not have heard it exactly as the witness said it, and you people might

> have heard it differently; so for that reason you are required to recall the witness' testimony as you've heard it.

Id. at 510-511, 272 S.E. 2d at 125. Our Supreme Court held that the trial judge's comment to the jury that the transcript was unavailable to them was an indication that the judge did not exercise his discretion to decide whether, under the facts of that case, the transcript should have been available. The Court further held that this error by the trial court was prejudicial because the requested evidence, if believed, would have established an alibi for the defendant. Accordingly, the defendant was granted a new trial.

In *State v. Ashe*, 314 N.C. 28, 33, 331 S.E. 2d 652, 656 (1985), the trial judge responded to a jury request to review portions of the testimony as follows:

> I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree upon that recollection in your deliberations.

Our Supreme Court found that the trial judge's response was in substance precisely the same as the trial judge's response in *Lang*, and therefore the trial judge erred in not exercising his discretion in denying the request. The Court also found the error to be prejudicial because, although the court did not give the foreman a chance to specify what portion of the testimony the jury wanted to review, it was reasonable to conclude that it was evidence relating to the defendant's alibi, the only contested issue in the case.

Assuming *arguendo*, that Judge Barefoot failed to exercise his discretion in denying the jury's request in this case, we do not find this to be prejudicial error. In order for this alleged error to be found prejudicial, the burden rests on defendant to demonstrate that had this error not occurred, there is a reasonable possibility that his trial would have had a different outcome. *See* G.S. 15A-1443(a); *State v. Helms*, 93 N.C. App. 394, 378 S.E. 2d 237 (1989). Defendant has not met this burden. The testimony requested by the jury—"a transcript of Mr. Hanible's and Mr. Windon's testimony from the time Jessie [sic] fired the gun until they returned to the drinkhouse"—was not significant to defendant's defense. This testimony related to events occurring *after* defendant fired the murder weapon, and thus this requested testimony, unlike alibi testimony, would not exonerate defendant and was not critical to the jury's determination of defendant's guilt.

Defendant had a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and WELLS concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY R. BRUCE FULLER AND WIFE, DIANE R. FULLER, GRANTOR; TO WILLIAM E. ANDERSON, TRUSTEE FOR ALVIN E. PENNEBAKER AND WIFE, GEORGE ANN PENNEBAKER AND EDWARD C. PENNEBAKER AND WIFE, O. I. PENNEBAKER, RECORDED IN DEED OF TRUST BOOK 1105 AT PAGE 344, BUNCOMBE COUNTY REGISTRY; SEE SUBSTITUTION OF TRUSTEE RECORDED IN DEED BOOK 1509 AT PAGE 73, BUNCOMBE COUNTY PUBLIC REGISTRY

No. 8828SC1111

(Filed 6 June 1989)

Mortgages and Deeds of Trust § 32.1— purchase of land—inclusion of another tract in deed of trust—foreclosure on other tract—anti-deficiency statute inapplicable

Where respondents purchased two tracts of land from petitioners and executed a promissory note secured by a deed of trust covering the two tracts being purchased and a third tract already owned by respondents, the anti-deficiency statute, N.C.G.S. § 45-21.38, did not prohibit petitioners from foreclosing on the third tract since (1) the promissory note and deed of trust did not contain language indicating that they were purchase money instruments as required by N.C.G.S. § 45-21.38, and (2) the statute only prohibits a purchase money creditor from obtaining a deficiency judgment, there has not yet been a foreclosure sale, and there is thus no way to determine a deficiency at this point.

APPEAL by respondent from *Sherrill (W. Terry), Judge*. Judgment entered 26 July 1988 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 April 1989.

The undisputed facts in the record indicate the following sequence of events. Respondents sought to purchase two tracts of land from petitioners. In partial payment for the land, respondents signed a promissory note for $596,000 secured by a Deed of Trust

covering not only the two parcels of land being purchased but an additional tract of land already owned by respondents (Tract III). Respondents subsequently defaulted and petitioners sought to foreclose on all properties covered under the Deed of Trust. The lower court made findings of fact and conclusions of law and ordered the trustee to proceed with the sale of all three parcels of land. Respondents appeal.

Adams, Hendon, Carson, Crow & Saenger, P.A., by Martin K. Reidinger and Lori M. Glenn, for petitioner-appellees.

Leonard, Biggers & Knight, P.A., by T. Bentley Leonard, for respondent-appellants.

LEWIS, Judge.

Respondents' sole assignment of error is the court's allowing foreclosure on Tract III as described in the Deed of Trust in contravention of the anti-deficiency statute, G.S. 45-21.38. They argue that the language of the statute limits petitioners to foreclosure on the land actually sold by them to respondents. We do not agree.

At the outset we hold that G.S. Section 45-21.38 is not applicable. It states:

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

(Emphasis added). There is no indication on the face of either the promissory note or the deed of trust in this case that the debt was incurred for the purchase of the property secured. "A strict reading of G.S. Section 45-21.38 reveals that this statute does not apply unless the 'evidence of indebtedness' . . . shows on its face that the debt is for the purchase money for real estate . . . [t]herefore, G.S. 45-21.38 does not apply, even by implication." *Gambill v. Bare*, 32 N.C. App. 597, 598, 232 S.E. 2d 870, 870, *disc. rev. denied*, 292 N.C. 640, 235 S.E. 2d 61 (1977); *see also Merrit v. Ridge*, 323 N.C. 330, 372 S.E. 2d 559 (1988) (G.S. 45-21.38 limits a purchase money creditor to property conveyed in cases where the note and mortgage or deed of trust are executed to the seller *and the securing instruments state that they are for the purpose of securing the balance of the purchase price.*) G.S. Section 45-21.38 does not apply in this case.

Further, we note that even if the promissory note and deed of trust contained language indicating that they were purchase money instruments, G.S. Section 45-21.38 would still not be applicable here. Petitioners are not seeking a money judgment for any deficiency. They are seeking to foreclose on property conveyed under a deed of trust. G.S. Section 45-21.38 only prohibits a mortgagee or trustee in a purchase money situation from obtaining a deficiency *judgment*. There being no foreclosure sale at this point, there is no way to determine a deficiency. This result is not changed by *Merrit v. Ridge, supra,* cited by respondents as additional authority. That case merely held that G.S. Section 45-21.38 precluded the creditor from recovering expenses and fees arising from the foreclosure sale. The court there specifically limited a purchase money creditor "to property conveyed" under the purchase money deed of trust. Tract III here was part of the "property conveyed" under the deed of trust and is thus subject to foreclosure.

Affirmed.

Judges ARNOLD and GREENE concur.

MARY L. HUNNICUTT, PLAINTIFF v. LILLIAN LUNDBERG, DEFENDANT

No. 8810SC1012

(Filed 6 June 1989)

Animals § 2.1— walker tangled in dogs' leashes—injury not foreseeable—owner not liable

The trial court properly entered summary judgment for defendant in an action to recover damages for personal injuries allegedly sustained by plaintiff when she fell as a result of her legs being tangled in the leashes of defendant's two small dogs where defendant had the two ten-pound dogs on individual leashes of average size; the use of leashes and verbal commands had been sufficient in the past to control the dogs; the encounter between plaintiff and defendant lasted only two or three minutes before plaintiff fell; and this was an unavoidable accident which could not have been foreseen or prevented by the exercise of even more reasonable precautions than those already exercised by defendant.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 9 June 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 13 April 1989.

This is a civil action to recover damages for personal injuries allegedly sustained by the plaintiff, Mary Hunnicutt, when she fell as a result of her legs being tangled in the leashes of defendant's two small dogs. Plaintiff was 84 years old at the time of the accident.

Plaintiff and defendant are neighbors who were on friendly terms before plaintiff's accident. On the afternoon of 4 October 1986, plaintiff was walking in her neighborhood. Plaintiff wanted to talk with defendant whom she saw coming out of her house with her dogs, so she walked over to meet defendant in defendant's driveway.

Plaintiff could see that the dogs were barking and jumping. Defendant stated in her deposition that the dogs "were anxious and jumping around. They were anxious to get out. They wanted to walk. They didn't want to stay and talk." The dogs were on separate leashes about five feet long, and weighed about ten pounds each. Defendant tried to quiet the dogs so the two women could talk. In an effort to help, plaintiff took one of the two dog leashes.

The dogs would not quiet down. In a matter of seconds, the leashes tangled around plaintiff's legs, she fell and sustained injuries. Plaintiff stated in her affidavit: "[t]he circumstances changed quickly from what I thought would be an uneventful chat with my neighbor to a dangerous situation."

In response to defendant's motion for summary judgment, Judge Bailey concluded that there was no genuine issue as to any material fact, and that the defendant was entitled to judgment as a matter of law. Plaintiff appeals.

McNamara, Pipkin & Knott, by Joseph T. Knott, III and Ashmead P. Pipkin, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by David H. Batten and Kari L. Russwurm, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court improperly entered summary judgment in favor of defendant. We disagree.

The summary judgment rule provides "an efficient method for determining whether a material issue of fact actually exists. . . . In order to prevail, a movant must establish the absence of any material issue of fact." *Southerland v. Kapp*, 59 N.C. App. 94, 95, 295 S.E. 2d 602 (1982) [citations omitted]. The movant can meet this burden by showing the non-existence of an essential element of the plaintiff's claim. *Id.* These elements comprise a negligence cause of action: duty, breach of that duty, legal cause (comprised of actual and proximate cause) and injury. *Id.*; *Prosser and Keeton on Torts* § 30 (1984).

The test to determine defendant's liability in this case has been stated:

> The test of the liability of the owner of the dog is . . . whether the owner should know from the dog's past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result. That is, the liability of the owner depends upon his negligence in failing to confine or restrain the dog. The size, nature and habits of the dog, known to the owner, are all circumstances to be taken into account in determining whether the owner was negligent.

Sink v. Moore, 267 N.C. 344, 350, 148 S.E. 2d 265, 270 (1966); *see Sanders v. Davis*, 25 N.C. App. 186, 212 S.E. 2d 554 (1975). In reviewing a motion for summary judgment, all material filed in support of and in opposition to the motion must be considered in a light most favorable to the non-movant. *Sanders* at 188, 212 S.E. 2d at 556.

Applying these rules then, it was defendant's duty, based on her prior experience with her dogs, to restrain her dogs in a way that she would expect to be able to control them on her walk in the neighborhood. Defendant had the two ten pound dogs on individual leashes of average size. There was evidence from both parties that the use of leashes and verbal commands had been sufficient in the past to control the dogs. Plaintiff states in her affidavit that "I had seen her control her dogs before when they interrupted our street side conversations with their barking, and I thought she was going to do so again." Looking at the evidence in the light most favorable to the plaintiff, it is clear that defendant was performing her legal duty at the time plaintiff approached her to talk.

We also do not see any suggestion in the evidence that defendant breached this duty during their short encounter. From plaintiff's deposition we learn:

> Q. How long would you say you had talked to her or been with her before you fell?
>
> A. Probably a minute or so. It couldn't have been more than two or three minutes at the most.

The encounter was just too short for the defendant to be expected to formulate and enact stricter means of control before plaintiff's fall. Rather, this was "[a]n unavoidable accident . . . which was not intended and which, under all the circumstances, could not have been foreseen or prevented by the exercise of [even more] reasonable precautions" than those already exercised by the defendant. *Prosser and Keeton* § 29 (1984). The order of the trial court is

Affirmed.

Judges GREENE and LEWIS concur.

MILLER BUILDING CORPORATION, PLAINTIFF v. JOHN T. BELL AND W. DEAN BEST, DEFENDANTS

No. 885SC985

(Filed 6 June 1989)

Rules of Civil Procedure § 56— summary judgment motion—evidence of unpled defense

Evidence of the unpled defense of duress contained in an affidavit filed in opposition to a motion for summary judgment should have been considered by the court in ruling on the motion.

APPEAL by defendants from *Tillery, Judge*. Judgment entered 15 June 1988 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 May 1989.

This is a civil action wherein plaintiff seeks to recover from defendants the balance due on a certain promissory note allegedly executed by defendants as co-makers with Bogue Shore Club, Inc. and delivered to plaintiff. Defendants filed an answer admitting execution of the note but denying they were indebted to plaintiff.

Plaintiff made a motion for summary judgment which was supported by evidentiary matter. Defendants, in opposition to the motion, filed the affidavit of defendant John T. Bell purporting to allege affirmative defenses. Allegations in the affidavit, except where quoted, are summarized as follows: Defendants are the sole shareholder of Bogue Shore Club, Inc. Plaintiff filed a lien on defendants' property which was "greatly in excess of any colorable claim against Bogue Shore Club or the property, and the amount was without justification and done with the sole purpose to coerce a resolution of disputed matters in a manner favorable to Miller Building Corporation and unfavorable to Bogue Shore Club, Inc." Plaintiff also notified Bogue Shore Club's construction loan lender, First American Savings Bank of Greensboro, of the lien on the property. The filing of the lien and the notification to the lender "created a situation of extreme duress and to prevent the immediate termination of the project Bogue Shore Club, Inc. agreed to pay Miller a compromised amount of the lien. [T]his agreement was not voluntary and was procured by duress." Defendants were not obligated to plaintiff in any way, but plaintiff demanded defendants personally execute the note along with Bogue Shore Club, Inc.

Plaintiff "willfully misused the valid lien process for the ulterior purpose of procuring a favorable resolution of disputes between Miller and Bogue Shore Club and then induced and procured the [defendants] to become personally indebted to Miller Building Corporation so as to condone its activities."

The trial court refused to consider the affidavit filed by defendants. Thereafter, the court entered summary judgment for plaintiff, against defendants, in the amount of $90,417.33, together with interest and attorney's fees. Defendants appealed.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, and John D. Martin, for plaintiff, appellee.

Ward and Smith, P.A., by Michael P. Flanagan, for defendants, appellants.

HEDRICK, Chief Judge.

Defendants assign error to the refusal of the trial judge to consider the affidavit filed in opposition to the motion for summary judgment. We believe *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976), is controlling in this case. In *Gillespie*, Justice Branch, writing for the Supreme Court, stated:

> The threshold question presented by this appeal is whether defendant could demonstrate the existence of a genuine issue as to a material fact by raising an unpleaded defense by his evidence opposing plaintiff's motion for summary judgment.
>
> . . .
>
> We hold that unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment. However, we think in such cases it is the better practice to require a formal amendment to the pleadings.

Id. at 306, 230 S.E. 2d at 377.

Plaintiff's efforts to distinguish *Gillespie* from the case *sub judice* are not convincing. The evidence embodied in the affidavit which the court refused to consider gives rise to a genuine issue of material fact as to whether the note in question was obtained by duress. Therefore, summary judgment for plaintiff must be vacated and the cause remanded to the superior court for further proceedings.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

HOMER LUSK v. JERRY WALLACE CASE, JR.

No. 8828SC1010

(Filed 6 June 1989)

1. **Damages § 17.1— automobile accident—instruction on aggravation of condition proper—instruction on activation of dormant condition not called for by evidence**

In an action to recover damages for physical injury arising from an automobile collision, the "aggravation" instruction given by the judge was proper and reflective of the evidence, given the nature of plaintiff's preexisting degenerative type disease which worsens with time and the testimony presented at trial regarding the effect of plaintiff's collision injury on that disease, and the judge's refusal to submit plaintiff's orally requested instruction on activation of a dormant condition was not an abuse of discretion.

2. **Rules of Civil Procedure § 59— inadequate damages—new trial not required**

In an action to recover damages in excess of $10,000 for physical injury arising from an automobile collision where the jury awarded plaintiff $2,500, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial based on an allegedly inadequate award where plaintiff presented no evidence that the award was given "under the influence of passion or prejudice." N.C.G.S. § 1A-1, Rule 59(a)(6).

APPEAL by plaintiff from *Boner (Richard), Judge*. Judgment entered 30 June 1988 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 13 April 1989.

Plaintiff filed this complaint on 6 October 1987, seeking damages in excess of $10,000.00 for physical injury arising from an automobile collision on 8 July 1987. Defendant answered admitting negligence. A trial was subsequently held on the issue of damages at

the conclusion of which the jury awarded plaintiff $2,500.00 Thereafter plaintiff moved for a new trial pursuant to G.S. 1A-1, Rule 59(a) alleging *inter alia* inadequate damage award in light of the evidence presented and error in law committed at trial. From a denial of this post-trial motion and entry of judgment plaintiff appeals.

Baley, Baley & Clontz, P.A., by Stanford K. Clontz, for plaintiff-appellant.

Frank J. Contrivo for defendant-appellee.

LEWIS, Judge.

Plaintiff brings forward in his brief several assignments of error grouped into two basic arguments. Plaintiff contends that the trial court erred in denying his request for a jury instruction on activation of a dormant condition. He also contends that the trial court abused its discretion and erred in denying his G.S. 1A-1, Rule 59(a) motion for a new trial and entering judgment upon the verdict. We have reviewed the record on appeal and find the proceedings below free of prejudicial error.

[1] "Where a requested instruction is not submitted in writing and signed pursuant to G.S. 1-181 it is within the discretion of the court to give or refuse such instruction." *State v. Harris*, 67 N.C. App. 97, 102, 312 S.E. 2d 541, 544, *disc. rev. denied*, 311 N.C. 307, 317 S.E. 2d 905 (1984). Plaintiff did not submit a written request so it was within the trial judge's discretion whether to give the "activation" instruction.

A trial judge is required to instruct a jury on the law arising from the evidence presented. *Watson v. White*, 60 N.C. App. 106, 298 S.E. 2d 174 (1982), *rev'd on other grounds*, 309 N.C. 498, 308 S.E. 2d 268 (1983). Evidence in the case below revealed that at the time of the automobile collision, plaintiff was in the early stages of a progressive condition known as degenerative disc disease. Although plaintiff stated that prior to the collision he experienced no back pain, medical testimony failed to show that this lack of pain was unusual with this condition. What the evidence affirmatively showed and what the testimony of plaintiff's doctor revealed was that plaintiff's back strain, diagnosed as arising from the accident, "aggravated" or worsened the disc condition. Particularly revealing in light of the issue before us is the following exchange between plaintiff's attorney and plaintiff's doctor:

Q. All right. With regard to this disc, degenerative disc problem, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether this problem could or might have been *activated or aggravated* by this motor vehicle collision injury . . .

A. It is my impression that it was *aggravated* by the accident.

(Emphasis added). Given the nature of plaintiff's degenerative-type disease which worsens with time, and the testimony presented at trial regarding the effect of plaintiff's collision injury on that disease, the "aggravation" instruction given by the judge was proper and reflective of the evidence. The judge's refusal to submit plaintiff's orally requested instruction was not an abuse of discretion. Plaintiff's assignments of error relating to the instruction are overruled.

[2] Finally, we address plaintiff's contention that the jury award was inadequate and that the trial court abused its discretion in not granting his motion for a new trial pursuant to G.S. 1A-1, Rule 59(a)(6). We do not agree.

A trial court's order granting or denying a new trial upon any ground enumerated in G.S. 1A-1, Rule 59 may be reversed on appeal only in those exceptional cases where abuse of discretion is clearly shown. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). G.S. 1A-1, Rule 59(a)(6) allows for a new trial when it is shown the excessive or inadequate award was given "under the influence of passion or prejudice"; plaintiff has presented no such evidence and none appears from the record. Plaintiff's argument is without merit.

For the foregoing reasons we find no error.

No error.

Judges ARNOLD and GREENE concur.

ALLEN BROWN, TRADING AS A. BROWN AND PARTNERS, PLAINTIFF v. MTA SCHOOLS, INC., DEFENDANT

No. 8818DC1225

(Filed 6 June 1989)

Contracts § 29— breach of contract—evidence of damages—sufficient

In an action for breach of contract arising from a contract between a school for truck drivers and mechanics and an advertising agency, there was evidence to support the award of $6,500 in damages in evidence that the contract valued plaintiff's services at $3,400 a month and that defendant used plaintiff's advertising plan for four months while purporting to reject his services. Plaintiff's request that the trial court be directed to enter judgment for $15,300 or retry the damages issue was rejected because plaintiff did not appeal from the judgment.

APPEAL by defendant from *Lowe, Judge.* Judgment entered 27 July 1988 in District Court, GUILFORD County. Heard in the Court of Appeals 16 May 1989.

Stephen E. Lawing for plaintiff appellee.

Stern, Graham & Klepfer, by Robert L. Johnston, for defendant appellant.

PHILLIPS, Judge.

On 14 October 1985 plaintiff, a Greensboro advertising agency, and defendant, a school for truck drivers and mechanics, entered into a written contract providing that: Plaintiff would be responsible for conceiving, designing and placing all of defendant's advertising with the media; defendant would pay him $1,700 for the month of October, 1985 and $3,400 each following month the contract remained in effect; it could be terminated by either party giving the other thirty days' written notice. Plaintiff had already conceived and designed an advertising plan for defendant's business and immediately placed various advertisements with the media in the Greensboro area; but before the month ended defendant orally informed plaintiff that it was dealing directly with the media and his services were no longer required. Defendant did not give

the written notice required by the contract nor did it pay plaintiff anything for his services, though it continued to use plaintiff's ads through 15 February 1986. Plaintiff sued for breach of contract and following a trial by Judge Lowe without a jury, judgment was entered for plaintiff in the amount of $6,500.

Defendant appellant concedes that it breached the parties' contract and contends only that the evidence does not support the court's finding on the damages issue. The contention has no merit. As plaintiff points out: That the unterminated contract valued plaintiff's services at $3,400 a month is *some* evidence that his advertising plan was worth that amount, and that defendant used it for four months, while purporting to reject plaintiff's services, would support a verdict of up to $15,300. But plaintiff's request that we direct the trial court to either enter judgment for that amount or to retry the damages issue is denied. For plaintiff did not appeal from the judgment; and as our Courts have noted in innumerable decisions errors not timely asserted and pursued in the manner required by our appellate rules cannot be considered. Plaintiff did *notice* an appeal but he did not perfect it by recording an exception and filing an assignment of error that challenged the correctness of the judgment, as Rule 10, N.C. Rules of Appellate Procedure requires. No question as to the verdict's inadequacy having been presented to us, we do not rule on it.

Affirmed.

Judges BECTON and LEWIS concur.

IN THE MATTER OF: THE FORECLOSURE OF THE DEED OF TRUST EXECUTED BY FIRST RESORT PROPERTIES OF N.C. INC. TO SAMUEL H. POOLE, TRUSTEE, AND CHARLES BILLINGS AND WIFE, JANICE BILLINGS, BENEFICIARIES, RECORDED IN BOOK 362, PAGE 544, MOORE COUNTY REGISTRY

No. 8820SC1023

(Filed 6 June 1989)

APPEAL by petitioners from *Helms (William H.), Judge*. Order entered 6 June 1988 in Superior Court, MOORE County. Heard in the Court of Appeals 13 April 1989.

Jack E. Carter for petitioners-appellants Charles and Janice Billings.

Parham, Helms and Kellam, by Raymond L. Lancaster and William H. Trotter, Jr., for respondent-appellee Berkeley Federal Savings and Loan Association.

LEWIS, Judge.

This appeal concerns an order dismissing the foreclosure proceedings on the second of two tracts of land covered by a deed of trust. The issue raised by this appeal is the same as that presented by case number 8820SC1022 filed by this Court this same day. For the reasons stated in that opinion, the order of the trial court is affirmed.

Affirmed.

Judge ARNOLD concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I dissent for the same reasons stated in my dissenting opinion in case number 8820SC1022.

S. JEROME BLACK v. DIANE P. BLACK

No. 8820DC1315

(Filed 6 June 1989)

1. Divorce and Alimony § 30— equitable distribution—rental value of residence for post-separation period—failure to award—no error

The trial court did not err in an action for divorce and equitable distribution by denying defendant's application for judgment against plaintiff for one-half of the fair rental value of the residence of the parties from the time of the separation through the date of the hearing. A trial court may not award

rental value of the marital residence for the post-separation period as a part of the equitable distribution proceeding.

2. Divorce and Alimony § 30— equitable distribution—valuation of a truck—valuation of truck lease—no error

The trial court did not err in an action for divorce and equitable distribution by assigning a value of $200 to a 1982 Ford LTL 9000 truck as of the date of separation where the court found that the truck had a value of $34,500 and was encumbered by a lien in the amount of $34,300. The court did not err by also finding that plaintiff had leased the truck and that the lease had a fair market value of $29,444 where the value of the lease was supported by competent evidence in the record, and the truck and the lease were two separate items of property.

APPEAL by plaintiff and defendant from *Huffman, Donald R., Judge.* Judgment entered 20 June 1988 in District Court, UNION County. Heard in the Court of Appeals 18 May 1989.

On 11 May 1987, plaintiff filed complaint seeking absolute divorce and equitable distribution. Defendant answered and joined plaintiff's prayer for absolute divorce and equitable distribution. She also counterclaimed for alimony, temporary alimony, and unjust enrichment. On 24 September 1987, the trial court entered a judgment of absolute divorce. On 17 June 1988, an order was entered distributing the marital property. From this judgment, both parties appealed.

Griffin & Brooks, by James E. Griffin, for the plaintiff.

Harry B. Crow, Jr., for the defendant.

JOHNSON, Judge.

DEFENDANT'S APPEAL

[1] The sole issue presented by defendant's appeal is whether "the trial court erred in denying the application by the defendant for judgment against the plaintiff for one-half of the fair rental value of the residence of the parties from the time of the separation of the parties through the date of the hearing." We find no error.

In *Becker v. Becker*, 88 N.C. App. 606, 364 S.E. 2d 175 (1988), this Court held that a trial court may not award rental value of

the marital residence for the post-separation period as a part of the equitable distribution proceeding. Therefore, we find that defendant's claim is without merit.

PLAINTIFF'S APPEAL

[2] In his appeal, plaintiff contends "the trial court committed error in assigning a value to[,] and including as marital property of the parties[,] both the net fair market value of the 1982 Ford [t]ruck, and the net present fair market value of a lease of said truck entered into between the plaintiff and a North Carolina corporation known as S. J. Black and Son, Inc. as of the date of separation of the parties." Again, we find no error.

The trial court found that as of the date of separation, the 1982 Ford LTL 9000 truck had a value of $34,500.00 and was encumbered by a lien in the amount of $34,300.00. Thus, the court found that the truck had a fair market value of $200.00. The court also found that the plaintiff had leased the truck and that the lease had a fair market value of $29,444.00.

Defendant argues that by making these findings the court double valued the truck. Both the findings concerning the value of the truck and the value of the lease are supported by competent evidence in the record. It also appears to this Court that the truck and the lease are two separate items of property. Therefore, the trial judge properly valued the truck and the lease as separate assets. In view of the fact that all the findings of fact are supported by competent evidence in the record, *Johnson v. Johnson*, 78 N.C. App. 787, 338 S.E. 2d 567 (1986), we conclude that the trial court properly valued the truck and the lease of the truck.

The judgment of the trial court is in all respects affirmed.

Plaintiff's Appeal: AFFIRMED.

Defendant's Appeal: AFFIRMED.

Judges EAGLES and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 JUNE 1989

ABELS v. RENFRO CORP. No. 8817SC1228	Surry (87CVS918)	Dismissed
ACE CHEMICAL v. IMPERIAL CASUALTY & INDEMNITY CO. No. 8826SC705	Mecklenburg (86CVS1662)	No Error
BROOKS v. GIESEY No. 883SC1086	Craven (86CVS1721)	Affirmed
COUNTY OF CARTERET v. NML SHIPBUILDERS No. 883SC736	Carteret (87CVS689)	No Error
CRISP v. TRIVETTE No. 8825SC1227	Caldwell (87CVS318)	No Error
DEHART v. WINCHESTER No. 8830SC341	Swain (82CVS153)	No Error
DIORIO v. PENNY No. 8829SC833	Henderson (87CVS0309)	Appeal Dismissed
ELLIS v. WHITE BROTHERS No. 8822DC1231	Davidson (88CVD696)	Dismissed
FRANKLIN v. FRANKLIN No. 8821DC1296	Forsyth (74CVD7028)	Vacated & Remanded
G W P INVESTMENTS v. CLARK No. 8813SC1207	Brunswick (88CVS213)	Reversed & Remanded
HARRIS v. BROWN No. 8829SC638	Henderson (87CVS252)	Appeal Dismissed
HINSON v. HINSON No. 8826DC1248	Mecklenburg (75CVD918SF)	Affirmed
IN RE LAUGHTER No. 8827SC1223	Gaston (88SP15)	Affirmed
IN RE MANGUM No. 8810DC1166	Wake (88SPC264)	Appeal Dismissed
IN RE PETER No. 888DC770	Wayne (87SPC225)	Appeal Dismissed
JOHNSON v. JOHNSON No. 8821DC1208	Forsyth (85CVD4139)	Vacated & Remanded

OWENS v. FISHER No. 8828SC799	Buncombe (87CVS2079)	New Trial
PETTEWAY v. PETTEWAY No. 887DC1218	Edgecombe (84CVD494)	Affirmed in part; vacated and remanded in part.
PRIME CONSTRUCTORS v. TOWN OF PARMELE No. 882SC761	Martin (86CVS417)	Affirmed
REID v. REID No. 8821DC1310	Forsyth (86CVD1760)	Affirmed
REPCOM, INC. v. DURHAM RADIO CORP. No. 8814SC955	Durham (86CVS2579)	Affirmed
STATE v. AYTCHE No. 888SC1405	Lenoir (88CR663)	No Error
STATE v. DAVIS No. 8826SC1410	Mecklenburg (88CRS15763) (88CRS15764)	Affirmed
STATE v. EVANS No. 897SC17	Edgecombe (84CRS2733) Nash (82CRS12190)	Affirmed
STATE v. FOSTER No. 8821SC830	Forsyth (87CRS20821)	No Error
STATE v. FRANCIS No. 8816SC1195	Robeson (88CRS5741) (88CRS5742)	No Error
STATE v. GETWARD No. 885SC953	New Hanover (85CRS4288)	No Error
STATE v. HARRIS No. 8826SC697	Mecklenburg (87CRS35800) (87CRS35802) (87CRS35804)	No Error
STATE v. HARTNESS No. 8830SC1115	Cherokee (87CRS2372) (87CRS2373) (87CRS2374) (87CRS2375) (88CRS364)	New Trial
STATE v. HUNT No. 8816SC1174	Robeson (87CRS8628) (87CRS8629)	No Error

STATE v. JOHNSON No. 884SC1319	Onslow (88CRS2747)	No Error
STATE v. KEY No. 8817SC876	Surry (87CRS3028) (87CRS3029)	No Error
STATE v. LOVE No. 8815SC771	Alamance (87CRS9146)	No Error
STATE v. McDONALD No. 8814SC1232	Durham (87CRS28954)	No Error
STATE v. MARTIN No. 8822SC1147	Iredell (87CRS11209)	No Error
STATE v. MASHACK No. 8821SC1154	Forsyth (87CRS33827)	No Error
STATE v. MULLIS No. 8826SC1353	Mecklenburg (87CRS48075)	No Error
STATE v. NOBLES No. 8814SC1338	Durham (87CRS20546)	No Error
STATE v. NOBLITT No. 8820SC803	Richmond (87CRS4036) (87CRS4664)	No Error
STATE v. ROBINSON No. 8815SC1184	Alamance (86CRS8821) (86CRS8822) (86CRS8823)	Affirmed
STATE v. ROSENBERRY No. 886SC1312	Halifax (87CRS7471)	No Error
STATE v. SIMMONS No. 886SC1271	Hertford (87CRS2760) (87CRS2762)	No Error
STATE v. STEWART No. 8825SC1293	Catawba (88CRS5073)	Affirmed
STATE v. SUTTON No. 8818SC1238	Guilford (87CRS56159) (88CRS20319)	No Error
STATE v. TAEFI No. 8826SC732	Mecklenburg (87CRS39523)	No Error
STATE v. TOLSON No. 8830SC733	Cherokee (87CRS901) (87CRS902) (83CRS2308)	No Error

STATE v. WILLIAMS No. 887SC1102	Wilson (88CRS996) (88CRS997)	No error in trial. Remanded for correction of clerical error in judgment.
STATE v. WINSTON No. 894SC7	Onslow (85CRS17380)	Dismissed
WHITEHURST v. HIATT No. 883SC1329	Pitt (88CVS1035)	Reversed & Remanded
WILLIS v. PAPPAS TELECASTING OF THE CAROLINAS No. 8828DC1309	Buncombe (87CVD287)	No Error

ROYCE E. STUTTS, ADMINISTRATOR OF THE ESTATE OF DEBORAH LEE STUTTS
v. DUANE LEE ADAIR

No. 8810SC974

(Filed 20 June 1989)

1. **Automobiles and Other Vehicles § 79.2— intersection—defendant making left turn—struck by plaintiff—plaintiff's speed**

The trial court did not err in a wrongful death action arising from an automobile collision at an intersection by refusing to instruct the jury on the duty of plaintiff's decedent, Ms. Stutts, not to drive faster than was reasonable or prudent under existing conditions or on her duty to decrease speed to avoid the collision where defendant presented no evidence that Ms. Stutts may have breached her duty to drive at a reasonable and prudent speed. Defendant's contention that the configuration of stoplights, a fast-food mart, and police vehicles in a bank parking lot heightened Ms. Stutts' duty under N.C.G.S. § 29-141(a) and required the trial judge to submit defendant's requested instruction notwithstanding the absence of evidence about her speed was rejected; none of the evidence indicated that Ms. Stutts saw or should have seen defendant turn in front of her in time to slow down or sound her horn, so that her failure to do these things was not evidence that she exceeded a prudent speed; extensive damages to the vehicles is not by itself evidence of excessive speed; and the fact that a person dies in an accident is not evidence of that person's contributory negligence.

2. **Damages § 16.3— automobile collision—wrongful death action—evidence of lost income**

The trial court did not err in a wrongful death action arising from an automobile accident by admitting evidence of income lost by the decedent's parents as a result of decedent's death where plaintiff's lawyer used the word estate in his question to the expert. Decedent died unmarried and childless and her beneficiaries under the wrongful death statute were her parents. The record indicates that the jury understood the proper method of ascertaining the beneficiaries under the wrongful death statute and understood that any damages awarded were not to be based upon the pecuniary injury to the estate.

3. Death § 7.4— automobile accident—lost income to parents of decedent child—admissible

The trial court did not err in a wrongful death action arising from an automobile collision by allowing an expert to testify as to the amount of decedent's income lost to her parents where the decedent was an adult child who never married and who was childless. In a wrongful death action involving an adult child, there is no reason to demand actual support of the parents as the sole ground for any recovery of lost income and, because this is not a case of sheer speculation, the trial judge should enjoy a wide latitude to admit any evidence tending to demonstrate the parents' expectations to the child's income.

4. Death § 7.6— automobile accident—lost income to parents of decedent—submission of issue harmless error

Although the trial court erred in a wrongful death action by submitting the issue of damages for income lost to decedent's parents because there was no evidence before the judge that decedent had ever expressed an intent to provide any of her income to her parents, the error was harmless because defendant had made and won a motion in limine to exclude any testimony about statements made by decedent relative to her intent to provide for her parents in the future. Having precluded plaintiff from introducing any evidence of decedent's desire to provide for her parents, defendant cannot now complain that plaintiff offered no evidence of the parents' reasonable expectations; moreover, although plaintiff's expert testified that the lost income to the parents was approximately $105,000, the jury awarded plaintiff $55,000 and had been instructed that it could award damages for other items in addition to lost income.

APPEAL by defendant from *Herbert Small, Judge*. Judgment entered 17 March 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 21 February 1989.

Page, Page & Webb, by John T. Page, Jr. and Alden B. Webb, for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale and Albert D. Barnes, for defendant-appellant.

BECTON, Judge.

This is a civil case in which plaintiff, Royce E. Stutts, as administrator of the estate of Deborah Lee Stutts, his daughter, seeks to recover damages from defendant, Duane Lee Adair, for the wrongful death of Ms. Stutts. Following a trial, a jury found that defendant negligently caused Ms. Stutts' death and awarded plaintiff damages of $55,000. From the judgment entered, defendant appeals. We affirm.

On 12 March 1986, Deborah Stutts was driving south on Falls of the Neuse Road in Raleigh. At the intersection of Falls of the Neuse and Newton Roads, her automobile collided with a pick-up truck driven by Mr. Adair. Ms. Stutts died from the injuries she suffered in the accident.

The evidence at trial showed that Mr. Adair, at the time of the crash, was attempting to turn left, from the northbound lane of Falls of the Neuse Road, onto Newton Road. Traffic at this intersection is governed by signal lights. Plaintiff's evidence tended to show that the lights regulating the north-south flow of traffic on Falls of the Neuse Road were a solid green when Mr. Adair attempted to turn. A sign instructed left-turning vehicles to yield to through traffic when the light was solid green. Mr. Adair and his father, a passenger in the truck, testified that at the time of the accident, the light directing vehicles in their lane showed a green arrow.

The evidence further showed that Ms. Stutts was 34 years old at the time of her death, and that she was unmarried and childless. Among her survivors were Royce and Ophelia Stutts, her parents. Ms. Stutts was an employee of First Citizens Bank and Trust Company, and she held a week-end job as a bartender.

Other facts necessary to our disposition of this case will be discussed as they relate to defendant's assignments of error, to which we now turn.

I

[1] Defendant first assigns error to the trial judge's refusal to instruct the jury on Ms. Stutts' duty not to drive at a speed greater than was reasonable and prudent under the conditions existing at the time of the accident. *See* N.C. Gen. Stat. Sec. 20-141(a) (Supp. 1988). In a related exception, defendant argues that the

judge erred by failing to instruct on Ms. Stutts' duty to decrease her speed to the extent necessary to avoid the collision. *See* N.C. Gen. Stat. Sec. 20-141(m) (Supp. 1988).

It is true that a person must "at all times drive with due caution and circumspection" and may not exceed a reasonable and prudent speed dictated by the prevailing conditions. *Kolman v. Silbert*, 219 N.C. 134, 137, 12 S.E. 2d 915, 917 (1941). At the same time, it is "the duty of the trial judge . . . to instruct the jury on the law as it applies to the substantive features of the case *arising on the evidence.*" *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 509, 358 S.E. 2d 566, 568 (1987) (emphasis added and citation omitted). Defendant contends that he proffered "abundant evidence" at trial to warrant an instruction on the duty required by Section 20-141(a). He argues that the following evidence suggested a breach by Ms. Stutts of her duty to observe a reasonable and prudent speed: (1) the physical damage to the two vehicles; (2) the death of Ms. Stutts; (3) the "complex series of stop lights" at Falls of the Neuse and Newton Roads; (4) the presence at that intersection of a fast-food mart "with its potential for cars attempting to enter or exit from the northbound lanes"; (5) "numerous police officers and vehicles" in the parking lot of a First Citizens Bank building at the corner of Falls of the Neuse and Newton and yellow tape cordoning off the building (the evidence at trial showed the bank had been robbed approximately one hour before the accident; this branch of First Citizens Bank was not the one at which Ms. Stutts worked); and (6) Ms. Stutts' failure to slow down or to sound her horn when Mr. Adair turned into her path.

We have reviewed the testimony and certain of the exhibits presented at trial, and we agree with the trial judge that defendant presented no evidence that Ms. Stutts may have breached her duty to drive at a reasonable and prudent speed. We reject defendant's contention that the configuration of the stoplights, the fast-food mart, and the police vehicles in the bank parking lot "heightened" Ms. Stutts' duty under Section 20-141(a) and required the judge to submit defendant's requested instruction notwithstanding the absence of any evidence about Ms. Stutts' rate of speed. Further, none of the evidence indicated that Ms. Stutts saw, or should have seen, defendant turn in front of her in time for her to slow down or to sound her horn. Thus, her failure to do either of these was not evidence that she exceeded a prudent speed.

Defendant has laid much emphasis on the damage sustained by the vehicles involved in this accident. He also finds Ms. Stutts' death from the injuries she suffered in the crash as probative of the "force of impact" and thus, of her rate of speed. At trial, defendant introduced photographs taken after the collision of Ms. Stutts' car and of Mr. Adair's truck, and these photographs have been reviewed by us. Defendant contends that "the physical evidence of destruction is a compelling testament to the decedent's excessive speed." We disagree. While "[t]he physical facts at the scene of an accident may disclose that the operator of the vehicle was traveling at excessive speed," *Keller v. Security Mills of Greensboro, Inc.*, 260 N.C. 571, 573, 133 S.E. 2d 222, 224 (1963) (citations omitted), extensive damage to the vehicles is not, by itself, evidence of such speed. *See Beauchamp v. Clark*, 250 N.C. 132, 136, 108 S.E. 2d 535, 538 (1959) (fact that truck and tractor-trailer collided with such force as to substantially damage vehicles did not require conclusion that truck was operated at such high rate of speed as to demonstrate violation of statute or rule of prudent person). "An automobile develops enough energy at 30 miles per hour to lift it 30 feet off the ground." 10 Am. Jur. Proof of Facts 748. At 20 miles per hour, a vehicle will strike a stationary object with the same force as if it had been dropped off a platform 13.5 feet high. *Id.* at 747. Absent more, we do not infer excessive speed from the vehicular damage in this case.

The fact that a person dies in an accident, moreover, is not evidence of that person's contributory negligence. *See Crisp v. Medlin*, 264 N.C. 314, 317, 141 S.E. 2d 609, 611 (1965) (negligence not presumed from fact that a person has been killed). In *Crisp*, our Supreme Court said that the "grievous injuries" suffered by the decedents "indicate[d] that the automobile was traveling at a very rapid speed when it wrecked." *Id.* at 318, 141 S.E. 2d at 612. Ms. Stutts had a deep laceration across her forehead following the accident. No evidence indicated that such an injury would have resulted only from a very rapid speed of travel. We do not infer from her wound that Ms. Stutts was exceeding a reasonable speed when she collided with defendant's truck.

A trial judge is not justified in instructing the jury on a principle of law not applicable to the evidence merely because a party pleads the breach of that law. *Sugg v. Baker*, 258 N.C. 333, 337, 128 S.E. 2d 595, 597 (1962). Before the judge may submit the breach of a particular law or duty for jury determination, there must

be both allegation and proof of the breach. *Id.* at 337, 128 S.E. 2d at 597-98. Because, in this case, there was no evidence tending to indicate Ms. Stutts' speed at the time of the accident, we hold that the judge did not err by refusing to instruct the jury about Ms. Stutts' duty to drive at a reasonable and prudent speed.

In the same vein, we reject defendant's contention that the judge was required to instruct the jury about Ms. Stutts' duty to decrease her speed to the extent necessary to avoid the collision. Nothing in the record indicates that Ms. Stutts had the opportunity to slow down when Mr. Adair entered her path of travel. Rather, the evidence indicates that Mr. Adair, without the right of way, turned into Ms. Stutts' lane. There was no evidence that Ms. Stutts saw, or should have seen, Mr. Adair in time to react to his presence. *See State v. Worthington*, 89 N.C. App. 88, 92, 365 S.E. 2d 317, 320 (1988), *appeal dismissed*, 322 N.C. 115, 367 S.E. 2d 134 (1988) (Section 20-141(m) does not impose liability except in cases in which a reasonable and ordinarily prudent person *could*, and would, have decreased speed). The evidence being insufficient to suggest a breach of the duty to decrease speed, the judge correctly refused to instruct on that duty.

Defendant cites our recent decision in *Hinnant v. Holland*, 92 N.C. App. 142, 374 S.E. 2d 152 (1989), *disc. rev. denied*, 324 N.C. 335, 378 S.E. 2d 792 (1989), for the proposition that, in a traffic-accident case, a judge's failure to give an instruction on the duty to decrease speed is error. Defendant misreads *Hinnant*. In contrast to this case, evidence was adduced at the Hinnant trial about the speed of the vehicle. Guided by our Supreme Court's holding in *Pittman v. Swanson*, 255 N.C. 681, 122 S.E. 2d 814 (1961), a case in which evidence of speed was also introduced at trial, we held in *Hinnant* that when the evidence suggests a breach of the duty to decrease speed, it is error for the trial judge to fail to submit that instruction, even if the judge *does* instruct on the driver's duty to observe a reasonable and prudent speed under the existing conditions. A critical distinction between this case and *Hinnant* is that, here, no evidence concerning Ms. Stutts' speed was introduced at trial. Neither *Hinnant* nor *Pittman* abrogate the requirement that an instruction must arise from the evidence presented to the jury.

We overrule these assignments of error. For reasons stemming from our discussion here, we also overrule defendant's exceptions

to the judge's refusal to find Ms. Stutts contributorily negligent and to direct a verdict in defendant's favor.

II

[2] Defendant's next assignments of error address the damages awarded in this case. He first argues that plaintiff introduced improper evidence about the income lost as a result of Ms. Stutts' death. Dr. J. Finley Lee testified as an expert in the field of economics and statistics. During direct examination, plaintiff's lawyer asked him, "Do you have an opinion as to the present value of the economic loss *to the estate* of Deborah Stutts[?]" (Emphasis added.) Defendant objected, and the judge overruled the objection. Dr. Lee testified that "the loss of net income" was approximately $105,881.

Defendant contends that the question posed by plaintiff, and Dr. Lee's answer, "apply an incorrect legal standard inconsistent with the North Carolina wrongful death statute [N.C. Gen. Stat. Sec. 28A-18-2 (1984 & Supp. 1987)]." Subsection (b)(4) of that statute allows damages for wrongful death "to the *persons* entitled to receive the damages recovered. . . ." (Emphasis added.) Defendant is correct that recovery of damages under the statute is to the beneficiaries of the decedent and not to the decedent's estate. *See Smith v. Mercer*, 276 N.C. 329, 334, 172 S.E. 2d 489, 492 (1970) (damages determinable in accordance with subsection (b)(4) "quite different" from damages determinable on basis of pecuniary injury suffered by decedent's estate).

Notwithstanding the phrasing of plaintiff's question to Dr. Lee, we think it plain from the record that both Dr. Lee and the jury understood the correct measurement of damages under the wrongful death statute. To determine damages under that statute, "the first step . . . is to identify the particular persons who are entitled to receive the damages. . . . " *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 418, 196 S.E. 2d 789, 805 (1973). The same persons who would receive the decedent's personal estate under the Intestate Succession Act are the persons entitled to receive the damages recovered in a wrongful death action. Sec. 28A-18-2(a); *Bowen*, 283 N.C. at 414, 196 S.E. 2d at 805. Ms. Stutts died unmarried and childless; consequently, her beneficiaries under the wrongful death statute were her parents. *See* N.C. Gen. Stat. Sec. 29-15(3) (1984).

Dr. Lee testified on *voir dire* that he calculated the lost-income figure on the premise that the "residual" of Ms. Stutts' net income

stream—that amount remaining after self-maintenance and other expenses were factored out—would "have been the ability of Ms. Stutts, had she not died, [to] contribut[e] to . . . *her parents*." (Emphasis added.) More importantly, the judge, at great length, instructed the jury that Ms. Stutts' parents were her next of kin who would recover any damages that the jury awarded. *See Carver v. Carver*, 310 N.C. 669, 683, 314 S.E. 2d 739, 747 (1984) (trier of fact must be apprised of those who are to share in recovery). The judge likewise instructed the jury as to the life expectancies, based on mortuary tables, of Ms. Stutts and her parents, and he required the jury to determine, based on mortuary tables, and the health, constitution, and habits of the three people, whether the beneficiaries had a shorter life expectancy than did Ms. Stutts. He instructed the jury that if it found that Ms. Stutts' parents had shorter life expectancies, it was to determine the amount of the damages, if any, in light of those shorter expectancies. The judge correctly applied the wrongful death statute by instructing that "when the expectancy of a next of kin [is] shorter than that of the deceased, the award on the account of that next of kin is limited to the value of benefits that next of kin might have expected to receive during his or her lifetime." *See Bowen*, 283 N.C. at 419, 196 S.E. 2d at 805 (if jury found son's life expectancy greater than that of parents, recovery under statute necessarily would be limited to expectancy of last surviving parent).

We think the record indicates sufficiently that the jury understood the proper method of ascertaining the beneficiaries under the wrongful death statute and understood that any damages awarded were not to be based upon the pecuniary injury to Ms. Stutts' estate. We hold that Dr. Lee's testimony was not inadmissible because plaintiff's lawyer used the word "estate" in his question to Dr. Lee, and we overrule this assignment of error.

III

Defendant next argues that the trial judge erred by instructing the jury that it could award damages to Ms. Stutts' parents for the loss of her net income. He contends that no relevant or competent evidence supported the submission of the instruction, and that the judge should have charged that the jury could award no damages on this basis. Defendant's argument is based on his reading of subsection (b)(4) of the wrongful death statute. That subsection provides, among other things, for the following:

(b) Damages recoverable for death by wrongful act include:

. . .

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the *reasonably expected*:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent . . .

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered[.]

(Emphasis added.)

Defendant maintains that none of plaintiff's evidence established that Ms. Stutts' parents had any "reasonable expectations" to share in her income. In addition, he again challenges the admission of Dr. Lee's testimony, arguing that the statute forbids a presumption that the residue of the income stream would have gone to Ms. Stutts' beneficiaries. Defendant contends that, in cases such as this one, the statute requires that the beneficiaries' reasonable expectations must stem from a tangible manifestation of the adult child's intent to share her income, by such means as past support of the parents, a trust fund on their behalf, or a will.

A

[3] The Wrongful Death Act is designed "as fully as possible [to] compensate persons for the loss of their decedent," *Beck v. Carolina Power and Light Co.*, 57 N.C. App. 373, 381, 291 S.E. 2d 897, 902 (1982), *aff'd*, 307 N.C. 267, 297 S.E. 2d 397 (1982) (citation omitted), and we do not believe the legislature intended to provide a windfall to tortfeasors by imposing a single means by which parents might prove their reasonable expectations to their adult child's income. And although we recognize that "damage awards based on sheer speculation would render the wrongful death statute punitive in its effect . . . which is not what the legislature intended," *DiDonato v. Wortman*, 320 N.C. 423, 431, 358 S.E. 2d 489, 493 (1987) (citations omitted), the case before us involves an adult child of demonstrated earning ability whose lost-income stream was calculable.

We are mindful of *State v. Smith*, 90 N.C. App. 161, 368 S.E. 2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E. 2d 866 (1989), in which this court recognized that parent beneficiaries are not entitled to recover damages for the lost income of their adult child absent some evidence that the parents had reasonable expectations to share in that income. However, we did not explore, in *Smith*, the kind of showing parents must make in order to recover under the statute.

Nor have we overlooked *Clark v. Inn West*, 324 N.C. 415, 379 S.E. 2d 23 (1989), in which our Supreme Court discussed damages for "loss of means of support" under the North Carolina Dram Shop Act, N.C. Gen. Stat. Secs. 18B-120 to -129 (1983). In a footnote, the Court noted that the parents of a minor who consumes alcohol and is then killed or injured are not "expressly" foreclosed, under the Dram Shop Act, from bringing an action against the business that served liquor to the minor. *Id.* at ---, 379 S.E. 2d at ---, n.2. Discussing whether parents might recover for lost support when their decedent is a minor, the Court said that

> . . . the statute does not preclude recovery by the parents for loss of support by their underage child, if the underage child in fact supported the parents. Here, however, the complaint alleges only that the decedent would have provided income and support for his parents in the future. Support cannot be lost until it is in fact provided. Thus, the complaint does not allege sufficient facts to establish the parents' actual dependence on the decedent for income and support.

Id.

Although the dram shop statute directs that "[d]amages for death shall be determined under the provisions of [subsection (b) of the Wrongful Death Act]," Sec. 18B-120(2), we do not think that *Clark* requires us to impose a showing of actual support in order for parents to recover a portion of their adult child's lost income under the wrongful death statute. First, an action brought under the Dram Shop Act is an action brought against the permittee or local Alcohol Beverage Control Board for negligently selling or furnishing alcohol to an underage person who, after becoming impaired, negligently operates a vehicle and causes injury. Sec. 18B-121. Dram shop actions are distinct from those which can be brought against the primary tortfeasor under the Wrongful Death Act. Second, any liability of the permittee or Alcohol Beverage

Control Board is limited to $500,000. Sec. 18B-123. No such limitation on the amount recoverable exists under the wrongful death statute. Third, a requirement of actual past support to prove "reasonable expectations" jars with subsection (c) of the Wrongful Death Act, which specifies that "*[a]ll* evidence which reasonably tends to establish *any* of the elements of damages included in subsection (b) . . . is admissible. . . . " (Emphasis added.)

Further, we believe that policy considerations support a broader construction of the lost-income provision of the Wrongful Death Act than the Supreme Court in *Clark* accorded the "loss of means of support" language of the dram shop statute. These considerations argue against the burden defendant would have us place on parent beneficiaries. By way of example: A child grows up in poverty. Through scholarships, financial aid, and her parents' hard-earned assistance, she attends college and then professional school. She receives an offer of employment that promises to earn her a high salary. Her first desire, once she begins working, is to improve the lot of her parents. She, in fact, tells this intention to them or to others. Prior to commencing the new job, however, she is killed through the negligence of another. Under defendant's reading of subsection (b)(4), the parents recover nothing for their daughter's lost income, despite their reasonable expectations of sharing it.

It may be that adult children do not, typically, provide support to their parents while the latter are self-sufficient. Nevertheless, it seems accurate to suggest that the average adult child intends—and the average parents reasonably expect—that if and when the parents need financial assistance, the child will provide whatever monetary support she can. Indeed, North Carolina makes it a misdemeanor, punishable by fine, imprisonment, or both, for a person "of full age . . . having sufficient income . . . [to] neglect to maintain and support his or her . . . parents," without reasonable cause, in the event the parents, through illness or inability to work, are unable to support themselves. N.C. Gen. Stat. Sec. 14-326.1 (1986).

Along with these policy concerns, the rationale, rather than the holdings, in *DiDonato* and *Bowen*, supports a more liberal evidentiary standard for proving reasonable expectations to income when the decedent is an adult child. In *DiDonato*, our Supreme Court held that parents may not recover damages for lost income when the decedent is a viable fetus. The Court said that "[w]hen a child

is stillborn we can know nothing about its intelligence, abilities, interests and other factors relevant to the monetary contribution it might—or might not—some day have made to the beneficiaries in a wrongful death action . . . [and a] jury attempting to calculate an award for such damages would be reduced to 'sheer speculation.' " 320 N.C. at 431-32, 358 S.E. 2d at 494 (citation omitted).

In *Bowen*, the court addressed the entitlement of the parents of a seventeen-year-old child to recover damages under the Wrongful Death Act. In considering the net-income provision, the Court said this:

> In the present factual situation, Howard may have made no financial contributions to the support of his parents during their active years. It may be that the persons who would receive his net income if he had survived would be a wife and a child or children. During his years in college, and during the earlier years of his career and possible marriage, it may be more likely that financial aid would flow from his parents to Howard rather than from Howard to his parents.

283 N.C. at 420, 196 S.E. 2d at 806.

In contrast to both *DiDonato* and *Bowen*, this case concerns a 34-year-old adult whose financial worth was more realistically ascertainable. The degree of speculation feared in *DiDonato* and *Bowen* is not present in this case. In a wrongful death action involving an adult child, therefore, there is no reason to demand actual support of the parents as the sole ground for any recovery of lost income. Such a requirement would run counter to the remedial purpose of the statute and to the evidentiary provisions of subsection (c). The concrete manifestations of the child's intent to provide support, for which defendant argues, would obviously demonstrate that the parents had reasonable expectations to the child's income. In our view, however, such expectations could also be shown through less tangible means—for example, through the verbally-expressed intentions of the child.

Again, this is not a "sheer" speculation case. *DiDonato*, 320 N.C. at 430, 358 S.E. 2d 493 (citations omitted). *Some* speculation, however, must always be necessary. *See Beck*, 57 N.C. App. at 381, 291 S.E. 2d at 902. Indeed, "[i]t [is] difficult, if not impossible, to formulate a rule of general application for the measurement of . . . damages [under subsection (b)(4)]." *Bowen*, 283 N.C. at 419,

196 S.E. 2d at 805. In our view, the trial judge should enjoy wide latitude, in a case such as this one, to admit any evidence tending to demonstrate the parents' expectations to the child's income.

An expert should not be precluded from valuing the decedent's lost income on the ground that he or she cannot testify whether any of that income would have gone to the parents. This court has said that expert testimony is virtually the only means a plaintiff has to demonstrate lost earnings. *Thorpe v. Wilson*, 58 N.C. App. 292, 298, 293 S.E. 2d 675, 679 (1982). Plaintiffs can offer additional evidence to establish what expectations, if any, the parents had to those earnings. "[T]he assessment of damages," for lost income, as for the other items of recovery enumerated in subsection (b)(4), can then "be left to the good sense and fair judgment of the jury—subject, of course, to the discretionary power of the judge to set its verdict aside when, in his opinion, equity and justice so require." *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E. 2d 342, 348-49 (1975). We hold, therefore, that the trial judge did not err by allowing Dr. Lee to testify as to the amount of Ms. Stutts' lost income stream.

B

[4] Even though Dr. Lee's testimony was admissible, the trial judge erred by submitting the issue of damages for lost income because there was no evidence before the judge that Ms. Stutts had ever expressed an intent to provide any of her income to her parents. Under the particular circumstances of this case, however, the error was harmless.

Significantly, prior to the presentation of evidence, defendant made, and won, a motion *in limine* to exclude any testimony about statements made by Ms. Stutts relative to her intent to provide for her parents in the future. In light of our foregoing analysis, we believe that this was highly relevant evidence that should not have been excluded. Given subsection (c) of the Wrongful Death Act, such statements, in our view, would not have constituted inadmissible hearsay. Instead, the statements would have been offered merely to show Ms. Stutts' intent to assist in her parents' support. As it was defendant who precluded plaintiff from introducing any evidence of Ms. Stutts' desire to provide for her parents, we question how defendant can complain, on appeal, that plaintiff offered no evidence of the parents' reasonable expectations.

In addition, we note that, although Dr. Lee testified that the lost income to Ms. Stutts' parents was approximately $105,000,

the jury awarded plaintiff $55,000. It is thus clear that "the jury was not in fact misled by [Dr. Lee's] testimony, as defendant contend[s]. . . ." *Powell v. Parker*, 62 N.C. App. 465, 470, 303 S.E. 2d 225, 228 (1983), *disc. rev. denied*, 309 N.C. 322, 307 S.E. 2d 166 (1983). The judge instructed the jury that, in addition to lost income, it could award damages for other of the listed items under subsection (b)(4), and it is just as probable that the damages in this case represent compensation for any of those items. Defendant has not attacked the verdict on any of the other grounds of recovery on which the trial judge instructed the jury. Therefore, we hold that the judge's error in submitting the lost-income instruction was harmless, and we overrule this assignment of error.

IV

The judgment of the trial court is

Affirmed.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. FREDERICK LYLES

No. 8811SC690

(Filed 20 June 1989)

1. Criminal Law § 126.3 — jurors' impeachment of verdict — exposure to extraneous evidence

Jurors could testify to impeach their verdict in an armed robbery case pursuant to N.C.G.S. § 15A-1240 and Rule of Evidence 606(b) where one juror removed paper from the bottom of defendant's photograph in a photographic lineup to reveal that it was taken at the Wilson Police Department on 7 December 1981, and the jurors discussed the writing on the photograph as evidence that defendant had been in the area in December 1981 contrary to testimony by defendant's alibi witnesses. The writing on the photograph was "extraneous information" within the meaning of Rule 606(b) and was a "matter not in evidence" which implicated defendant's confrontation right within the meaning of N.C.G.S. § 15A-1240(c)(1).

2. Criminal Law § 126.3— jurors' impeachment of verdict—exposure to extraneous evidence—effect on verdict—evidence properly excluded

The judge hearing a motion for appropriate relief properly excluded juror testimony regarding how extraneous information considered by the jury during its deliberations affected the jury's decision. While jurors may testify regarding the objective events listed in N.C.G.S. § 15A-1240(a) and N.C.G.S. § 8C-1, Rule 606(b) as exceptions to the anti-impeachment rule, those statutes prohibit jurors from testifying to the subjective effect those matters had on their verdict.

3. Criminal Law § 101.2— jury's exposure to extraneous evidence—denial of right to confrontation

Defendant's constitutional right to confrontation was violated in an armed robbery case by the jury's exposure to extraneous evidence during deliberations when a juror removed paper covering the bottom of defendant's photograph in a photographic lineup to reveal that the photograph was taken at the Wilson Police Department on 7 December 1981, and the writing on the photograph contradicted testimony by defendant's alibi witnesses that defendant lived in another state from 1980 to 1984 and did not return to North Carolina during that time. Sixth Amendment to the United States Constitution; Art. I, § 23 of the North Carolina Constitution.

4. Constitutional Law § 65; Criminal Law § 101.2— jury's exposure to extraneous evidence—denial of constitutional right to confrontation—burden of proving harmless error

Where the evidence established that defendant's Sixth Amendment right of confrontation was violated by the jury's improper consideration of extraneous evidence, the trial judge erred by placing the burden of showing prejudice upon defendant. Rather, the violation of a right guaranteed by the United States Constitution was presumed to be prejudicial, and the burden was on the State to show that it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b).

5. Constitutional Law § 65; Criminal Law § 101.2— jury's exposure to extraneous evidence—prejudicial error

The jury's exposure to extraneous evidence during deliberations when a juror removed paper covering writing on a mug shot of defendant revealing that the photograph had been

taken at the Wilson Police Department at a time defendant's alibi witnesses testified he was living in another state constituted prejudicial error since there was more than a reasonable possibility that an average juror could have been affected by the information revealed in the photograph.

APPEAL by defendant from *J. B. Allen, Jr., Judge.* Order entered 18 May 1987 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 14 February 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Randy Meares and Assistant Attorney General D. David Steinbock, for the State.

Office of the Appellate Defender, by Malcolm Ray Hunter, Jr., for defendant-appellant.

BECTON, Judge.

Following his conviction of robbery with a firearm, the defendant, Frederick Lyles, filed a Motion for Appropriate Relief, seeking a new trial on the ground that his constitutional right of confrontation had been violated by the jury's exposure to certain extraneous evidence. Evidence presented at the hearing on defendant's motion showed that the jury members tampered with a photographic exhibit during deliberations. As a result, they were exposed to information not introduced in evidence which contradicted defendant's alibi witnesses. Until that information was revealed, the jury had been split on the issue of defendant's guilt. The hearing judge denied defendant's Motion for Appropriate Relief, and this court granted certiorari. For the reasons that follow, we reverse, and order that defendant receive a new trial.

I

The relevant facts are as follows: Two men robbed a jewelry store in Kenly, North Carolina, in November 1982. Three years later, in November 1985, eyewitnesses identified defendant from a photographic line-up as one of the robbers. Based on this identification, defendant was indicted and tried for robbery with a dangerous weapon.

At trial, the State's case rested solely on the eyewitnesses' identification of defendant. The photographic line-up used by the witnesses in 1985 was introduced in evidence as State's Exhibit 1.

In its original condition, the exhibit consisted of several "mug shots," of defendant and five other men, taped to a manila folder, with paper taped over the lower portion of the photographs to conceal writing that appeared there. To challenge the State's identification testimony, defendant presented evidence that he had been in another state when the robbery was committed and that he differed in several respects from the eyewitnesses' description of the perpetrator.

The jury deliberated for four hours before it asked to see Exhibit 1, the photographic line-up. Neither party objected, and the exhibit was delivered to the jury room. While viewing the exhibit, one of the jurors peeled back the paper over the bottom of defendant's photograph, revealing the words, "Police Department, Wilson, North Carolina—12291, 12-07-81." The jurors discussed the writing on the photograph as evidence that defendant had been in the area in December 1981, a fact which, if true, contradicted the testimony of defendant's alibi witnesses that he lived in another state from 1980 to 1984 and had not returned to North Carolina during that time. Less than one hour after this information was revealed, the jury returned a unanimous guilty verdict.

Following his conviction, and while an appeal was pending before this court, defendant filed his Motion for Appropriate Relief. We ordered the case remanded to the superior court for an evidentiary hearing on the motion.

At the hearing, eleven of the twelve jurors testified. All admitted seeing and discussing the information revealed on the photograph. The hearing judge sustained objections to questions concerning the effect of the information on the jury's verdict, but allowed that testimony to be elicited for purposes of the record. The hearing judge concluded as a matter of law that defendant failed to show he was prejudiced by the jury's actions and that, therefore, he was not entitled to the relief sought.

Defendant appealed, and this court granted certiorari. Defendant's primary contentions on appeal are: (1) that he was entitled to a new trial because his constitutional right of confrontation was violated by the jury's consideration of information not in evidence; (2) that the hearing judge erred by excluding evidence of the effect the information had upon the jury's verdict; and (3) that the hearing judge improperly placed the burden of showing prej-

udice upon the defendant. Given our disposition of this appeal, we will not address defendant's remaining assignments of error.

II

[1] We must first decide whether this was a case in which jurors could testify to impeach their verdict. We conclude that it was.

Generally speaking, once a verdict is rendered, jurors may not impeach it. *State v. Cherry*, 298 N.C. 86, 100, 257 S.E. 2d 551, 560 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980). Substantial policy considerations supporting this anti-impeachment rule include freedom of deliberation, stability and finality of verdicts, and protection of jurors from harassment and embarrassment. *See* N.C. Gen. Stat. Sec. 8C-1, comment to R. Evid. 606 (1988); *Chandler v. U-Line Corp.*, 91 N.C. App. 315, 322-23, 371 S.E. 2d 717, 721-22, *disc. rev. denied*, 323 N.C. 623, 374 S.E. 2d 583 (1988); *see generally*, Weinstein, 3 *Weinstein's Evidence* para. 606[03] (1987). However, harsh injustice has sometimes resulted from the view that jury verdicts are beyond challenge. Thus, as an "accommodation between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in [an] individual case," certain exceptions to the rule have been carved out. *Weinstein's Evidence* para. 606[03].

Section 15A-1240 of the General Statutes and Rule 606(b) of the Rules of Evidence provide limited exceptions to the anti-impeachment rule. Section 15A-1240 allows impeachment of a verdict only in a criminal case, and only when (1) the verdict was reached by lot; (2) a juror was subjected to bribery, intimidation, or attempted bribery or intimidation; or (3) *"matters not in evidence . . . came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him. . . ."* N.C. Gen. Stat. Sec. 15A-1240 (1988) (emphasis added). Rule 606(b), which applies in both criminal and civil cases, provides that a juror is competent to testify when the validity of a verdict is challenged, but only "on the question [1] *whether extraneous prejudicial information was improperly brought to the jury's attention* or [2] whether any outside influence was improperly brought to bear upon any juror." N.C. Gen. Stat. Sec. 8C-1, R. Evid. 606(b) (1988) (emphasis added). *See generally*, Brandis, 1 *Brandis on North Carolina Evidence* Sec. 65 (3d ed. 1988).

We hold that the writing on defendant's photograph was both "extraneous information" within the meaning of Rule 606(b) and was a "matter not in evidence" which implicated defendant's confrontation right within the meaning of Section 15A-1240(c)(1) because it was "information dealing with the defendant [and] the case . . . being tried . . . which . . . reache[d] a juror without being introduced in evidence." *State v. Rosier*, 322 N.C. 826, 832, 370 S.E. 2d 359, 363 (1988). Our Supreme Court made it clear in *Rosier* that once the jury receives extraneous information pertinent to the defendant or the case, the jurors are competent to impeach their verdict. *Id.* The *Rosier* court reached a different result than the one we reach today because the information which came to the jury's attention, although not introduced in evidence, was not "extraneous" since it did not concern *that defendant* or the evidence in *that case. Id.*

III

[2] Defendant contends that the hearing judge erred by excluding juror testimony regarding how the extraneous information affected the jury's decision. We disagree.

Defendant correctly points out that the official comment to Rule 606 suggests that a juror is competent to testify regarding the effect of extraneous prejudicial information upon the jurors' mental processes. The comment states in relevant part:

> *The exclusion [in Rule 606(b)] is intended to encompass testimony about mental processes* and any testimony about any matter or statement occurring during the deliberations, *except that testimony* of either of these two types *can be admitted if it relates to extraneous prejudicial information or improper outside influence*. . . . G.S. 15A-1240 . . . should be amended to conform to Rule 606.

N.C. Gen. Stat. Sec. 8C-1, comment to R. Evid. 606 (1988). *See also Chandler*, 91 N.C. App. at 322, 371 S.E. 2d at 721 (citing *comment* to R. Evid. 606 for quoted principle). It appears, however, that the comment inadvertently misstates the rule since both Rule 606(b) and Section 15A-1240 unambiguously prohibit inquiry into the effect of *anything* occurring during deliberations upon jurors' minds.

Rule 606(b) plainly states that "*a juror may not testify as to . . . the effect of anything upon his or any other juror's mind*

or emotions as influencing him to assent to or dissent from the verdict . . . *or concerning his mental processes* in connection therewith. . . ." N.C. Gen. Stat. Sec. 8C-1, R. Evid. 606(b) (emphasis added). Similarly, Section 15A-1240(a) provides that "*no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes* by which the verdict was determined." N.C. Gen. Stat. Sec. 15A-1240(a) (emphasis added). Thus, it is clear that jurors may testify regarding the *objective events* listed as exceptions in the statutes, but are prohibited from testifying to the *subjective effect* those matters had on their verdict. *See Smith v. Price*, 315 N.C. 523, 535-36, 340 S.E. 2d 408, 416 (1986) (Rule 606(b) permits juror testimony regarding "the *fact* that extraneous prejudicial information was acquired by [a] juror," but prohibits testimony as to "the *effect* . . . this information had upon her vote") (emphasis added); *accord Mattox v. United States*, 146 U.S. 140, 148-49, 36 L.Ed. 917, 921 (1892) (established long-standing rule that "[a] jur[or] may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated on his mind"); *see also Weinstein's Evidence* para. 606[04] and cases cited therein.

Finally, although Rule 606(b) is broader in some respects than Section 15A-1240, we do not agree with any suggestion that the two statutes conflict. In our view, the exceptions to the anti-impeachment rule listed in Section 15A-1240 are designed to protect the same interests as, and are entirely consistent with, the exceptions in Rule 606(b). *Accord Brandis* Sec. 65, n.95 ("[I]t seems that with the possible exception of 'by lot,' everything admissible under 15A-1240 is also admissible under the Rule").

Although official commentary is useful to determine legislative intent when an ambiguity exists, it cannot control when, as here, the language of the statute itself is clear and unambiguous. *Cf. In re Forsyth County*, 285 N.C. 64, 71, 203 S.E. 2d 51, 55 (1974) (statute controls when language in caption conflicts with clear language in statute). Thus, to the extent that the comment contradicts the plain language of Rule 606(b) and Section 15A-1240 and is inconsistent with the Supreme Court's statement of the current rule in *Smith*, we decline to follow the comment.

Accordingly, we hold that the hearing judge did not err by excluding testimony regarding jurors' subjective reactions to the written information appearing on defendant's photograph.

IV

[3] Defendant next contends that the jury's exposure to the information on the photograph violated his constitutional right of confrontation. We agree.

A criminal defendant's right to confront the witnesses and evidence against him is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 23 of the North Carolina Constitution. A fundamental aspect of that right is that a jury's verdict must be based on *evidence produced at trial*, not on extrinsic evidence which has escaped the rules of evidence, supervision of the court, and other procedural safeguards of a fair trial. *See, e.g., Parker v. Gladden*, 385 U.S. 363, 364, 17 L.Ed. 2d 420, 422-23 (1966); *Turner v. Louisiana*, 379 U.S. 466, 472-73, 13 L.Ed. 2d 424, 429 (1965) (rights conferred by the Sixth Amendment "necessarily impl[y] at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel").

In this case, it is undisputed that information about the defendant, which had not been admitted in evidence, came to the attention of the jury and that this evidence directly contradicted defendant's alibi witnesses. Because this exposure occurred during the jury's deliberations, defendant had no opportunity to challenge the evidence by cross-examination or to minimize its impact in his closing argument or through a curative instruction by the trial judge. Moreover, the evidence implied that defendant had prior criminal involvement, and the jury was allowed to draw this inference notwithstanding that this is a subject intricately regulated by the rules of evidence.

Under these circumstances, the jury's exposure to the extraneous information clearly abridged defendant's constitutional right of confrontation. *Accord Parker*, 385 U.S. at 364, 17 L.Ed. 2d at 420, 422-23 (bailiff told jurors that defendant was "wicked"); *United States v. Bruscino*, 662 F. 2d 450, 458 (7th Cir. 1981) (jury exposed to extraneous materials suggesting defendant's involvement with "Mexican Mafia"); *Bulger v. McClay*, 575 F. 2d 407, 411 (2d Cir. 1978), *cert. denied*, 439 U.S. 915, 58 L.Ed. 2d 263 (1978) (jurors read newspaper story giving defendant's address which discredited his explanation for being near scene of crime); *Farese v. United States*, 428 F. 2d 178, 181-82 (5th Cir. 1970) (jury discovered cash

in pocket of shirt inside attache case introduced in evidence); *Lacy v. Gabriel*, 567 F. Supp. 467, 469 (D. Mass. 1983), *aff'd*, 732 F. 2d 7 (1st Cir. 1984) (jurors unmasked portions of photographs, revealing defendant's prior crimes). *See also Smith*, 315 N.C. at 536, 340 S.E. 2d at 416 (recognizing that verdict may be impeached in criminal case when confrontation right is implicated); *cf. State v. Johnson*, 295 N.C. 227, 235, 244 S.E. 2d 391, 396 (1978) (bailiff's remarks to jurors were of nature to require a new trial as matter of law; not analyzed on confrontation grounds). Our remaining question is whether this violation sufficiently prejudiced defendant to warrant granting him a new trial.

V

[4] We agree with defendant's final contentions that the hearing judge erred by placing the burden of showing prejudice on the defendant, and that, under the circumstances, the judge erred by denying him a new trial.

Generally, a new trial motion is addressed to the sound discretion of the trial judge, and unless his ruling is clearly erroneous or an abuse of discretion, it will not be disturbed on appeal. *See, e.g., Johnson*, 295 N.C. at 234, 244 S.E. 2d at 396. When, however, the motion is based on a constitutional right, the ruling becomes a question of law, fully reviewable on appeal. *See State v. Gardner*, 322 N.C. 591, 593, 369 S.E. 2d 593, 596 (1988). Here, defendant's motion was grounded on—and the evidence presented at the hearing unquestionably established—a violation of his Sixth Amendment right of confrontation.

We hold that the hearing judge erred by placing the burden of showing prejudice upon defendant. Under North Carolina law, the violation of any right guaranteed by the United States Constitution is presumed to be prejudicial, and the *burden is then on the State* to show that it was harmless beyond a reasonable doubt. N.C. Gen. Stat. Sec. 15A-1443(b) (1988). Cases based upon federal Rule 606(b) are in accord with this standard. *See, e.g., United States v. Perkins*, 748 F. 2d 1519, 1533-34 (11th Cir. 1984); *United States v. Hilliard*, 701 F. 2d 1052, 1063-64 (2d Cir. 1983), *cert. denied*, 461 U.S. 958, 77 L.Ed. 2d 1318 (1983); *United States v. Bassler*, 651 F. 2d 600, 603 (8th Cir. 1981) (once it is established that extraneous material reached jury, a presumption of prejudice arises which may be overcome only by a showing that the error was harmless beyond a reasonable doubt).

[5] We turn now to the question whether the evidence presented at the hearing established that the error was "harmless beyond a reasonable doubt."

An error of constitutional magnitude will be held to be harmless beyond a reasonable doubt only when "the court can declare a belief . . . that there is *no reasonable possibility that the violation might have contributed to the conviction.*" *State v. Lane*, 301 N.C. 382, 387, 271 S.E. 2d 273, 277 (1980) (emphasis added). In the context of jury exposure to extraneous information, because inquiry into jurors' mental processes is prohibited, the test for determining harmlessness generally has been whether there was "no reasonable possibility" that "*an average juror*" could have been affected by it. *See, e.g., Miller v. United States*, 403 F. 2d 77, 84 (2d Cir. 1968) ("[w]here an extraneous influence is shown, the court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror"); *Lacy*, 567 F. Supp. at 469 (because jurors' thought processes "are not properly matters for judicial review," the prejudicial effect of extraneous information "must be evaluated in the context of the 'average' juror, or a 'reasonable' juror, rather than attempting to measure the actual effect on the jurors who were involved"); *State v. Poh*, 116 Wis. 2d 510, 529, 343 N.W. 2d 108, 116-19 (1984).

In assessing the impact of the extraneous evidence on the mind of the hypothetical "average juror," the court should consider: (1) the nature of the extrinsic information and the circumstances under which it was brought to the jury's attention; (2) the nature of the State's case; (3) the defense presented at trial; and (4) the connection between the extraneous information and a material issue in the case. *See Poh*, 116 Wis. 2d at 530, 343 N.W. 2d at 119. Applying these factors to the case before us, we conclude that there was more than a reasonable possibility that an average juror could have been affected by the information revealed on the photograph, and, therefore, that the State failed to show that the error was harmless beyond a reasonable doubt.

Here, the implication of the words printed at the bottom of the official police department "mug shot" was that defendant had been in Wilson in 1981, and that he had been charged with a crime while there. Not only would this unauthenticated evidence have been inadmissible at trial as hearsay and incompetent character evidence, but, more importantly, the evidence *went to the heart of*

defendant's alibi defense. The State's case rested on the identification of defendant as one of the perpetrators; defendant's challenge to that evidence was that he lived out-of-state for several years, including the year the robbery was committed. In all likelihood, defendant's alibi and the credibility of the witnesses who testified in his behalf were undermined by the jury's exposure to this evidence. Moreover, the jury, which had been split as to defendant's guilt after four hours of deliberation, reached the unanimous guilty verdict less than one hour after the information came to their attention. In circumstances such as this, the possibility that the jury's verdict was tainted by exposure to the extraneous evidence was obvious. Accordingly, we hold that defendant is entitled to a new trial.

VI

In summary, we hold that: (1) the jurors were competent to impeach their verdict within the terms of Rule 606(b) and Section 15A-1240(c)(1); (2) the hearing judge did not err in excluding evidence of the effect the extraneous information had on the verdict; (3) the jury's exposure to the information violated defendant's constitutional right of confrontation; (4) the hearing judge erred in putting the burden on defendant to establish prejudice; and (5) the jury's exposure to the information was not harmless beyond a reasonable doubt. The order denying defendant's Motion for Appropriate Relief is

Reversed; new trial.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. FOTIOS KAMTSIKLIS

No. 883SC834

(Filed 20 June 1989)

1. Constitutional Law § 34— conviction for four conspiracies— one conspiracy in fact—double jeopardy violation

Defendant's conviction for conspiracy to transport cocaine was arrested where defendant was charged with four separate conspiracies which were, in fact, only a single conspiracy.

2. Indictment and Warrant § 12.2— conspiracy—indictments—amended to change dates—no error

The trial court did not err in a prosecution for conspiracy, possession, delivery, sale, and transportation of in excess of 400 grams of cocaine by allowing the State's oral motion to amend the conspiracy indictments to change the dates of the alleged offenses because the charges were not substantially altered by changing the dates recited in the indictments. Even though the dates were changed the morning of the trial, defendant did not raise an alibi defense or any other defense which would make time critical to his defense; ordinarily, the precise dates of the conspiracy are not essential to the indictment because the crime is complete upon the meeting of the minds of the confederates.

3. Criminal Law § 119— narcotics—requested instructions—not given—no error

The trial court did not err in a prosecution for conspiracy and possession, delivery, sale, and transportation of cocaine by failing to give defendant's requested instructions clarifying that the jury could convict him based solely on the evidence of events allegedly occurring on a particular date where the trial court instructed the jury concerning the dates the offenses occurred and stated that defendant was not on trial for any offense not charged in the indictments. The court's instruction was correct and in substance covered the points requested by defendant.

4. Criminal Law § 70— narcotics trafficking—tape recording—admissible

There was no prejudicial error in a narcotics prosecution in the admission of four tape recordings which were played for the jury where the recordings were cumulative in that they were made by means of a body recorder and the person on whom the recorder was concealed had previously testified in detail as to each conversation recorded and played for the jury.

5. Criminal Law § 67— recognition of defendant's voice—result of prior threat—no prejudicial error

There was no prejudicial error in a narcotics prosecution in the admission of an agent's testimony that defendant had threatened to kill him where, while authenticating tape re-

cordings during direct examination, the agent testified that he could recognize defendant's voice because "you don't forget the voice of a person who tells you they are going to kill you." Given defendant's assertions concerning the quality of the tapes, the court found no error in allowing the State's witness to explain why defendant's voice was so recognizable; moreover, the trial court properly limited the use of this portion of the testimony and the evidence was overwhelmingly against the defendant. N.C.G.S. § 15A-1443(a).

6. **Judges § 5; Criminal Law § 99— plea bargaining—judge's remark—recusal unnecessary**

The trial court did not err by not recusing himself in a narcotics prosecution where the judge was told in chambers after the jury had been impaneled that no plea arrangement would be forthcoming, the trial judge slammed a piece of paper on the table, angrily indicated that if the case could not be settled, it would be tried, and in an angry tone made a statement indicating that he did not believe the negotiations were being conducted in good faith. The trial judge stated that he had been curt and felt frustrated by what he perceived to be a waste of more than two hours of the jurors' time. Because defendant did not move for the trial judge's disqualification, the determination here is only whether the trial judge should have recused himself, and while this incident demonstrates impatience, it is not sufficient to demonstrate substantial evidence of personal bias, prejudice or interest on the part of the judge.

7. **Criminal Law § 99.3— narcotics conspiracy—judge's comment while admitting evidence—no error**

Defendant in a narcotics prosecution was not deprived of a fair trial where, while overruling an objection, the trial court stated "it's all part of the conspiracy so it can come in." Although it was unnecessary for the trial court to respond as quoted, this single remark in a trial which lasted longer than a week did not deprive him of a fair trial.

8. **Criminal Law §§ 138.13, 138.37— sentencing hearing—refusal to continue—no substantial assistance**

The trial court did not err in a narcotics prosecution by refusing to continue the sentencing hearing in order to allow defendant time to provide the State with substantial assistance

so that he might be eligible for a reduced sentence or by failing to find that the information defendant gave to the State was of substantial assistance. The State argued that some of the statements given by defendant were false and there could be doubts as to defendant's credibility in subsequent proceedings; N.C.G.S. § 90-95(h)(5) is permissive, not mandatory, and defendant has no right to a lesser sentence even if he does provide what he believes to be substantial assistance; and the trial court is not required as a matter of law to continue a sentencing hearing so that defendant may be afforded an opportunity to provide the State with substantial assistance.

9. **Criminal Law § 138.14— consolidated sentences—no aggravating factors—term in excess of statutory minimum**

The trial court did not err by sentencing defendant to two consecutive forty-year terms for trafficking in cocaine without finding any aggravating factors where the trial court consolidated four trafficking counts into two judgments per sentencing. The statutory mandatory minimum sentence for each conviction of trafficking in more than 400 grams of cocaine is thirty-five years in prison; since each of the forty-year sentences pronounced is less than the total of the presumptive terms of the consolidated convictions, the trial court's sentences were lawful. N.C.G.S. § 90-95(h)(3)c.

10. **Criminal Law § 138.14— trafficking in cocaine—sentence in excess of statutory minimum—no aggravating factors—error**

The trial court erred when sentencing defendant for conspiracy to sell cocaine by sentencing defendant to a term in excess of the statutory mandatory minimum without finding any factors in aggravation.

APPEAL by defendant from *Currin, Judge*. Judgments entered 4 February 1988 in Superior Court, PITT County. Heard in the Court of Appeals 20 March 1989.

This is a criminal case in which defendant was convicted of possession, delivery, sale, and transportation of in excess of 400 grams of a mixture containing cocaine as well as four separate conspiracies leading to the commission of the offenses listed.

The trial court arrested judgment in two of the conspiracy charges, conspiracy to possess and conspiracy to deliver more than

400 grams of cocaine. The trial court consolidated the charges of sale and delivery of cocaine for judgment and sentenced defendant to a forty year prison term and a $250,000 fine. The trial court also consolidated the possession and transportation offenses and sentenced defendant to another forty year term, to be served consecutively, and another $250,000 fine. As to the remaining charges of conspiracy to sell and conspiracy to transport, the trial court sentenced defendant to two consecutive forty year terms. From the judgments entered, defendant appeals.

Attorney General Thornburg, by Associate Attorney General G. Lawrence Reeves, Jr., for the State.

Glover & Petersen, by James R. Glover; Perry W. Martin for the defendant-appellant.

EAGLES, Judge.

Defendant brings forward nine issues on appeal. We find that the trial court erred in allowing more than one conspiracy charge to go to the jury. The trial court also erred in sentencing defendant for his conviction on conspiracy to sell to a term in excess of the statutory mandatory minimum without finding any aggravating factors. Accordingly, we arrest judgment on the conviction for conspiracy to transport cocaine and vacate the sentence and remand for resentencing on the conviction of conspiracy to sell cocaine. We find no other error.

[1] Defendant first argues that the four separate conspiracies for which he was charged were, in fact, only a single conspiracy and that his conviction for more than that single conspiracy violated his right to be free from double jeopardy. The State concedes that this court's opinion in *State v. Worthington*, 84 N.C. App. 150, 352 S.E. 2d 695, *disc. rev. denied*, 319 N.C. 677, 356 S.E. 2d 785 (1987), mandates that only one conspiracy charge should have been submitted to the jury. Accordingly, we arrest judgment as to defendant's conviction for conspiracy to transport cocaine.

[2] Defendant next argues that the trial court erred in allowing the State's oral motion to amend the conspiracy indictments. The indictments initially charged that the conspiracies occurred "on or about May 6, 1987 through May 12, 1987." The amended indictments changed the time of the conspiracies to a period beginning on April 19, 1987 until May 12, 1987. Defendant argues that this

amendment deprived him of his right to be tried on the charges returned by the grand jury. Furthermore, he contends that upon amendment of the indictments he was deprived of sufficient notice to prepare a defense.

G.S. 15A-923(e) provides that "[a] bill of indictment may not be amended." In *State v. Price*, 310 N.C. 596, 598, 313 S.E. 2d 556, 558 (1984), our Supreme Court stated that an amendment was "any change in the indictment which would substantially alter the charge set forth in the indictment." The trial court in *Price* had allowed the State to amend a murder indictment by alleging the date of the offense rather than the date of the victim's death. There the court stated that "because the change did not 'substantially alter the *charge* set forth in the indictment' " the amendment was not violative of G.S. 15A-923(e). *Id.* at 599, 313 S.E. 2d at 558-559. [Emphasis in original.] Here the conspiracy charges have not been substantially altered by changing the dates recited in the indictments.

Defendant further claims that because the amendments occurred on the morning of trial he was deprived of sufficient notice to prepare a defense. We disagree. Defendant correctly states that error occurs when time is material to the indictment and an amendment would deprive defendant of the opportunity to prepare his defense. *See id.* Ordinarily, the precise dates of a conspiracy are not essential to the indictment because the crime is complete upon the meeting of the minds of the confederates. *State v. Christopher*, 307 N.C. 645, 300 S.E. 2d 381 (1983). Furthermore, defendant did not raise an alibi defense or any other defense which would make time critical to his defense. *See Price* at 599, 313 S.E. 2d at 559. Accordingly, we overrule this assignment of error.

[3] Defendant's third assignment of error concerns the trial court's instructions on the substantive offenses. Defendant argues that the trial court erred in failing to give his requested instructions. He contends that his tendered instructions clarified that the jury could convict him of the substantive counts of the indictment based solely on the evidence of events allegedly occurring on May 12, 1987. We note that the trial court "is not required to give a requested instruction in the exact language of the request," *State v. Paige*, 316 N.C. 630, 662, 343 S.E. 2d 848, 867 (1986), so long as the substance of defendant's requested instruction is given. *See also State v. Ball*, 324 N.C. 233, 377 S.E. 2d 70 (1989). Here the

trial court instructed the jury concerning the dates the offenses occurred and, more specifically, stated that "I would also charge you that the defendant is not on trial for any offence [sic] not charged in the indictments which are before you in this trial." The trial court's instruction was correct and in substance covered the points requested by defendant.

[4] Next, defendant argues that the trial court erred in allowing into evidence four tape recordings which were played for the jury. Specifically defendant contends that the State did not lay a proper foundation for the tapes' admission, that the trial court failed to review the tapes on voir dire in order to delete irrelevant and prejudicial material on the tapes, and failed to direct the court reporter to record what was heard when the tapes were played for the jury. Upon a careful review of this assignment of error, we find no prejudicial error.

Defendant argues that the State failed to properly authenticate the tape recordings as required by *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971). Our Supreme Court there set the following prerequisites for the admission of a tape recording:

> (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made.

Id. at 17, 181 S.E. 2d at 571.

The State does not dispute that it failed to present evidence as to the *Lynch* prerequisites. Rather, the State contends that it complied with Rule 901 of the North Carolina Rules of Evidence which the State claims now provides a different method of authenticating tape recordings. In pertinent part, G.S. 8C-1, Rule 901 provides:

> (a) General provision.—The requirement of authentication or identification as a condition precedent to admissibility is satis-

fied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

. . .

(5) Voice Identification.—Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

See also 2 Brandis on North Carolina Evidence, section 195 (3d ed. 1988).

In addition, the State concedes that the rules of evidence do not abolish the *Lynch* requirement that the trial court conduct a voir dire to hear the recordings so that irrelevant and prejudicial material may be deleted. The State does not address the trial court's decision not to record what was heard in the courtroom when the tape recordings were played for the jury. However, the State contends that defendant has not demonstrated that he was prejudiced by the error, if any.

We need not decide here whether the rules of evidence have overruled the requirements for authenticating tape recordings as set forth in *Lynch*. Even assuming *arguendo* that the trial court committed error the defendant has failed to demonstrate how any error under this assignment of error was prejudicial. G.S. 15A-1443(a); *State v. Toomer*, 311 N.C. 183, 191, 316 S.E. 2d 66, 71 (1984). The tape recordings here are cumulative in that they repeat Dale Varnum's testimony. Each of the recordings were made by means of a body recorder concealed on Varnum's person. Varnum had previously testified in detail as to each conversation recorded and played for the jury. We overrule this assignment of error.

[5] In defendant's fifth assignment of error he contends that the trial court erred in allowing Agent Duber's testimony that, in 1986, the defendant had threatened to kill him. In authenticating the tape recordings during direct examination Agent Duber testified that he could recognize defendant's voice, "[b]ecause you don't forget the voice of a person who tells you they are going to kill you."

Defendant objected to Agent Duber's statement, claimed that it was extremely prejudicial, and moved for a mistrial. The trial court denied defendant's motion for a mistrial but instructed the jury that Agent Duber's testimony in this regard could be used only for identifying the voices on the tapes. Given defendant's assertions concerning the poor audibility and quality of the tapes, we find no error in allowing the State's witness to explain why defendant's voice would be so recognizable to him.

Moreover, even if this was error it was harmless error. The trial court properly limited the use of this portion of Agent Duber's testimony. We must assume that the jury complied with the trial court's instruction. In addition, the evidence is so overwhelmingly against the defendant that we are not convinced that "had the error in question not been committed, a different result would have been reached at the trial." G.S. 15A-1443(a).

[6] Defendant's sixth assignment of error claims that the defendant did not receive an unbiased trial from a neutral and detached judge. Defendant argues that upon being told that no plea arrangement would be forthcoming, the trial judge "displayed a prejudice against the defendant." The incident occurred in the judge's chambers after the jury had been impaneled. Defendant's attorney claims that the trial judge slammed a piece of paper on the table, angrily indicated that if the case could not be settled it would be tried, and in an angry tone made a statement indicating that he did not believe the negotiations were being conducted in good faith. The district attorney stated that the trial judge was concerned about the jury doing nothing while the plea bargaining was ongoing. The trial judge stated that he had been "curt" and that he felt frustrated by what he perceived to be a waste of more than two hours of the jurors' time. Defendant moved for a mistrial, but never moved that the trial judge be disqualified.

G.S. 15A-1223 sets forth the criteria for disqualifying a judge from any criminal proceeding. In particular, G.S. 15A-1223(c) provides that "[a] motion to disqualify must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification." Because the defendant failed to move for the trial judge's disqualification, we determine here only whether the trial judge should have recused himself.

In *State v. Fie*, 320 N.C. 626, 627, 359 S.E. 2d 774, 775 (1987), our Supreme Court stated that "the burden is upon the party

moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." Here defendant did not move for the trial judge's disqualification. In addition, this particular incident demonstrates impatience but is not sufficient to demonstrate substantial evidence of "personal bias, prejudice or interest on the part of the judge."

In addition, defendant argues that "a party has a right to be tried before a judge whose impartiality cannot reasonably be questioned." *Id.* The circumstances here do not reasonably warrant questioning the judge's impartiality. We overrule this assignment of error.

[7] During Andy Noble's testimony on direct examination the defendant objected to the relevance of certain testimony. The trial court responded, "[w]ell, it's all part of the conspiracy so it can come in," and overruled the objection. Defendant argues that this statement made in the jury's presence constituted an opinion of the defendant's guilt and denied him a fair trial. We disagree.

While a judge may not express his opinion on a question of fact before the jury, G.S. 15A-1222, not every improper remark requires a new trial. *State v. Guffey*, 39 N.C. App. 359, 250 S.E. 2d 96 (1979). Citing our decision in *State v. Sidbury*, 64 N.C. App. 177, 306 S.E. 2d 844 (1983), defendant argues that because the trial judge's remarks go to a central issue in the case, the existence of a conspiracy, he is entitled to a new trial. Defendant bears the burden of showing that he was prejudiced. *State v. Weeks*, 322 N.C. 152, 367 S.E. 2d 895 (1988). We must determine whether the remark deprived him of a fair trial "in light of all attendant circumstances." *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E. 2d 366, 369 (1979). Though it was unnecessary for the trial court to respond as quoted, we hold that this single remark in a trial which lasted longer than a week did not deprive defendant of a fair trial.

[8] On the morning following the announcement of the jury's verdicts, the trial court held the sentencing hearing. Defendant claims that the trial court erred in refusing to continue the hearing in order to allow defendant time to provide the State with "substantial assistance" so that he might be eligible for a reduced sentence pursuant to G.S. 90-95(h)(5). He also argues that the information he gave to the State was substantial assistance.

We do not believe defendant's assistance constituted "substantial assistance" as contemplated by G.S. 90-95(h)(5). The State argues that because some of the statements given by defendant were false, there could be doubts raised as to defendant's credibility in subsequent proceedings. Furthermore, our courts have recognized that the "substantial assistance" statute is "permissive, not mandatory, and that defendant has no right to a lesser sentence even if he does provide what he believes to be substantial assistance." *State v. Perkerol*, 77 N.C. App. 292, 301, 335 S.E. 2d 60, 66 (1985), *disc. rev. denied*, 315 N.C. 595, 341 S.E. 2d 36 (1986).

In addition, we hold that the trial court is not required, as a matter of law, to continue a sentencing hearing so that the defendant may be afforded an opportunity to provide the State with substantial assistance. This court recognized in *State v. Willis*, 61 N.C. App. 23, 41, 300 S.E. 2d 420, 430, *modified*, 309 N.C. 451, 306 S.E. 2d 779 (1983), that G.S. 90-95(h)(5) is "a post-conviction form of plea bargaining." The statute does not guarantee any criminal defendant that the State will, in fact, participate in this form of plea bargaining. This assignment of error is without merit.

[9] Defendant's final assignment of error argues that the trial court erred in sentencing him to two consecutive forty year terms for trafficking in cocaine without finding any aggravating factors. The trial court consolidated the four trafficking counts into two judgments for sentencing. Defendant contends that where the trial court sentences a defendant to a prison term in excess of the statutory minimum he must make findings in aggravation and mitigation.

The trial court need not make findings in aggravation and mitigation when two or more convictions are consolidated for judgment so long as the term pronounced does not exceed the total of the presumptive terms for each conviction. G.S. 15A-1340.4(b). In addition, the Supreme Court has stated that in those cases where a mandatory minimum sentence is established, "the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act." *State v. Perry*, 316 N.C. 87, 110, 340 S.E. 2d 450, 464 (1986). The statutory mandatory minimum sentence for each conviction of trafficking in more than 400 grams of cocaine is 35 years in prison. G.S. 90-95(h)(3)(c). Since each of the 40 year sentences pronounced is less than the total of the presumptive terms of the

consolidated convictions, the trial court's sentences for the substantive offenses were lawful.

[10] Defendant further argues that the trial court erred in sentencing him to consecutive 40 year terms for conspiracy to transport cocaine and conspiracy to sell cocaine. Because we arrest judgment on the conviction for conspiracy to transport, we need not discuss the sentence pronounced for that offense. However, the State concedes that the trial court erred when it sentenced defendant to a term in excess of the statutory mandatory minimum sentence without finding any factors in aggravation. We agree and, accordingly, we vacate the sentence imposed as a result of defendant's conviction for conspiracy to sell and remand for a new sentencing hearing.

For the foregoing reasons we arrest judgment as to defendant's conviction for conspiracy to transport more than 400 grams of cocaine and we vacate defendant's sentence for conspiracy to sell and remand for a new sentencing hearing. We find no error in the remaining convictions.

Vacated and remanded in part; no error in part.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. JAMES ROBERT PRUITT

No. 8818SC934

(Filed 20 June 1989)

1. Criminal Law § 34.8; Rape and Allied Offenses § 4.1— prior sexual conduct by defendant—admissibility to show modus operandi

In a prosecution for rape and sexual offenses, testimony by two of defendant's former lovers about defendant's past sexual conduct was admissible to prove defendant's modus operandi, plan, motive and intent where the testimony showed strikingly similar behavior by defendant toward the witnesses and the victim in that defendant befriended all three women, lured them into a dating relationship, and, after gaining their trust, used physical violence or the threat of a deadly weapon

to force each woman to engage in vaginal intercourse, anal intercourse, cunnilingus and fellatio. Furthermore, defendant failed to show that this evidence should have been excluded under the Rule 403 balancing test. N.C.G.S. § 8C-1, Rules 404(b), 403.

2. **Criminal Law § 89.3— sexual attack—prior consistent statement—admissibility to corroborate witness**

A detective's testimony relating a prior consistent statement by a State's witness concerning defendant's sexual attack on her was properly admitted to corroborate the witness's in-court testimony about the sexual attack.

3. **Rape and Allied Offenses § 6— first degree rape—first degree sexual offense—employment or display of deadly weapon—sufficiency of instructions**

The trial court's instruction on employment or display of a deadly weapon as a necessary element of first degree rape and first degree sexual offense was sufficient, although the instruction did not emphasize the victim's awareness of the weapon, where it made clear that the State was required to prove that the weapon was displayed in some fashion, and where the victim's testimony showed that defendant threatened her with a knife and that the knife remained on a bedside table, within eight feet of defendant, throughout the attack.

4. **Criminal Law § 102.8— jury argument—failure to present evidence of consent—no comment on defendant's failure to testify**

The prosecutor's jury argument in a rape and sexual offense case concerning defendant's failure to present evidence to support his contention that the victim consented to sexual acts with him did not constitute an improper comment on defendant's failure to testify.

5. **Criminal Law § 111.1— court's explanation of charges—no improper reading of indictment**

The trial court in a prosecution for first degree rape and first degree sexual offenses did not err in presenting the charges to the jury because the court used phrases from the indictments such as "did ravish and carnally know" and "willfully and feloniously," since the trial court may refer to and summarize the indictments when explaining the charges against

defendant and the circumstances under which defendant is being tried, and the record shows that the trial court did not read the entire indictment to the jury.

6. Constitutional Law § 81 — three consecutive life sentences — no cruel and unusual punishment

The imposition of three consecutive life sentences upon defendant for a rape and three first degree sexual offenses did not constitute cruel and unusual punishment.

APPEAL by defendant from *Mills (F. Fetzer), Judge.* Judgment entered 11 March 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 March 1989.

Defendant was indicted for one count of rape and three counts of first degree sexual offense.

At trial the victim testified that on or about 4 August 1987 she met defendant for the first time at a convenience store in Kernersville. At that time she gave defendant her telephone number. After the initial meeting she and defendant went out together several times. These outings included going to defendant's motel room where they would drink, watch TV, and kiss.

On 8 August 1987, defendant picked her up at work and took her by her parents' house so she could change clothes. Then she and defendant rode around Kernersville for a while. They eventually went to defendant's motel room, arriving there at approximately 12:30 A.M. They had a mixed drink and watched TV for a while. The victim noticed defendant was unusually quiet that evening and asked if he had been drinking. Defendant told her that he had drunk a fifth of liquor before picking her up at work. After this admission, defendant became extremely quiet until he suddenly reached out and grabbed the victim's jumpsuit by the throat and ripped it all the way off, ripping the bra and panties that she wore underneath as well. When the victim pleaded with defendant to let her go, he started hitting her and telling her that if she didn't "shut-up" he would kill her with a knife. When defendant threatened her with the knife, the victim saw the knife lying on a nightstand near the bed on which they were then lying.

The victim testified that defendant forced vaginal intercourse, anal intercourse, fellatio, and cunnilingus on her. She also testified that defendant demanded that she urinate on him and threatened

to stab her when she said that she could not. After performing these sex acts on the victim, defendant stood beside her and, while holding on to her hair, masturbated to ejaculate. The victim testified that to her knowledge defendant did not "climax" until he masturbated. Throughout this time the knife remained on the nightstand at a distance of between two and eight feet from defendant.

After completing these sex acts, defendant forced the victim to drink liquor straight from the bottle. He told her he was going to kill her and dump her in the river so that she could not tell the police what he had done.

The victim testified that defendant then threw her back down on the bed and started having vaginal intercourse with her again. He stopped and went over to the door when he heard someone yelling outside. Defendant opened the door and started yelling at someone down in the parking lot. When defendant moved to the side of the door, the victim jumped off the bed and ran from the motel room even though she was naked.

The victim ran to the motel office and beat on the door. The desk clerk at the motel opened the office door and the victim told her that she had been raped by the man staying in room 331. The desk clerk then called the police and found the victim some clothes to cover herself. The desk clerk confirmed from the motel records that room 331 was registered to a "James Pruitt." The police searched the room and found the victim's torn clothes and her handbag, but did not find defendant.

Defendant presented no evidence at trial. The jury convicted defendant of rape and of three counts of first degree sexual offense. Defendant was sentenced to three consecutive life sentences. From these convictions and sentences, defendant appeals.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

PARKER, Judge.

Defendant has grouped his numerous assignments of error into six basic arguments. First, defendant contends that the trial court erred in allowing the State's witnesses to attest to defend-

ant's past sexual conduct. Second, defendant argues that the trial court erred in admitting testimony of one witness to corroborate another witness's testimony about defendant's past sexual conduct. Third, the defendant urges this Court to find error in the trial judge's jury instruction on possession of a deadly weapon. Fourth, the defendant asserts that the court committed plain error in allowing the prosecutor to argue to the jury that defendant had failed to put on evidence of consent. Next, defendant contends that the trial court erred in presenting the charges against the defendant to the jury. Finally, defendant argues that the sentences imposed against defendant are unconstitutional because they are cruel and unusual punishment. We address separately each of defendant's contentions.

[1] Defendant argues that he was denied a fundamentally fair trial because the court admitted evidence in violation of G.S. 8C-1, Rule 404 when it allowed two of the State's witnesses, defendant's former lovers, to testify to defendant's past sexual conduct. The State contends that this evidence was admissible under G.S. 8C-1, Rule 404(b) and under *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), as evidence tending to show defendant's *modus operandi*, motive, intent, preparation and plan.

At trial State's witness D. B. testified that she met defendant in mid-January 1986 and consented to sexual intercourse on 28 January 1986. On 4 February 1986, she and defendant went to a motel and engaged in consensual sexual intercourse including oral sex. On this occasion defendant had been drinking. While talking with defendant after intercourse, D. B. called defendant Roger instead of Robert. Defendant became upset and called D. B. names. D. B. started to dress and leave. Defendant then allegedly ripped off her underwear, began beating and kicking her, pulled out a knife and threatened to kill her with the knife. Defendant then forced D. B. to engage in anal intercourse and fellatio, and demanded that she urinate on him. When D. B. refused, defendant went to the bathroom and D. B. was able to escape to the motel office.

P. S., a second State's witness, testified that she met defendant in January 1987 and that he moved in with her at the end of March 1987. Thereafter they entered into a consensual sexual relationship which continued until early May 1987. On 13 May 1987, defendant and P. S. were riding in his car when defendant suddenly hit her. Defendant drove his car into some woods and continued

to beat P. S. When he stopped beating her, he allegedly forced her to engage in anal intercourse, fellatio, cunnilingus, and vaginal intercourse. Thereafter, P. S. remained with defendant in the woods until it started to get dark. Defendant then drove P. S. to the emergency room and left.

General Statute 8C-1, Rule 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith on a particular occasion. Such evidence is admissible, however, for the limited purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Our Supreme Court has ruled that the list of exceptions contained in Rule 404(b) is not exclusive and that extrinsic evidence of conduct is admissible if "relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E. 2d 84, 91 (1986). When the incidents are offered for a proper purpose, the ultimate test of admissibility 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 N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E. 2d 118, 119 (1988) (citing *State v. Cotton*, 318 N.C. 663, 665, 351 S.E. 2d 277, 278-79 (1987)).

Our courts have been liberal in admitting evidence of similar sexual offenses under the exceptions listed above. *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978). In *State v. Bagley*, 321 N.C. 201, 362 S.E. 2d 244, *cert. denied*, --- U.S. ---, 108 S.Ct. 1598, 99 L.Ed. 2d 912 (1987), the defendant was charged with first degree sexual offense for allegedly forcing the victim to submit to cunnilingus by threatening her with a knife. The North Carolina Supreme Court held that testimony from another woman that defendant had pinned her to the ground and threatened her with a knife while he licked her and attempted to perform cunnilingus was relevant and admissible to prove defendant's *modus operandi*, motive, intent, preparation and plan. *Id.* at 207-208, 362 S.E. 2d at 248. In *State v. Morrison*, 85 N.C. App. 511, 355 S.E. 2d 182, *appeal dismissed and disc. rev. denied*, 320 N.C. 796, 361 S.E. 2d 84 (1987), defendant was charged with rape which he allegedly committed after luring the victim to his apartment on the pretext of changing clothes before they went out on their date. This Court held that testimony from another woman that defendant attempted

to rape her after luring her to his apartment on the pretext of changing clothes before they went out on a date was relevant and admissible to show a common scheme or plan to commit the offense with which defendant was charged. *Id.* at 514, 355 S.E. 2d at 184-85.

In the present case we conclude that the strikingly similar behavior attributed to defendant by all three women—befriending the women; luring them into a dating relationship; and then, after gaining their trust, using physical violence and/or the threat of a deadly weapon to force each woman to engage in vaginal intercourse, anal intercourse, cunnilingus, and fellatio—rendered the testimony of defendant's former lovers, D. B. and P. S., admissible to prove defendant's *modus operandi*, plan, motive and intent.

Finally, defendant has failed to show that the evidence should have been excluded under the Rule 403 balancing test. Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, and it will not be reviewed absent a showing of abuse of that discretion. *State v. Cotton*, 318 N.C. at 668, 351 S.E. 2d at 280; *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986). In the present case there was no abuse of discretion. The trial judge admitted the evidence of prior misconduct for a limited purpose and specifically instructed the jury before their deliberations that they could consider this evidence only for the limited purposes of considering (i) whether or not the defendant had the necessary intent required to commit the crimes charged and (ii) whether or not there existed in the mind of the defendant a plan, scheme, system or design involving the crimes charged in these cases. Moreover, the evidence was not grossly shocking or so cumulative as to mislead the jury away from the offenses for which defendant was being tried. *State v. Bagley*, 321 N.C. at 208, 362 S.E. 2d at 248.

[2] Defendant's second argument is that the trial court erred when it admitted the testimony of Detective Mary Ann Harper to corroborate the testimony of D. B. Ms. Harper was the police detective who investigated D. B.'s charges against defendant after the alleged sexual assault in 1986. Ms. Harper's testimony, in fact, was limited to the description of events given to her by D. B. with regard to the alleged assault on D. B. by defendant. The trial court admitted this evidence solely for the purpose of corroborating D. B.'s testimony.

The North Carolina Supreme Court has permitted prior consistent statements of a witness as corroborative evidence even when the witness has not been impeached. *State v. Martin*, 309 N.C. 465, 476, 308 S.E. 2d 277, 284 (1983). Since Ms. Harper's testimony was limited to the prior consistent statement made by D. B. regarding defendant's sexual attack, we conclude that this testimony was properly admitted to corroborate D. B.'s in-court statement. *See also State v. Riddle*, 316 N.C. 152, 340 S.E. 2d 75 (1986); *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986).

[3] Next, defendant argues that the trial court erred when instructing the jury on "use of a deadly weapon" as a necessary element of first degree rape or first degree sexual offense. The judge's instruction to the jury on use of a deadly weapon was as follows:

> And fourth, that the defendant employed or displayed a dangerous or deadly weapon. A dangerous or deadly weapon is a weapon which is likely to cause death or serious bodily injury. The State is not required to prove that a dangerous or deadly weapon was used in a particular manner. A dangerous or deadly weapon is employed when a person has such in his possession at the time of the alleged crime.

The North Carolina Supreme Court has held that the State is not required to prove "that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape." *State v. Langford*, 319 N.C. 340, 344, 354 S.E. 2d 523, 525 (1987). The State is only required to show that defendant possessed a deadly or dangerous weapon at the time of the rape and that the victim was aware of the presence of the weapon, because it had been displayed or employed. *See id.* Although the trial court's instruction did not emphasize the victim's awareness of the weapon, the instruction made clear that the State was required to prove that the weapon was displayed in some fashion. The victim's testimony indicates that not only did defendant have a knife in his possession during his sexual assault on her, defendant threatened her with this knife, and the knife remained on the bedside table, within eight feet of defendant, throughout the attack. This assignment of error is, therefore, overruled.

[4] Fourth, defendant contends that the trial court erred in allowing the prosecutor to argue to the jury that defendant had failed to put on evidence of consent because, in effect, counsel was commenting on defendant's failure to take the stand. We note at the

outset that defendant did not object to this argument at trial; therefore, Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure bars the assignment of error. Defendant also contends, however, that the judge committed plain error by failing to intervene *ex mero motu.*

Defendant objects to the following portion of the prosecutor's argument:

> [Defendant's Counsel] indicated that the main thing you would have to decide in this case was their contention that [the victim] had consented to all of these sexual acts that you've heard, that she was a willing and voluntary participant with Mr. Pruitt in all of these acts. He said he'd have evidence. Well, the only evidence that you've had in this trial of consent from the witness chair is evidence of no consent or lack of consent.

This argument is merely a reference to the failure of defendant to put on any evidence. Such an argument is permissible. *See State v. Griffin*, 308 N.C. 303, 314, 302 S.E. 2d 447, 455 (1983); *State v. Tilley*, 292 N.C. 132, 143, 232 S.E. 2d 433, 441 (1977). The defendant contends that this is an improper reference to defendant's failure to testify because only the defendant could have testified to the victim's consent. We note that even where the defendant has chosen not to testify and the prosecution, in closing, has explicitly stated "[t]hat's something no one here can answer except the defendant," the North Carolina Supreme Court has held that the trial judge was not required to intervene *ex mero motu. State v. Wilson*, 311 N.C. 117, 130, 316 S.E. 2d 46, 54-55 (1984). Moreover, any prejudice which might have resulted from the prosecutor's remarks was cured by the following instruction contained in the jury charge:

> The defendant in this case has not testified. The law of the State of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in anyway [sic].

See id.; State v. Hopper, 292 N.C. 580, 585-86, 234 S.E. 2d 580, 583 (1977).

[5] Next, defendant argues that the court erred in presenting the charges against the defendant to the jury because the court used phrases from the indictment such as "did ravish and carnally

know" and "willfully and feloniously." The trial court may refer to and summarize the indictments when explaining the charges against defendant and the circumstances under which the defendant is being tried. *State v. Leggett*, 305 N.C. 213, 217-18, 287 S.E. 2d 832, 835-36 (1982); *State v. Shelton*, 53 N.C. App. 632, 639-40, 281 S.E. 2d 684, 690 (1981), *disc. rev. denied and appeal dismissed*, 305 N.C. 306, 290 S.E. 2d 707 (1982); *State v. Laughinghouse*, 39 N.C. App. 655, 657-58, 251 S.E. 2d 667, 668-69, *cert. denied*, 297 N.C. 615, 257 S.E. 2d 438 (1979). The record shows that the trial court did not read the entire indictment to the jury. Therefore, defendant's assignment of error is without merit.

[6] Finally, defendant asserts that imposing three consecutive life sentences against defendant constitutes cruel and unusual punishment. The punishment imposed for each conviction was within the statutory limits. The North Carolina Supreme Court has consistently held that a sentence which is within the maximum authorized by statute is not cruel or unusual punishment. *See State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E. 2d 436, 441 (1983); *State v. Mitchell*, 283 N.C. 462, 471, 196 S.E. 2d 736, 742 (1973). Accordingly, this assignment of error is overruled.

No error.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. ALPHONZA THORPE

No. 8814SC691

(Filed 20 June 1989)

1. **Narcotics § 4— maintaining building for possession or sale of controlled substances—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for knowingly maintaining a building used for the possession or sale of controlled substances where it tended to show that defendant provided financing for a game room and was in what he considered a marriage to the woman who controlled the lease, the utilities, and the liquor license; defendant was on the premises or near the game room on each

occasion when undercover SBI agents visited the store; and plaintiff gave directions to people who were in the store.

2. **Narcotics § 4.4— constructive possession of narcotics— insufficiency of evidence**

Evidence was insufficient to be submitted to the jury in a prosecution for possession with intent to sell and deliver Dilaudid where there was no evidence that the drug seller was an employee or agent of defendant, no evidence that defendant ever had actual possession of the narcotics, and no evidence that defendant was present in the store at the time the sales took place.

3. **Narcotics § 4— aiding and abetting in sale of narcotics— insufficiency of evidence**

Evidence was insufficient to be submitted to the jury on the theory of aiding and abetting in a prosecution for sale and delivery of Dilaudid where defendant directed customers to a drug dealer and remained near the sale but defendant did not communicate to the dealer any willingness to assist him.

Chief Judge HEDRICK concurring in part and dissenting in part.

APPEAL by defendant from *Lee (Thomas H.), Judge.* Judgment entered 28 January 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 7 December 1988.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James P. Erwin, Jr., for the State.

Loflin & Loflin, by Thomas F. Loflin, III, for defendant-appellant.

ORR, Judge.

Defendant appeals from his convictions on two charges of possession with intent to sell or deliver the controlled substance Dilaudid, two counts of sale of the controlled substance Dilaudid, and two counts of knowingly maintaining a building used for the possession or sale of controlled substances.

The principal evidence for the State consisted of the testimony of various law enforcement agents who were involved in an undercover investigation which involved Doris' Game Room. The defendant, Alphonza Thorpe, presented no evidence.

The State's evidence tended to show that on 13 March 1986, Kay L. Broos, an agent for the State Bureau of Investigation, was working undercover in Durham, North Carolina with the assistance of the Durham Vice Squad. Ms. Broos, while in her undercover capacity, stopped her van when she observed defendant at the corner of Corporation and Roxboro roads. A man who had been standing with defendant approached the van. She asked him if he knew how she could get some D's (or Dilaudid). This man was later identified as Charles Henry Thomas. Defendant was across the street and some 30 feet away while Ms. Broos talked to Thomas.

April 9 and April 16 are the two dates cited in the indictments against defendant. On 9 April 1986, Ms. Broos went back to the aforementioned intersection where she again saw defendant. This time she was accompanied by SBI Agent Alexander and two detectives. On this occasion, defendant asked Ms. Broos what was going on. She answered that she wanted to get some "fours" (street slang for Dilaudid). There is a conflict in the testimony at this point. Ms. Broos claims defendant then stated, "Go on inside. It's my store. It's okay." Her partner in the van that day, Agent Alexander, testified that she thought defendant said to go inside *the* store.

The women then went inside the store and saw Charles Henry Thomas sitting at the bar. Ms. Broos recognized Thomas as being the same person she had dealt with previously on 13 March 1986 and approached him to purchase two "fours." Thomas stepped behind the bar and pulled out a tinfoil wrapper which contained the pills. He handed Agent Broos two pills, and she gave him $100.00. Defendant was not in the game room at the time this transaction took place.

Ms. Broos went back to the game room later that same day. This time she went inside and spoke to Thomas again. She purchased another pill from Thomas. She also asked him where the owner was. He responded that the owner was not there.

Ms. Broos and Agent Alexander returned to Doris' Game Room on 16 April 1986. They again saw defendant on the street corner. They told him they wanted to go inside and get some "fours." Defendant walked the two women to the front door of the game room. He did not go inside at this time.

A little later, defendant entered the game room and picked up a pool stick. He asked Ms. Broos if she had gotten her "fours." She replied that she had not because she was waiting for him.

He instructed her to go see Thomas who was standing in front of the counter. When Ms. Broos approached him, he went behind the counter and sold her two "fours."

After purchasing the pills, the two women left the building and spoke to defendant who was again standing outside. He asked them if they had gotten their "fours." Agent Broos responded affirmatively. She then told defendant that she was concerned about going in the store and dealing with people she did not know. Defendant then told her not to worry and that she could buy her pills directly from him.

Thorpe received a total of 16 years active sentence on all charges. He received two seven-year sentences under G.S. 90-95(a)(1) for two counts: 1) possession with intent to sell or deliver a controlled substance, and 2) sale of a controlled substance. In addition, he received a two-year sentence for knowingly maintaining a building for the purpose of unlawfully keeping or selling controlled substances under G.S. 90-108(a)(7).

I.

Defendant-appellant makes nine assignments of error in the eight questions presented. The primary issue to be considered is the assignment of error questioning whether there was sufficient evidence to take these charges to the jury.

The standard for determining the sufficiency of the evidence on a motion for nonsuit in a criminal trial is:

> upon a motion for judgment of nonsuit in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom.

State v. Witherspoon, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977). (Citations omitted.)

[1] The misdemeanor indictment charged defendant with maintaining a building for purposes of selling controlled substances in violation of G.S. 90-108(a)(7) (1985). This statute reads in part:

> (a) It shall be unlawful for any person:
>
> . . .

> (7) To knowingly keep or maintain any store, shop, warehouse . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article. . . .

G.S. 90-108(a)(7).

There can be no doubt according to the evidence that defendant knew drugs were being sold on the premises of Doris' Game Room. Agent Broos testified:

> Well, Agent Alexander and myself sat down on the bench and we were there a couple of minutes. And the defendant, Mr. Thorpe, walked in the front door and he came over towards the pool table and he picked up a pool stick. And we were sitting there and he came and took another couple of steps and looked at me and asked me if I got my fours. And it [sic] told him, no, I was waiting on him.
>
> And he said, 'Well, go on over there,' pointing to Charles Henry Thomas who was standing there in front of the bar and he said, 'Go on over there and see him, the same one as before.'

The critical question is whether defendant had control over the premises so he could be considered to "keep or maintain" the store as required under G.S. 90-108(a)(7). The State's evidence on the control issue, viewed in the light most favorable to the State, provides sufficient evidence to avoid a nonsuit.

The State provided proof through the testimony of Avery Hall, a probation and parole officer, that while the game room was in Doris Burnette's name, Thorpe had provided the capital for the business by selling his Cadillac. The inference could also be made from the testimony that the game room was only in Ms. Burnette's name because the couple wished to obtain a beer license, and Mr. Thorpe was not eligible for a license. Ms. Hall also testified that clearance was obtained so that Thorpe would work in the game room as Doris wished to have his assistance.

We conclude that viewing the evidence in the light most favorable to the State, there was sufficient evidence to take this issue to the jury. Evidence was presented that Thorpe provided financing for the game room and was in what he considered a

marriage to the woman who controlled the lease, the utilities, and the liquor license. In addition to these facts, defendant was on the premises or near the game room on each occasion when the agents visited the store, and he gave directions to people who were in the store.

II.

Thorpe was also charged on two felony charges in violation of G.S. 90-95(a)(1): 1) possession with intent to sell and deliver schedule II substances and 2) sale and delivery of schedule II substances. Each charge was filed for actions on 9 April 1986 and 16 April 1986. Defendant claims the evidence was not sufficient to go to the jury on either felony charge for either occasion. We agree.

A.

[2] We begin by analyzing the possession with intent to sell narcotics charge against defendant for the events on April 9. The State concedes that there is no evidence that defendant ever had actual possession of the narcotics. The States relies on a theory of constructive possession to support its indictment. The State points to *State v. Fuqua*, 234 N.C. 168, 66 S.E. 2d 667 (1951), to support this theory. *Fuqua*, however, is readily distinguishable.

In *Fuqua*, the defendant was charged with possession of intoxicating liquor for the purpose of sale, and illegal possession of intoxicating liquor. The jury acquitted him of the first charge and convicted him of the latter. The facts presented by the State showed an employee for the defendant was seen by a police officer running across the street from the defendant's place of business into a barn. The barn was located in the State of Virginia. The officer observed the employee carrying a cup in his hand as he went to the barn and returned to the defendant's place of business. The officer entered the defendant's business and found the cup was filled with Coca-Cola and liquor. The officer never observed the defendant-owner in possession of the cup. *Id.*

Our Supreme Court held, "[a]n accused has possession of intoxicating liquor within the meaning of the law when he has both the power and the intent to control its disposition or use." *Id.* at 170, 66 S.E. 2d at 668. This power to control may include power used in conjunction with others. *Id.* at 170-71, 66 S.E. 2d at 668. In *Fuqua*, the Court held that the defendant-owner was acting

in conjunction with his employee and therefore held there was sufficient evidence to go to the jury.

The distinctions between *Fuqua* and the case at bar are obvious. First, there is no evidence in the record of the case *sub judice* that Thomas, the drug seller, was an employee or agent of defendant. Further, there is no evidence that defendant was present in the store at the time the sales took place.

The cases which the State relies on to support its constructive possession theory typically concern defendants who are found in the proximity of some narcotics which are not in the possession of any other person. *See State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984); *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983).

In the case *sub judice*, defendant notes the controlled substances were in the actual possession of Thomas. We do not know if they were on his person or located somewhere in the game room because Agent Broos was unable to testify to that fact.

Also persuasive is defendant's reliance on *State v. Ledford*, 23 N.C. App. 314, 208 S.E. 2d 870 (1974). In *Ledford*, the defendant was indicted for unlawful possession of LSD. The State's evidence showed that a police officer observed the defendant at a drive-in with a boy named Tessnear. Several times Tessnear left the group and went to talk to people in other cars. Tessnear would then go behind a particular building, return to the car, and an exchange of some kind would occur. Tessnear left the drive-in with the defendant and his sister. *Id.*

After some time, the defendant and his sister returned to the drive-in with Tessnear. Defendant then went behind the same building the police officer had observed Tessnear go behind earlier. Defendant was picking up various objects. A police officer approached the defendant and asked him what he had in his pockets. Defendant cooperated at first and then he ran from the police. He was arrested several days later. Police officers found syringes and pills containing LSD behind the building. *Id.*

Defendant's motion for nonsuit was denied. On appeal, this Court held the evidence presented did not take the court "beyond the realm of suspicion and conjecture." *Id.* at 316, 208 S.E. 2d at 872.

In *Ledford*, the defendant was seen coming and going in a car with the man who made "the exchanges." Further, Ledford

was seen picking up objects behind a building where LSD was found. Perhaps most condemning is the fact Ledford fled the police when he was asked what he had in his pockets. *Id.*

We believe the case mounted against Ledford was more substantial than the facts presented against defendant in the case *sub judice*. Therefore, in accordance with the principles of *Ledford*, we hold the motion for nonsuit in the charge of possession with intent to sell and deliver for the April 9 transactions should have been granted.

The same analysis applies to the identical charge of possession with intent to sell narcotics for the April 16 transactions. The only significant difference between the April 9 transactions and the April 16 transactions is that defendant entered Doris' Game Room with Agent Broos on April 16. However, there is still no testimony that defendant was in the game room at the time the sale of Dilaudid took place.

The facts of the April 16 sale are substantially similar to those of April 9. Again we compare this situation to the facts in *Ledford*. The facts in question are still less persuasive than the facts in *Ledford*. The motion for nonsuit in the charge of possession with intent to sell and deliver for the April 16 transaction should have been granted.

B.

[3] The State relies on the theory of aiding and abetting to support its second felony charge of sale and delivery of schedule II substances. As stated above, there is no evidence that defendant was actually present in Doris' Game Room when Agent Broos purchased the illegal narcotics from Thomas on either of the dates cited in the indictment. The State again relies on the theory of constructive presence to tie defendant to the sale and delivery transactions which transpired between Thomas and the SBI agents.

The State cites *State v. Wiggins*, 16 N.C. App. 527, 192 S.E. 2d 680 (1972), and *State v. Torain*, 20 N.C. App. 69, 200 S.E. 2d 665 (1973), *cert. denied*, 284 N.C. 622, 202 S.E. 2d 278 (1974), as authority for its constructive presence theory. These cases, however, concern the constructive presence of an aider and abettor when that person is waiting in the getaway car or standing watch with a rifle while a crime is being committed. *Wiggins* holds that an

aider or abettor is constructively present if they are close enough to render assistance. *Wiggins* at 530-31, 192 S.E. 2d at 682-83.

In the case *sub judice*, the State claims defendant aided Thomas in the sale of the illegal narcotics on both April 9 and April 16. On each occasion, defendant directed the SBI agents to Thomas. Our Supreme Court has stated a person is guilty of aiding and abetting if he "by word or deed, [gives] active encouragement to the perpetrator of the crime or by his conduct [makes] it known to such perpetrator that he [is] standing by to lend assistance when and if it should become necessary." *State v. Gaines*, 260 N.C. 228, 231-32, 132 S.E. 2d 485, 487 (1963), *quoting State v. Ham*, 238 N.C. 94, 97, 76 S.E. 2d 346, 348 (1953).

The question becomes whether or not directing customers to a dealer and remaining near the sale (but not necessarily at it) is the type of "encouragement" or "assistance" our Supreme Court referred to in *Gaines*. Further, we must examine whether the offer to assist was communicated to the perpetrator by the defendant.

In *Gaines*, the two defendants accompanied the perpetrator (Hill) to a jewelry store where Hill stole a diamond ring. The two defendants claimed they thought Hill was going to the store to buy a ring. When the jeweler accused Hill of stealing a ring, Hill and the defendants fled. Our Supreme Court held there was insufficient evidence of aiding and abetting because there was no evidence that either defendant ever had possession of the ring. In addition, there was no evidence that they offered any sort of encouragement to the defendant. *Gaines*, 260 N.C. 228, 132 S.E. 2d 485 (1963).

"The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense." (Citations omitted.) *State v. Sanders*, 288 N.C. 285, 290, 218 S.E. 2d 352, 357 (1975), *cert. denied, Sanders v. North Carolina*, 423 U.S. 1091 (1976). In *Sanders*, the defendant did not assist two of his co-defendants in placing dynamite under the hood of a car. However, the defendant knew what his co-defendants were doing, but he stayed in one car and held a gun to the witness's head. *Id.* at 288-89, 218 S.E. 2d at 356.

The Supreme Court held the defendant was present and available to render assistance to the perpetrators had they needed help. *Id.* at 290, 218 S.E. 2d at 357. The defendant communicated

his willingness to assist by accompanying the perpetrators to the place where he knew a crime would occur. There was sufficient evidence, therefore, to support the aiding and abetting charge against the defendant. *Id.*

In the case *sub judice*, the only evidence of encouragement by defendant was when he directed the agents to Thomas to purchase the illegal narcotics. As stated in *Gaines*, to be convicted of aiding and abetting, the willingness to assist the perpetrator must be communicated to him. *Gaines* at 231-32, 132 S.E. 2d 487. We have no evidence of such communication in the case at bar.

The trial court erred in denying defendant's motion for nonsuit in the charges of sale and delivery of schedule II substances. We have reviewed defendant's other assignments of error and find them to be without merit.

No error as to the misdemeanor conviction.

Reversed as to the felony convictions.

Judge ARNOLD concurs.

Chief Judge HEDRICK concurs in part and dissents in part.

Chief Judge HEDRICK concurring in part and dissenting in part.

I concur in the part of the opinion which finds no error in defendant's trial for the misdemeanor of knowingly maintaining a building for the purpose of unlawfully keeping or selling controlled substances. I dissent, however, from the part of the opinion reversing defendant's felony convictions. In my opinion, the evidence is sufficient to take the case to the jury and support the verdict finding defendant guilty of possession with intent to sell or deliver a controlled substance and sale of a controlled substance. I vote to find no error.

CITY OF RALEIGH v. COLLEGE CAMPUS APARTMENTS, INC.

No. 8810SC825

(Filed 20 June 1989)

Rules of Civil Procedure § 41.1— second suit based on same claim as first—second voluntary dismissal—summary judgment proper

Plaintiff's second voluntary dismissal operated as an adjudication on the merits, and summary judgment was properly granted for defendant where both of plaintiff's dismissals were obtained by plaintiff filing notice of dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1)(i) and were not by stipulation or order of court, and the second suit was based on or included the same claim as the first suit. Moreover, there was no merit to plaintiff's claim that N.C.G.S. § 1A-1, Rule 41(a) should not apply because defendants were not the same or in privity in both actions, since defendant in the first action was an individual and in the second action was that individual's wholly owned corporation; because of the close identity between the defendants, the individual defendant undoubtedly expended considerable time and money to defend three lawsuits by plaintiff on the same claim, the very situation the two dismissal rule sought to prevent; and plaintiff need not have dismissed in either case, as it could have amended its complaint to add the corporate defendant in the first action, or it could have amended its summons in the second action at any time before or after judgment pursuant to N.C.G.S. § 1A-1, Rule 4(i).

Judge GREENE dissenting.

APPEAL by plaintiff from Judgment of *Judge Anthony M. Brannon*, entered 24 March 1988 in WAKE County Superior Court. Heard in the Court of Appeals 22 February 1989.

Associate City Attorney Elizabeth C. Murphy for plaintiff appellant.

Warren & Perry, by Sue E. Anthony, for defendant appellee.

COZORT, Judge.

The City of Raleigh, plaintiff herein, sued defendant, College Campus Apartments, Inc., claiming that defendant violated the

Raleigh City Code by replacing the siding on a house in an historic district with aluminum siding. Plaintiff claimed that the house, located on Cutler Street, was subject to certain restrictions which prevented changes from being made on the house's exterior without prior approval by the Historic Properties Commission. Plaintiff alleged that defendant failed to obtain a "certificate of appropriateness" from the Commission before it replaced the original siding. Plaintiff sought an injunction and an order forcing defendant to remove the aluminum siding and to restore the original siding.

Prior to filing the present suit, plaintiff filed two complaints involving the same claim as the claim in the present action. In the first suit, filed 11 March 1987, plaintiff sued Jeffrey Pinto, the present defendant's sole shareholder and registered agent. Plaintiff took a voluntary dismissal without prejudice on 24 September 1987 after discovering that the Cutler Street house was owned by the defendant corporation and not by Mr. Pinto. At the time the dismissal was taken Mr. Pinto had not yet answered, having filed only a motion to dismiss plaintiff's complaint. On 27 October 1987, plaintiff refiled the suit against the defendant corporation, merely substituting the corporation for Mr. Pinto as defendant. The summons issued in the second case was of the type used in condemnation actions under N.C. Gen. Stat. § 40A-41 (1984). The summons informed defendant that it had 120 days, rather than 30 days, in which to answer. After discovering that the wrong type of summons was issued, plaintiff filed another voluntary dismissal without prejudice on 21 January 1988. On 5 January 1988, 16 days before dismissing the second action, plaintiff filed the present action against the defendant corporation.

After filing an answer on 2 February 1988, defendant moved for summary judgment on 18 February 1988. The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

The issue raised by plaintiff's appeal is whether plaintiff's second voluntary dismissal of the claim constituted an adjudication on the merits under N.C. Gen. Stat. § 1A-1, Rule 41(a)(1), thus barring plaintiff from bringing the third action on this claim. We hold that it does and affirm summary judgment for defendant.

Rule 41(a)(1) of the North Carolina Rules of Civil Procedure provides:

(a) *Voluntary dismissal; effect thereof.*—

(1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. 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.* If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1988) (emphasis supplied). The portion of Rule 41(a)(1) quoted above is identical to Federal Rule of Civil Procedure 41(a)(1). *See* 9 C. Wright and A. Miller, Federal Practice and Procedure 147 (1971) (hereinafter cited as *Wright and Miller*) *and* W. Shuford, N.C. Civil Practice and Procedure § 41-1 at 320-21 (2d ed. 1981) (hereinafter cited as *Shuford*). "This 'two dismissal' rule, as it is called, was intended to prevent delays and harassment by plaintiff securing numerous dismissals without prejudice." *Wright and Miller* § 2368 at 187. There are two elements to the two dismissal rule: (1) plaintiff must have *filed* the notices to dismiss under Rule 41(a)(1)(i), since this Court has held that the two dismissal rule does not apply where plaintiff's dismissal is by stipulation or by order of court, *Parrish v. Uzzell*, 41 N.C. App. 479, 483-84, 255 S.E. 2d 219, 221 (1979); and (2) the second suit must have been "based on or including the same claim" as the first suit. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1988). Concerning the first requirement, the record clearly reflects that both of plaintiff's dismissals were obtained by plaintiff filing notice of dismissal per Rule 41(a)(1)(i), and were not by stipulation or order of court. As to the second requirement, plaintiff concedes in its brief that the allegations in the second suit filed against defendant

"were the same as those set out in the previous complaint alleging a violation of the Raleigh City Code and the Historic District guidelines . . . ." Thus it cannot be disputed that the second suit was based on or including the same claim as the first suit. The requirements of the two dismissal rule are, therefore, met under Rule 41(a)(1). N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(1988).

Nevertheless, plaintiff would have us read into the statute a requirement that the two dismissal rule does not apply unless the defendants were the same or in privity in both actions. Following that argument, plaintiff contends the statute should not apply because the dismissals were not taken against the same defendant. In the first suit Jeffrey Pinto was the sole defendant. In the second suit his corporation, College Campus Apartments, Inc., was the named defendant.

There is some precedent in the federal courts for plaintiff's argument. *See, e.g., Friedman v. Washburn Co.*, 145 F. 2d 715 (7th Cir. 1944). Moreover, Professors Wright and Miller, noted authorities on civil procedure, have said that,

> a general rule that the "two dismissal" rule applies though the suits were not against the same defendant seems unsound. If two defendants are unrelated, it is hard to see how defendant B is so harassed by a single dismissal against him that the dismissal should be with prejudice merely because an earlier action on the same claim against defendant A was dismissed. A state court has so reasoned, and, construing a rule based on the federal rule, has limited the Robertshaw case to its particular facts and held that unless the defendants are the same or substantially the same or in privity in both actions, the "two dismissal" rule does not apply.

Wright and Miller, § 2368 at 190. In the *Robertshaw* case referred to above, plaintiff filed suit against a New York corporation in federal district court in New York. Plaintiff discovered that the patent in dispute was owned by a Maryland corporation. Plaintiff dismissed the New York suit and filed suit in Maryland against the Maryland corporation. The Maryland and New York corporations merged. The New York corporation survived and owned rights in the patent. Plaintiff then dismissed the suit filed in Maryland against the Maryland corporation and refiled against the New York corporation on the same claim. *Robertshaw-Fulton Controls Co. v. Noma Electric Corp.*, 10 F.R.D. 32, 33-34 (E.D. Md. 1950). The court rejected plaintiff's argument that for the two dismissal rule

to apply the defendants in both suits had to be the same. *Id.* at 35. The court reasoned:

> It is true that subdivision (d) of Rule 41 provides for the awarding of costs in a previously dismissed action "based upon or including the same claim against the same defendant". However, there is no such qualification in subdivision (a) of the Rule, of the words "the same claim", and this omission, we believe, is to be treated as indicating that no such qualification was intended.

Id.

Likewise, North Carolina's Rule 41(d) limits the awarding of costs to the defendant for previously dismissed suits to cases in which the defendant was the same in both actions. N.C. Gen. Stat. § 1A-1, Rule 41(d) (1988). That "same defendant" limitation is absent in the two dismissal rule of Rule 41(a)(1). If the General Assembly had intended to limit the rule's application to cases where the defendant was the same in both suits, it could have done so. There is simply no basis for judicially adding a requirement the General Assembly intended to leave out when the statute is clear unambiguous. *Begley v. Employment Securities Comm.*, 50 N.C. App. 432, 436, 274 S.E. 2d 370, 373 (1981).

Furthermore, even if we were to hold that both dismissals had to be against the same defendants or substantially the same defendants, although such a requirement is not demanded by statute or by the holding of this case, there is a close identity between Mr. Pinto and the defendant corporation.

In the first case, Jeffrey Pinto was named the sole defendant. In the second case, Mr. Pinto's wholly owned corporation, College Campus Apartments, Inc., the defendant herein, was the only defendant. Mr. Pinto is the corporation's only stockholder, and he is its registered agent. Mr. Pinto was served with the summons in all three cases. Therefore, there is a close identity between the defendants in both of the previously dismissed suits.

The purpose of the two dismissal rule—to prevent abuse and harassment by plaintiff securing numerous dismissals without prejudice—is advanced in this case. Because of the close identity between Mr. Pinto and the corporate defendant, Mr. Pinto has undoubtedly expended considerable time and money to defend three

lawsuits by plaintiff on the same claim. *See Crowe v. Blue Cross Hospital Service, Inc.*, 84 F.R.D. 623, 626 (E.D. Mo. 1979).

Moreover, the rule's potential harshness is mitigated in this case because in the first case plaintiff could have amended its complaint and joined the defendant corporation as a party defendant. Under N.C. Gen. Stat. § 1A-1, Rule 15(a), plaintiff could have amended its complaint as a matter of right because Mr. Pinto had not yet filed a responsive pleading to the complaint when plaintiff took its voluntary dismissal. N.C. Gen. Stat. § 1A-1, Rule 15(a) (1988). Mr. Pinto had filed only a Rule 12 motion, which is not a responsive pleading. *Shuford*, § 15-4 at 134. The defendant corporation should have been joined under Rule 19(a) as a necessary party in plaintiff's first suit. N.C. Gen. Stat. § 1A-1, Rule 19(a) (1988); *Shuford*, § 19-3 at 173. Plaintiff could have amended its complaint instead of taking a dismissal.

In the second suit, in which the defendant corporation was properly named but the summons issued was improper, plaintiff could have amended the summons under Rule 4(i) "[a]t *any* time, before or after judgment . . . ." N.C. Gen. Stat. § 1A-1, Rule 4(i) (1988) (emphasis added). Plaintiff argues that the summons was so defective that the action was not commenced. We disagree. The action was commenced when plaintiff filed its complaint. N.C. Gen. Stat. § 1A-1, Rule 3 (1988). The summons issued was one intended for a condemnation action and indicated that defendant had 120 days in which to answer. Nevertheless, the summons was sufficient to confer jurisdiction. The summons gave Mr. Pinto notice, as the defendant's registered agent, that plaintiff had instituted an action in Wake County Superior Court, and that the defendant corporation had to file an answer in the clerk's office of the Wake County Superior Court within a specified—albeit wrong—time. *Harris v. Maready*, 311 N.C. 536, 541-42, 319 S.E. 2d 912, 916 (1984).

For the foregoing reasons, we hold plaintiff's second voluntary dismissal operated as an adjudication on the merits, and summary judgment was properly granted to defendant. The trial court's order is

Affirmed.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The majority construes Rule 41(a) to make the second dismissal without prejudice a final adjudication upon the merits, even though the defendants are not the same. I disagree. I believe the "two dismissal" rule applies only when the defendants "are the same or substantially the same or in privity in both actions." 5 Moore's Federal Practice Sec. 41.04 at 41-44 (2d ed. 1988); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2368 at 190 (1971) ("a general rule that the 'two dismissal' rule applies only though the suits were not against the same defendants seems unsound"). *Accord Falkenstein v. Braufman*, 251 Minn. 444, 88 N.W. 2d 884 (1958); *cf. State, County of St. Louis v. Marchand*, 401 N.W. 2d 449 (1987) (two dismissals of action against same defendant alleging his paternity of same child did not bar third action against defendant, as party plaintiffs were different).

As the plaintiff's claim was against two different defendants, it was not the "same claim" as that term is used in Rule 41(a). To hold otherwise would bar a plaintiff's action against a defendant for breach of contract simply because plaintiff had previously entered "two dismissals" of a like claim against another defendant for breach of the same contract.

Additionally, the fact that Jeffrey Pinto was the only stockholder of College Campus Apartments, Inc., and its registered agent, is not, in my opinion, sufficient evidence that the parties are "substantially the same or in privity." Accordingly, I would hold the plaintiff's second voluntary dismissal did not operate as an adjudication on the merits and that the trial court erred in entering summary judgment for the defendant.

WAYNE G. CHURCH, BRUCE M. CHURCH AND VERNON FOSTER v. JAMES R. CARTER

No. 8823SC930

(Filed 20 June 1989)

1. Process § 14.1 — partnership formed in North Carolina — subject matter jurisdiction in North Carolina

The trial court had subject matter jurisdiction to adjudicate plaintiffs' claims against defendant for fraud, an accounting,

and dissolution of the parties' partnership where the trial court properly found that the parties had formed a North Carolina partnership.

2. **Process § 14.1— North Carolina partnership—real estate development in South Carolina—money sent from North Carolina—"things of value"**

Plaintiffs shipped "things of value" to defendant at his direction, and statutory jurisdiction was thus established under N.C.G.S. § 1-75.4(5)(d) where plaintiffs advanced $67,500 to defendant to be used by him to acquire options on certain real property in South Carolina and to obtain a mobile home for use in the partnership business, and these monies were sent to defendant from Wilkes County.

3. **Process § 14.3— North Carolina partnership—minimum contacts—sufficiency for exercise of personal jurisdiction**

Although defendant's contacts with North Carolina may have been few in number, the nature and quality of them—his soliciting of partners here, the formation of the partnership here, defendant's receipt of monies sent to him from North Wilkesboro, and the partnership's taking out a loan for which defendant signed a guaranty agreement with a North Carolina bank—were such that due process was not offended by this State's exercising jurisdiction over him.

APPEAL by defendant from *Russell G. Walker, Jr., Judge.* Order entered 1 June 1988 in Superior Court, WILKES County. Heard in the Court of Appeals 21 March 1989.

Vannoy, Moore, Colvard, Triplett, Freeman & McLean, by Anthony R. Triplett, for plaintiff-appellees.

McElwee, McElwee, Cannon & Warden, by William C. Warden, Jr., for defendant-appellant.

BECTON, Judge.

This is an appeal from an order denying defendant's motion to dismiss a Complaint for lack of subject matter and personal jurisdiction. We affirm.

Plaintiffs, Wayne G. Church, Bruce M. Church, and Vernon Foster, are residents and citizens of North Carolina. Defendant,

James R. Carter, is a resident and citizen of South Carolina. In 1986, plaintiffs and defendant entered into an oral agreement to form the Kings Port Partnership. The purpose of this venture was to purchase, construct, and sell various condominium units and patio-home lots in North Myrtle Beach, South Carolina. Plaintiffs allege that, in their roles as financial investors in the partnership, they forwarded sums of money to defendant for his use in acquiring options on five tracts of land in South Carolina. Plaintiffs sent these monies to South Carolina from Wilkes County, North Carolina. In August 1986, the partnership executed a guaranty agreement, in favor of Southern National Bank of North Carolina, to secure a $60,000 loan. Defendant signed the guaranty on behalf of the partnership.

In 1987, plaintiffs filed a Complaint in the Superior Court of Wilkes County, charging defendant with fraud and praying for damages, an accounting, and dissolution of the partnership. Defendant moved to dismiss the Complaint, pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the Rules of Civil Procedure, for lack of subject matter and personal jurisdiction. Following a hearing, the trial judge denied the motion, and defendant appealed.

I

[1] Ordinarily, an order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and is not immediately appealable. *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E. 2d 526, 527 (1981), *cited with approval, Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E. 2d 182, 184 (1982). However, since defendant also has challenged the trial court's power to exercise personal jurisdiction over him, we must, at this time, decide the issue he has raised concerning subject matter jurisdiction. *See* N.C. Gen. Stat. Sec. 1-75.4 (1983) (subject matter jurisdiction prerequisite to court's exercising personal jurisdiction); W. Shuford, *North Carolina Civil Practice and Procedure* Sec. 12-6, n.1 (1988).

N.C. Gen. Stat. Sec. 7A-240 (1983) confers subject matter jurisdiction on the trial divisions of the General Courts of Justice "[in] all justiciable matters of a civil nature," except for areas in which jurisdiction specifically lies elsewhere. *See Harris v. Pembaur*, 84 N.C. App. 666, 668, 353 S.E. 2d 673, 675 (1987). Defendant contends that North Carolina lacks subject matter jurisdiction because the Kings Port Partnership is a South Carolina business entity. For

reasons we shall elaborate upon, *infra*, we conclude that the judge found that plaintiffs and defendant formed a North Carolina partnership. Evidence in the record supports this finding. Plaintiffs' allegations of fraud, their demand for an accounting from defendant, and their prayer that the court dissolve the partnership are clearly justiciable in our courts. *See* N.C. Gen. Stat. Secs. 59-51, 59-52, and 59-62 (1982 & Supp. 1988).

Defendant contends that plaintiffs have made a demand for one-fourth of the guaranty amount but have not alleged that a default on the loan repayment has occurred. Defendant thus argues that plaintiffs, in making their demand, have failed to state a claim against him. The alleged failure of a complaint to state a cause of action for which relief can be granted, however, does not equate with a lack of jurisdiction over the subject matter of the complaint. *Dale v. Lattimore*, 12 N.C. App. 348, 352, 183 S.E. 2d 417, 419-20 (1971), *cert. denied*, 279 N.C. 619, 184 S.E. 2d 113 (1971).

We hold that North Carolina has subject matter jurisdiction to adjudicate each of plaintiffs' claims against defendant, and we overrule this assignment of error.

II

Defendant next argues that the trial judge erred by denying defendant's motion to dismiss the Complaint for lack of personal jurisdiction. It is well established that determining whether a forum has jurisdiction over a defendant necessitates a two-step analysis. *See Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E. 2d 629, 630 (1977). First, we determine whether statutory authority confers jurisdiction upon our courts. *Id.* The second, and critical, inquiry is this: Will the exercise of jurisdiction violate constitutional guarantees of due process? *Brickman v. Codella*, 83 N.C. App. 377, 380, 350 S.E. 2d 164, 166 (1986).

Plaintiffs bear the burden of showing, by a preponderance of the evidence, that defendant placed himself within the reach of our jurisdictional statutes. *J.M. Thompson Co. v. Doral Mfg. Co., Inc.*, 72 N.C. App. 419, 423, 324 S.E. 2d 909, 912 (1985), *disc. rev. denied*, 313 N.C. 602, 330 S.E. 2d 611 (1985). When the parties do not request that the judge make findings of fact in support of a ruling on a motion to dismiss, we presume that the judge found facts sufficient to support the judgment. *Id.* at 423-24, 324 S.E. 2d at 912. Our task is to determine whether the presumed

findings of fact are supported by competent evidence in the record; if they are, the findings are conclusive on appeal, notwithstanding other evidence in the record to the contrary. *See id.* at 424, 324 S.E. 2d at 912-13.

We turn now to the question whether statutory authority allows our courts to exercise jurisdiction over this defendant.

A

[2] N.C. Gen. Stat. Sec. 1-75.4 (1983), the North Carolina "long-arm" statute, lists twelve "circumstances" under which a court, having subject matter jurisdiction, will also acquire personal jurisdiction. Our statute is designed to extend jurisdiction over nonresident defendants to the fullest limits permitted by the Fourteenth Amendment's due process clause. *E.g., Pope v. Pope,* 38 N.C. App. 328, 330, 248 S.E. 2d 260, 261 (1978). We thus give a broad and liberal construction to the provisions of the statute, within the perimeters established by federal due process. *See First Nat'l Bank v. Gen. Funding Corp.*, 30 N.C. App. 172, 176, 226 S.E. 2d 527, 530 (1976).

Plaintiffs contend that statutory jurisdiction lies under several of the provisions listed in Section 1-75.4. As any one of the enumerated circumstances is adequate to meet the statutory requirement, we need not examine and discuss each of the circumstances plaintiffs allege exist in this case. From the evidence in the record, we are satisfied that the judge correctly found that statutory jurisdiction lies.

In their Complaint and affidavits, plaintiffs allege they advanced $67,500 to defendant, at his direction, to be used by him to acquire options on certain real property in South Carolina and to obtain a mobile home for use in the partnership business. Plaintiffs maintain that these monies were sent to defendant from Wilkes County. Consequently, they argue, Section 1-75.4(5)(d) applies. Subsection 5(d) confers jurisdiction when "things of value [are] shipped from this State by the plaintiff to the defendant on his order or direction." We agree with plaintiffs that subsection 5(d) is applicable.

In *Pope*, we held that "[m]oney payments are clearly a thing of value" under subsection (5)(c) of the long-arm statute. In *Schofield v. Schofield*, we said such payments also constituted "things of value" under subsection (5)(d). 78 N.C. App. 657, 660, 338 S.E. 2d 132, 134 (1986). Both *Pope* and *Schofield* were domestic cases involving spousal-support payments. Their holdings, however, apply

here. We hold that plaintiffs shipped "things of value" to defendant at his direction, and that statutory jurisdiction is thus established under Section 1-75.4(5)(d).

Having satisfied the first test of our two-part inquiry, we turn to the question whether the court's exercise of jurisdiction in this case comports with the due process safeguards to which defendant is entitled.

B

[3] Constitutional due process requires that a defendant have sufficient "minimum contacts" with the forum state so that that state's exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (citations omitted); *see Miller v. Kite*, 313 N.C. 474, 477, 329 S.E. 2d 663, 665 (1985). The existence of such contacts is determined by a careful consideration of the facts of each case in order to ascertain what is just under the circumstances. *Brickman*, 83 N.C. App. at 380, 350 S.E. 2d at 166. Factors we consider are these: 1) the quantity of the contacts; 2) the nature and quality of the contacts; 3) the source and connection of the cause of action to the contacts; 4) the interest of the forum state; and 5) convenience to the parties. *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E. 2d 300, 302, *disc. rev. denied and appeal dismissed*, 313 N.C. 604, 330 S.E. 2d 612 (1985). The location of critical witnesses and material evidence, and the existence of a contract having a substantial connection with the forum state are also probative concerns. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 469, 265 S.E. 2d 637, 640 (1980). In each case, it is essential that there be some act by which the defendant purposefully adopts "the privilege of conducting activities within the forum State, thus invoking the protections and benefits of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, *reh'g denied*, 358 U.S. 858, 3 L.Ed. 2d 92 (1958) (citation omitted); *see Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E. 2d 676, 679 (1974).

Plaintiffs argue that minimum contacts exist in this case for the following reasons: 1) defendant came to Forsyth County, North Carolina, to initiate discussions with plaintiff Foster concerning the Myrtle Beach business venture; 2) a subsequent meeting between plaintiffs and defendant was held in North Wilkesboro, North Carolina, at which meeting plaintiffs and defendant agreed to form

the Kings Port Partnership; 3) plaintiffs forwarded monies from North Carolina to defendant for partnership use; and 4) defendant executed a guaranty agreement, on behalf of the partnership, with Southern National Bank of North Carolina, for a $60,000 loan to be used for partnership affairs. Plaintiffs allege that three meetings related to the formation of the partnership occurred in North Carolina. Defendant claims that only two such meetings took place and that final decisions concerning the formation of the partnership were made in South Carolina. We presume that the trial judge found as fact that defendant solicited plaintiffs in North Carolina and that the decision to form the enterprise was made in this State. *See J.M. Thompson Co.*, 72 N.C. App. at 423-24, 324 S.E. 2d at 912; *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E. 2d 111, 114 (1986). We find support for these findings in the pleadings and affidavits of plaintiffs. These contacts, in our view, are more than adequate for jurisdictional purposes.

In *Brickman*, we noted the significance of the nonresident defendant's "[seeking] out" the plaintiffs and "initiat[ing] the contacts with North Carolina from which the claim[s] ar[ose]." 83 N.C. App. at 383, 350 S.E. 2d at 168 (emphasis omitted). We quoted, in that case, the well-known requirement of *World-Wide Volkswagen Corp. v. Woodson* that a defendant's contacts with the forum state must be such that he or she "should reasonably anticipate being haled into court there." 444 U.S. 286, 297, 62 L.Ed. 2d 490, 501 (1980) (citations omitted). We held, in *Brickman*, that the defendant's contacts with this State were not "random, casual, or fortuitous," but were, rather, " 'purposefully directed' " at the plaintiff "in order to obtain his financial assistance with a new business venture whereby [defendant] sought personal commercial benefit." 83 N.C. App. at 384, 350 S.E. 2d at 168. We are presented with an identical situation here. Thus, although defendant's contacts with this State may have been few in number, the nature and quality of them—his soliciting of partners here, the formation of the partnership here, defendant's receipt of monies sent to him from North Wilkesboro, and the partnership's taking out a loan for which defendant signed a guaranty agreement with a North Carolina bank (*cf. United Buying Group v. Coleman*, 296 N.C. 510, 517, 251 S.E. 2d 610, 615 (1979), in which guarantor received no "attending commercial benefits" for promise and, therefore, execution of guaranty agreement was insufficient for minimum contacts)—are such that due process is not offended by this State's exercising jurisdiction over him.

The partnership agreement in this case is substantially connected to North Carolina. *See Georgia R.R. Bank and Trust Co.*, 46 N.C. App. at 469, 265 S.E. 2d at 640. Moreover, North Carolina has a decided interest in "protecting its residents in the making of contracts with nonresidents who solicit business within its borders," especially when those dealings give rise to allegations that North Carolina citizens have been defrauded. *See Brickman*, 83 N.C. App. at 384, 350 S.E. 2d at 168. Finally, there is nothing in the record to suggest that litigating these claims in North Carolina will place an untoward inconvenience on defendant; *e.g.*, nothing in the record indicates that the location of critical witnesses and material evidence necessitates litigating this action in South Carolina. *See Georgia R.R. Bank and Trust Co.*, 46 N.C. App. at 469, 265 S.E. 2d at 640.

III

We hold that the trial judge correctly denied defendant's motion to dismiss this action for lack of subject matter and personal jurisdiction, and the order of the court is, therefore,

Affirmed.

Judges JOHNSON and ORR concur.

SENTRY ENTERPRISES, INC., PLAINTIFF APPELLANT v. CANAL WOOD CORPORATION OF LUMBERTON, K. T. GOODSON, JR. AND DONNELL MOSELEY, DEFENDANT APPELLEES

No. 884SC675

(Filed 20 June 1989)

1. Trespass § 7; Corporations § 8.1— sale of timber by corporation—authority of president to bind corporation—no trespass by timber cutting company

The trial court properly granted summary judgment for defendant on plaintiff's trespass claim where plaintiff had three shareholders, all of whom knew that the land was to be cleared for a subdivision and that defendant was cutting and removing the timber; none of the officers, directors, or shareholders of plaintiff objected at any time to the timber being cut and

removed; and since the cutting and removal of timber was in the ordinary course of plaintiff's business—the development of a subdivision—and since plaintiff had authorized the president to clear the land, plaintiff's president had the apparent authority to bind plaintiff corporation to the timber agreement with defendant.

2. **Rules of Civil Procedure §§ 15, 56— summary judgment disposing of all claims—subsequent amendment of complaint improper**

The trial court's granting of summary judgment for defendant in plaintiff's trespass action was a final judgment because it disposed of all of plaintiff's claims, and the trial court erred in allowing plaintiff leave to amend its complaint to add a negligence claim; furthermore, it was irrelevant that the trial court granted plaintiff leave to amend on the court's own motion.

3. **Corporations § 8; Negligence § 30.1— checks made payable to president instead of corporation—no negligence by payor**

Summary judgment for defendant would have been proper on plaintiff's negligence claim had that claim properly been before the court where plaintiff claimed that defendant was negligent in writing checks in payment for timber cut by defendant to plaintiff's president individually rather than to plaintiff corporation; plaintiff produced no evidence that defendant knew of any improper purpose in the president's asking that checks be written in his name; and no duty rested on defendant, who made payments to the agent designated to receive them, to see that the money reached the principal.

APPEAL by plaintiff from Order of *Judge Bradford Tillery* entered 15 February 1988 in ONSLOW County Superior Court. Heard in the Court of Appeals 24 January 1989.

Lanier & Fountain, by Charles S. Lanier and Gordon E. Robinson, Jr., for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by Daniel Lee Brawley and John D. Martin; and Bailey & Raynor, by G. Keith Fisher, for defendant appellees.

COZORT, Judge.

Plaintiff, Sentry Enterprises, Inc., is a closely-held North Carolina corporation located in Onslow County. In 1984, the time

material to this action, it had a total of three shareholders who also served as corporate officers: Daniel Furia, Secretary-Treasurer; Charles J. Scozzari, President; and Bernardo Navarro, Vice-President. Mr. Furia, who resided in New Jersey, exercised authority for Mr. Navarro, who lived in South America, through a power of attorney. Mr. Scozzari was the only shareholder/director residing in Onslow County. Mr. Scozzari managed plaintiff's daily business. As president, Mr. Scozzari was authorized to accept payment and to accept, endorse, and negotiate checks on plaintiff's behalf.

In 1984, plaintiff began development of real property located in Onslow County. Defendant Canal Wood, a North Carolina corporation engaged in the business of buying and selling timber, cut timber off plaintiff's land. It is the cutting of that timber which gave rise to this legal action.

On 9 March 1984, Mr. Scozzari and defendant entered into a Timber Purchase and Sales Agreement giving defendant Canal Wood the right to cut and remove timber from plaintiff's land in Onslow County. The contract was signed "C. J. Scozzari," and it listed Mr. Scozzari as "SELLER." Defendant Canal Wood hired defendant Goodson to cut and remove timber from plaintiff's land. Defendant Goodson started cutting and removing timber in March, 1984, and completed the work in June, 1984. Defendant Canal Wood made payments totaling $69,938.91—the total due under the agreement—to Mr. Scozzari, with checks bearing his name as payee. Mr. Scozzari converted the payments made by defendant and other funds to his own use. In a separate action, plaintiff obtained a consent judgment against Mr. Scozzari and received $119,040.55 in payment thereof from him.

On 3 September 1986, plaintiff filed suit against Canal Wood, Goodson, and Donnell Moseley, the broker who brought plaintiff and Canal Wood together. The suit alleged that defendants, acting in concert, *trespassed* on plaintiff's land and converted the timber to their own use. Defendants answered and moved for summary judgment on plaintiff's trespass action. On 27 October 1987, the trial court filed an order granting summary judgment for defendants Canal Wood and Goodson. In that same order, the trial court, on its own motion, gave plaintiff 20 days to file and serve an amended complaint. On 13 November 1987, plaintiff filed an "amendment to complaint," wherein plaintiff alleged that plaintiff and defendant Canal Wood entered into a contract for the purchase of

timber from plaintiff and that Canal Wood cut and removed the timber from plaintiff's property. Plaintiff alleged that defendant Canal Wood paid Mr. Scozzari $69,938.91 and that defendant was negligent in paying Mr. Scozzari individually rather than the plaintiff. After answering the amended complaint, defendant Canal Wood moved for summary judgment. Defendant Goodson filed a motion to dismiss for failure to state a claim against him. On 15 February 1988, the trial court granted defendant Canal Wood's motion for summary judgment and granted defendant Goodson's motion to dismiss. Plaintiff timely gave notice of appeal to the 15 February order granting summary judgment for defendant Canal Wood. Plaintiff did not appeal the dismissal as to defendant Goodson, and plaintiff has taken a voluntary dismissal as to defendant Moseley. Thus, the only parties before this Court in this appeal are plaintiff and the defendant corporation.

On appeal, plaintiff contends (1) that the trial court erred in granting summary judgment on 27 October 1987 as to the trespass claim, and (2) that the trial court erred in granting summary judgment on 15 February 1988 as to the negligence claim. In a cross assignment of error, defendant contends the trial court erred in allowing the plaintiff to amend his complaint. We find no merit to plaintiff's contentions regarding summary judgment. We agree with defendant that the trial court erred in allowing plaintiff to amend the complaint after summary judgment.

The first assignment of error presented in plaintiff's brief contends that the trial court erred in granting defendant's motion for summary judgment on 27 October 1987. In the argument thereunder, plaintiff contends that "the central issue in this case is whether it was negligent for Canal Wood . . . to contract for the purchase of the timber to make payments for the timber to C. J. Scozzari, instead of [plaintiff]." Plaintiff's argument is misplaced. When the trial court entered summary judgment for Canal Wood on 27 October 1987, the only claim before the court was plaintiff's claim for trespass. Plaintiff's claim for negligence did not arise until the amended complaint was filed on 13 November 1987. Thus, the only issue pertinent to the 27 October 1987 summary judgment is whether there is any genuine issue of material fact as to plaintiff's claim for *trespass*. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (1988).

[1] In its brief, plaintiff fails to distinguish between the two orders granting summary judgment. Nonetheless, we have reviewed the

record below and find that the trial court was correct in granting summary judgment for defendant Canal Wood on the trespass claim.

To prove trespass plaintiff must show that defendant made an unauthorized entry on plaintiff's land. *Keziah v. Seaboard Air Line R.R. Co.*, 272 N.C. 299, 311, 158 S.E. 2d 539, 548 (1968). To prove unlawful cutting of timber under N.C. Gen. Stat. § 1-539.1(a), plaintiff must show that defendant trespassed and that defendant cut or removed timber from plaintiff's land. N.C. Gen. Stat. § 1-539.1(a) (1983); *Matthews v. Brown*, 62 N.C. App. 559, 561, 303 S.E. 2d 223, 225 (1983). Plaintiff argues that defendant's entry upon its land was unauthorized because defendant knew or should have known that plaintiff's president, C. J. Scozzari, exceeded his authority when he signed and accepted payment under the Timber Purchase and Sales Agreement made with defendant Canal Wood. Plaintiff claims that defendant Canal Wood was on notice that Mr. Scozzari was not acting within the scope of his authority as president because Mr. Scozzari demanded that defendant's checks be made in his name. We find that plaintiff's president had the apparent authority to sign the timber agreement and to bind plaintiff to the contract. Therefore, under that agreement, defendant had the right to enter upon plaintiff's land to remove timber.

"Where a third party in good faith and with reasonable prudence deals with an agent having apparent authority, the principal is bound by the agent's acts. *Thompson v. Assurance Society*, 199 N.C. 59, 64, 154 S.E. 21, 24 (1930)." *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E. 2d 889, 892 (1985). The president of a corporation has the apparent authority to bind the corporation to contracts which are within the corporation's ordinary course of business. *Id.* at 596, 324 S.E. 2d at 892-93.

The timber agreement plaintiff's president made with defendant Canal Wood was in the ordinary course of plaintiff's business. Daniel Furia, currently plaintiff's president, was one of plaintiff's three shareholders and was plaintiff's secretary-treasurer at the time the timber was cut. Mr. Furia testified in deposition that plaintiff desired to develop the land in Onslow County as a subdivision. He stated that plaintiff wanted the land cleared and had authorized Mr. Scozzari to clear it. Mr. Furia testified that plaintiff's officers, directors and shareholders knew timber was being cut and removed from their land and knew defendant Canal Wood was cutting and removing that timber. Neither the officers, direc-

tors nor shareholders of plaintiff objected at any time to the timber being cut and removed. Since the cutting and removal of timber was in the ordinary course of plaintiff's business—the development of a subdivision—and since plaintiff had authorized the president to clear the land, plaintiff's president had the apparent authority to bind plaintiff corporation to the timber agreement with defendant. We find the trial court was correct in granting defendant's motion for summary judgment on the trespass claim.

[2] We now turn to defendant's cross assignment of error wherein the defendant alleges the trial court erred in allowing the plaintiff to amend the complaint after entry of summary judgment. We hold that the trial judge had no authority to grant leave to amend *after* summary judgment was entered against plaintiff.

This Court has held that once a Rule 12(b)(6) motion is granted, the trial court is "no longer empowered to grant plaintiff leave to amend under Rule 15(a) . . . ." *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E. 2d 378, 382 (1987). In *Harris v. Family Medical Center*, 38 N.C. App. 716, 718, 248 S.E. 2d 768, 770 (1978), we held that plaintiff's right to amend is lost if the trial court grants defendant's motion for judgment on the pleadings. In *Harris*, we expressly relied on *Clardy v. Duke University*, 299 F. 2d 368 (4th Cir. 1962) (per curiam), which held that plaintiff's motion for leave to amend was properly denied after the trial court entered summary judgment for defendant. *Id.* at 369-70. Plaintiff seeks to distinguish this line of cases on the grounds that in this case the trial court granted plaintiff leave to amend on the court's own motion. We are not persuaded. It is simply irrelevant who makes the motion. Once the trial court enters final judgment in the case, the trial court lacks the authority to grant leave to amend under Rule 15. *See Johnson*, 86 N.C. App. at 7-8, 356 S.E. 2d at 382-83. Summary judgment was a final judgment in this case because it disposed of *all* of plaintiff's claims. *See Bailey v. Gooding*, 301 N.C. 205, 208-09, 270 S.E. 2d 431, 433 (1980). If we adopted plaintiff's argument, Rule 15(a) would render Rule 56 meaningless and ineffective. *See Clardy*, 299 F. 2d at 370. The portion of the trial court's order granting plaintiff leave to amend the complaint is reversed. Plaintiff should not have been allowed to amend his complaint to add the negligence claim. The negligence claim was not properly before the trial court, and the plaintiff has no standing to seek review of the trial court's granting defendant's motion for summary judgment on that claim. Nevertheless, in the interest of judicial

economy, we have elected to consider plaintiff's claim that defendant was negligent in writing checks to Mr. Scozzari instead of the plaintiff corporation. We have reviewed all the evidence, and we find no evidence of negligence by defendant.

[3] Michael Marks, defendant's manager, testified in deposition as to the reason for writing checks in Mr. Scozzari's name:

> A. He said he was the President of the company. He said he owned the company and he needed the money wrote [*sic*] in his name so he could pay out tractor bills and bulldozer bills or whatever what [*sic*] to begin clearing land.
>
> * * * *
>
> Q. Is it your practice to pay corporations by making checks directly to an office manager or the president?
>
> A. I feel like if it's deemed necessary, if they request it, I feel like they own the timber, or they own whatever, and I try to oblige them as necessary and he made that request, he as in Mr. Scozzari.

Plaintiff has produced no evidence that defendant knew of any improper purpose in Mr. Scozzari's asking that checks be written in his name. "No duty rests upon a debtor, who makes a payment to an agent designated to receive it, to see that the money reaches the principal, if the debtor is without notice of an improper purpose or intention on the part of the collecting agent. *Shriver v. Sims*, 127 Nev. 374, 255 N.W. 60, 94 A.L.R. 779 (1934)." *Haynes Petroleum Corp. v. Turlington*, 261 N.C. 475, 478, 135 S.E. 2d 43, 46 (1964).

> While it is generally recognized that an agent having authority to collect a debt has no authority to receive a check in payment, it is nevertheless held that, where he cashes the check and receives the money thereon, the principal is bound. *Kloewer v. Associates Discount Corp.*, 245 Iowa 373, 62 N.W. 2d 244 (1954); Restatement of the Law, Agency, s. 178; 3 Am. Jur., 2d Agency, s. 139, pp. 531, 532; 94 A.L.R. 786. Checks made payable to the order of an agent, which are cashed by him, are not different from payments made in cash so far as the legal effect of the transaction is concerned. *Zummach v. Polasek*, 199 Wis. 529, 227 N.W. 33 (1929).

Id. at 477, 135 S.E. 2d at 45-46.

We conclude, therefore, that summary judgment for defendant would have been correct on the negligence claim if that claim were properly before the court.

In summary, the portion of the 27 October 1987 order granting summary judgment for defendant is affirmed; the portion of the order granting plaintiff leave to amend the complaint is reversed. Summary judgment for defendant, including dismissal of the action with prejudice, is affirmed.

Affirmed in part; reversed in part.

Judges PHILLIPS and GREENE concur.

IN THE MATTER OF: THE ASSESSMENT OF ADDITIONAL SALES AND USE TAX AGAINST STRAWBRIDGE STUDIOS, INC., FOR THE PERIOD SEPTEMBER 1, 1979 THROUGH JULY 31, 1982

No. 8814SC1068

(Filed 20 June 1989)

1. Taxation § 31.1— sales and use tax—school pictures

The Secretary of Revenue correctly determined that a photographer must pay sales tax on the contract sale of school pictures to students, under which all students are photographed and picture packages are sold to the school at a price which is agreed upon in advance for the school to resell at a price set by the school, because the taxpayer did not present any evidence of registration or purchase for resale. The Department of Revenue's internal correspondence and correspondence with the taxpayer's attorney is not evidence that the contract sales were wholesale sales because the correspondence makes it clear that the statutory and regulatory requirements must be met to be taxable as wholesale sales. The taxpayer's burden of proof to overcome the presumption of a retail sale and the requirement of a Form E-590 did not deny the taxpayer due process and equal protection because a Form E-590 is not required; the taxpayer may present other written evidence to establish that the schools are registered to pay the retail tax and that the pictures are purchased for resale. N.C.G.S. § 105-164.28, N.C.G.S. § 105-164.26.

2. Taxation § 31.1 — sales tax — commission sale of school pictures

The evidence in the record on appeal supported the Secretary of Revenue's findings and conclusions that additional sales and use tax was required on the commission sale of school pictures where, in a letter to a school principal, taxpayer's president explained that under the proof method, each student was photographed and provided one color picture and that the price of the packages available for order included sales tax; the proof envelope described the picture sales as a school project on which the school retained a commission but it did not say the school was selling pictures; and the principal's report sheets show that the sales tax was collected on the sales to the students and was sent by the schools to the taxpayer. Furthermore, the findings and conclusions that describe the schools acting as representatives of the taxpayer in taking orders, sending money and distributing proofs and picture packages were supported by the evidence.

APPEAL by petitioner from *Read (J. Milton, Jr.), Judge*. Order entered 31 May 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 April 1989.

The Secretary of Revenue (Secretary) sustained a proposed assessment of additional sales and use tax against Strawbridge Studios, Inc. (taxpayer). Upon the taxpayer's petition for review, the Tax Review Board affirmed the Secretary's decision. The taxpayer gave notice of appeal and petitioned for review by the superior court. On 31 May 1988, Judge Read affirmed the decision of the Tax Review Board and the Secretary of Revenue. The taxpayer appeals.

Arthur Vann for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for the Secretary of Revenue.

LEWIS, Judge.

The Secretary made the following findings of fact based upon the evidence presented:

(1) The taxpayer is engaged in business as a school photographer operating and existing under the laws of the State of North Carolina, maintaining a place of business only in Durham County.

(2) The taxpayer sells school pictures directly to schools on a 'Contract Sales' basis. In using this method, all students are photographed, and picture packages are sold to the school at a price which is agreed upon in advance. The school may then resell as many packages as possible at a price set by the school, and keep any 'profits' from the sale. The schools have not furnished forms E-590 Certificates of Resale, and the schools are not, for the most part, registered for sales and use tax purposes. These sales have been reported by Strawbridge Studios for sales tax purposes, and the State tax paid thereon. School annuals are also sold to the schools using this method, but no tax has been paid on the sale of annuals to schools.

EXCEPTION NO. 1

(3) The taxpayer also sells school pictures using a 'commission' or 'proof' system. In using this method, Strawbridge Studios photographs all students at a school, and returns a proof picture to each student for examination. The students may then select a picture package and order same. The proof pictures and orders are returned to the studio for further processing. The picture packages so ordered by the students are produced and returned to the schools. A representative of the school delivers the picture packages to the students, and collects all monies. All monies are then deposited in the school's bank account. The school's representative then completes a 'settlement sheet' and submits same to Strawbridge Studios, retaining a commission percentage of the sales amount which is agreed upon in advance, and remitting to Strawbridge Studios only the net balance due after deducting the commissions. The price of the picture packages is set by Strawbridge Studios. The net monies received by Strawbridge Studios has been reported for sales tax purposes, but no tax has been paid on commissions retained by the schools, notwithstanding the fact that the tax has been collected on the total sales price to the student. School annuals are also sold using this method, but no tax has been paid on the sale of school annuals. The 'Principal Report Sheets' reflect a computation of State and county tax on gross collections before deducting any commissions retained by the schools. The school's representative deducts the schools [sic] commissions from the collection before tax, and remits the net amount due Strawbridge Studios, plus applicable tax collected. However, Strawbridge Studios has reported for sales tax purposes only the amount received from

the school after the deduction of the commissions and has paid sales tax on that net amount only. In his letter of October 24, 1983, Mr. Gooch advised [taxpayer's attorney] of this method of computation and forwarded copies of settlement sheets to [taxpayer's attorney] for review.

EXCEPTION NO. 2

(4) A comparison was made between taxpayer's income tax returns and sales tax returns, and it was determined that some sales which were reported for income tax purposes were not reported for sales tax purposes. Tax has been assessed on these sales, but the auditor was unable to determine the source of the additional sales, and thus these sales were classified as 'sales of an unknown source', and were included as additional taxable sales.

EXCEPTION NO. 3

(5) Strawbridge Studios was afforded time and an opportunity to obtain forms E-590, Certificates of Resale or other written evidence from the schools to show that they were properly registered for sales and use tax purposes, and that they were purchasing the pictures in question for the purpose of resale. Strawbridge Studios did not obtain any evidence or Certificates of Resale which would exempt sales made on the 'contract' basis as sales for resale.

EXCEPTION NO. 4

(6) Mr. Gooch's letter of October 24, 1983 to [taxpayer's attorney] sets forth the Department's position on each type of sales in question and further provides that no county sales or use tax is due on those sales which are consummated by delivery of the pictures outside of Durham County, the county of location of Strawbridge Studios.

Based upon these findings of fact, the Secretary sustained imposition of additional sales and use tax on the sale of annuals under the "contract sales" method and on the sale of pictures under the "commission" method. The Tax Review Board and the superior court affirmed this decision. The taxpayer appeals.

The taxpayer brings forward eight assignments of error which essentially challenge the findings of fact and conclusions of law of the court's order. The taxpayer contends the findings of fact

regarding the "contract sales" are not supported by the evidence and that the court erred as a matter of law in concluding these sales are retail sales. The taxpayer also contends the findings of fact as to the "commission" method are not supported by the evidence and that the court erred in concluding these sales were retail sales with the schools acting as the taxpayer's agent. We have carefully reviewed the record on appeal and each assignment of error and conclude the decision should be affirmed.

The scope of our review of the superior court's decision is the same as for other civil cases—to determine whether the superior court committed an error of law. *See American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 303 S.E. 2d 649, *cert. denied*, 309 N.C. 819, 310 S.E. 2d 348 (1983) (decided under former G.S. 150A-52). In reviewing the administrative decision, the superior court must apply the "whole record" test. *Savings & Loan Assoc. v. Savings & Loan Comm.*, 43 N.C. App. 493, 259 S.E. 2d 373 (1979).

> This test does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. . . . Instead the reviewing court is required to examine all of the competent evidence, pleadings, etc., which comprise the 'whole record' to determine if there is substantial evidence *in the record* to support the administrative tribunal's findings and conclusions. . . . If, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand.

Id. at 497-98, 259 S.E. 2d at 376 (emphasis original). Under the "whole record" test, the court must take into account matters which detract from the weight of the evidence supporting the decision. *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 338 S.E. 2d 114 (1985). "Ultimately it must determine whether the decision has a rational basis in the evidence." *Id.* at 523, 338 S.E. 2d at 117.

"Retail" is "the sale of any tangible personal property in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale." G.S. 105-164.3(13). "Wholesale sale" is "a sale of tangible personal property by a wholesale merchant to a manufacturer, or registered jobber or dealer, or registered wholesale or retail merchant, for the purpose of resale but does not include a sale to users or consumers not for resale." G.S.

105-164.3(24). The sale of tangible personal property by a wholesale merchant is taxable unless the property is sold to a registered retailer, wholesale merchant or nonresident retail or wholesale merchant. G.S. 105-164.5(2).

> For the purpose of the proper administration of [the record-keeping provisions of the Sales and Use Tax Article] and to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records as required herein.

G.S. 105-164.26. In addition, "[t]he burden of proof that a sale of tangible personal property is not a sale at retail is upon the wholesale merchant or retailer who makes the sale unless he takes from the purchaser a certificate to the effect that the property is for resale." G.S. 105-164.28. The Sales and Use Tax Regulations provide:

> A purchaser of tangible personal property who is properly registered with the Sales and Use Tax Division of the Department of Revenue and is engaged in the business of selling tangible personal property at retail or wholesale and makes purchases of tangible personal property for the purpose of resale shall furnish to his vendors as their authority for not collecting the tax, either (1) a Certificate of Resale, Form E-590, or (2) other evidence in writing adequate to support the conclusion that he is registered with the Department of Revenue for sales and use tax purposes and that the property is being purchased for the purpose of resale. Such certificates or other written evidence shall be completed in duplicate and a copy retained by both the vendor and the vendee in their files. In the absence of such certificates or other adequate written evidence, vendors selling taxable tangible personal property to wholesale and retail merchants shall be deemed to be making retail sales and will be liable for collecting and paying the tax thereon at the applicable rate.

Sales & Use Tax Regulation 1(F). In this case, the taxpayer owes tax on the school picture sales to the students unless it can establish by a Certificate of Resale or other written evidence that it sold the pictures and annuals to the schools for resale.

[1] We first address those assignments of error relating to the "contract sales." The taxpayer contends that statements in the

Department of Revenue's internal correspondence and correspondence with the taxpayer's attorney stating that the "contract sales" are or appear to be sales for resale constitute evidence that the "contract sales" are wholesale sales. However, the Department's characterizations as wholesale sales or sales for resale do not stand alone in the record. In each case, the correspondence also makes it clear that in order to be taxable as wholesale sales the statutory and regulatory requirements must be met. The characterizations are not, as the taxpayer contends, judicial admissions that the requirements for wholesale taxation have been met.

To be taxed as a wholesale sale, the "contract sales" must meet the statutory requirements. The taxpayer must meet its burden of proof to overcome the presumption of a retail sale. G.S. 105-164.26 and 105-164.28. To overcome this presumption, the taxpayer must present either a Certificate of Resale, Form E-590, or other written evidence to support that the schools are registered with the Department of Revenue and that the pictures are being purchased for the purpose of resale. Sales & Use Tax Regulation 1(F). The taxpayer has not presented either a Form E-590 or other sufficient written evidence of registration and purchase for resale.

The taxpayer contends the burden of proof and requirement of a Form E-590 creates a conclusive presumption of retail sales which denies taxpayer due process and equal protection. We do not agree. Pursuant to G.S. 105-164.43 and G.S. 105-262, the Secretary of Revenue is required to promulgate rules and regulations to aid in assessing and collecting taxes. Regulation 1(F) merely elaborates on the proof required by G.S. 105-164.28. No part of the tax law requires the taxpayer to obtain a Form E-590 from the schools; the taxpayer may present other written evidence to establish that the schools are registered to pay the retail tax and that the pictures are purchased for resale. As taxpayer has not presented any evidence of registration or purchase for resale, we affirm the determination that taxpayer must pay tax on the "contract sales" to students.

[2] Next we address the assignments of error related to "commission" sales. The taxpayer contends that the findings of fact are not supported by the evidence and that the conclusions of law are erroneous. However, the taxpayer's own documents support the disputed findings of fact. In a letter to a school principal, the taxpayer's president explains that under the proof method each

student is photographed and provided one color picture. The letter states that the price of the packages available for order includes sales tax. Additionally, although the proof envelope describes the picture sales as a school project on which the school retains a commission, it does not say the school is selling the pictures. Moreover, the Principal's Report Sheets in the Record on Appeal show that the sales tax was collected on the sales to the students and was sent by the schools to the taxpayer. The evidence in the Record on Appeal supports the Secretary's finding and conclusions regarding the "commission" sales.

In its brief the taxpayer challenges a finding of an agency relationship between the taxpayer and the schools with regard to the "commission" sales. However, the findings of fact and conclusions of law do not state that an agency relationship exists. The findings and conclusions merely describe the schools acting as representatives of the taxpayer in taking orders, sending money and distributing proofs and picture packages. These findings and conclusions are supported by the evidence in the Record on Appeal.

The order of the superior court affirming the decision of the Secretary of Revenue and the Tax Review Board is affirmed.

Affirmed.

Judges ARNOLD and GREENE concur.

RICHARD EGAN D/B/A CRYSTAL COAST REALTY v. JERRY L. GUTHRIE AND PEGGY D. GUTHRIE

No. 883DC948

(Filed 20 June 1989)

Brokers and Factors § 6.2— sale after listing agreement expired— realtor's failure to comply with best effort requirement— genuine issue of fact

Where defendants agreed to sell their restaurant property to a third party, accepted the sum of $5,000 from that party prior to the expiration of an exclusive listing agreement giving plaintiff the exclusive right to sell the property, and completed the sale of the property two days after the expiration of the

listing agreement, nothing else appearing, these actions would have constituted a breach of the exclusive right to sell agreement by defendants and entitled plaintiff to a commission on the sale and summary judgment in this case; however, defendants raised a genuine issue of material fact as to plaintiff's compliance with the requirement of the contract that plaintiff use its best efforts in good faith to secure a purchaser, and summary judgment for plaintiff was therefore improper.

APPEAL by defendants from *Ragan, James E., III, Judge.* Judgment entered 5 July 1988 in CARTERET County District Court. Heard in the Court of Appeals 22 March 1989.

Plaintiff is a citizen and resident of Carteret County, North Carolina, doing business as Crystal Coast Realty. Defendants are also citizens and residents of Carteret County. On 22 February 1987, defendants entered into an exclusive right to sell contract with plaintiff for the sale of the Captain's Choice Restaurant, located on Harkers Island, North Carolina. The contract stated *inter alia* the following:

> In consideration of [plaintiff] agreeing to list the . . . property for sale and in further consideration of [plaintiff's] services and efforts to find a purchaser, [plaintiff is] hereby granted the exclusive right, for a period of 6 mo., to and including Aug. 15, 1987, to sell the said property for the price of $350,000 . . .
>
> . . .
>
> [Plaintiff is] to afford [defendant] the full benefit of [plaintiff's] judgment, experience and advice in the marketing of the property. [Defendant] understand[s] that [plaintiff] make[s] no representation or guarantee for a sale of [defendant's] property but [plaintiff] promise[s] to use [plaintiff's] *best efforts* in good faith to secure a purchaser who is ready, willing, and able to purchase the property.

(Emphasis added.) The contract further stated that if plaintiff produced a purchaser who was ready, willing and able to purchase the property on defendant's terms or if the property was sold or exchanged by plaintiff, defendant or any other party, before the expiration of the listing or within 90 days after the expiration of the agreement to any party with whom plaintiff or the listing

service had negotiated as a prospective purchaser, defendant would pay to plaintiff a fee of 6 percent provided defendant was notified in writing by plaintiff of the name of the prospective purchaser.

At some point during the listing period, defendants were approached by a third party, Barnes, who was interested in purchasing the property, but who did not want to purchase through a realtor. Barnes indicated to defendants that he would contact them when the listing agreement expired and quoted defendants a price of $235,000 for the property. Defendants advised Barnes that they would sell him the property for an agreed upon price if plaintiff did not find a purchaser for the property. Prior to 15 August 1987, defendants accepted a check in the amount of $5,000 from Barnes and his wife. On 17 August 1987, a deed executed by defendants conveying the Captain's Choice Restaurant property to the Barneses was recorded in the Carteret County Register of Deeds Office. No commission was paid to plaintiff by defendants as a result of the sale of the property.

Plaintiff filed a complaint on 16 September 1987 seeking a sum of $13,500 as a commission on the sale of the property by defendants to the Barneses. Defendants answered in due time and the case was selected for arbitration. Judgment was entered for plaintiff by the arbitrator and an appeal for trial *de novo* was entered by defendants. Plaintiff made a motion for summary judgment on 22 June 1988. The trial court granted plaintiff's motion on 5 July 1988. Defendants appealed from this order.

Bennett, McConkey, Thompson, Marquardt & Wallace, P.A., by Dennis M. Marquardt, for plaintiff-appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for defendants-appellants.

WELLS, Judge.

Defendants assign error to the trial court's grant of summary judgment in favor of plaintiff. Defendants contend that plaintiff failed to exert "best efforts" in trying to sell the property at issue and that there was an oral modification of the written contract. Defendants further contend that no "sale" took place before the expiration of listing contract. Defendants argue that these contentions create genuine issues of material fact which must be resolved by a jury, thereby making summary judgment for plaintiff improper.

At the center of the controversy in the present case is the real estate listing contract entered into by plaintiff and defendants. That contract provides that plaintiff is granted "the exclusive right, for a period of 6 months, to and including August 15, 1987, to sell the said property . . . ." The contract also provides that plaintiff is to be paid a commission if plaintiff produces a purchaser who is ready, willing and able to purchase the property on the terms stated in the agreement or "if the property is sold or exchanged by [plaintiff, defendants] or by any other party before the expiration of [the] listing on any terms acceptable to [defendants] . . . ." We interpret this exclusive listing agreement to be an "exclusive right to sell," which "[prohibits] the owner from selling both personally and through another broker, without incurring liability for a commission to the original broker." *Joel T. Cheatham, Inc. v. Hall*, 64 N.C. App. 678, 308 S.E. 2d 457 (1983).

In *Cheatham* we stated:

> In accordance with cases of other jurisdictions, in the event the owner breaches [an exclusive right to sell] agreement, he is liable for the commission which would have accrued if the broker had obtained a purchaser during the period of the listing. The broker need not show that he could have performed by tendering an acceptable buyer, or that he was the procuring cause of the sale. The owner may breach the agreement by arranging a sale in violation of the agreement or by action which renders the broker's performance impossible.

Id. at 681-682, 308 S.E. 2d at 459.

In the present case defendants agreed to sell the restaurant property to a third party and accepted the sum of $5,000 from that party prior to the expiration of the listing agreement. Defendants completed the sale of the property on 17 August 1987, two days after the expiration of the listing agreement. Nothing else appearing, these actions would have constituted a breach of the exclusive right to sell agreement by defendants and entitled plaintiff to a commission on the sale and summary judgment in this case. *See Adaron Group, Inc. v. Industrial Innovators, Inc.*, 90 N.C. App. 758, 370 S.E. 2d 66, *disc. rev. denied*, 323 N.C. 363, 373 S.E. 2d 540 (1988).

The real estate brokerage transaction involves an offer on the part of the owner as seller to pay a commission upon the

rendering of performance by the broker. The performance by the broker is consideration for enforcing the agreement with the owner to pay a commission upon successful completion of the performance. One commentator has recently noted:

> The broker who desires an exclusive right to sell contract should make sure that the contract is based on an adequate consideration so that it will be enforceable. The contract should include promises on the part of the broker that he will make promotional efforts to sell the property involved, will advertise it, and will bear certain expenses designed to result in an advantageous transaction for his principal. These promises will support the agreement of the principal that the broker shall be entitled to his commissions regardless of who procures a sale of the property involved during the term of the contract.

J. Webster, P. Hetrick, L. Outlaw, *North Carolina Real Estate for Brokers and Salesmen*, p. 303 (3d Ed. 1986).

Our Supreme Court has stated:

> 'As a general rule, a broker who is not a mere middleman, but is employed by a principal to act as his agent in a transaction, is bound to exercise reasonable care and skill, or the care and skill ordinarily possessed and used by other persons employed in a similar undertaking. He must exert himself with reasonable diligence in his principal's behalf, and is bound to obtain for the latter the most advantageous bargain possible under the circumstances of the particular situation. Thus, a broker employed to sell property has the specific duty of exercising reasonable care and diligence to effect a sale to the best advantage of the principal—that is, on the best terms and at the best price possible.'

Carver v. Lykes, 262 N.C. 345, 137 S.E. 2d 139 (1964) (*quoting* 12 Am. Jur. 2d, *Brokers* § 96). Under the contract in this case, plaintiff was obligated to make, at a minimum, reasonable efforts to sell the owner's property in order to entitle plaintiff to a commission.

"A real estate broker is entitled to receive his commission when he has accomplished what the listing contract between him and the seller-principal calls for as performance on his part. If the broker has not done what the contract calls for, he is not entitled to a commission." *Webster, supra* at 294.

In the present case the listing contract between plaintiff and defendants called for plaintiff to "use your best efforts in good faith to secure a purchaser who is ready, willing, and able to purchase the property." Defendants contend in essence that plaintiff failed to comply with the terms of the agreement by failing to exert best efforts in trying to sell defendants' property.

Defendants' forecast of evidence supports this contention. We note that plaintiff's complaint contained no allegations of performance on plaintiff's part, nor did plaintiff produce any forecast of evidence as to what, if any, efforts it made to sell defendants' restaurant. The degree to which plaintiff exerted best efforts or reasonable efforts in trying to sell defendants' property is a question of fact to be properly decided by the trier of facts.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1983); *Cashion v. Texas Gulf, Inc.*, 79 N.C. App. 632, 339 S.E. 2d 797 (1986). "An issue is material if the facts alleged would constitute or would irrevocably establish any material element of a claim or defense." *Anderson v. Canipe*, 69 N.C. App. 534, 317 S.E. 2d 44 (1984). "An issue is genuine if it may be maintained by substantial evidence." *Id.* at 536, 317 S.E. 2d at 46.

We quote from *Webster*:

> The broker who seeks to recover a commission has the 'burden of proof' in establishing his contract of employment before he can recover for his services. The broker must establish, to the satisfaction of a judge or jury if a case goes to court, that a contract existed between the broker and the principal from whom a commission is claimed; the broker must establish the terms of the contract; the broker must show that he has performed under the terms of the contract; and finally, the broker must show that the principal has breached the terms of the contract for which damages are due.

Webster, supra at 293. Generally speaking, in order to entitle a broker to a commission, he must accomplish what he undertook to do in his contract of employment . . . accordingly, in every case, reference must be had to the terms of the particular employment in order to determine whether a broker's duties have been performed. 12 Am. Jur. 2d, *Brokers* § 182.

Defendants' forecast of evidence in the present case has raised a genuine issue as to plaintiff's compliance with the performance required by the listing contract. Defendants' contentions if proven at trial would constitute a valid defense, failure of performance, to plaintiff's claim. Defendants have therefore established the existence of genuine issues of material fact making a grant of summary judgment for plaintiff improper in this case.

Reversed and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

GWENDOLYN MITCHELL, PLAINTIFF v. GERALD THORNTON, DIRECTOR FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANT

No. 8821SC977

(Filed 20 June 1989)

1. **State § 12— Department of Social Services employee—advisory opinion of State Personnel Commission—claim in superior court—subject matter jurisdiction**

The superior court had subject matter jurisdiction to hear a claim filed pursuant to N.C.G.S. § 126-37 by a county Department of Social Services employee who was dissatisfied with action taken by the county Department of Social Services director following an advisory decision by the State Personnel Commission.

2. **State § 12— order of reinstatement of Department of Social Services employee—notice of recourse for dismissal and appeal rights**

The record supported the trial court's judgment ordering plaintiff's reinstatement as a county Department of Social Services employee with back pay and restored benefits because plaintiff had not been given a written statement of the specific reason for her dismissal and a written statement informing her of her appeal rights.

APPEAL by defendant from *Seay, Judge*. Judgment entered 20 May 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 May 1989.

This is a proceeding pursuant to G.S. Chapter 126, State Personnel System, wherein plaintiff, a local employee, seeks reinstatement to her former position with the Forsyth County Department of Social Services, compensation for back pay and full benefits, and attorney's fees. The State Personnel Commission [hereinafter the Commission] adopted "the findings of fact and conclusions of the Hearing Officer as its own." The Commission's findings, except where quoted, are summarized as follows:

After more than nine years of employment with defendant, plaintiff was dismissed on 15 December 1982. On 28 December 1982, plaintiff filed an appeal with the Commission alleging that she had been dismissed without just cause. On 21 February 1983, plaintiff filed an additional letter with the Commission alleging that she had been dismissed without procedural just cause because she was not furnished with a written statement by defendant setting forth the specific reasons for her dismissal and informing her of "her appeal rights as required by the State Personnel Act." Plaintiff "was, apparently, dismissed for inadequate performance of duties although she was never furnished with a written statement setting forth specific acts or omissions that were the reasons for her dismissal and had never been formally warned about inadequate performance of duties." Plaintiff's appeal was placed on the Commission's "inactive status" while she pursued her action in superior court, but her appeal was never dismissed by the Commission. On 23 December 1985, defendant's motion to dismiss plaintiff's appeal for failure to timely file her appeal was denied by the Commission's Hearing Officer, and a hearing on plaintiff's appeal was scheduled for 14 August 1986. At the hearing, defendant moved to dismiss plaintiff's appeal for lack of jurisdiction, contending plaintiff had not exhausted her remedies under Forsyth County's Grievance Procedure. This motion was denied. The Commission entered a recommendation, pursuant to G.S. 126-37, that:

1. Petitioner be reinstated to Respondent's employment in a position of standing equal to the position she held when she was dismissed from Respondent's employment on December 15, 1982.

2. Petitioner be awarded back pay and full benefits up to the time of her reinstatement less any pay received from other employment during that time period.

3. Petitioner be awarded reasonable attorney's fees.

After the decision of the Commission was made, defendant did not implement any of the advisory recommendations. Subsequently, plaintiff, pursuant to G.S. 126-37, filed this proceeding in superior court, stating in her complaint that she "is dissatisfied with the action taken by defendants pursuant to the decision of the Commission and because of that dissatisfaction brings this action."

On 20 May 1988, Superior Court Judge Seay made findings of fact and conclusions of law and entered a judgment ordering plaintiff to be reinstated to her position, awarding plaintiff back pay and attorney's fees, and restoring plaintiff's benefits as though she had continued in defendant's employment. Defendant appealed.

Gary D. Henderson and Robert E. Winfrey for plaintiff, appellee.

Bruce E. Colvin for defendant, appellant.

HEDRICK, Chief Judge.

G.S. 126-37 in pertinent part provides:

> (a) . . . The decisions of the State Personnel Commission shall be binding in appeals of local employees subject to this Chapter if the Commission finds that the employee has been subjected to discrimination prohibited by Article 6 of this Chapter or in any case where a binding decision is required by applicable federal standards. *However, in all other local employee appeals, the decisions of the State Personnel Commission shall be advisory to the local appointing authority.* (Emphasis added).
>
> (b) An action brought in superior court by an employee who is dissatisfied with an advisory decision of the State Personnel Commission or with the action taken by the local appointing authority pursuant to the decision shall be heard upon the record and not as a trial de novo. In such an action brought by a local employee under this section, the defendant shall be the local appointing authority. If [the] superior court affirms the decision of the Commission, the decision of [the] superior court shall be binding on the local appointing authority.

This statute creates a cause of action, a claim for relief, for certain employees of local governmental agencies. This statute does not provide a means by which an employee can obtain appellate

review of the decision of the Commission. Rather this statute creates an action which is tried in the superior court on the record developed in the proceedings before the Commission. The judge of the superior court must make findings of fact, draw conclusions of law therefrom and enter the judgment as provided in G.S. 1A-1, Rule 52. Since the action in superior court is heard "upon the record," it is critical to all parties that the record made by the Commission be as complete as possible. Our review is the same as in an appeal from any civil action tried in the superior or district courts.

By Assignments of Error Nos. 6 and 7, based on numerous exceptions noted in the findings and conclusions made by Judge Seay, defendant contends the trial court erred "in its findings and conclusions that it had jurisdiction to hear the Plaintiff-Appellee's purported appeal" and in denying defendant's "motions to dismiss and for summary judgment."

G.S. 126-5(a) provides:

The provisions of this Chapter shall apply to:

(1) All State employees not herein exempt, and

(2) To all employees of area mental health, mental retardation, substance abuse authorities, and to employees of local social services departments, public health departments, and local emergency management agencies that receive federal grant-in-aid funds; and the provision of this Chapter may apply to such other county employees as the several boards of county commissioners may from time to time determine.

It is apparent from the findings and conclusions and the judgment entered in the superior court that plaintiff and defendant were both subject to the State Personnel Act as employees of the Department of Social Services for Forsyth County.

From the record, Judge Seay made the following critical findings:

1. That the parties are properly before the Court and the Court has jurisdiction of the person and subject matter.

2. On December 28, 1982, Plaintiff Mitchell filed an appeal with the State Personnel Commission alleging, in essence, that she had been dismissed from defendant's employment, effective December 15, 1982, without just cause.

3. Plaintiff Mitchell had been issued a letter dated December 6, 1982, from Katherine E. Anderson, Defendant's Program Supervisor for Intake Income Maintenance, in which Mrs. Anderson concurred with an earlier recommendation from Barbara Fulp, Plaintiff's immmediate [sic] supervisor at the time, to dismiss Plaintiff from Defendant's employment, effective December 15, 1982.

4. Plaintiff sought to continue her employment with Defendant and reported for work on December 16, 1982, but was not allowed to continue in employment. Plaintiff's last actual day of work for Defendant was December 15, 1982. Plaintiff, was in fact, dismissed from Defendant's employment on December 15, 1982.

5. Prior to that time Plaintiff had been continuously employed by the Defendant for over nine years during which she had never been formally disciplined pursuant to the State Personnel Act or the *Local Government Personnel Manual.*

6. Plaintiff was never furnished with a written statement setting forth specific acts or omissions that were the reasons for her dismissal and had never been formally warned about inadequate performance of duties. Defendant also failed to furnish Plaintiff with a written statement informing her of her appeal rights.

7. Plaintiff's appeal was placed on the State Personnel Commission's inactive status for a period of time which Plaintiff pursued her action in Superior Court of Forsyth County, but the State Personnel Commission appeal has never been dismissed. The appeal was subsequently reactivated.

8. On December 25, 1985, Defendant moved to dismiss Plaintiff's appeal for failure to file her appeal in a timely manner. The motion was denied by Mr. Joseph Totten, then Hearing Officer for the State Personnel Commission, and the matter was scheduled for hearing about eight months later.

9. On the day of the hearing Defendant renewed its motion to dismiss Plaintiff's appeal for lack of jurisdiction, specifically contending that Plaintiff Mitchell had not shown that she had actually been dismissed from employment and that she had not exhausted her remedies as far as the County's Grievance Procedure was concerned.

10. Defendant elected not to present a case at the hearing; therefore, no evidence has been introduced on behalf of the Defendant.

[1] It is noted that defendant excepted to seven of the ten findings of fact listed above. G.S. 126-37(b) clearly gives the superior court jurisdiction to hear "[a]n action" filed in the superior court by a local employee who is "dissatisfied . . . with the action taken by the local appointing authority." The record discloses that plaintiff filed her appeal with the Commission by letter on 28 December 1982. After a careful review of the testimony and the evidence in the record, it is clear the record supports each of the findings of fact of the superior court excepted to by defendant. We note that counsel for defendant, Mr. Bruce Colvin of the Office of Forsyth County Attorney, was present at the hearing before Hearing Officer William Guy when plaintiff testified, but neither offered evidence nor cross-examined plaintiff. We hold, therefore, the superior court did have subject matter jurisdiction to hear plaintiff's claim filed pursuant to G.S. 126-37, and the trial court properly denied defendant's motion to dismiss and motion for summary judgment.

[2] By Assignment of Error No. 8, purportedly based on the same exceptions as Assignments of Error Nos. 6 and 7, defendant engages in a frivolous argument that plaintiff "did not rebut any of the many non-discriminatory reasons given by [defendant] for not implementing the advisory recommendations directed to the Department of Social Service [sic] by the State Personnel Commission." The record before us demonstrates defendant's defiant attitude with respect to plaintiff's claim as a permanent employee of the Forsyth County Department of Social Services. We hold the critical findings and conclusions made by Judge Seay are supported by the record, and the judgment appealed from will be affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

BRUCE STANCIL, PLAINTIFF v. HOWARD STANCIL, DEFENDANT

No. 887SC975

(Filed 20 June 1989)

Corporations § 18— oral agreement for repurchase of stock—statute of frauds inapplicable—summary judgment inappropriate

The trial court erred in entering summary judgment for defendant in plaintiff's action to compel defendant to reconvey his stock in a closely-held corporation to plaintiff pursuant to their alleged oral agreement, since the issues of whether the repurchase provision existed and whether defendant paid the full purchase price of the stock were disputes as to material facts; the determination of the facts turned on the credibility of the witnesses, thus making summary judgment inappropriate; and N.C.G.S. § 25-8-319, the statute of frauds provision which requires that a contract for the sale of securities be evidenced by a writing, was inapplicable, as the shares of plaintiff's corporation were not "securities."

APPEAL by plaintiff from *Watts, Thomas S., Judge.* Order entered 13 June 1988 in Superior Court, WILSON County. Heard in the Court of Appeals 23 March 1989.

This is a civil action in which plaintiff, shareholder of fifty percent of the stock in a close corporation, seeks to compel defendant, owner of the other fifty percent of the stock, to reconvey his stock to plaintiff pursuant to their alleged oral agreement.

Lee, Reece & Weaver, by W. Earl Taylor, Jr. and Cyrus F. Lee, and Lane & Boyette, by Wiley L. Lane, Jr., for plaintiff-appellant.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford, for defendant-appellee.

JOHNSON, Judge.

The evidence contained in the record on appeal of this matter tends to show the following: Plaintiff, Bruce Stancil, and his brother, defendant Howard Stancil, each own fifty percent of the 25,000 shares of stock of Bruce Stancil Refrigeration, Inc., a North Carolina close corporation. Bruce Stancil started the business in the 1960's and incorporated it in 1973. In 1980, defendant Howard Stan-

cil became associated with the corporation, working in the office. At that time the parties also orally agreed that defendant would purchase a fifty percent interest in the business for $35,000. Relations between the brothers deteriorated, and in 1984 defendant quit working at the corporation.

This action, instituted by plaintiff on 29 October 1986, is one of four civil actions between the parties arising out of disputes concerning the corporation. In this action, plaintiff alleges that one of the terms of his oral agreement to sell stock to defendant was that plaintiff would have the right to repurchase defendant's interest in the corporation at the price of $35,000 in the event that defendant did not, or could not, satisfactorily perform his duties as office manager and bookkeeper of the business; or if defendant left the company and no longer worked there; or if the parties became unable to work together in an agreeable manner. Plaintiff sues to compel specific performance of this alleged contract. Plaintiff claims in his affidavit to have written a memorandum of the contract after it was agreed upon, which he claims both parties signed. He alleges that the writing has been lost or misplaced.

On 24 May 1988, defendant moved for summary judgment. On 27 May 1988, he filed a motion to amend his answer and a motion for judgment on the pleadings. On 13 June 1988, the trial court entered an order allowing defendant to amend his answer to raise the affirmative defense that the alleged oral agreement is unenforceable because it fails to satisfy the requirement of the statute of frauds provision, G.S. sec. 25-8-319, that sales of securities be evidenced by a writing. On the same date, the court granted defendant's motion for summary judgment, and plaintiff gave notice of appeal from the order.

Plaintiff's sole contention on appeal is that the trial court erred in granting defendant's motion for summary judgment and concluding that defendant is entitled to judgment as a matter of law.

The granting of summary judgment is appropriate only 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. sec. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In ruling on this motion, the court must consider the evidence in the light most favorable to the nonmovant, *Durham v. Vine*,

40 N.C. App. 564, 253 S.E. 2d 316 (1979), and give to that party the benefit of all inferences which may reasonably be drawn in his favor. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975).

Our review of the record which was before the trial court in ruling on defendant's motion for summary judgment reveals that the parties agree that they had an oral agreement whereby defendant was to purchase a one-half interest in the corporation for $35,000. The parties disagree about other relevant facts. Plaintiff claims that defendant has only paid him $20,000 and defendant states that he has paid the full amount. Also, defendant contends that there was no provision for plaintiff to repurchase the stock as outlined above. These issues of whether the repurchase provision existed and whether defendant paid the full purchase price of the stock are certainly disputes as to material facts. Summary judgment is an extreme remedy and is appropriate only when the truth is quite clear. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). When the determination of a material fact turns on the credibility of witnesses, as here, summary judgment is improper. *Commercial Credit Corp. v. McCorkle*, 19 N.C. App. 397, 198 S.E. 2d 736 (1973); *Lee, supra.*

In ruling on defendant's summary judgment motion, the question for the trial court was whether defendant had established a complete defense to plaintiff's claim, thereby making summary judgment appropriate. *Ballinger v. North Carolina Dep't of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982), *disc. rev. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983).

Defendant argues in his brief that he has a complete defense in G.S. sec. 25-8-319, the statute of frauds provision which requires that a contract for the sale of securities be evidenced by a writing. Defendant urges us to apply the rule of *Oakley v. Little*, 49 N.C. App. 650, 272 S.E. 2d 370 (1980). *Oakley* held that the plaintiff's failure to produce a writing sufficient to show a contract for the sale of shares of stock in a corporation was a complete defense pursuant to G.S. sec. 25-8-319(a). *Id.* We decline to follow *Oakley*, and believe, rather, that we are bound by the more recent Supreme Court decision of *Penley v. Penley*, 314 N.C. 1, 332 S.E. 2d 51 (1985). Before turning to the *Penley* decision, we note that approximately two years before *Penley*, our Supreme Court, in *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E. 2d 551 (1983), acknowledged the distinctions between publicly held corporations and close corpo-

rations. *See* Note, *Shareholder Agreements—Oral Agreements in Close Quarters—Penley v. Penley*, 22 Wake Forest L. Rev. 147 (1987). *Meiselman* recognized that "[c]lose corporations are often little more than incorporated partnerships." *Meiselman*, 309 N.C. at 288, 307 S.E. 2d at 557, *quoting* Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 Duke L.J. 128, 138 (1965) (citations omitted). In remanding the case for an evidentiary hearing to determine the "rights or interests" of the minority shareholder, the Court also stated that such corporations are often "based on personal relationships that give rise to certain 'reasonable expectations' on the part of those acquiring an interest in the close corporation." *Id.* at 289, 307 S.E. 2d at 558.

In the wake of *Meiselman*, the Court in *Penley* held that an oral agreement between a husband and wife, made prior to incorporation, to share equally in the close corporation, was enforceable on principles of simple contract law. The Court rejected, as too "narrow and inflexible," defendant's argument that plaintiff could not recover because the oral agreement must be considered to be a shareholders' agreement required to be in writing by G.S. sec. 55-73(b) of the Business Corporation Act. *Penley*, 314 N.C. at 23, 332 S.E. 2d at 64. The Court found that the statute was not plaintiff's exclusive legal remedy and that plaintiff's alternate theory based on contract law was proper. *Id.*

The decision of this Court in *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E. 2d 897 (1981) is also supportive of our position that the statute of frauds is not a bar to plaintiff's claim. In *Loy*, this Court held that plaintiff's claim that, prior to incorporation, defendants orally agreed to sell plaintiff a twenty-five percent interest in their close corporation was not barred by the absence of a writing. *Id.*

We believe that the reasoning of *Penley* and *Loy* is applicable to the instant case. As in *Penley*, the close corporation in the instant case involves family members. The record reveals that the brothers were quite informal in both the operation of the business and in their relationship as shareholders. Their company appeared to be little more than an "incorporated partnership." *Meiselman, supra.* We do not find it to be determinative that the agreement between the parties in the instant case occurred after incorporation, unlike the situations in *Penley* and *Loy*. Even though the

timing was different, the same dynamics of the close corporation existed.

We also reject defendant's contention that G.S. sec. 25-8-319 is applicable here. That provision provides in part the following:

> A contract for the sale of securities is not enforceable by way of action or defense unless
>
> (a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; . . .

The term "security" is defined in G.S. sec. 25-8-102(1)(a)(ii) as an instrument which "is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment." The official comment to this definition states that the term "security," for purposes of Article 8 of the Uniform Commercial Code, is intended to cover anything which either organized exchanges or "over-the-counter" markets would likely consider to be suitable for trading. Clearly, the shares of plaintiff's close corporation are not suitable for trading, and do not meet this definition of "security." Therefore, G.S. sec. 25-8-319 is inapplicable to the instant case.

In sum, we hold that the trial court erred in granting defendant's motion for summary judgment. Plaintiff's claim is not automatically barred by the absence of a writing. While we express no opinion as to whether the parties actually reached the agreement concerning a possible future repurchase of the stock as claimed by plaintiff, he has by way of deposition and affidavit at least created a genuine dispute as to this material fact. For the foregoing reasons, this case is reversed and remanded to the trial court for a trial on the merits.

Reversed and remanded.

Judges BECTON and ORR concur.

EARL SUNDERHAUS AND WIFE, MARDENE D. SUNDERHAUS v. BOARD OF ADJUSTMENT OF THE TOWN OF BILTMORE FOREST, AND THE TOWN OF BILTMORE FOREST

No. 8828SC1139

(Filed 20 June 1989)

1. **Municipal Corporations § 30.17— satellite dish—substantial installation work performed before ordinance enacted**

The trial court properly determined that plaintiffs had performed substantial work on the installation of a satellite dish by the time of enactment of a city zoning ordinance so as to exempt them from its requirements where plaintiffs had dug a trench and laid PVC pipe, thus expending a significant amount of the labor required to install the dish.

2. **Municipal Corporations § 30.8— installation of satellite dish—usual domestic use of residential property—no violation of ordinance**

The trial court properly concluded that plaintiff's satellite dish did not violate a city's zoning ordinance of 1942, since the ordinance required a permit for accessory uses but not the usual private and domestic uses of residential property, and the erection of a satellite dish for the reception of television signals is consistent with the usual domestic uses which homeowners make of their property.

APPEAL by defendants from *Claude S. Sitton, Judge.* Judgment entered 19 July 1988 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 20 April 1989.

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

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by O. E. Starnes and Michelle Rippon, for defendant-appellants.

BECTON, Judge.

Defendants, the Town of Biltmore Forest and its Board of Adjustment, appeal from a judgment vacating the Board's order that plaintiffs, Earl and Mardene Sunderhaus, remove a satellite-dish television antenna from the yard area of their home. We affirm.

Earl and Mardene Sunderhaus reside in the Town of Biltmore Forest (the Town). Their home is located in a Residence A District, a district zoned for single-family dwellings. Sometime prior to 18 October 1983, a trench was dug in the Sunderhauses' yard, and PVC pipe was placed in the trench. This work was done as part of the installation of a satellite-dish television antenna.

On 18 October 1983, the Town enacted a new zoning ordinance. Among other things, the ordinance said that "[n]o building or other structure shall be erected . . . until a certificate of zoning compliance shall have been issued by the Zoning Administrator." The ordinance defined a "structure" as "[a]nything constructed or erected, including but not limited to buildings, which requires location on the land or attachment to something having permanent location on the land."

During December 1983, plaintiffs finished erecting the satellite dish. This dish is a round, concave piece of sheet metal, nine feet in diameter. It is joined to an iron pipe, and the pipe is planted in a concrete bed two feet in diameter. An antenna wire, running through the PVC pipe, connects the dish to the house.

In February 1984, Robert Musselwhite, the Town's Zoning Administrator, wrote plaintiffs a letter telling them that the 1983 ordinance required the removal of their dish. The Sunderhauses appealed to the Board of Adjustment. At its meeting on 13 March 1984, the Board affirmed Mr. Musselwhite's decision and ordered plaintiffs to take down the dish.

Plaintiffs next petitioned the superior court for certiorari to review the Board's ruling. Plaintiffs and defendants submitted stipulated findings of fact to the judge. After reviewing these facts, the judge vacated the order of the Board and entered judgment for the Sunderhauses. Defendants appealed.

I

When a superior court reviews, on certiorari, an order of a board of adjustment, the court's function is to review the evidence contained in the record to determine whether the board has committed an error of law. *See Lee v. Bd. of Adjustment of Rocky Mount*, 226 N.C. 107, 109, 37 S.E. 2d 128, 130 (1946). Our review is of the superior court's conclusions upon those questions of law. *See Freewood Assocs., Ltd. v. Davie County Bd. of Adjustment*, 28 N.C. App. 717, 719, 222 S.E. 2d 910, 912 (1976), *disc. rev. denied*

and appeal dismissed, 290 N.C. 94, 225 S.E. 2d 323 (1976) (citing *In re Application of Campsites Unlimited, Inc.*, 287 N.C. 493, 498, 215 S.E. 2d 73, 76 (1975)).

The judge ruled that "the only effective ordinance governing the installation of the satellite dish is [a] 1942 ordinance of the Town," and that the Sunderhauses' dish did not violate that ordinance. The judge held the 1983 ordinance inapplicable on the ground that the Sunderhauses had completed "substantial work" toward the installation of their dish prior to the enactment of the 1983 ordinance.

The judge's conclusions present the two issues we consider on appeal. Our first inquiry is whether the judge correctly ruled that the Sunderhauses had performed substantial work by 18 October 1983, so as to exempt them from the requirements of the new ordinance. We next examine whether plaintiffs could put up a satellite dish consistent with the provisions of the 1942 ordinance.

A

[1] In cases involving building permits, North Carolina courts have held that the mere issuance of a permit does not create a vested right to build contrary to the provisions of a subsequently enacted zoning ordinance. *E.g.*, *Keiger v. Winston-Salem Bd. of Adjustment*, 281 N.C. 715, 719, 190 S.E. 2d 175, 178 (1972). If, however, the permittee, in good faith reliance upon the lawfully-issued permit, has commenced building, or has incurred substantial expenditures or contractual obligations in preparation for building, the permittee acquires a right to proceed with the construction. *See id.*; *Warner v. W. & O., Inc.*, 263 N.C. 37, 41, 138 S.E. 2d 782, 785 (1964); *Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E. 2d 904, 909 (1969); *see also Campsites*, 287 N.C. at 500-01, 215 S.E. 2d at 77. In *Campsites*, our Supreme Court held that a party may acquire a right to build without a permit if the good faith expenditures are made at a time when no permit is required. 287 N.C. at 501, 215 S.E. 2d at 78 (building-permit cases declared law applicable to "present case"). Likewise, a substantial expenditure or the commencement of building at a time when one zoning ordinance is in effect will serve to make the provisions of that ordinance applicable to the builder, notwithstanding the enactment of new regulations prior to the completion of the project.

To acquire a right to carry on construction, a property owner must make a substantial beginning toward the end result of the

project. *See* 82 Am. Jur. 2d *Zoning and Planning* Sec. 186 (1976); *Town of Hillsborough*, 276 N.C. at 54, 170 S.E. 2d at 909. When courts are called upon to consider what constitutes substantial work, the construction projects at issue are typically more ambitious than is the one involved here. We find no clear guidance from other cases to help us assess whether the excavation of a trench and the laying of PVC pipe is a "substantial" beginning toward the erection of a satellite dish. When a *building* is partially or fully constructed before the zoning changes take effect, courts have consistently held the new zoning regulations inapplicable. Annotation, *Retroactive Effect of Zoning Regulation, in Absence of Saving Clause, On Validly Issued Building Permit*, 49 A.L.R. 3d 13, 22 (1973). When only preliminary construction has been performed by the time of the new regulations, case results are more problematic. *See id.* and cases cited. Some courts have held that the builder has a right to proceed with the construction, while others hold that the new ordinance prevails. *Id.*

When we consider the relatively small scale of the project involved here, we hold that the trial judge correctly ruled that plaintiffs had completed substantial work toward the installation of their dish. A significant amount of the labor needed to install the dish was accomplished by the digging of the cable trench and by the laying of the PVC pipe. Therefore, the permissibility of this use of plaintiff's yard is determinable under the 1942 regulations.

B

[2] Defendants argue that the Sunderhauses violated the 1942 ordinance by erecting the dish. Article VII, Section 3 of that ordinance says this:

> No main or *accessory building or structure of any nature* may be erected *until* an application in writing has been made, the plans and specifications for such building or structure, in such detail as may be required by the Board of Adjustment, submitted to said Board, and a building permit therefor issued by said Board.

(Emphasis added.) Article II of the ordinance defines "[a]ccessory building or accessory use" as "a building or use subordinate to the main building or use and maintained for purposes customarily incidental to those of the main building." Defendants contend that "[u]nder this broad definition, a satellite dish would be included as

an 'accessory use.' " They also argue that the dish is a "structure" as specified in Article VII. Consequently, defendants claim, the 1942 ordinance required the Sunderhauses to obtain a permit from the Board prior to installing the dish.

The trial judge, however, concluded that "the satellite dish does not constitute a building or use as that term is used in the 1942 ordinance." In our view, the judge's conclusion is correct.

Article IV of the ordinance grants the following exemption to the permit requirement of Article VII:

> USES IN RESIDENCE DISTRICTS
>
> Section 1. *Uses permitted and for which special permission is not required.* In the Residence A, A-1 and A-2 Districts, no new building or structure, and no alteration, enlargement or extension of any existing building or structure, shall be designed, arranged or constructed, and no land, building or structure or any part thereof, shall be used except for the following purpose:
>
> . . .
>
> (b) Except as hereinafter otherwise provided, the usual private and domestic outbuildings and uses . . .

Construing Articles IV and VII together, the import of the 1942 ordinance is clear: accessory uses require permission of the Board; "the usual private and domestic . . . uses" of residential property, however, do not necessitate a permit. Perforce, the judge's conclusion that the satellite dish constituted neither a "building or use," as those terms are used in the ordinance, was a conclusion that the Sunderhauses had engaged in a "usual private and domestic . . . use" of their property.

Our courts have long recognized that "[a] zoning ordinance . . . is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use." *In re Application of Rea Constr. Co.*, 272 N.C. 715, 718, 158 S.E. 2d 887, 890 (1968) (citation omitted). We agree with plaintiffs that "[i]n today's society the reception of television signals is a general and expected use of residential property." Whether a satellite dish is, in fact, a "structure" is not, we think, of critical importance. Article VII's prohibition of the erection, without Board permission, of "accessory building[s]

or structure[s] *of any nature*" (emphasis added) cannot mean that a permit is needed to put up *any and all* accessory structures, since Article IV plainly exempts "outbuildings" from the permit requirement.

When we construe the language of Article IV in a manner favoring the free use of private property, we hold that the exemptions delineated in that Article are broad enough to allow for the erection of a satellite-dish television receiver. Such use of a residential property is, in our view, consistent with the usual domestic uses that homeowners make of their property, i.e., the enjoyment of television in one's home. As with any other legislative enactment, "[a] zoning ordinance . . . must be construed so as to ascertain and effectuate the intent of the legislative body that adopted the ordinance." *Id.* (citation omitted). Article IV's allowances for the usual private and domestic pursuits of home ownership do not permit us to say that a satellite dish runs counter to "the original intent of the body" that enacted the ordinance. *Farr v. Bd. of Adjustment of Rocky Mount*, 318 N.C. 493, 498, 349 S.E. 2d 576, 579 (1986).

We hold, therefore, that the judge properly concluded that the Sunderhauses' dish antenna did not violate the Town's ordinance of 1942.

II

For the reasons we have stated above, the judgment of the trial court is

Affirmed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. ANGELO N. LYNCH

No. 887SC1062

(Filed 20 June 1989)

1. **Searches and Seizures § 43— evidence seized from person—motion to suppress—time for making**

The trial court could properly summarily deny defendant's motion to suppress evidence seized from his person, since a motion to suppress must be made prior to trial, but defendant failed to make his motion, not only prior to trial, but prior to admission of the evidence.

2. **Arrest and Bail § 6.2— resisting public officer—sufficiency of evidence**

Evidence was sufficient to sustain defendant's conviction for resisting a public officer where it tended to show that an officer mistakenly believed defendant to be a person for whom arrest warrants were outstanding; pictures of that person and defendant showed that they were sufficiently similar in appearance that the officer's mistake was not unreasonable; the officers stopped defendant's vehicle to ascertain his identity; the officers were lawfully discharging a duty of their office when they asked defendant to identify himself; once they did so, defendant attempted to flee; because defendant had not identified himself, the officers had no choice but to apprehend him in order to ascertain his identity; and defendant continued to struggle after the officers apprehended him.

APPEAL by defendant from *Brown (Frank R.), Judge.* Judgments entered 26 April 1988 in Superior Court, NASH County. Heard in the Court of Appeals 12 April 1989.

Defendant was tried and convicted of possession with intent to sell or deliver marijuana under G.S. 90-95(a)(1) and resisting public officers in the discharge of their duties under G.S. 14-223.

The State's evidence tended to show the following: On 31 December 1987, Officers Pipkin, Reams, and Pollard of the Rocky Mount Police Department were on patrol. The officers were riding in an unmarked car and were dressed in plain clothes. At approximately 5:30 P.M., the officers saw defendant standing on a street corner. Officer Pipkin mistakenly believed that defendant was Law-

rence Branch. Officer Pipkin had warrants to arrest Branch for sale or delivery of cocaine. The officers circled around the block and returned to the corner where defendant had been standing. At that time, defendant had entered an automobile. The officers stopped the vehicle and Officer Pipkin approached the car, identified himself as a police officer, and asked defendant to identify himself. Defendant did not respond, jumped out of the car, and attempted to flee. The officers apprehended defendant and, after a brief struggle, took him into custody.

The officers initially arrested defendant for resisting public officers. After transporting defendant to the police station, Officer Reams noticed what appeared to be an envelope in defendant's mouth. With assistance from Officer Pipkin, Reams forcibly extracted seven small envelopes containing marijuana from defendant's mouth. At that time, the officers charged defendant with possession of marijuana with intent to sell or deliver.

At the close of the State's evidence, defendant moved to suppress the marijuana seized from his person and to dismiss the charges against him. The trial court denied defendant's motions and defendant presented no evidence. From judgments imposing concurrent sentences of four years for possession with intent to sell or deliver and six months for resisting a public officer, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James P. Erwin, Jr., for the State.

Terry W. Alford for defendant-appellant.

PARKER, Judge.

Defendant brings forward five assignments of error. Defendant's first three assignments of error are directed to the admission into evidence of the marijuana seized from his person. Defendant contends that the evidence was inadmissible because (i) the initial stop of defendant's vehicle was unconstitutional, (ii) defendant's arrest was unconstitutional, and (iii) the search of defendant's person and the seizure were unconstitutional in that they were the products of the illegal detention. Defendant's fourth assignment of error is that the trial court erred in denying his motion to dismiss the charges against him. His fifth assignment of error is that the trial court erred in accepting the verdicts of the jury.

[1] By his first three assignments of error, defendant challenges the admissibility of evidence on the grounds that it was obtained in violation of his constitutional rights. The exclusive method of making such a challenge at trial is by a motion to suppress made in compliance with the requirements of Chapter 15A of the General Statutes. *State v. Harris*, 71 N.C. App. 141, 142, 321 S.E. 2d 480, 482 (1984). In this case, the trial court summarily denied defendant's motion to suppress.

Subject to well-defined exceptions, a motion to suppress must be made prior to trial. G.S. 15A-975. Defendant has not shown that he comes within an exception to the general rule, and he not only failed to make his motion prior to trial but also failed to make it before the evidence was admitted. Because defendant's motion was not timely, the trial court could properly summarily deny the motion. *State v. Satterfield*, 300 N.C. 621, 625, 268 S.E. 2d 510, 514 (1980). Failure to make a proper motion to suppress constitutes a waiver of the right to challenge the admissibility of evidence on constitutional grounds. *Id.* at 624, 268 S.E. 2d at 513.

[2] Although defendant has waived his right to challenge the admissibility of the evidence that was seized from his person, we must nevertheless determine whether defendant's detention was illegal. Defendant's fourth assignment of error raises the issue of whether the trial court erred in failing to dismiss the charge of resisting a public officer. If the officers in this case acted illegally, then defendant was entitled to resist them and the motion to dismiss the charge should have been granted. *State v. McGowan*, 243 N.C. 431, 90 S.E. 2d 703 (1956); *State v. Hewson*, 88 N.C. App. 128, 362 S.E. 2d 574 (1987).

Defendant contends that his arrest was illegal because the officers attempted to arrest him under a warrant for the arrest of another individual and there was no probable cause to arrest defendant. The conduct proscribed under G.S. 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties. The indictment in this case alleges that defendant attempted to run from and struggled with the officers while they were attempting to ascertain defendant's identity. Thus, defendant's conviction may be based upon his conduct prior to the time of his actual arrest. *Cf. State v. Davis*, 90 N.C. App. 185, 190, 368 S.E. 2d 52, 56 (1988) (dismissal required where indictment alleged post-arrest resistance and evi-

dence showed pre-arrest resistance). Therefore, we must examine the officers' conduct from the moment they first stopped defendant's vehicle.

Defendant contends that the initial stop of his vehicle was illegal. The officers stopped the vehicle for the purpose of ascertaining defendant's identity. A brief detention of an individual for this purpose is not an arrest but is, however, considered a seizure of the person subject to the requirements of the fourth amendment to the United States Constitution. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979). The fourth amendment requires that, in order to detain an individual, the police must have a reasonable suspicion of criminal activity based upon known and objective facts. *Id. See also State v. Williams*, 87 N.C. App. 261, 360 S.E. 2d 500 (1987). The suspicion need not concern ongoing criminal activity, but may relate to the individual's involvement in a past crime. *United States v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675, 680, 83 L.Ed. 2d 604, 612 (1985).

In this case, Officer Pipkin testified that he mistakenly believed that defendant was another individual for whom arrest warrants had been issued. Pictures of defendant and the other individual show that they are sufficiently similar in appearance that the officer's mistake was not unreasonable. The United States Supreme Court has held that an arrest based upon a reasonable mistake as to the arrested individual's identity is valid. *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed. 2d 484 (1971). Under the facts of this case, we need not decide whether the officer's initial mistake justified an arrest; it was at least sufficient to establish a reasonable basis to stop defendant and require him to identify himself. When an officer is unsure of the identity of a suspect, he must take reasonable steps to confirm the identity of the individual under suspicion. *United States v. Glover*, 725 F. 2d 120, 123 (D.C. Cir.), *cert. denied*, 466 U.S. 905, 104 S.Ct. 1682, 80 L.Ed. 2d 157 (1984). *See also Robinson v. City of Winston-Salem*, 34 N.C. App. 401, 406-07, 238 S.E. 2d 628, 631 (1977) (same duty imposed upon officers in civil action for false imprisonment).

In the present case, the officers were lawfully discharging a duty of their office when they asked defendant to identify himself. Once they did so, defendant attempted to flee. Because defendant had not identified himself, the officers had no choice but to apprehend him in order to ascertain his identity. Defendant continued

to refuse to identify himself after his arrest, and the officers testified that they still believed him to be the other individual up to the time that they discovered drugs on his person.

Defendant's reliance on *State v. Williams*, 32 N.C. App. 204, 231 S.E. 2d 282, *appeal dismissed*, 292 N.C. 470, 233 S.E. 2d 924 (1977), is misplaced. In *Williams*, this Court held that a defendant's flight from an unlawful attempt to arrest him was justified and could not be considered as a circumstance to establish probable cause for the arrest. *Id.* at 208, 231 S.E. 2d at 284-85. In this case, however, defendant fled from a lawful investigatory stop. Such flight may provide probable cause to arrest an individual for violation of G.S. 14-223. *See State v. McNeill*, 54 N.C. App. 454, 456, 283 S.E. 2d 565, 567 (1981).

We need not determine whether mere flight after an officer's request for identification is sufficient to sustain a conviction under G.S. 14-223. The State's evidence in this case shows that defendant continued to struggle after the officers apprehended him. For the purpose of ruling on a motion to dismiss, this evidence must be viewed in the light most favorable to the State. *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). We find the evidence in this case to be sufficient to sustain defendant's conviction for resisting a public officer.

Defendant also contends that the trial court erred in failing to dismiss the charge of possession of marijuana with intent to sell or deliver. This contention is based upon defendant's prior arguments concerning the admissibility of the drugs seized from his person. Having held that defendant waived his right to challenge the admissibility of the evidence, we find no error in the trial court's denial of defendant's motion to dismiss the charge.

Defendant offers no additional arguments in support of his fifth assignment of error. Accordingly, the assignment is overruled.

For the foregoing reasons, we find that defendant's trial was free of reversible error.

No error.

Judges PHILLIPS and COZORT concur.

FRANCES F. COOPER, D/B/A PROMISE LAND REALTY v. MARWIL, INC., MARY D. McNEILL, AND WILLIAM F. GASKINS, JR.

No. 883SC1099

(Filed 20 June 1989)

1. **Brokers and Factors § 1.1; Corporations § 10— extension of real estate listing contract—power of secretary-treasurer to bind corporation**

There was no merit to defendants' argument that an extension of a real estate listing contract was not binding on defendant corporation, since the original contract was executed by one defendant acting for and on behalf of the corporation; from its plain language, the extension merely extended the original contract and incorporated its terms; the property which was to be sold was owned by the corporation; the only inference which could be drawn was that when the other defendant signed the extension, she was acting in her capacity as secretary-treasurer and intended to bind the corporation; and the corporation benefited from the services rendered by plaintiff in locating a purchaser for the property and was thus estopped to deny that it was a party to the agreement as extended.

2. **Brokers and Factors § 6— amount of commission—parol evidence inadmissible**

The trial court properly entered summary judgment for plaintiff on her claim for real estate commissions where the facts taken in the light most favorable to defendant showed that on 21 December 1987, the parties executed an extension of the exclusive listing agreement incorporating the terms of the original listing agreement, including a 6% commission for plaintiff; defendants sold the property on 5 February 1988, during the period of the extended exclusive listing contract; and absent evidence of fraud or mistake, the parol evidence rule would prevent defendants from introducing the negotiations occurring during September 1987 in which plaintiff allegedly agreed to accept a $50,000 commission.

APPEAL by defendants from *Reid (David E., Jr.), Judge*. Judgment entered 5 August 1988 in Superior Court, CARTERET County. Heard in the Court of Appeals 19 April 1989.

In this civil action, plaintiff, a real estate broker doing business in Carteret County, North Carolina, seeks to recover commissions on the sale of real property. Defendants William F. Gaskins, Jr. and Mary D. McNeill are the sole stockholders in defendant corporation Marwil, Inc.

On 22 June 1987 defendant corporation entered into an exclusive listing agreement with plaintiff to sell a tract of defendant corporation's land on which was located a campground and marina. Under the terms of the agreement plaintiff had "the exclusive right, for a period of six months, to and including 21 December 1987, to sell the said property for the price of $4 million . . . or any other price or form of payment suitable to [defendant]." The agreement further provided that if plaintiff "[produced] a purchaser who is ready, willing and able to purchase the property on the terms described above or if the property is sold or exchanged by [plaintiff], [defendant], or by any other party before the expiration of this listing, on any terms acceptable to [defendant], or within 60 days after the expiration of this agreement to any party with whom [plaintiff] or any member of the Multiple Listing Service has negotiated as a prospective purchaser, [defendant agrees] to pay [plaintiff] a fee of 6%."

Plaintiff procured a prospective purchaser, Fred M. Bunn, and negotiations for the property began. In September 1987 defendants and plaintiff made an oral agreement that plaintiff would accept $50,000.00 in lieu of her commission in exchange for which defendant corporation would accept Mr. Bunn's offer of $3,150,000.00 for its property. Subsequent to this oral agreement, defendant corporation and Mr. Bunn entered into an option to purchase defendants' property. On 21 December 1987 the option agreement between defendant corporation and Mr. Bunn was extended through 22 January 1988. Also on 21 December 1987 defendants extended the exclusive listing agreement with plaintiff.

On 22 January 1988, Mr. Bunn exercised his option to purchase the property. The transaction closed on 5 February 1988. At closing defendants refused to pay plaintiff her 6% commission claiming that she had orally agreed to accept $50,000.00. Plaintiff filed this civil action to recover her commission. The individual defendants signed an agreement to be individually liable for any judgment rendered in the cause. Plaintiff moved for summary judgment, and after hearing on the motion, the court entered summary judgment in plaintiff's favor. Defendants appeal.

Bennett, McConkey, Thompson, Marquardt & Wallace, P.A., by Thomas S. Bennett, for plaintiff-appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for defendant-appellants.

PARKER, Judge.

Defendants contend that the trial court erred in entering summary judgment for plaintiff for the reason that there was a genuine issue of material fact as to whether the parties agreed that plaintiff would receive a 6% commission or $50,000.00 for procuring a purchaser. Defendants argue that after entering into the exclusive listing contract the parties modified their written contract by a parol agreement. Defendants also assert that the 21 December 1987 extension was not binding on the corporation because it was signed by Mary D. McNeill without any indication that it was signed in her corporate capacity.

Plaintiff does not deny that she and defendants discussed her accepting $50,000.00 in lieu of the commission specified in the June 1987 contract. Plaintiff argues that evidence of the oral agreement is inadmissible under the parol evidence rule in that the parties executed a written agreement on 21 December 1987 which renewed and extended the terms of the original contract without incorporating the intervening oral agreement.

[1] We first consider defendants' argument that the 21 December 1987 extension was not binding on the corporation. On that date defendants Gaskins and McNeill were the sole shareholders and officers of defendant corporation. Defendant Gaskins was president; defendant McNeill was secretary-treasurer. According to plaintiff's uncontradicted affidavit, the parties met at First Citizens Bank & Trust Company in Atlantic Beach, North Carolina. In the presence of both defendant Gaskins and defendant McNeill, plaintiff requested that the exclusive right of sale contract be extended, and defendant McNeill and plaintiff executed the extension at the bottom of the original contract. This extension stated: "This contract is hereby renewed and extended upon the same exclusive right-to-sell terms and conditions for a period of 180 days from 21 December 1987."

An agreement extending the time for performance of a contract merely supplements the original agreement; it does not supersede or change the terms in other respects. 17 Am. Jur.

2d *Contracts* § 471 (1964). Furthermore, a contract need not be signed in the name of the corporation to bind it, if that was the intention of the parties. 18B Am. Jur. 2d *Corporations* § 1668 (1985). In the present case there is no contention that the original contract was not executed by defendant Gaskins acting for and on behalf of the corporation. From its plain language, the extension merely extended the original contract and incorporated its terms. The property which was to be sold was owned by the corporation. Under these circumstances the only inference that can be drawn is that when defendant McNeill signed the extension she was acting in her capacity as secretary-treasurer and intended to bind the corporation. In *Fountain v. Lumber Co.*, 161 N.C. 35, 38, 76 S.E. 533, 535 (1912), our Supreme Court stated: "We think where the president deals directly in reference to his corporation's property, since he has no lawful right to deal with it individually, there should be a presumption that he acted lawfully, and in behalf of the corporation."

Finally, we note that the corporation benefited from the services rendered by plaintiff in locating a purchaser for the property. Having received this benefit with full knowledge of the extension of the exclusive listing contract, defendant corporation is estopped to deny that it is a party to the agreement as extended. *See Whitten v. AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E. 2d 891 (1977); *Brinson v. Supply Co.*, 219 N.C. 498, 14 S.E. 2d 505 (1941).

[2] We next address the effect, if any, of the oral modification on the written extension of the original exclusive listing contract. Defendants assert that the parties orally modified their original contract in September 1987 by defendant corporation agreeing to sell the land for $3,150,000.00 and plaintiff agreeing to accept a $50,000.00 commission. Thereafter on 22 September 1987 defendant corporation entered into a contract with Mr. Bunn whereby Mr. Bunn purchased an option on defendant's land. When defendant corporation executed the extension of the exclusive listing agreement on 21 December 1987, Mr. Bunn had not yet exercised his option to purchase the property, but had only purchased an extension of his option.

The rule in North Carolina is that when a written agreement is executed, all prior or contemporaneous agreements are merged so that the writing becomes the exclusive source of the parties' rights and obligations with regard to the transaction. *Oak Island*

Southwind Realty, Inc. v. Pruitt, 89 N.C. App. 471, 473, 366 S.E. 2d 489, 490 (1988); *see also Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953); *Realty, Inc. v. Coffey*, 41 N.C. App. 112, 115, 254 S.E. 2d 184, 186 (1979). Thereafter, no parol evidence of prior or contemporaneous conversations is admissible to contradict the provisions of the written instrument absent an allegation of fraud or mistake. *Neal v. Marrone*, 239 N.C. at 77, 79 S.E. 2d at 242; *Whitehurst v. FCX Fruit and Vegetable Service*, 224 N.C. 628, 32 S.E. 2d 34 (1944). *See also Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 464, 323 S.E. 2d 23, 25 (1984).

Defendants' answer alleges that plaintiff did not deal fairly with defendants, but defendants have failed to forecast evidence of mistake or fraud. Although defendants submitted the affidavit of defendant Gaskins in opposition to plaintiff's motion for summary judgment, the affidavit contains no evidence of fraud or mistake.

On appellate review of a summary judgment, the evidence must be viewed in the light most favorable to the non-movant. *Sharpe v. Quality Education, Inc.*, 59 N.C. App. 304, 307, 296 S.E. 2d 661, 662 (1982). A plaintiff as the moving party has the burden of proof and is entitled to summary judgment where (i) he establishes that all of the facts on all of the essential elements of his claim are in his favor and that there is no genuine issue of material fact with regard to any essential element of his claim and (ii) the opposing party fails to show in response that a genuine issue of material fact exists or an excuse for not so showing. *Development Corp. v. James*, 300 N.C. 631, 268 S.E. 2d 205 (1980).

In the present case the facts taken in the light most favorable to defendant show (i) that on 21 December 1987 the parties executed an extension of the exclusive listing agreement incorporating the terms of the original listing agreement, including a 6% commission for plaintiff, and (ii) that defendants sold the property on 5 February 1988, during the period of the extended exclusive listing contract. Absent evidence of fraud or mistake the parol evidence rule would prevent defendants from introducing the negotiations occurring during September 1987 in which plaintiff allegedly agreed to accept a $50,000.00 commission. On these facts there is no genuine issue as to defendants' obligation to pay plaintiff her 6% commission. The trial court therefore correctly granted plaintiff's motion for summary judgment.

Affirmed.

Judges PHILLIPS and COZORT concur.

O. C. MERRITT AND WIFE, GRACE MERRITT v. JAMES KNOX AND WIFE, LOUISE D. KNOX

No. 8810SC815

(Filed 20 June 1989)

Usury § 7— usurious interest—penalties barred by statute of limitations—recovery of legal rate

Where the 12% interest rate provided in a business property loan promissory note was usurious at the time the note was executed in 1977, and the forfeiture and double recovery penalties provided by N.C.G.S. § 24-2 for usury were barred by the statute of limitations, the holders of the note were entitled to recover interest at the legal rate set by N.C.G.S. § 24-1. Therefore, the holders are entitled to recover 6% interest from the date the note was executed in December 1977 until the legal rate was changed to 8% after the note matured by an amendment to N.C.G.S. § 24-1, effective 1 July 1980, and to recover 8% interest from 1 July 1980 until the judgment is satisfied.

APPEAL by defendants from *McLelland (D. Marsh), Judge.* Judgment entered 23 March 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 21 February 1989.

Richard C. Titus for plaintiff-appellees.

Joslin, Culbertson & Sedberry, by William Joslin, for defendant-appellants.

PARKER, Judge.

Defendants appeal from the entry of summary judgment for plaintiffs in their action to recover the amount due on a promissory note. Defendants do not contest their liability on the note. They contend that the trial court erred in enforcing the 12% interest rate provided in the note because the rate was usurious under the law in effect at the time the note was executed.

Defendants executed the note on 14 December 1977. The principal amount of the note was $20,000, it was due and payable one year from the date of execution, and it provided for interest at the rate of 12% per annum from the date of execution until paid. The note also provided for payment of attorney's fees in the amount of 15% of the balance due in an action to enforce the holder's rights upon default. Prior to the institution of this action, defendants had made payments on the note totalling $600. The trial court found that plaintiffs were entitled to recover the principal amount of $19,400 plus 12% interest on that amount up to the date of judgment. The trial court also awarded plaintiffs attorney's fees in the amount of 15% of the outstanding balance due pursuant to G.S. 6-21.2.

Defendants argue that the court erred in ordering payment of interest at that rate and in basing the award of attorney's fees upon that amount. Plaintiffs concede that the 12% interest rate cannot be enforced and both parties suggest that the balance due and attorney's fees should be based upon an annual interest rate of 10%; that rate being the maximum legal rate at the time of execution.

We agree that the trial court erred in enforcing the 12% interest rate. The note was executed on 14 December 1977. The applicable statute in effect on that date provided in pertinent part:

> Except as otherwise provided in this chapter or other applicable law, the parties to a loan, purchase money loan, advance, commitment for a loan or forbearance may contract in writing for the payment of interest not in excess of:
>
> . . . .
>
> (2) Ten percent (10%) per annum where the principal amount is one hundred thousand dollars ($100,000) or less and is a business property loan . . .

G.S. 24-1.1 (Supp. 1977). The note was secured by a second deed of trust and the proceeds were to be used for development of the property; thus, the loan was a "business property loan" as defined by the statute. *Id.* Accordingly, the 12% interest rate provided by the note was usurious. Subsequent changes in the law regarding interest rates could not validate the interest provision. *See Pond v. Horne*, 65 N.C. 84 (1871).

There are two statutory penalties for usury: (i) the entire amount of interest due is subject to forfeiture, and (ii) the debtor may recover twice the amount of interest paid. G.S. 24-2. The debtor may plead these remedies as counterclaims in an action to recover the debt. *Id.* Both remedies, however, are subject to a two-year statute of limitation. G.S. 1-53(2), (3). The statute runs from the date of payment for the double-recovery remedy, and from the date of the agreement for the forfeiture remedy. *Haanebrink v. Meyer*, 47 N.C. App. 646, 267 S.E. 2d 598 (1980). Under the facts of this case, defendants are barred by the statute from obtaining relief under G.S. 24-2.

Although the interest due on the note is not subject to forfeiture, the 12% rate cannot be enforced. While the underlying debt is not affected, usury invalidates the provisions of a note which provide for the payment of interest. *In re Castillian Apartments*, 281 N.C. 709, 712, 190 S.E. 2d 161, 162 (1972). Contracts prohibited by statute are void. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 536, 180 S.E. 2d 823, 831 (1971). Similarly, contract provisions in violation of a statute are contrary to public policy and will not be enforced. *Gore v. Ball, Inc.*, 279 N.C. 192, 203, 182 S.E. 2d 389, 395 (1971). Therefore, the trial court in this case erred in enforcing the 12% interest rate as provided in the note.

Plaintiffs are nonetheless entitled to some interest because the penalty of forfeiture is barred by the statute of limitation. Both parties contend that interest should be allowed at the rate of 10% because that was the maximum legal rate under the law in effect at the time the note was executed. We disagree.

The provision for interest in the note was illegal and void. Therefore, the note must be treated as if the parties had not specified any interest rate. Under such circumstances, the law will not imply the highest rate allowed by statute, but interest shall be at the legal or judgment rate. G.S. 24-5; G.S. 25-3-118(d). Thus, where the debtor of a usurious loan is not entitled to the benefit of the statutory penalties, he is liable for interest at the legal rate. *See Smith v. Bryant*, 209 N.C. 213, 183 S.E. 276 (1936). The legal rate of interest is set by statute. G.S. 24-1.

Since plaintiff is entitled to interest at the legal rate as provided by G.S. 24-1, an additional question arises under the facts of this case. The legal rate in effect at the time the note was executed was 6%. G.S. 24-1 (1965 & Supp. 1977). The legal rate

was changed to 8% by an amendment to G.S. 24-1 which became effective on 1 July 1980. 1979 N.C. Sess. Laws Ch. 1157, § 1. Thus, we must determine the correct interest rate to apply in this case.

The United States Court of Appeals for the Fourth Circuit faced a similar situation in *E.E.O.C. v. Liggett & Meyers Inc.*, 690 F. 2d 1072 (4th Cir. 1982), involving a damage award for violations of the Fair Labor Standards Act. The court held that the 8% legal rate provided by G.S. 24-1 applied to the total amount of damages even though some damages were incurred prior to the effective date of the amendment which changed the legal rate. *Id.* at 1074-75. The court relied on the legislature's intent that the date of judgment should control in determining which rate to apply. *Id.* (quoting 1979 N.C. Sess. Laws Ch. 1157, § 8, which provides: "This act shall not apply to judgments entered prior to July 1, 1980.").

In the present case, however, the principal amount of liability is not the result of a damage award but arises from the agreement between the parties. The majority rule appears to be that interest on a contractual obligation is determined by the law in effect at the time of the agreement, and changes in the legal rate will not be applied retroactively. Annotation, *Retrospective Application and Effect of Statutory Provision for Interest or Changed Rate of Interest*, 4 A.L.R. 2d 932, 934-39 (1949). Many jurisdictions have also held that interest for the time period after the maturity of a debt is in the nature of damages and, therefore, changes in the legal rate will be applied as of the dates the changes became effective. *Id.* at 941-44. *See, e.g., Rachlin & Co. v. Tra-Mar, Inc.*, 33 A.D. 2d 370, 375-76, 308 N.Y.S. 2d 153, 159 (1970).

We elect to follow the above-stated rules in this case. The initial provision for 12% interest being illegal and void, the legal rate then in effect, 6%, was implied by law. *See* G.S. 25-3-118(d). The note reached maturity on 14 December 1978, one year from the date of execution. Interest continued to run at the legal rate from that point onward. G.S. 24-5; G.S. 25-3-122(4). When interest is not made payable on the face of an instrument, it is implied by law as damages for the retention of the principal of the debt. *Craftique, Inc. v. Stevens and Co., Inc.*, 321 N.C. 564, 568, 364 S.E. 2d 129, 132 (1988). Therefore, the change in the legal rate effective 1 July 1980 will be applied as of that date.

Accordingly, the entry of summary judgment in favor of plaintiffs is affirmed, but the case is remanded, and the trial court is ordered to enter judgment awarding plaintiffs the principal sum of $19,400 plus interest at the rate of 6% from 14 December 1977 through 30 June 1980, and at the rate of 8% from 1 July 1980 until the judgment is satisfied. The trial court is also ordered to award attorney's fees based upon the balance due on the note as computed in accordance with this opinion.

Remanded for correction of judgment.

Judges BECTON and ORR concur.

NCNB NATIONAL BANK OF NORTH CAROLINA v. ROY GUTRIDGE AND WIFE, PEGGY S. GUTRIDGE

No. 8830SC1049

(Filed 20 June 1989)

1. **Bills and Notes § 20— signing of promissory note by husband— note guaranteed by wife—directed verdict for lender proper**

The trial court properly granted plaintiff's motion for directed verdict in its action to recover on a promissory note where there was uncontested evidence at trial that defendant husband signed a promissory note in the amount of $50,617.38 and that defendant wife guaranteed payment of the note.

2. **Negligence § 1.3— failure of lender to perfect security interest in vehicle—negligence claim by borrowers—no statutory basis**

The trial court properly dismissed defendants' counterclaim for plaintiff's alleged negligence in failing to perfect its security interest in a vehicle, since the purpose of the statutes upon which defendants relied, N.C.G.S. §§ 20-52, 20-52.1(c), and 20-58, is to protect lenders by providing a method for them to protect their security for motor vehicle loans, and the statutes do not provide a basis for negligence claims by borrowers.

APPEAL by defendants from *Hairston, Peter W., Judge.* Judgment entered 10 March 1988 in SWAIN County Superior Court. Heard in the Court of Appeals 17 April 1989.

Plaintiff brought this action against defendants to recover on a promissory note. Defendants filed a counterclaim seeking damages for plaintiff's failure to perfect its security interest in the collateral which secured the note.

Defendants contacted plaintiff bank about obtaining financing to purchase a trolley bus for use with their Cherokee, North Carolina campground business. Defendant Roy Gutridge executed a promissory note and security agreement in favor of plaintiff on 17 May 1984, and received a check payable to him and Trolley Works, Inc., a Florida corporation, in the amount of $48,500.00. Defendant Peggy Gutridge executed an agreement guaranteeing payment of the Roy Gutridge note. At trial defendant subsequently testified that plaintiff's agent told him that the bank would secure a security interest in the trolley, record its lien on the title, and hold the title until defendant repaid the loan in full. The loan officer then telephoned Trolley Works, Inc. and asked that the company note plaintiff's security interest on the title to the vehicle.

Defendant Roy Gutridge endorsed the check and mailed it to Trolley Works, Inc., but did not receive possession of the trolley. Defendants made several payments on the loan, but upon being informed by plaintiff that the lien on the title had not been perfected they travelled to Trolley Works' location in Florida. Defendants then learned that the trolley designated for them had been sold to a third party, and that the company was manufacturing another trolley for them, scheduled for delivery by 1 October 1984. Trolley Works ceased doing business prior to 1 October 1984.

Defendants ceased making payments due under the note, and plaintiff brought this action against them to recover the remaining sum of $50,136.50. Defendants filed a counterclaim seeking to recover damages for their losses allegedly caused by plaintiff's failure to perfect its security interest in the vehicle. Plaintiff moved for a directed verdict at the close of all the evidence. The trial court granted the motion, awarded plaintiff $50,136.50 with interest from the date of default, and dismissed defendants' counterclaim with prejudice.

McKeever, Edwards, Davis & Hays, P.A., by Fred H. Moody, Jr., for plaintiff-appellee.

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

WELLS, Judge.

I. PLAINTIFF'S CLAIM

[1] Defendants assign error to the trial court's granting plaintiff's motion for a directed verdict. In evaluating a motion for directed verdict, the non-movant's evidence must be taken as true and all inconsistencies in the evidence resolved in the non-movant's favor. *Morris v. Bruney*, 78 N.C. App. 668, 338 S.E. 2d 561 (1986). The standard is whether the evidence so considered is sufficient to submit the case to the jury. *Hitchcock v. Cullerton*, 82 N.C. App. 296, 346 S.E. 2d 215 (1986).

The evidence presented at trial to the effect that defendant Roy Gutridge signed a promissory note in the amount of $50,617.38 and that defendant Peggy Gutridge guaranteed payment of the note was uncontested. Defendant Roy Gutridge received a check for $48,500.00, and plaintiff paid $2,117.38 on his behalf for a single premium credit life insurance policy, thereby supplying the consideration for his promise. The note constituted a valid contract and plaintiff was entitled to recover damages following defendants' default.

Defendants contend that plaintiff is precluded from electing to proceed against Roy Gutridge on the promissory note because its own actions caused the loss of the collateral. The promissory note constituted a valid contract between the parties; the collateral served merely to secure the debtor's obligation under the note. In such a case, upon default the lender may proceed against the collateral or directly against the debtor on the note. *See, e.g., Langston v. Brown*, 260 N.C. 518, 133 S.E. 2d 180 (1963). This rule can be varied by agreement of the parties. To adopt the rule expounded by defendants, and preclude the lender from collecting the debt exclusively under the note, would undermine the validity of the underlying *contractual* obligation upon which any security agreement is based. The trial court properly granted plaintiff's motion for directed verdict on its claim and we overrule this assignment of error.

II. DEFENDANTS' COUNTERCLAIM

[2] Defendants also argue that the trial court erred in dismissing their counterclaim. They cite portions of the motor vehicles statute governing acquisition and transfer of title and perfecting security interests to support their contention that because the lienholder

controls the processes of perfecting its security interest and obtaining the certificate of title, it owes the debtor-purchaser a duty of care with regard to completing these matters. Statutory provisions relied on by defendants appear as follows:

> (a) Every owner of a vehicle subject to registration hereunder shall make application to the Division for the registration thereof and issuance of a certificate of title for such vehicle upon the appropriate form or forms furnished by the Division, ...
>
> (b) When such application refers to a new vehicle purchased from a manufacturer or dealer, such application shall be accompanied with a manufacturer's certificate of origin that is properly assigned to the applicant. If the new vehicle is acquired from a dealer or person located in another jurisdiction other than a manufacturer, the application shall be accompanied with such evidence of ownership as is required by the laws of that jurisdiction duly assigned by the disposer to the purchaser, or, if no such evidence of ownership be required by the laws of such other jurisdiction, a notarized bill of sale from the disposer.

N.C. Gen. Stat. § 20-52 (1983).

. . .

> (c) Upon sale of a new vehicle by a dealer to a consumer-purchaser, the dealer shall execute in the presence of a person authorized to administer oaths an assignment of the manufacturer's certificate of origin for the vehicle, including in such assignment the name and address of the transferee and no title to a new motor vehicle acquired by a dealer under the provisions of subsections (a) and (b) of this section shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.
>
> Any dealer transferring title to, or an interest in, a new vehicle shall deliver the manufacturer's certificate of origin duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the manufacturer's certificate of origin to the lienholder and the lienholder shall forthwith forward the manufacturer's certificate of origin together with the

> transferee's application for certificate of title and necessary fees to the Division. Any person who delivers or accepts a manufacturer's certificate of origin assigned in blank shall be guilty of a misdemeanor.

N.C. Gen. Stat. § 20-52.1(c) (1983).

. . .

> Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.
>
> (1) If the vehicle is not registered in this State, the application for notation of a security interest shall be the application for certificate of title provided for in G.S. 20-52.

N.C. Gen. Stat. § 20-58 (1983).

In order to prevail on a negligence claim a party must first show that the adversarial party owed him a duty of care. *Bolkhir v. North Carolina State University*, 321 N.C. 706, 365 S.E. 2d 898 (1988). Defendants' premise, that legislative enactments not specifically mentioning tortious conduct can nevertheless establish duties to act and standards of care, is correct. *See, e.g., Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967); *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E. 2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E. 2d 734 (1983). In determining whether portions of statutes are relevant to the existence of a duty of care, a court may consider whether the statute's purpose is to "protect a class of persons which includes the one whose interest is invaded, and . . . to protect the particular interest which is invaded . . . against the kind of harm which has resulted. . . ." *Hutchens, supra* (*quoting* Restatement (Second) of Torts § 286 (1965)).

We therefore consider the purpose of the statute in evaluating defendants' contention that it placed a particular duty of care on plaintiff. We are persuaded that the purpose of the provisions of the motor vehicles statute relied upon by defendants is to protect lenders, by providing a method for them to protect their security for motor vehicle loans. These provisions do not provide a basis for negligence claims by borrowers. Defendants could not establish the existence of a duty of care owed to them by plaintiff on the basis of these statutes; the trial court, therefore, properly granted plaintiff's motion for directed verdict and dismissed defendants' counterclaim.

We also reject defendants' argument that there existed a triable issue regarding which party agreed to assume responsibility for perfecting the security interest in the collateral. Even assuming that the parties did enter such an agreement obligating the bank to perfect its security interest, and the bank breached its agreement, this would not entitle defendants to recover on their counterclaim. Defendants were not injured by any such breach because they never acquired title to the vehicle. The agreement they alleged was that plaintiff would perfect its security interest once the collateral was acquired: not that it would obtain title to the vehicle on defendants' behalf.

We have considered defendants' other assignments of error, find them to be without merit, and overrule them.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

MOZELLE LEE EFFLER v. RICHARD D. PYLES AND LINDA L. PYLES

No. 8811SC891

(Filed 20 June 1989)

1. **Statute of Frauds § 5.1— promise to mother-in-law to pay debt—no promise to pay debt of another—no writing required**

In an action to recover damages for breach of an alleged oral agreement concerning the purchase of real property, the trial court correctly allowed testimony regarding defendant's oral promise to plaintiff where defendant promised *plaintiff* directly that he would make all the monthly payments on a mortgage note; defendant's agreement was not solely with his wife to pay off her debt to her mother, the plaintiff; defendant's promise to plaintiff was supported by independent consideration in that plaintiff pledged her own residence as collateral and obtained for defendant a $25,000 loan; and this constituted an original promise which was not subject to the writing requirement of N.C.G.S. § 22-1.

2. Contracts § 27— plaintiff obtaining loan for defendant—repayment promised by defendant—sufficiency of evidence of contract and breach

The trial court properly directed a verdict for plaintiff where her evidence was sufficient to permit the jury to find that she and defendant entered a contract wherein she agreed to obtain a loan on his behalf in exchange for his promise to repay the loan, and that defendant breached that agreement.

3. Quasi Contracts and Restitution § 1.2— loan to son-in-law—no benefit to wife—no recovery for unjust enrichment

The trial court properly entered summary judgment for defendant wife on plaintiff's claim for unjust enrichment where plaintiff failed to show that she conferred a benefit on defendant wife; defendant wife received title to the property in question from her husband; and though he had previously acquired his interest in the property with plaintiff's assistance, this did not satisfy plaintiff's burden of showing that she conferred a benefit directly on defendant wife.

APPEAL by defendant Richard Pyles and plaintiff from *Brewer, Coy E., Jr., Judge.* Judgment entered 31 March 1988 in LEE County Superior Court. Heard in the Court of Appeals 17 April 1989.

Plaintiff brought this action against defendants seeking damages and equitable remedies for the breach of an alleged oral agreement concerning the purchase of real property.

The evidence presented at trial tended to show that defendant Richard Pyles married plaintiff's daughter, Shirley, in 1976. The couple moved to Sanford, North Carolina, in March 1980 and lived with plaintiff. Plaintiff conveyed property located on Charlotte Avenue to her daughter on 5 December 1980, and on 5 August 1982 her daughter conveyed it to herself and Richard as tenants by the entireties. Richard purchased a small house and had it moved onto the property.

Richard and Shirley Pyles subsequently found a larger house in Sanford, located at 306 Cool Springs Road, and attempted to secure financing to purchase it. Plaintiff's evidence tended to show that Richard and Shirley Pyles asked her to co-sign a note with both of them and to pledge her own residence as collateral. In return for plaintiff's agreement to do these things, Richard and

Shirley promised to make all of the monthly payments on the note until it was paid in full, and to sell the Charlotte Avenue property and apply the proceeds to the balance of the note. Richard Pyles denied the existence of this agreement.

Plaintiff testified that she and her daughter went to Summit Savings & Loan to sign a note with Richard to obtain a $25,000.00 loan, but Richard had to work late that night and was unable to meet them, so plaintiff and her daughter signed the note alone. Richard and Shirley Pyles purchased the property on 20 May 1983 and took title as tenants by the entireties. The Pyles made monthly payments on the note from May 1983 until December 1984. Shirley Pyles died on 31 December 1984. Richard ceased making payments due on the note in May 1985, and plaintiff made payments thereafter.

Richard married defendant Linda Pyles in February 1985. He subsequently conveyed to himself and Linda, as tenants by the entireties, the property located on Charlotte Avenue and at 306 Cool Springs Road. The Charlotte Avenue property was sold in April 1986 for $16,500.00. Defendants did not apply the proceeds to the note at Summit Savings & Loan.

Plaintiff commenced this action against defendants on 28 April 1987, seeking to recover all funds wrongfully diverted from her, the imposition of an equitable lien on all property acquired or improved with funds wrongfully diverted from her, specific performance of Richard's promises, punitive damages, and restitution from Linda Pyles in the amount in which she was unjustly enriched. The trial court granted defendants' motion for summary judgment with regard to the claim for punitive damages and all remaining claims against Linda Pyles, but denied defendants' motion regarding all other claims against Richard Pyles. The jury found that Richard contracted with plaintiff to repay the money she owed to Summit Savings & Loan. It further found that Richard breached the contract, and that plaintiff was entitled to recover $24,049.16 in damages.

Staton, Perkinson, Doster & Post, by Norman C. Post, Jr., for plaintiff appellee-appellant.

J. Douglas Moretz for defendant appellant-appellees.

WELLS, Judge.

I. DEFENDANT'S APPEAL

[1] Defendant Richard Pyles (hereinafter defendant) assigns error to the trial court for allowing testimony of oral communications concerning his promise to pay Shirley Pyles' debt to plaintiff. N.C. Gen. Stat. § 22-1 (1986) provides:

> No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

This rule is subject to the well established main purpose rule, however, which provides that "the promise to pay the debt of another is outside the statute and enforceable if the promise is supported by an independent and sufficient consideration running to the promissor." *McKenzie Supply Co. v. Motel Development Unit 2*, 32 N.C. App. 199, 231 S.E. 2d 201 (1977). " 'Generally, if it is concluded that the promissor [sic] has the requisite personal, immediate, and pecuniary interest in the transaction in which a third party is the primary obligor, then the promise is said to be original rather than collateral and therefore need not be in writing to be binding.' " *Id.* (*quoting Burlington Industries v. Foil*, 284 N.C. 740, 202 S.E. 2d 591 (1974)).

Defendant promised *plaintiff* that he would make all of the monthly payments on the mortgage note; he made the agreement directly with plaintiff, rather than solely with Shirley Pyles to pay off her debt to her mother. Defendant's promise to plaintiff, furthermore, was supported by independent consideration: plaintiff pledged her own residence as collateral and obtained for defendant a $25,000.00 loan. We hold that this constituted an original promise, and therefore was not subject to the writing requirement. The trial court correctly allowed the testimony regarding defendant's oral promise to plaintiff.

[2] Defendant also assigns error to the trial court's refusal to grant him a directed verdict. In evaluating a defendant's motion

for directed verdict, the plaintiff's evidence must be taken as true and all evidence considered in the light most favorable to the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). A directed verdict is proper only if it appears as a matter of law that the evidence is insufficient to support a verdict for plaintiff. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977). Plaintiff's evidence was sufficient to permit the jury to find that she and defendant entered a contract wherein she agreed to obtain a loan on his behalf in exchange for his promise to repay the loan, and that defendant breached that agreement. We overrule this assignment of error.

Defendant brought forth additional assignments of error but conceded at oral argument that they lacked merit. We do not address these arguments. Defendant also conceded in his brief that an assignment of error regarding the trial court's instructions to the jury would be relevant only if this Court ordered a new trial. Because of our disposition of this appeal we do not consider this assignment of error.

II. PLAINTIFF'S APPEAL

[3] Plaintiff appeals from the entry of summary judgment in favor of defendant Linda Pyles. Plaintiff contends that Linda Pyles was unjustly enriched by the receipt of title to the two properties, and that she diverted to herself the sale proceeds of the Charlotte Avenue property, which she knew were due to plaintiff. "In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party [and] the defendant must have consciously accepted the benefit." *Booe v. Shadrick*, 322 N.C. 567, 369 S.E. 2d 554 (1988).

Plaintiff has not shown that she conferred a benefit on defendant Linda Pyles. Linda Pyles received title to the property through her husband. Although *he* had previously acquired his interest in this property with plaintiff's assistance, this does not satisfy plaintiff's burden of showing that she conferred a benefit directly on defendant Linda Pyles. The trial court did not err in entering summary judgment for this defendant.

As to defendant Richard Pyles, no error.

As to defendant Linda Pyles, affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. VANNA ELIZABETH LANGDON

No. 8818SC1064

(Filed 20 June 1989)

1. **Searches and Seizures § 43— motion to suppress—not accompanied by affidavit—summarily denied**

The trial court did not abuse its discretion in a narcotics prosecution by denying defendant's initial motion to suppress evidence where the motion was unverified and unaccompanied by an affidavit as required by N.C.G.S. § 15A-977.

2. **Searches and Seizures § 43— narcotics—motion to suppress—affidavit insufficient**

There was no prejudicial error in a narcotics prosecution from the denial of defendant's motion to suppress evidence where defendant's initial motion was denied for failure to file an affidavit supporting the motion; defendant's second motion contained an additional allegation for suppression, so that the trial court erred in denying the motion on the premise that one trial court cannot overrule another in the same case; and there was no prejudice because the affidavit accompanying the second motion did not support the additional allegation for suppression. Defendant alleged that the affidavit supporting the warrant contained false information which was or should have been known to the applicants, but her affidavit contained no supporting facts and merely attempted to point out factual inaccuracies in the officers' application for the warrant. N.C.G.S. § 15A-978(a).

APPEAL by defendant from *Helms (William H.), Judge*. Judgment entered 30 June 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 March 1989.

Defendant was indicted on one count of felony possession of cocaine, one count of misdemeanor possession of triazolam (a Schedule IV controlled substance) and one count of misdemeanor possession of alprazolam (a Schedule IV controlled substance). The physical evidence supporting these indictments was seized from defendant's apartment during a search pursuant to a search warrant. Before trial defendant moved to suppress the evidence seized, on the grounds that there was insufficient evidence to find probable cause and the

information contained in the warrant application was stale. No affidavit was originally submitted with defendant's motion to suppress. At a hearing on defendant's motion, the State requested that the motion be summarily denied for failure to comply with the requirements of G.S. 15A-977. From the transcript it is apparent that defendant's counsel was surprised by the State's request. Defendant asked for a recess to "read these cases and come back and meet [the State's] motion." The trial court allowed a recess until the following morning. The next day defendant's counsel presented to the State and the court a "Response to State's Oral Motion for Summary Denial of Defendant's Suppression Motion." In the "Response," defendant asserted that the officers' affidavit that was attached to their application for the search warrant was a sufficient affidavit to support defendant's motion. Defendant also asserted that because "[n]o facts that the defendant may supply the court by way of affidavit will alter the court's inevitable conclusion that the search warrant was based on insufficient evidence," summary denial of defendant's motion would be an unconstitutional application of G.S. 15A-977(c). Defendant also asserted the State should be estopped to move for summary denial because of the conduct of the prosecutor. In addition, defendant tendered an affidavit and asked the court to allow the filing of the affidavit in support of the original motion to suppress. The trial court found the motion to suppress was filed without an affidavit and the subsequent attempt to file an affidavit was untimely. The trial court then allowed the State's motion to dismiss the motion to suppress.

On the day defendant's case was calendared for trial, but prior to commencement of jury selection, defendant made another motion to suppress. Defendant's second motion contained the same assertions as the first, plus an assertion that the application for search warrant contained information the applicants knew or should have known was false. An affidavit was attached to this second motion to suppress. The trial court denied defendant's motion based on the premise that one trial court cannot overrule another. Defendant pled guilty to one count of felony possession of cocaine and appeals under G.S. 15A-979(b).

Attorney General Thornburg, by Assistant Attorney General Grayson G. Kelley, for the State.

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

EAGLES, Judge.

Defendant's first argument is that the trial court abused its discretion in summarily dismissing her first motion to suppress. Defendant's second argument is that the trial court erroneously denied her second motion to suppress. We find no prejudicial error.

[1] A defendant who seeks to suppress evidence must comply with the procedural requirements of G.S. 15A-971, *et seq. See State v. Satterfield*, 300 N.C. 621, 624, 268 S.E. 2d 510, 513 (1980). Our General Assembly may impose reasonable prerequisites on motions to suppress evidence, and the failure to meet those requirements constitutes a waiver of the right to challenge the admission of the evidence at trial on constitutional grounds. *See State v. Detter*, 298 N.C. 604, 616, 260 S.E. 2d 567, 577 (1979). G.S. 15A-977(a) states that a motion to suppress evidence made before trial "must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated." G.S. 15A-977(c) provides that "[t]he judge may summarily deny the motion to suppress evidence if: . . . (2) The affidavit does not as a matter of law support the ground alleged." The decision to deny summarily a motion that is not accompanied by an affidavit is vested in the discretion of the trial court. *See State v. Harris*, 71 N.C. App. 141, 321 S.E. 2d 480 (1984).

Defendant's first motion to suppress merely states that the "warrant was illegally issued because it does not show probable cause" and that "the information contained in the warrant was stale at the time the warrant was issued." This initial motion was unverified and not accompanied by an affidavit as required by statute. Because the motion as filed did not comply with the requirements of G.S. 15A-977, the motion was subject to being summarily denied. *See State v. Holloway*, 311 N.C. 573, 319 S.E. 2d 261 (1984). We cannot say the trial court abused its discretion in denying defendant's initial motion to suppress.

[2] Defendant's second motion to suppress was filed on the day defendant's case was calendared for trial, but prior to jury selection. This motion to suppress was timely. *See* G.S. 15A-976, and official commentary ("This Article does not define when a trial 'begins,' but it is clear that the motion must be made before the jury is impaneled, as that is when jeopardy attaches."). Unlike

the first motion, this motion was accompanied by an affidavit. Because defendant's second motion contained an additional allegation for suppression, the trial court erred in denying the motion on the premise that one trial court cannot overrule another in the same case. The additional allegation had not been presented to the trial court when it considered the first motion. However, defendant was not prejudiced by this error because the court could have summarily denied the motion under G.S. 15A-977(c), i.e., "[t]he affidavit does not as a matter of law support the ground alleged." *See State v. Holloway, supra.* The second motion to suppress alleges additionally that the application for search warrant and its attached affidavit "contained false information, the falsity of which was or should have been known to the applicants." G.S. 15A-978(a) provides that

> [a] defendant, may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. . . . For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

As this court has stated, G.S. 15A-978(a) permits a defendant to challenge only whether the affiant acted in good faith in including the information used to establish probable cause. *State v. Kramer*, 45 N.C. App. 291, 294, 262 S.E. 2d 693, 694, *cert. denied*, 300 N.C. 200, 269 S.E. 2d 627 (1980). The statute does not permit a defendant to attack the factual accuracy of the information relied upon to establish probable cause. *Id.* Although defendant's second motion to suppress questions the applicant's good faith, her affidavit in support of the motion merely attempted to point out factual inaccuracies in the officers' application for search warrant. Defendant's affidavit contains no facts to support her allegations of bad faith. Because defendant's affidavit failed to support the additional allegation contained in her motion, the motion was subject to being denied under G.S. 15A-977(c).

For the reasons stated, the judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. HARWYN RENEE DAVIS

No. 8813SC1082

(Filed 20 June 1989)

Searches and Seizures § 12— frisk of all persons in lounge— seizure of gun from defendant—no unconstitutional search and seizure

Alcohol law enforcement agents and law officers were reasonable in their belief that patrons in a lounge might be armed and dangerous, and this determination was no less reasonable or prudent because it was made prior to the entry into the lounge, so that a frisk of all persons in the lounge and the seizure of a gun from defendant's person as a result thereof were not unconstitutional. N.C.G.S. § 15A-255.

APPEAL by defendant from *Cornelius, Judge*. Judgment entered 28 July 1988 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 17 May 1989.

On the evening of 20 November 1987 defendant was seated in the LTD Lounge in Brunswick County. Alcohol Law Enforcement (ALE) agents along with several Brunswick County deputy sheriffs entered the lounge pursuant to a valid search warrant and announced that they intended to search the premises and the two proprietors of the lounge. ALE agent Billy Nichols instructed all persons in the lounge to raise their hands above their heads, and he announced that they all would be frisked for weapons.

Defendant raised his hands as instructed, but he attempted three times to lower one hand. Each time defendant lowered his hand Agent Nichols told defendant to keep his hands up. After the third attempt Nichols frisked defendant and felt an object in defendant's coat. Nichols then reached in defendant's coat pocket and found a .32 caliber revolver.

Defendant was arrested and subsequently indicted for possession of a handgun by a convicted felon, for carrying a concealed weapon, and for carrying a handgun into an establishment in which alcoholic beverages were served and consumed. Defendant moved to suppress the gun as evidence, and the trial court conducted a hearing on the motion. The court ultimately denied the motion, and subsequently defendant pled guilty to the felony of carrying

a handgun by a convicted felon. The trial court found defendant guilty and sentenced him to the two-year presumptive term. From that judgment, defendant appeals.

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

Michael R. Ramos for defendant appellant.

ARNOLD, Judge.

Defendant argues that the trial court committed reversible error in denying his motion to suppress because the search and seizure were arbitrary and unreasonable, and thus they violated the Fourth Amendment of the United States Constitution and Article One, Section 20 of the North Carolina Constitution.

N.C.G.S. § 15A-255 provides as follows:

> An officer executing a warrant directing a search of premises or of a vehicle may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapons by an external patting of the clothing of those present. If in the course of such a frisk he feels an object which he reasonably believes to be a dangerous weapon, he may take possession of the object.

It is obvious that this statute explicitly allows the type of "frisk" that the ALE agents conducted in the case *sub judice*. Defendant contends, nevertheless, that the "search and seizure" were unconstitutional. We do not agree.

This Court addressed a very similar case in *State v. Long*, 37 N.C. App. 662, 246 S.E. 2d 846, *rev. denied and appeal dismissed*, 295 N.C. 736, 248 S.E. 2d 866 (1978). In *Long*, Air Force investigators obtained search warrants from their base commander to search the on base house of an Air Force sergeant and to search the sergeant himself. Defendant Long was present in the house when the investigators entered and he was frisked to determine if he were armed. The frisking investigator felt a sharp pointed object in one of Long's boots which felt like a knife, but which turned out to be a spoon wrapped in plastic containing several packets of heroin. Long was arrested and convicted of carrying and possessing contraband. *Id.*

In addressing defendant Long's argument that the search and seizure were unconstitutional, Justice Mitchell (then Judge) stated that "[o]nly those searches and seizures which are unreasonable are constitutionally prohibited." *Id.* at 667, 246 S.E. 2d at 850. He went on to say, however, that the facts of *Long* did not require that the court determine whether complete searches of all individuals present in the sergeant's home for contraband would have been constitutional. *Id.* The court held that:

> the investigators limited their search of the defendant to a "frisk" for weapons and did not conduct a complete search of the defendant's person. . . . [W]e find that a limited "frisk" or search for weapons is reasonable and may be constitutionally made of all individuals present in a private residence, when the residence is searched pursuant to a valid search warrant based upon probable cause. . . .

Id. at 668, 246 S.E. 2d at 851.

In the case *sub judice*, the agents and officers had firsthand knowledge from previous searches of the LTD Lounge that its patrons often carried weapons. Defendant contends that because the agents had already determined that they were going to frisk patrons before they entered the lounge, there was no probable cause to search him. Had the agents fully searched the patrons we would agree with defendant, however the frisks were solely for the safety of the officers and those patrons present during the search.

In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968), the United States Supreme Court held that "stop and frisk" procedures by police officers are covered by the protection of the Fourth Amendment. However, the court added that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27, 20 L.Ed. 2d 889, 88 S.Ct. 1868. The test for a constitutional stop and frisk is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others is in danger. *Id.*

We conclude that in the case *sub judice* the agents and officers were reasonable in their belief that patrons in the LTD Lounge

might be armed and dangerous. This determination was no less reasonable or prudent because it was made prior to the entry into the lounge.

Defendant also contends that the frisk and seizure of his gun by Agent Nichols were unconstitutional under Article One, Section 20 of the North Carolina Constitution. Defendant neither provides any authority for his assertion, nor does he provide any argument other than to state his contention.

Nevertheless, we find that our Supreme Court has held that even though North Carolina has no "stop and frisk" statute, this is not fatal to the authority of law enforcement officers to stop suspicious persons and search them for weapons. *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973). The Supreme Court not only stated that the "stop and frisk" was a time-honored police procedure, but it also cited *Terry* to point out that this procedure was constitutional under the United States Constitution. *Id.*

The North Carolina Supreme Court has upheld the "stop and frisk" procedure, and this fact, coupled with the specific grant of authority in N.C.G.S. § 15A-255, leads us to conclude that the actions by the ALE agents in the case *sub judice* were not unconstitutional under the North Carolina Constitution. *Accord, State v. Peck*, 305 N.C. 734, 291 S.E. 2d 637 (1982).

No error.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. JAMES CHARLES HOLMAN

No. 8923SC73

(Filed 20 June 1989)

1. Criminal Law § 101.1— statement by prospective juror— denial of mistrial—failure to poll jurors—no error

In a prosecution for taking indecent liberties with a child, the trial court did not abuse its discretion in denying defendant's motion for a mistrial without polling each juror to determine the effect, if any, on each one from a statement by a

prospective juror that if someone did this (commit the offense of indecent liberties) to one of her children, "they would be trying [her] for murder."

2. Rape and Allied Offenses § 19— assault on child—no lesser offense of taking indecent liberties

Assault on a child under the age of twelve years is not a lesser included offense of taking indecent liberties with a child, since assault is an essential element of the former, but not the latter.

APPEAL by defendant from *Briggs, Judge*. Judgment entered 28 July 1988 in Superior Court, ASHE County. Heard in the Court of Appeals 12 June 1989.

Defendant was charged in a proper bill of indictment with taking indecent liberties with a child in violation of G.S. 14-202.1. He was found guilty as charged and sentenced to five years in prison. Defendant appeals.

Attorney General Thornburg, by Assistant Attorney General David M. Parker, for the State.

Sherrie R. Hodges for defendant-appellant.

EAGLES, Judge.

[1] Defendant first argues the trial court erred by denying his motion for a mistrial because "a statement made by a prospective juror during jury selection was highly prejudicial to [him] and resulted in substantial and irreparable harm to [his] case." In this case, a prospective juror stated that if someone did this (i.e., commit the offense of indecent liberties) to one of her children, "they would be trying [her] for murder." The prospective juror was immediately excused and the trial court instructed the remaining prospective jurors to disregard the statement. At the time of the incident, no evidence had been presented. Defendant's motion for mistrial was subsequently denied. Defendant contends each juror should have been polled to determine the effect of the statement.

The trial court's decision on a motion for mistrial is largely within the trial court's discretion and its ruling is not reviewable in the absence of abuse of discretion. *State v. Loren*, 302 N.C. 607, 612, 276 S.E. 2d 365, 368 (1981). The trial court had a duty to determine whether substantial or irreparable prejudice to de-

fendant resulted from the prospective juror's statement. *State v. Pollock*, 50 N.C. App. 169, 273 S.E. 2d 501 (1980); G.S. 15A-1061. The trial court had the best opportunity to observe the effect of the statement, if any, on the members of the jury pool. We note that defendant did not request the right to examine the jurors. We cannot say the trial court abused its discretion by not polling each juror. Defendant's argument is meritless.

[2] Defendant's second argument is that the trial court erred by failing to submit to the jury the offense of assault on a child under the age of 12 years. Defendant contends that assault on a child is a lesser included offense of taking indecent liberties with a child. We disagree.

"When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment." *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E. 2d 743, 754 (1978). G.S. 14-202.1 provides in pertinent part:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

One is guilty of misdemeanor assault on a child if he "[a]ssaults a child under the age of 12 years." G.S. 14-33(b)(3). This crime obviously has an essential element which is not also an essential element of taking indecent liberties with a child—that is, an assault.

An assault is defined as "an intentional offer or attempt by force or violence to do injury to the person of another." *State v. Thompson*, 27 N.C. App. 576, 577, 219 S.E. 2d 566, 568 (1975), *cert. denied*, 289 N.C. 141, 220 S.E. 2d 800 (1976). A broader defi-

nition of assault is a "show of violence causing a reasonable apprehension of immediate bodily harm." *Id., citing State v. Allen*, 245 N.C. 185, 95 S.E. 2d 526 (1986). Neither definition of assault constitutes an essential element of G.S. 14-202.1. No touching is required. *State v. Turman*, 52 N.C. App. 376, 278 S.E. 2d 574 (1981). A defendant does not have to be in close proximity to the victim. *State v. Strickland*, 77 N.C. App. 454, 335 S.E. 2d 74 (1985). Evidence of taking indecent liberties with children has been deemed sufficient when a defendant took photographs of a nude child, *State v. Kistle*, 59 N.C. App. 724, 297 S.E. 2d 626 (1982), *cert. denied*, 307 N.C. 471, 298 S.E. 2d 694 (1983), and when a defendant exposed himself to a victim, *State v. Hicks*, 79 N.C. App. 599, 339 S.E. 2d 806 (1986).

Clearly, assault is not an essential element of taking indecent liberties with a child. Since assault is an essential element of the crime of assault on a child under the age of 12 years, this offense cannot be a lesser included offense of taking indecent liberties with a child. Defendant's argument is without merit.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges JOHNSON and ORR concur.

CONCERNED CITIZENS OF DOWNTOWN ASHEVILLE, AN UNINCORPORATED ASSOCIATION, JIM F. HUGHES, JOHN A. AUTEN, ROBERT H. JOLLY, PLAINTIFFS v. BOARD OF ADJUSTMENT OF THE CITY OF ASHEVILLE, DEFENDANT AND ASHEVILLE-BUNCOMBE COMMUNITY CHRISTIAN MINISTRY, INTERVENOR

No. 8828SC877

(Filed 20 June 1989)

Municipal Corporations § 31.1— decision to allow permit for shelter for homeless—no standing of nearby landowners to seek review—no special damages

Plaintiffs, an unincorporated association of owners of businesses and real property located on Coxe Avenue in Asheville, lacked standing to seek review of the Zoning Board of Ad-

justment's decision to allow a zoning permit for the renovation of an existing structure on Coxe Avenue to provide a shelter for the homeless, since plaintiffs failed to allege and the trial court failed to find that plaintiffs would be subject to "special damages" distinct from the rest of the community. N.C.G.S. § 160A-388(e).

APPEAL by plaintiffs from *Lewis, Robert D., Judge.* Order entered 11 March 1988 in BUNCOMBE County. Heard in the Court of Appeals 15 March 1989.

Plaintiff, Concerned Citizens of Downtown Asheville, is an unincorporated association whose membership consists of owners of businesses and real property located on and near the southern end of Coxe Avenue in Asheville, North Carolina. Plaintiffs Hughes, Auten and Jolly are each owners of a business and interest in real property located on the southern end of Coxe Avenue.

On 16 November 1987 the Zoning Administrator for the City of Asheville issued a zoning permit to Asheville-Buncombe Community Christian Ministry to allow the renovation of an existing structure located at 207 Coxe Avenue, Asheville. The structure is to be used as a shelter for the homeless.

Pursuant to N.C.G.S. § 160A-388(b), plaintiffs appealed the issuance of the permit to the Asheville Board of Zoning Adjustment. Following a hearing on 17 December 1987, the Board of Zoning Adjustment affirmed the decision of the Zoning Administrator in issuing the permit. In its order dated 5 February 1988 the Board's findings of fact included: that the property was located in the Commercial Service District; "that neither 'shelters for the homeless,' nor any other form of lodging for the indigent is specifically allowed as a use within any of the zoning districts as set forth in the Zoning Ordinance"; that the proposed homeless shelter was a "community service" and a residential use and that services and other residential uses are specifically allowed in a Commercial Service District. The Board found that due to a pre-existing use parking and setback requirements had been met, and concluded as a matter of law that "the proposed facility is an allowed use in the Commercial Service zone."

Pursuant to N.C.G.S. § 160A-388(e), plaintiffs filed a petition in the superior court for review in the nature of certiorari. Plaintiffs asked that the court review the record, issue an order reversing

the decision of the Board and order that the zoning permit be rescinded. Instead, by order dated 11 March 1988, the superior court affirmed the order of the Board of Adjustment. From this order, plaintiffs appeal.

David E. Matney, III for appellants.

William F. Slawter for defendant appellee.

Whalen, Hay, Pitts, Hugenschmidt, Master & Devereux, by Edward C. Hay, Jr. and Barry L. Master, for respondent intervenor appellee.

ARNOLD, Judge.

Defendant Board of Adjustment of the City of Asheville contends that plaintiffs lacked standing to seek review of the Zoning Board of Adjustment's decision. We agree.

An appeal from a board of zoning adjustment decision may be taken by any person "aggrieved." N.C.G.S. § 160A-388(e). Thus, plaintiffs had standing only if they were aggrieved persons within the meaning of the statute. *Heery v. Town of Highlands Zoning Board of Adjustment*, 61 N.C. App. 612, 300 S.E. 2d 869 (1983). As the court in *Heery* pointed out, an aggrieved party is one who can show either "some interest in the property affected," or, if plaintiffs are nearby property owners, they must show "special damage" which amounts to "a reduction in the value of [their] property." *Id.* at 613, 300 S.E. 2d at 870, *citing Pigford v. Board of Adjustment*, 49 N.C. App. 181, 270 S.E. 2d 535 (1980), *disc. rev. denied and appeal dismissed*, 301 N.C. 722, 274 S.E. 2d 230 (1981); *Jackson v. Board of Adjustment*, 275 N.C. 155, 161-62, 166 S.E. 2d 78, 82-83 (1969).

In this case, as in *Heery*, plaintiffs failed to allege, and the Superior Court failed to find that plaintiffs would be subject to " 'special damages' distinct from the rest of the community." *Heery* at 614, 300 S.E. 2d at 870. Plaintiffs allege nothing more than that they are nearby or adjacent property owners. Though this might be sufficient to challenge the validity of an amendment to the ordinance itself in a declaratory judgment action, *Godfrey v. Zoning Board of Adjustment*, 317 N.C. 51, 66, 344 S.E. 2d 272, 281 (1986), it is insufficient to allege standing under N.C.G.S. § 160A-388(e). See generally 3 Rathkopf, *The Law of Zoning and Planning* § 43.04 at 43-22 (1988).

The order appealed from is vacated, and the matter is remanded to the Superior Court for the entry of an order dismissing the petition for writ of certiorari and vacating the writ of certiorari granted.

Vacated and appeal dismissed.

Judges JOHNSON and PHILLIPS concur.

BERNETTE COTTON, JUDY LYNN JONES AND ELIZA HARVEY, ET AL., PLAINTIFFS v. NORMAN K. STANLEY AND EVELYN B. STANLEY, DEFENDANTS

No. 8810SC1055

(Filed 20 June 1989)

Attorneys at Law § 7.5— allowance of fees as part of costs—failure to make appropriate findings

In an action for injunctive relief for alleged unfair trade practices in failing to comply with the Housing Inspector's deadline for correcting defects in heating and plumbing facilities in defendants' rental units, the trial court's order awarding attorney fees was inadequate where the court made no findings with regard to the time and labor expended by plaintiffs' counsel, the skill required, the experience and ability of the attorneys, and the customary fee for like work; moreover, language in the court's order suggested that the court may have limited its award of attorneys' fees to those services related to preparation for retrial, while plaintiffs were entitled to legal fees for prosecuting the appeal as well as for the preparation for retrial.

APPEAL by plaintiffs from *Stephens (Donald W.), Judge*. Order on attorneys' fees entered 13 June 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 14 April 1989.

On 28 April 1983 plaintiffs filed a class action against defendants seeking injunctive relief and damages under Chapter 75 of the General Statutes for alleged unfair business practices. The damages sought were in the form of a rent rebate for rents paid to defendants after defendants failed to comply with the Housing

Inspector's deadline for correcting defects in heating and plumbing facilities in defendants' rental units.

The action was tried before a jury, and the jury found that defendants were engaged in unfair business practices, including their practice of collecting the full amount of rent for units which the Housing Inspector had determined were unsafe or unfit for human habitation. Based on the jury's findings, the trial judge entered a judgment concluding that defendants had violated G.S. 75-1.1 and granting plaintiffs injunctive relief. On the issue of rent rebates for defendants' failure to maintain premises fit for human habitation, the trial judge directed a verdict in favor of defendants based on plaintiffs' failure to present sufficient direct evidence of the amount by which the rental units had been diminished in value. The court also awarded plaintiffs, as the prevailing party, $10,000.00 in attorneys' fees.

Both parties gave notice of appeal; however, defendants failed to perfect theirs. On plaintiffs' appeal from the directed verdict, this Court in *Cotton v. Stanley*, 86 N.C. App. 534, 358 S.E. 2d 692 (1987), ruled that sufficient evidence of diminished rental value had been presented by plaintiffs for this issue to go to the jury. The case was remanded for retrial on the issue of damages. The Supreme Court denied defendants' petition for discretionary review. *Cotton v. Stanley*, 321 N.C. 296, 362 S.E. 2d 779 (1987).

During the interim before the case was scheduled for retrial, attempts at settlement were unproductive. After calendar call at the session for which the case was set for retrial, the trial judge urged the parties to pursue further negotiations which resulted in a settlement. Based thereon the court entered a consent judgment ordering defendants to pay the sum of $5,362.56. Plaintiffs' attorneys then moved the court to award attorneys' fees incurred in the appeal and preparation for retrial. The court found defendants' refusal to settle the issue after the decision of this Court to be unwarranted, and awarded plaintiffs an additional $1,500.00 in attorneys' fees. Plaintiffs appeal.

East Central Community Legal Services, by Augustus S. Anderson, Jr. and Victor Boone, and Robert A. Miller, P.A., by Robert A. Miller, for plaintiffs-appellants.

Robert T. Hedrick for defendants-appellees.

PARKER, Judge.

The sole issue presented on appeal is whether the trial court committed reversible error in setting an unreasonable attorneys' fee award. In an action under Chapter 75 of the General Statutes alleging unfair or deceptive trade practices, the prevailing party is entitled to reasonable attorneys' fees when the court finds (i) that the party charged with a violation wilfully engaged in unlawful conduct proscribed by the Chapter and (ii) that there was an unwarranted refusal by the party charged to fully resolve the matter. G.S. 75-16.1.

One purpose for the statute authorizing attorneys' fees is to encourage individuals to bring valid actions to enforce the statute by making such actions economically feasible. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 95, 331 S.E. 2d 677, 680 (1985); *City Finance Co. v. Boykin*, 86 N.C. App. 446, 358 S.E. 2d 83 (1987). Whether to award or deny these fees is within the sound discretion of the trial judge. *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E. 2d 120, 125 (1987); *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 688, 340 S.E. 2d 755, 761, *cert. denied*, 317 N.C. 333, 346 S.E. 2d 137 (1986); *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 457, 337 S.E. 2d 616, 620 (1985). Once the court decides to award attorneys' fees, however, it must award reasonable attorneys' fees. G.S. 75-16.1; *Morris v. Bailey*, 86 N.C. App. at 387, 358 S.E. 2d at 125. Furthermore, in order for the appellate court to determine if the statutory award of attorneys' fees is reasonable the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney. *Id.*

The order awarding attorneys' fees recited that the court had previously "found that defendant's conduct was wilful and that their refusal to settle the dispute was unwarranted." Then after recitations concerning the appeal and settlement the order stated:

> Plaintiffs now seek additional attorneys fees for legal expenses in prosecuting the appeal and in preparing for trial. The Court finds that the defendants failure and refusal to settle this remaining damage issue after the decision of the N. C. Court of Appeals which required Plaintiffs to prepare for a second jury trial was unwarranted. The Court in its discretion therefore awards an additional amount of $1,500 in attorneys fees.

This order is deficient in that the findings of fact are inadequate to enable this Court to determine whether or not the award of attorneys' fees was reasonable. The order merely states, "The Court in its discretion therefore awards an additional amount of $1,500 in attorneys fees." Consistent with this Court's decision in *Morris v. Bailey, supra,* we remand this action for the trial court to make findings of fact taking into consideration the time and labor expended by plaintiffs' counsel, the skill required, the experience and ability of the attorneys, and the customary fee for like work and to make an award based on these findings.

Further, the language that "defendants failure and refusal to settle this remaining damage issue after the decision of the N.C. Court of Appeals which required plaintiffs to prepare for a second jury trial was unwarranted," suggests that the court may have limited its award of attorneys' fees to those services related to preparation for retrial. This Court has held that when awarding attorneys' fees pursuant to G.S. 75-16.1, the trial court may include fees for services rendered at all stages of the litigation. *Finance Co. v. Boykin,* 86 N.C. App. at 449, 358 S.E. 2d at 85. Fees are authorized for the prevailing party and may be awarded for all time, including appeal, reasonably expended in obtaining or sustaining the status of prevailing party. *See id.* at 449-50, 358 S.E. 2d at 85. In the present case, plaintiffs sought review of the trial court's refusal to submit the issue of damages to the jury and prevailed on this issue on appeal. Since the trial court had already found in the previous order that defendants' conduct was wilful and that their refusal to settle the dispute was unwarranted, plaintiffs were, in our opinion, entitled to legal fees for prosecuting the appeal as well as for the preparation for retrial.

We affirm plaintiffs' entitlement to legal fees and remand for further findings of fact and an award of attorneys' fees consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. JAMES HERBERT McDONALD

No. 8816SC1118

(Filed 20 June 1989)

Criminal Law § 138.36— mitigating factor of restitution of victim— insufficiency of evidence

The trial court did not err in failing to find as a statutory mitigating factor that defendant made substantial or full restitution to the victim in a larceny case where the evidence tended to show that defendant initially abandoned the property but later led police to its location so the police could return it to the victim; the property was not returned in the condition in which it was stolen; and defendant did not inform the police promptly. N.C.G.S. § 15A-1340.4(a)(2)(f).

APPEAL by defendant from *Ellis (B. Craig), Judge.* Judgment entered 3 May 1988 in Superior Court, ROBESON County. Heard in the Court of Appeals 10 May 1989.

Defendant was indicted on charges of robbery with a dangerous weapon, common law robbery, and larceny from the person. At the close of the State's evidence, the defendant entered pleas of guilty to two counts of common law robbery and one count of larceny from the person. The court imposed a sentence of ten years for the first common law robbery offense (88CRS1420). The court consolidated for judgment the other common law robbery offense (88CRS1418) and the offense of larceny from the person (88CRS1419).

At trial the evidence in 88CRS1418 tended to show that in the early morning of 2 February 1988 the defendant pulled into a gas station where he pumped $5.00 worth of gas. The defendant came inside the station and handed the attendant $5.00. As the attendant was putting the money into the cash register, the defendant came across the counter and put his hands in the drawer and demanded the money. The attendant never saw a weapon but did see a "bulge" which he believed to be a weapon. When the attendant reached to get his own weapon, the defendant ran. He did not get any money, but tore one $20.00 bill which he pulled out of the register.

The evidence in 88CRS1419 tended to show that on the night of 1 February 1988 at about 10:30 p.m. a nurse had parked her

car in the parking deck at the hospital where she was employed. She and another woman were walking down the sidewalk when they heard the defendant come up behind them. The defendant ran between the two women and snatched the nurse's purse.

At about 5:30 a.m. the defendant was taken into custody. An officer booked the defendant. After the defendant was advised of his rights and had given a statement, the defendant led the officer to the place where he had left the nurse's purse and wallet. Those items, along with a driver's license and bank card were recovered and returned by the police to the nurse. Whatever money had been in the purse was not found.

The cases of larceny of the person and common law robbery were consolidated for judgment. Pursuant to N.C.G.S. § 15A-1340.4(a) the court found as an aggravating factor that the defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement; the court found as mitigating factors that the defendant was suffering from a physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense, and, that the defendant had voluntarily acknowledged wrongdoing at an early stage of the criminal process. The court found that the aggravating factor outweighed the mitigating factors and imposed a sentence of ten years to begin at the expiration of the ten-year sentence imposed in 88CRS1420. Defendant appeals this sentence.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred when it failed to find as a statutory mitigating factor that the defendant made substantial or full restitution to the victim in case number 88CRS1419. *See* N.C.G.S. § 15A-1340.4(a)(2)(f). We disagree.

N.C.G.S. § 15A-1340.4(b) requires the sentencing judge to list in the record each matter in aggravation or mitigation which is proved by a preponderance of the evidence. *State v. Michael*, 311 N.C. 214, 219, 316 S.E. 2d 276, 279 (1984). The factors must be proved by evidence which is substantial, uncontradicted and

manifestly credible. *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 455 (1983). "To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence." *State v. Canty*, 321 N.C. 520, 524, 364 S.E. 2d 410, 413 (1988). Trial judges are permitted discretion and latitude in ascertaining the true existence of aggravating and mitigating circumstances. *State v. Graham*, 309 N.C. 587, 592, 308 S.E. 2d 311, 315 (1983).

The resolution of this case depends on the meaning of N.C.G.S. § 15A-1340.4(a)(2)(f): "[t]he defendant has made substantial or full restitution to the victim." Traditionally, for a defendant charged with larceny to be eligible for a statutory reduction of a penalty based on restitution it is required that:

> (1) The thing stolen must be actually returned by the thief and not merely abandoned by him where the owner can get it. (2) The thing must be returned in the condition in which it was stolen. (3) The restitution must be voluntary. (4) The restitution must be promptly made, although a return within a reasonable time may suffice. (5) The restitution must be prompted by repentance for the deed, and not solely by fear of punishment . . . .

52A C.J.S. *Larceny* § 159.

N.C.G.S. § 15A-1340.4(a)(2)(f) allows for "substantial" or "full" restitution to be taken into account in finding the mitigating factor. Considering the factors listed above, the statute requires at least "substantial," though not necessarily "full" compliance with the first four factors. The fifth factor is not required, rather whether restitution is prompted by repentance does not go to the existence of the mitigating factor, but to its weight. *See Graham* at 591, 308 S.E. 2d at 315. (Defendant's motive in acknowledging guilt at an early stage does not go to the existence of the mitigating factor, but goes to its weight.)

In the larceny charge, 88CRS1419, the defendant initially abandoned the property, but later led police to its location so the police could return it to the victim. The property was not returned in the condition in which it was stolen. The defendant did inform the police promptly. In *Graham*, the defendant confessed to four break-ins and "informed the police where [some] of the stolen items

were found." *Graham* at 588, 308 S.E. 2d at 313. The Supreme Court held that the trial court did not err in failing to find that "the defendant had made substantial or full restitution to the victim." *Id.* at 592, 308 S.E. 2d at 315. The facts in this case are similar and do not conclusively establish that the defendant made substantial restitution.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

CHARLES J. TRAVIS v. KNOB CREEK, INC. AND ETHAN ALLEN, INC.

No. 8825SC1001

(Filed 20 June 1989)

1. **Appeal and Error § 68; Master and Servant § 9— breach of employment contract—release executed by employee—evidence excluded—prior Supreme Court ruling controlling**

   In an action for breach of a written, fixed term employment contract where plaintiff sought monetary damages, the Supreme Court in an earlier appeal of the action clearly determined that the trial court did not err in excluding evidence pertaining to a release executed by plaintiff.

2. **Appeal and Error § 12— application of statute of limitations—failure to raise defense at trial—no consideration on appeal**

   Defendants could not raise on appeal a question pertaining to the application of the three-year statute of limitations to plaintiff's claim, since defendants failed to raise this defense at the second trial.

APPEAL by defendants from *Owens, Hollis M., Jr., Judge.* Judgment entered 20 April 1988 in CATAWBA County Superior Court. Heard in the Court of Appeals 8 May 1989.

A review of the history of this case is appropriate for understanding our disposition of this appeal.

Plaintiff brought an action against defendants for breach of a written, fixed term employment contract, seeking monetary

damages. At the first trial of the case, the following issues were submitted to and answered by the jury:

1. Did the plaintiff enter into an agreement with Knob Creek, Inc. by the terms of which the plaintiff was to be employed for a term of years for specified sums?

ANSWER—Yes

2. Did the plaintiff substantially perform the agreement?

ANSWER—Yes

3. Did the defendants breach the agreement?

ANSWER—Yes

4. Did the release executed by the plaintiff in December 1979 serve to bar the plaintiff from recovery upon the contract of employment?

ANSWER—Yes

5. What amount of wages, if any, is the plaintiff entitled to recover of the defendants?

ANSWER—_____

From judgment entered in defendants' favor on the jury's verdict, plaintiff appealed to this Court. In that appeal, defendants cross-assigned as error the trial court's denial of their motion for a directed verdict on the grounds that plaintiff's claim was barred by the three-year statute of limitations under N.C. Gen. Stat. § 1-52(1) (1983). This Court found no error in the trial, but did not reach defendants' cross-assignment of error. *See Travis v. Knob Creek, Inc.*, 84 N.C. App. 561, 353 S.E. 2d 229 (1987). On discretionary review, our Supreme Court reversed the decision of this Court, holding that the trial court erred in submitting the release issue to the jury, and ordered a new trial. *See Travis v. Knob Creek, Inc.*, 321 N.C. 279, 362 S.E. 2d 277 (1987). In its opinion, the Supreme Court determined that defendants had abandoned the statute of limitations question in their presentation to that court.

At the second trial, the jury awarded plaintiff monetary damages in the amount of $133,800.00, and from judgment entered for plaintiff on that verdict, defendants now appeal.

We refer to our previous opinion and the opinion of our Supreme Court for further factual details of this case.

Patrick, Harper & Dixon, by Stephen M. Thomas, for plaintiff-appellee.

Blakeney, Alexander & Machen, by W. S. Blakeney and David L. Terry, for defendant-appellants.

WELLS, Judge.

[1] In this appeal, defendants have assigned error to the trial court's excluding evidence pertaining to the release executed by plaintiff. In its opinion, our Supreme Court clearly determined this issue adversely to defendants. We quote:

> At the time he signed his general release, the plaintiff neither had a cause of action nor had he asserted a legal right to continue working for Knob Creek. Until Knob Creek sought to discharge him, there was no reason for him to make such an assertion. His "claim" did not arise until over four years after the date of the release. The release did not specifically include future claims or existing non-asserted rights, and it did not contain any language implying that such claims or rights were being released. As a matter of law, the release here could not bar the plaintiff's claim or his right to work under the terms of the employment contract, because the release did not specifically refer to future claims or existing rights.

Travis, supra. Our Supreme Court's decision on this issue constitutes the law of the case and is thus binding on subsequent proceedings and appeals. *See Tennessee-Carolina Transportation v. Strick Corp.*, 286 N.C. 235, 210 S.E. 2d 181 (1974); *Lowder v. All Star Mills*, 91 N.C. App. 621, 372 S.E. 2d 739 (1988). We therefore hold that the trial court properly excluded defendants' proffered evidence pertaining to plaintiff's release and overrule this assignment of error.

[2] Defendants also attempt to present a question pertaining to the application of the three-year statute of limitations to plaintiff's claim, asserting that the statute operated to bar plaintiff's claim. Defendants failed to raise this defense at the second trial, and therefore they may not now raise it on appeal. Contentions not raised at trial may not be raised for the first time on appeal. *See Childers v. Hayes*, 77 N.C. App. 792, 336 S.E. 2d 146 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E. 2d 892 (1986), and cases cited therein.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

KNOTVILLE VOLUNTEER FIRE DEPARTMENT, INC. v. WILKES COUNTY

No. 8823DC1374

(Filed 20 June 1989)

Declaratory Judgment § 9— fire protection services—contract with county for distribution of fire taxes—declaratory judgment—supplemental proceeding

A district court order dismissing petitioner's supplemental proceeding to determine respondent's liability under a 1977 contract was remanded where the contract was for petitioner to provide fire protection for all property located within the district and the county to pay petitioner the fire taxes collected from the district during the contract period; petitioner brought a declaratory judgment action to determine the boundaries of the district and the applicability of the contract to it; the trial court held in 1986 that the 1977 contract between the parties was valid and binding, that the disputed area was within the district covered by the contract, and that all of the tax receipts collected for fire protection purposes within the district should be paid to petitioner "by the 10th of each month"; petitioner filed this supplemental proceeding to determine respondent's liability under the contract for fire taxes collected on various properties within the disputed area for 1985 and prior years; respondent moved to dismiss on the grounds that the declaratory judgment granted no retroactive relief, that liability for taxes previously collected was not raised in the declaratory judgment action, and that this proceeding would require respondent to raise new tax money or recoup tax payments mistakenly made to another fire department; and the trial court granted the motion to dismiss.

APPEAL by petitioner from *Osborne, Judge*. Order entered 25 October 1988, *nunc pro tunc* 6 September 1988, in District Court, WILKES County. Heard in the Court of Appeals 20 April 1989.

Ferree, Cunningham & Gray, by George G. Cunningham, for petitioner appellant.

Joe O. Brewer for respondent appellee.

PHILLIPS, Judge.

This supplemental proceeding to determine respondent's liability under a contract that was the subject of an earlier declaratory judgment action was dismissed by the trial court. The pertinent facts follow:

In 1975, by a special election in Wilkes County, the Knotville Fire District, comprising a certain area described in the notice of the election, was formed. On 14 June 1977 the petitioner fire department and the respondent county entered into a contract which required the petitioner to provide fire protection services for all property located within the district until 3 January 2008, and the county to pay petitioner the fire taxes collected from the district during that time. In 1985 a dispute arose between the parties as to whether a certain area is within petitioner's district or that of the Broadway Fire Department, and petitioner brought a declaratory judgment action to determine the boundaries of the district and the applicability of the contract to it. In that action, on 16 June 1986, the trial judge held that the 1977 contract between the parties was valid and binding, that the disputed area was in the district covered by the contract, and that "[a]ll of the tax receipts collected for fire protection purposes within the . . . District" should be paid to petitioner "by the 10th day of each month." That judgment was affirmed by this Court in *Knotville Volunteer Fire Department, Inc. v. Wilkes County and Broadway Fire Department, Incorporated*, 85 N.C. App. 598, 355 S.E. 2d 139, *disc. rev. denied, petition for disc. rev. dismissed*, 320 N.C. 632, 360 S.E. 2d 88, 89 (1987), and after the action returned to the District Court petitioner filed this supplemental proceeding to determine respondent's liability to it under the contract for fire taxes collected on various properties within the disputed area for 1985 and prior years. Respondent moved to dismiss the proceeding and following a hearing the court dismissed it on the ground that the declaratory judgment "granted no retroactive relief"; that the respondent's liability for the taxes previously collected was not raised in the declaratory judgment action; and that this proceeding could require the respondent to raise new tax money or recoup tax payments

that were mistakenly made from the disputed area to the Broadway Fire Department.

None of the grounds for dismissing the proceeding has any legal significance and the order is vacated. That the declaratory judgment granted no retroactive relief to petitioner is immaterial, since retroactive relief was neither sought by the action nor denied by the judgment. In the action petitioner sought only to establish the contract rights and duties of the parties, and from the adjudication that the 1977 contract was valid and binding and covered the disputed area, it necessarily follows that the rights and obligations agreed to were enforceable from the contract's inception. Nor is it legally significant that respondent's liability for past tax collections was not raised in the declaratory judgment action. None of the declaratory judgment statutes, G.S. 1-253, *et seq.*, require one seeking an adjudgment of contract rights to go further and seek an enforcement of those rights; for the liability that flows from a contract, the validity and meaning of which has been established by declaratory judgment, is usually obvious and agreed to by the parties, and when it is not it can be determined by a supplemental proceeding such as this one under the following provisions of G.S. 1-259:

> Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

Finally, since counties, no less than others, are legally bound by their valid contracts, it is irrelevant that the respondent county may have to either recover money that it erroneously paid to the Broadway Fire Department or levy some new taxes if its contract is enforced by this proceeding.

The order is therefore vacated and the proceeding remanded to the District Court for a determination of respondent's liability to petitioner in accord with this opinion and the law pertaining thereto.

Vacated and remanded.

Judges PARKER and COZORT concur.

STATE OF NORTH CAROLINA v. DONALD MILTON LAWRANCE, III

884SC920

(Filed 20 June 1989)

Homicide § 30.3— suffocation of infant—instruction on involuntary manslaughter not required

The trial court did not err in failing to instruct the jury on involuntary manslaughter where the evidence tended to show that defendant intended to press the face of his seven-month-old son into his crib mattress, and this intentional act caused the child's death by suffocation; but an instruction is not required, regardless of whether the actual killing was intentional or unintentional, when the intentional act leading to death was naturally dangerous to human life.

APPEAL by defendant from *Strickland, James R., Judge.* Judgment entered 13 February 1988 in ONSLOW County Superior Court. Heard in the Court of Appeals 8 May 1989.

Defendant was convicted of second-degree murder and sentenced to a term of forty-five years' imprisonment. The State's evidence tended to show that defendant's seven-month-old son died in his crib from suffocation. The pathologist who performed the autopsy testified that he found bruises on either side of the infant's face, on the mid part of his back, and a reddish area over the bridge of his nose. He also found healed fractures of five ribs and a collarbone, congestion of the brain, and fluid in the lungs. These findings were consistent with battered child syndrome.

Detective James O'Malley of the Onslow County Sheriff's Department testified that defendant waived his rights and admitted during questioning at the Sheriff's Department that evening that he had put the infant's head into his crib mattress in order to stop his crying and held it until he stopped moving. Defendant made a written statement on 8 September 1987 wherein he admitted the following:

I grabbed Donnie's face and squeezed his cheeks in anger to get him to stop crying. He did not. I picked him up and shook him three or four times to make him stop. He still did not stop crying. I put him on his stomach and pressed his head into the mattress. He stopped crying some moments later. I turned his head to the side and turned the radio on and walked out. I can only say I'm sorry. If I could go back and do it again he would still be here today.

Defendant denied at trial that he had shaken the infant or pushed his head into the crib mattress. He explained that he made the written statement because Detective O'Malley had threatened him with incarcerating his wife.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Isham B. Hudson, Jr., for the State.

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

WELLS, Judge.

Defendant contends that the trial court erred in failing to instruct the jury on involuntary manslaughter. The jury received instructions on first and second-degree murder. The trial court must instruct the jury on all substantial and essential issues of the case arising on the evidence presented at trial. *State v. Harris*, 306 N.C. 724, 295 S.E. 2d 391 (1982). When it is possible under the indictment to convict the defendant of a lesser included offense and the evidence supports the lesser charge, the defendant is entitled to receive instructions on the lesser offense as well as the more serious one. *State v. DeGraffenreid*, 223 N.C. 461, 27 S.E. 2d 130 (1943).

Involuntary manslaughter is a lesser included offense of second-degree murder. *State v. Greene*, 314 N.C. 649, 336 S.E. 2d 87 (1985). Second-degree murder is defined as "the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971). Voluntary manslaughter consists of "the unlawful killing of a human being without malice and without premeditation and deliberation." *Id.* Involuntary manslaughter is "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *Greene, supra.*

Defendant testified at trial that at approximately 9:00 a.m. on 8 September 1987 he used an eyedropper to administer medicine to his son, and had to hold the infant's cheeks to ensure that he swallowed it. He then placed the infant in his crib on his stomach and left the room. He left home at approximately 11:15 a.m. He further testified that his wife telephoned him at work shortly after 1:15 p.m. to tell him that something was wrong with their son. When he arrived home paramedics informed him that the child was dead.

We hold that the trial court correctly determined that the evidence presented at trial did not support an involuntary manslaughter instruction. Although defendant might not have intended to actually kill his son, the evidence certainly tended to show that he intended to press the child's face into the mattress. This intentional act caused the child's death by suffocation. The presence of an intentional act in the chain of causation leading to death does not automatically render a killing intentional, *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978), so as to preclude an involuntary manslaughter instruction. The instruction is not required, however, regardless of whether the actual killing was intentional or unintentional, when the intentional act leading to death was naturally dangerous to human life. We note that the alternative ground for establishing involuntary manslaughter, a killing proximately caused by a culpably negligent act or omission, is not supported by the evidence in this case.

Defendant did not request an instruction on voluntary manslaughter at trial, nor does he assert on appeal that such instruction should have been given. Because the trial court correctly determined that the evidence did not support an instruction on involuntary manslaughter, we overrule defendant's assignment of error.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. THOMAS SHREVE

No. 884SC926

(Filed 20 June 1989)

1. **Criminal Law § 85.1— communicating a threat—character for peacefulness—evidence improperly excluded**

In a prosecution of defendant for communicating a threat, the trial court erred in refusing to allow defendant to present character witnesses to testify as to his character for peacefulness where defendant presented evidence that people around him considered his statement that he would throw a bomb into a clinic which sometimes performed abortions to be a bad joke; defendant had protested in front of the clinic more than twenty times previously without incident; there were small children in close proximity to defendant and the clinic when he made the statement; and evidence of defendant's peacefulness was relevant to the issues of defendant's willfulness in making the statement, whether the statement would have been believed by a reasonable person, and whether the person at whom the statement was directed was reasonable in her belief that it was not a joke.

2. **Criminal Law § 88.3— cross-examination as to collateral matters—cross-examination properly limited**

In a prosecution of defendant for communicating a threat, the trial court did not err in refusing to allow him to cross-examine the person at whom the threat was directed about her experiences in Cyprus just a few months earlier, and there was no merit to defendant's argument that this evidence was relevant in determining whether the victim believed that defendant would actually throw a bomb, since the testimony defendant attempted to elicit was collateral to the charges tried.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 24 May 1988 in Superior Court, ONSLOW County. Heard in the Court of Appeals 10 April 1989.

Defendant Thomas Shreve was initially tried on two counts of communicating a threat, a violation of G.S. 14-277.1. The jury was unable to reach a verdict and the trial court declared a mistrial. Upon retrial defendant was convicted of one count of communicating a threat.

The State's evidence tends to show the following: The Crist Clinic for Women in Jacksonville is an obstetrics and gynecological practice which, upon occasion, performs abortions. On 18 September 1987 defendant participated in an anti-abortion protest in front of the clinic. Defendant had protested at that clinic twenty or more times previously and had never communicated a threat towards any person affiliated with the clinic. The business manager for the clinic is Kathy Ross (Ross). She testified that on 18 September 1987 at 8:20 a.m., while she was at the clinic's door, defendant yelled at her, "Mrs. Ross, if you will hold that door open, I'm going to throw a bomb in there and get you out." When defendant yelled at Ross, fellow protesters were nearby pushing children in strollers. At trial defendant presented witnesses who testified that they thought defendant was telling a bad joke. Ross called the police between 2:00 p.m. and 3:00 p.m.

The trial court sentenced defendant to ninety days in jail, suspended the sentence and placed defendant on unsupervised probation for five years. In addition, the trial court ordered defendant to pay a $300 fine. Defendant appeals.

Attorney General Thornburg, by Special Deputy Attorney General Robert G. Webb, for the State.

Holleman, Stam and Reed, by Paul Stam, Jr.; Perry, Perry & Perry, by James S. Perry, for defendant-appellant.

EAGLES, Judge.

[1] Defendant first assigns as error the trial court's refusal to allow defendant to present character witnesses to testify as to his character for peacefulness. Defendant argues that his character for peacefulness is directly at issue in determining whether he willfully communicated a threat. We agree and reverse and remand for a new trial.

The State concedes that it cannot distinguish the instant case from our Supreme Court's decision in *State v. Squire*, 321 N.C. 541, 364 S.E. 2d 354 (1988), which granted a new trial when the trial court refused to allow evidence of pertinent character traits. *See also State v. Bogle*, 324 N.C. 190, 376 S.E. 2d 745 (1989) (trial court erred in failing to give instruction that evidence of law-abidingness may be considered as substantive evidence of defendant's innocence). However, the State argues that the error was not prejudicial. We disagree.

G.S. 14-277.1 provides that

(a) A person is guilty of a misdemeanor if without lawful authority:

(1) He willfully threatens to physically injure the person or damage the property of another;

(2) The threat is communicated to the other person, orally, in writing, or by any other means;

(3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and

(4) The person threatened believes that the threat will be carried out.

Defendant presented evidence which showed that those people around him considered his statement to be a bad joke. Defendant had protested in front of the clinic more than twenty times previously without incident. Additionally, there were small children in close proximity to defendant and the clinic when he made the statement. Evidence of defendant's peacefulness was relevant to the issues of defendant's willfulness in making the statement, whether the statement would have been believed by a reasonable person as well as the reasonableness of Ross' perception that the statement was not a joke. Accordingly, we hold that the trial court's ruling was prejudicial error.

[2] Because of the likelihood of its recurrence at any retrial, we also address defendant's second assignment of error. Defendant contends that the trial court erred in refusing to allow him to cross-examine Ross about her experiences in Cyprus just a few months earlier. Defendant argues that this evidence was relevant in determining whether Ross believed that defendant would actually throw a bomb.

While an accused in a criminal case is guaranteed his right of cross-examination, the trial court may limit the scope of cross-examination. *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983). However, the trial court's rulings on limiting the scope of cross-examination will not be reversed unless defendant can show an abuse of discretion. *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 105 S.Ct. 363, 83 L.Ed. 2d 299

(1984). The testimony defendant attempted to elicit here was collateral to the charges tried. We find no abuse of discretion.

Our holding here makes it unnecessary to address defendant's final assignment of error. For the reasons stated we reverse and remand for a new trial.

New trial.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. RONNO LYNDON COOKE

No. 8827SC918

(Filed 20 June 1989)

1. **Criminal Law § 7.5— driving while impaired—defense of coercion—no instruction—no error**

The trial court did not err in a prosecution for driving while impaired by refusing to instruct the jury on the defense of coercion, compulsion or duress where defendant's evidence was to the effect that he drove the vehicle away from a drunken party in the country because several irate people were chasing him on foot and that he had been driving on different public highways for about thirty minutes when the officer stopped him. While the evidence tends to show that defendant was justifiably in fear for his safety when he drove away from his pursuers, it does not tend to show that he was still justifiably fearful thirty minutes later after his pursuers had been left many miles behind.

2. **Automobiles and Other Vehicles § 129— driving while impaired—credibility of breathalyzer operator—instructions—no error**

There was no error in the trial court's instructions concerning the credibility of the breathalyzer operator in a prosecution for driving while impaired where the instructions conformed with the Pattern Jury Instructions.

APPEAL by defendant from *Sherrill, W. Terry, Judge.* Judgment entered 21 April 1988 in Superior Court, GASTON County. Heard in the Court of Appeals 22 March 1989.

Attorney General Thornburg, by Special Deputy Attorney General Jane P. Gray, for the State.

Assistant Public Defender Joseph F. Lyles for defendant appellant.

PHILLIPS, Judge.

In appealing his conviction of driving while impaired in violation of G.S. 20-138.1 defendant contends that the court erred in not charging the jury on the defense of coercion and duress and as to the credibility of the breathalyzer operator. Neither contention has merit and we find no error.

[1] The trial court was correct in refusing to instruct the jury on the defense of coercion, compulsion or duress as there was no evidence that defendant faced threatening conduct of any kind *at the time the officer saw him driving while intoxicated. State v. Brower and Johnson*, 289 N.C. 644, 224 S.E. 2d 551 (1976), *reconsideration denied*, 293 N.C. 259, 243 S.E. 2d 143 (1978). The evidence that defendant relies upon was to the effect that he drove the vehicle away from a drunken party in the country because several irate people were chasing him on foot, and that he had been driving on different public highways for about thirty minutes when the officer stopped him. While this evidence tends to show that defendant was justifiably in fear for his safety when he drove away from his pedestrian pursuers, it does not tend to show that he was still justifiably fearful thirty minutes later after his pursuers had been left many miles behind. The coercion defense cannot be invoked "by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm," *State v. Kearns*, 27 N.C. App. 354, 357, 219 S.E. 2d 228, 231 (1975), *disc. rev. denied*, 289 N.C. 300, 222 S.E. 2d 700 (1976); and nothing in the record suggests that defendant would have exposed himself to harm of any kind if he had stopped driving the car long before the officer saw him.

[2] And the court's instructions concerning the breathalyzer exactly conformed with the Pattern Jury Instructions, N.C.P.I.—Crim.

270.20, and adequately conveyed the substance of defendant's request. *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982).

No error.

Judges PARKER and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 JUNE 1989

BOWLER v. N.C. DIV. OF MOTOR VEHICLES No. 884SC1314	Onslow (87CVS210)	Affirmed
BURGESS v. CAGLE No. 8830SC841	Haywood (85CVS558)	No Error
BYUN v. HIATT No. 8912SC50	Cumberland (88CVS2340)	Affirmed
CARSON v. REID No. 8829SC1027	Transylvania (82SP14)	Affirmed
COUNTY OF ALAMANCE v. STANLEY OLDSMOBILE No. 8818SC923	Alamance (86CVS1687)	Affirmed
COUNTY OF LENOIR EX REL. GRANT v. KELLY No. 898DC64	Lenoir (88CVD996)	Dismissed
DUNCAN v. DUNCAN No. 8827DC1419	Cleveland (88CVD595)	Dismissed
GOODMAN v. AT&T TECHNOLOGIES No. 8810IC929	Ind. Comm. (523445)	Affirmed
HAWFIELD v. STANLY COUNTY No. 8820SC1178	Stanly (88CVS044)	Affirmed
HEARTLAND GROUP v. DESTINY GROUP No. 8810SC944	Wake (88CVS362)	Affirmed
HOSKINS v. C.E.M. ENTERPRISES No. 883DC1267	Pitt (87CVS1441)	Affirmed
HUDEC v. HUDEC No. 8823DC1009	Alleghany (88CVD25)	Affirmed
IN RE ABERNATHY No. 8827DC1420	Gaston (87J219)	Vacated & Remanded
IN RE ESTATE OF RIEGG v. RIEGG No. 8830SC1000	Haywood (88SP19)	Vacated & Remanded
KING v. KING No. 8810DC1113	Wake (87CVD1576)	Dismissed

LIPOVAN v. BMW OF OF NORTH AMERICA No. 885SC894	New Hanover (87CVS1112)	Affirmed
PARSONS v. HIATT No. 8825SC1334	Caldwell (86CVS987)	Affirmed
PEE v. CAMPAGNA No. 882SC1245	Washington (87CVS20)	Affirmed
PELICAN WATCH v. U.S. FIRE INS. CO. No. 8712SC1106	Cumberland (85CVS1584)	Reversed in part, affirmed in part & remanded
RANDOLPH v. TAYLOR No. 887DC1039	Edgecombe (86CVD119)	Vacated & Remanded
STATE v. ALLEN No. 8920SC97	Union (88CRS6251)	No Error
STATE v. ENSLEY No. 8930SC25	Swain (86CRS72) (86CRS76)	No Error
STATE v. FRY No. 884SC970	Onslow (87CRS21784)	No Error
STATE v. GARCIA No. 891SC44	Dare (88CRS4851) (88CRS4852)	Appeal Dismissed
STATE v. GIVIAN No. 894SC39	Onslow (88CRS6902) (88CRS13200)	No Error
STATE v. HUNTER No. 8817SC1402	Surry (87CRS1258)	No Error
STATE v. KENNEDY No. 8922SC111	Iredell (87CRS11920)	No Error
STATE v. McCARTY No. 884SC1153	Duplin (87CRS5495) (87CRS5496) (87CRS5497) (87CRS5526)	No error in part; new trial in part
STATE v. McCOY No. 8818SC1391	Guilford (87CRS46182) (87CRS46183) (87CRS46184) (87CRS46185) (87CRS46186) (87CRS46187) (87CRS46188) (87CRS46189) (87CRS20751) (87CRS20752)	Affirmed

STATE v. MYERS No. 8821SC1388	Forsyth (88CRS6677)	No Error
STATE v. PARSONS No. 8825SC1364	Caldwell (86CRS5245)	No Error
STATE v. PERRY No. 886SC1411	Bertie (88CRS1413)	No Error
STATE v. WALLACE No. 898SC194	Lenoir (88CRS2992) (88CRS2994)	No Error
STATE v. WHITMAN No. 885SC777	New Hanover (87CRS9718) (87CRS9719)	New Trial
STATE EX REL. DAVIS v. JONES No. 889DC1321	Warren (87CVD220)	Vacated
VITTORINO v. DUNN No. 8813SC1302	Brunswick (86CVS419)	No Error

BOLTON CORPORATION, PLAINTIFF v. T. A. LOVING COMPANY, DEFENDANT

WILLIAM E. BOLTON, III, PLAINTIFF v. T. A. LOVING COMPANY, AND BOLTON CORPORATION, DEFENDANTS

No. 8810SC1292

(Filed 5 July 1989)

1. **Contracts § 21.2; Negligence § 2— public building project— delay damages—statutory claim by one prime contractor against another**

Under N.C.G.S. § 143-128, a prime contractor on a public building project may be sued by another prime contractor on the project for economic loss foreseeably resulting from the first prime contractor's failure to fully perform all duties and obligations due respectively under the terms of the separate contracts. While plaintiff heating and air conditioning contractor had no claim for negligence against defendant general work contractor for delay damages, plaintiff did have a claim against defendant pursuant to N.C.G.S. § 143-128.

2. **Contracts § 21.2— public building project—contractor's claim against project expediter**

Under N.C.G.S. § 143-128, plaintiff heating and air conditioning contractor for a public building project may sue defendant general work contractor for breach of its contract duties as project expediter as well as for breach of its contract duties for general work not included in the other three prime contracts.

3. **Evidence § 47— responsibility for delay—competency of architect's testimony**

A public construction project architect's testimony concerning responsibility for delay should have been admitted since (1) opinion testimony was not inadmissible because it invaded the province of the jury, and (2) the parties had agreed by contract that the architect's opinion would be determinative of the issue.

4. **Contracts § 21.2— public building project—responsibility for delay—decision by architect prima facie correct**

Where a public building construction contract gives the architect the authority to determine responsibility for delay among the prime contractors, the architect's determination

is prima facie correct, and the burden is upon the other parties to show fraud or mistake.

5. Contracts § 21.2— public building project—extension of time—period of undue delay attributable to general contractor

A change order granting the general work contractor for construction of a building at U.N.C. an extension of time of 150 days did not preclude the project architect from determining that the 150 days covered by that extension constituted a period of "undue delay" attributable to the general work contractor.

6. Contracts § 29.3— public building project—action by one contractor against another—undue delay—duration related losses

Plaintiff heating and air conditioning contractor may present evidence of duration related losses resulting from undue delay caused by defendant general work contractor in the construction of a building for U.N.C. which prevented plaintiff from performing its work in a timely manner, including evidence of the costs of maintaining personnel, tools and equipment at the project site for the extended period.

7. Contracts § 29.3— public building project—undue delay—damages for home office overhead

Damages for extended home office overhead may be allowed in an action by plaintiff heating and air conditioning contractor for a public building project to recover for undue delay by defendant general work contractor if they were contemplated in the contract and were incurred as a result of the undue delay caused by defendant.

8. Contracts § 29.3— public building project—undue delay by another contractor—recovery of subcontractor's delay damages

In an action by a heating and air conditioning contractor to recover damages for delay allegedly caused by defendant general work contractor in the construction of a building for U.N.C., plaintiff could recover for delay damages incurred by its ductwork subcontractor since the subcontractor is viewed under the contract as a mere employee or agent of its prime contractor, and the contract intends for any damages to a subcontractor to be a subset of its prime contractor's damages.

9. Fraud § 12— failure to show intent to deceive

A prime contractor's forecast of evidence that defendant general work contractor and project expediter for a building project at U.N.C. circulated an overly optimistic work schedule used as a basis for bids by other prime contractors was insufficient to establish fraud by defendant where there was no evidence that the projected work schedule was circulated by defendant with the intent to deceive plaintiff or any other prime contractors who were bidding on the project.

10. Unfair Competition § 1— false work schedule—basis for bids by others—no unfair trade practice

Plaintiff prime contractor's evidence that defendant general work contractor and project expediter for a building project at U.N.C. circulated a 930-day work schedule used as the basis for bids by other prime contractors when it knew that the 930-day schedule was unrealistic did not show unscrupulous or immoral conduct by defendant which would constitute an unfair trade practice in violation of N.C.G.S. § 75-1.1.

APPEAL by plaintiff, Bolton Corporation, from *Read, Judge, Stephens, Judge,* and *Barnette, Judge.* Orders entered 2 November 1987, 19 January 1988 and 16 February 1988. Appeal by plaintiff, William E. Bolton, III, from *Barnette, Judge.* Orders entered 16 February 1988 and 23 February 1988 in Superior Court, WAKE County. Cross-appeal by defendant. Heard in the Court of Appeals 19 April 1989.

This "delay damages" case arises from a multiple-prime contract pursuant to N.C.G.S. § 143-128, to build a multi-million dollar central library on the UNC-Chapel Hill campus. Bolton, the heating and ventilating contractor, sued the general contractor and "project expediter," Loving, in negligence, and as a third-party beneficiary for breach of Loving's contract with the State. Bolton claims that Loving breached its contract with the State by causing Bolton "undue delay" which prevented Bolton from performing its contract in a timely way. Bolton initiated claims against Loving for delay damages and against the State of North Carolina. The claim against the State is before this panel in a connected case.

This case is before this Court for the second time. *Bolton v. Loving,* 77 N.C. App. 90, 334 S.E. 2d 495 (1985). On appeal from a decision of this Court, the Supreme Court in *Bolton v.*

Loving, 317 N.C. 623, 347 S.E. 2d 369 (1986), held that an insurance settlement did not preclude Bolton from pursuing its claims against Loving. On remand, Bolton pursued its claims for breach of contract, fraud, unfair and deceptive trade practices, negligent breach of common law duty of care, and breach of common law duty of due care in performance of a contract. Other pertinent facts are included below.

Graham & James, by J. Jerome Hartzell and Mark Anderson Finkelstein, for plaintiff appellants and plaintiff appellees.

Poyner & Spruill, by David W. Long, Susan K. Nichols and David M. Barnes, for defendant appellant and defendant appellee.

ARNOLD, Judge.

This action presents the following issues to this Court: (1) Was there sufficient evidence of negligence to preclude defendant's motion for directed verdict on that claim? (2) Is the contract provision which identifies Loving as project expediter valid? (3) Is the architect's allocation of responsibility for delay final, absent bad faith? (4) What theory of damages, and what evidence of damages may be presented? (5) When the State granted a change order for extension of time to Loving, what effect, if any, did that have on Bolton's claim against Loving for "undue delay"? (6) Was it error to allow summary judgment for defendant on plaintiff's claims for fraud, and unfair and deceptive trade practices?

In large public construction projects many factors may combine to prevent timely completion:

> [T]he complexity of design and quality construction which may be required, the myriad of necessary reviews and approvals, the number of changes required throughout the design/construction cycle, and the possibility of one or more of the contractors becoming delayed in performance . . . . Clearly, the necessity for effective scheduling, supervision, and coordination is at the heart of the phased design and construction method; and without it, the result may be akin to [a] "battlefield" . . . .

Conner, *Construction and Management Services* 46 Law & Contemp. Prob. 5, 14 (1983).

N.C.G.S. § 143-128 requires that when a public building project's expected costs exceed $50,000.00 "separate specifications must

be prepared, and separate bids must be received, and separate contracts must be awarded for each of four branches of work[:]" heating, ventilating and air conditioning (HVAC); plumbing and gas fittings; electrical wiring and installation; and general work not included in the first three branches. A. F. Bell, *Construction Law* North Carolina Bar Foundation IV-1 (Institute of Government 1988). The rationale in favor of multiple-prime contracts has been stated:

> While there can be additional bidding expenses, proponents of separate contracts also see cost advantages. Breaking down the project into specialty segments generates more bidders and more competition. Finally, some owners believe that they can reduce their costs by performing less expensively and at least as efficiently as the prime contractor. The latter earns part of her compensation for selection, policing, and coordination of the specialty trades.

J. Sweet, Sweet on Construction Industry Contracts § 19.2 at 372 (1987).

Bolton assigns error to the trial court's 16 February 1988 order granting a directed verdict to Loving on Bolton's negligence claim. In its defense, Loving mistakenly relies on *N.C. Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978), which teaches that a breach of contract does not ordinarily give rise to a tort action between the parties to a contract. Both parties miss an essential point, however—Bolton's cause of action is statutory:

> N.C.G.S. § 143-128. **Separate specifications for building contracts; responsible contractors.**
>
> * * * *
>
> *Each separate contractor shall be directly liable* to the State of North Carolina, or to the county or municipality, and *to the other separate contractors for the full performance of all duties and obligations due respectively under the terms of the separate contracts and in accordance with the plans and specifications, which shall specifically set forth the duties and obligations of each separate contractor.*

See Bell at IV-16. In compliance with the statute the contract states:

Art. 12—Protection of Work, Property and the Public

The Contractors shall be jointly responsible for the entire site and the building or construction of the same and provide all the necessary protections, as required by the Owner or Engineer or Architect, and by laws or ordinances governing such conditions. They shall be responsible for any damage to the Owner's property, or of that of others on the job, by them, their men, or their sub-contractors, and shall make good such damages.

Art. 14—Construction Supervision

* * * *

All Contractors shall be required to cooperate and consult with each other during the construction of this project. Each Contractor shall lay out and execute his work so as to cause the least delay to other Contractors. Each Contractor shall be held responsible for any damage to other Contractors' work, and each Contractor shall be held financially responsible for undue delay caused by him to other Contractors on the project.

The parties to this suit did not contract one with the other, they are not promisee and promisor. Rather, each contracted with the owner, and in that contract each affirmed its statutory duty to be liable to the other for damage to the other's property or work. Because the parties are not promisee and promisor they are not bound by the limitations of *Ports Authority*.

[1] We interpret N.C.G.S. § 143-128 to mean that a prime contractor may be sued by another prime contractor working on a construction project for economic loss foreseeably resulting from the first prime contractor's failure to fully perform "all duties and obligations due respectively under the terms of the separate contracts."

A directed verdict in favor of Loving on the negligence claim was correct; however, Bolton does have a claim pursuant to the statute. On retrial, Bolton must provide sufficient evidence to support a cause of action under N.C.G.S. § 143-128.

To identify the extent of Loving's potential liability to Bolton it is necessary to understand what Loving's "duties and obligations" were under the terms of its separate contract. N.C.G.S. § 143-128. On appeal, both parties question the significance of the "project expediter" provisions of Loving's contract to Bolton's claim for

delay damages. On cross-appeal Loving argues that the trial court erred in refusing to grant its motion for a directed verdict on the ground that Loving could not be liable for failure to expedite because it "cannot be held liable for breach of a duty to coordinate the work of contractors." We disagree.

Loving's argument ignores the terms of the contract which separate the duty to coordinate from the duty to expedite, and assigns the duty to coordinate to the architect. The duty to coordinate derives from the owner's duty to "furnish a work site," and to cooperate to allow the contractor to perform. Goldberg, *The Owner's Duty to Coordinate Multi-Prime Construction Contractors, A Condition of Cooperation*, 28 Emory L.J. 377, 380-81 (1979). At common law "one who contracts to render a performance or produce a result for which it is necessary to obtain the cooperation of third persons is not excused by the fact that they will not co-operate." 6 Corbin § 1340 (1962). However, an owner's duty to cooperate and its ancillary duty to coordinate may be delegated in a contract. *Broadway Maintenance Corporation v. Rutgers*, 90 N.J. 253, 265, 447 A. 2d 906, 912 (1983).

At Articles 14 and 31 of the contract in the instant case each prime contracts to cooperate with the other primes in the execution of the project. In addition, Loving specifically contracted to assume the "project control responsibility" of project expediter:

> Article 14—Construction Supervision
>
> The Owner may designate a "Project Expediter" for State-owned projects involving two or more prime contractors. . . .
>
> It shall be the responsibility of the Project Expediter to schedule the work of all prime contractors; to maintain a progress schedule for all prime contractors for this project; and to notify the designer of any changes in the progress schedule.

By its terms the contract defines the project expediter as the entity which schedules the work of all primes and maintains the progress schedule. The project expediter is charged with using proper procedures to obtain information to evaluate the progress of the project. *See Goldberg* at 385-87. In Article 31 the contract states that the responsibility to coordinate work schedules remains with the engineer or architect. Article 14 contemplates that the project expediter's scheduling of the project will assist the ar-

chitect, who has the power to sanction contractors who do not keep up with their work. *See Conner* at 14.

[2] As General Contractor, Loving was responsible for "General work relating to the erection [and] construction" of the building not included in the three other prime contracts. N.C.G.S. § 143-128. As project expediter Loving's work was to facilitate and assist in the smooth and efficient production of the building. By statute Bolton may sue Loving for breach of these contract duties.

To prove Loving's liability Bolton attempted to establish that the architect's allocation of responsibility for delay was final, absent bad faith. By its order dated 2 November 1987, the trial judge denied Bolton's motion for partial summary judgment which, among other claims, stated that "[t]he architect was designated by the contract to rule on requests for extensions of time." Bolton's motion was denied, and it is not appealable. "Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of facts, either judge or jury." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E. 2d 254, 256 (1985).

[3] At trial, Bolton's attempt to introduce the project architect's testimony concerning responsibility for delay was refused by the trial judge because he saw the testimony as going to the ultimate issue for the jury. The testimony should have been allowed for two reasons: First, "the admissibility of expert opinion testimony does not depend on whether it invades the province of the jury, but whether it will aid the jury's understanding of the issue. . . ." *Pasour v. Pierce*, 76 N.C. App. 364, 369, 333 S.E. 2d 314, 317 (1985), *disc. rev. denied*, 315 N.C. 589, 341 S.E. 2d 28 (1986); *Alva v. Cloninger*, 51 N.C. App. 602, 612, 277 S.E. 2d 535, 541 (1981). Second, the parties had agreed by contract that the project architect's opinion would be determinative on the issue.

An authority on construction law posits that when a contract assigns the project architect or engineer responsibility to make decisions on all claims of contractors, as in this case, the architect's decision on responsibility for delay should control unless it is shown to be dishonestly made or to be clearly wrong. J. Sweet, Legal Aspects of Architecture, Engineering, and the Construction Process § 33.09 (3rd edition 1985). The rule is adopted from cases concerned with conditions precedent to payment. *See, e.g., Laurel Race Course, Inc. v. Regal Construction Co.*, 274 Md. 142, 333 A. 2d 319 (1975)

(engineer's certificate required before owner obligated to make payment); *Barnes Construction Co. v. Washington Township*, 134 Ind. App. 461, 184 N.E. 2d 763 (1962); *see* Restatement 2nd Contracts § 227 comment c.

In *Laurel*, the contractor sued the owner for amounts allegedly due under the contract. Owner defended that contractor had failed to produce the certification of the project engineer which would entitle it to payment under the terms of the contract. *Id.* Finding for the owner, the court stated:

> By this contract, which is perfectly lawful, the parties expressly agreed to submit the question . . . to the judgment of [a] third party, . . . [whose] judgment, no matter how erroneous or mistaken it may be, or how unreasonable it may appear to others, is conclusive between the parties, unless it be tainted with fraud or bad faith. To substitute for it the opinions and judgments of other persons, whether judge, jury or witnesses, would be to annul the contract, and make another in its place.

Id. at 151, 333 A. 2d at 325 (quoting *Lynn v. B.&O. R.R. Co.*, 60 Md. 404, 415 (1883).

City of Durham v. Reidsville Engineering Co., 255 N.C. 98, 120 S.E. 2d 564 (1961), presents the rule in a somewhat different context. In *Durham*, the city sued a construction contractor for breach of its contract to provide power and light wiring on a public construction project. The construction contractor and its casualty insurer filed a cross-action against the supervising engineers who had certified the contractor's work, which made it eligible for payment. Interpreting contract documents similar to those in this case, the court held that when

> authority is expressly granted to the Engineers in the contract, together with their decision on all matters of dispute involving the character of the work, compensation for extra work, etc., the Engineers in making such decision under the terms of the contract would be acting in the capacity of arbitrators and could not be held liable in damages to either party in the absence of bad faith.

Id. at 102, 120 S.E. 2d at 567.

Articles 31 and 35 of Loving's contract allocates to the architect the authority to determine responsibility for delay among

the prime contractors. Article 31 of the contract concerns "Separate Contracts and Contractor Relationships":

> Chapter 143, Article 8, General Statutes of North Carolina requires that separate contracts will be awarded for General Construction, Heating and Ventilating and Air Conditioning, Plumbing, and Electrical installations. The Owner reserves the right to prepare separate specifications, receive separate bids, and award separate contracts for such other major items of work as may seem to the best interest of the State.
>
> All Contractors shall cooperate in the execution of their work, and shall plan their work in such manner as to avoid conflicting schedules or delay of the work. The Engineer or Architect shall coordinate work schedules.
>
> If any part of a Contractor's work depends upon the work of another Contractor, defects which may affect that work shall be reported to the Architect or Engineer in order that prompt inspection may be made and the defects corrected. Commencement of work by a Contractor where such condition exists will constitute acceptance of the other Contractor's work as being satisfactory in all respects to receive the work commenced except as to defects which may later develop. The Engineer or Architect shall be the judge as to the quality of work, and shall settle all disputes on the matter between Contractors.

Whether the architect's allocation of responsibility for delay is final absent bad faith is largely answered by the last paragraph of Article 31. The subject of the paragraph as set out in the topic sentence is plain: when one prime's work depends on the work of another. When problems develop a report is to be made to the architect, otherwise the complaining prime will be deemed to have accepted the work of the prime whose work necessarily came first. Reading the paragraph as a whole, the last sentence explains that when the work of one prime depends on the work of another the "Architect shall be the judge as to the quality of work, and shall settle all disputes on the matter between Contractors." In this instance, to preclude the architect's testimony "would be to annul the contract."

Article 35 of the contract guides us in our determination of the proper weight to be accorded the architect's decisions:

Art. 35—Architect's or Engineer's Decisions

> The Architect or Engineer is charged with the responsibility of interpretation of the contract documents and general directions of the work. He shall make decisions on all claims of the Contractor or the Owner, or on any matter dealing with the execution of the work. His decisions relating to artistic effect and technical matters shall be final, provided such decisions are within the limitations of the contract terms.

The architect interprets the contract which governs the relationship of the parties, and makes decisions on all claims of contractors "on any matter dealing with the execution of the work." Finality is accorded only to decisions relating to artistic effect and technical matters.

[4] As in any construction project, contractors in a multiple-prime situation co-exist in a delicate state of symbiosis. Each prime's ability to maintain timely progress is as much a part of their work, and is as important to the other primes, as their ability to perform more tangible tasks. We hold that judgment of the quality of a prime's ability to perform its jobs and to maintain timely progress in those jobs is delegated to the architect by the contract. The architect's determination is "*prima facie* correct, and the burden is upon the other parties to show fraud or mistake." *Barnes*, 134 Ind. App. at 466, 184 N.E. 2d at 764-65.

[5] In addition to the issue of project expediter liability addressed above, Loving contends on cross-appeal that it cannot be held liable to Bolton for any of the 411 day time extension allowed by the University. We disagree.

Loving's reliance on the rationale of *United States v. Rice*, 317 U.S. 61, 87 L.Ed. 2d 53, 63 S.Ct. 120 (1942), is misplaced. Rather, we rely on the terms of the contract in the instant case. At Article 18 the contract defines the project architect as:

> the judge as to division of responsibility between the several Contractors, and shall apportion the amount of liquidated damages to be paid by each of them, according to delay caused by any or all of them.

Furthermore, Article 18 holds:

> If any Contractor be delayed at any time in the progress of the work by any act or neglect on the part of . . . any

other prime contractor on the work, . . . or by reason of which the Architect . . . considers delay justifiable, then the time of completion will be extended such period considered reasonable by the Architect . . . .

Loving correctly argues that Article 18 of the contract does not give the architect authority to decide delay disputes among the prime contractors. Article 18 is concerned with each prime's responsibility to the owner for delay. It is plain that the architect is the final judge as to apportionment of liquidated damages to the owner because of delay, and, as to when a prime should be granted a time extension from the owner because, in the architect's judgment, the prime has shown justifiable delay. However, given our interpretation of Article 31, Loving's reliance on Article 18 to shield it from liability for Bolton's delay claim is misplaced. Furthermore, an architect's decision under Article 18 would be relevant to a contractor's claim under Articles 31 and 35.

By letter dated 18 April 1984, Lesley N. Boney, Jr., project architect, made recommendations to the University's representative concerning liquidated damages on the library project. It was noted that the original completion time was 930 days, but actual completion time was 1,417 days. That due to change orders as of 18 April 1984 the total number of authorized completion days was extended to 1,191 days, leaving an overrun of 226 days for which liquidated damages were due from Loving. Boney closed his letter by stating that "no portion of the liquidated damages should be charged to the other contractors, and that the general contractor should be charged . . . for the delay in project completion." Subsequent to this decision by Boney, Loving negotiated a settlement with the University which resulted in change order G-29 which granted Loving a time extension of an additional 150 days, thus reducing the overrun to 76 days. Bolton was not a party to this settlement, and Boney only reluctantly approved the change order, with reservation, at the request of the University.

As stated above, the judgment of the quality of a prime's ability to perform its jobs, and maintain timely progress in those jobs, is delegated to the architect by the contract, and that determination is *prima facie* correct. The evidence suggests that Boney found the request for change order G-29 unjustifiable and unreasonable. It was only issued at the explicit direction of the University. Given these circumstances we find that G-29 does not

preclude the project architect from determining that the 150 days covered by that extension are a period of "undue delay."

Loving's argument that the Uniform Arbitration Act, N.C.G.S. § 1-567.1 *et seq.*, somehow lessens the power of the architect to settle disputes concerning cause for delay is also without merit. Loving correctly observes that the architect is not specifically made an arbitrator. The contract does not contemplate arbitration, and the parties are in no way bound to that procedure by the contract. However, the parties have agreed to be bound by the architect's judgments made under the powers given the architect in Articles 18, 31, and 35, and the correct forum to introduce such evidence is in a court of law.

Bolton assigns error to the trial court's exclusion of certain specific evidence of Bolton's delay damages, including the exclusion of evidence of extended "general conditions" expenses, that is, the cost of keeping tools and equipment on the site for the extended period; labor inefficiencies; invoice and actual cost records; home-office overhead; subcontractor's damages; and cost of delay in payment of retainage. Loving argues that the evidence was properly excluded because Bolton failed to tie its evidence of damages to any act or omission of Loving.

Article 12 of the contract makes each contractor liable for damage to another contractor's property; Article 14 makes each contractor "responsible for any damage to other Contractors' work, and each Contractor shall be held financially responsible for undue delay caused by him to other Contractors on the project." As stated above, the project architect's allocation of responsibility for undue delay is *prima facie* correct.

In breach of contract actions the injured party is entitled to be placed:

> in the same position he would have occupied if the contract had been performed. . . . Where one violates his contract he is liable for such damages, including *gains prevented* as well as *losses sustained*, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract.

Perfecting Service Co. v. Product Development & Sales Co., 259 N.C. 400, 415, 131 S.E. 2d 9, 21 (1963). In this case, N.C.G.S. § 143-128, by reference to the contract, contemplates that a contractor who

breaches his statutory duty to fulfill his contractual duties and obligations shall be liable for contract damages.

Contract damages are defined as either general damages, "damages that courts believe 'generally' flow from the kind of substantive wrong done by defendant," or special damages, those "peculiar to the particular plaintiff." Dobbs, *Remedies* § 3.2 (1973). Recovery of special damages is limited to those damages "which may reasonably be supposed to have been in the contemplation of the parties at the time they contracted." *Stanback v. Stanback*, 297 N.C. 181, 186, 254 S.E. 2d 611, 616 (1979) (citing *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. 145 (1854)). Although the parties here did not contract one with the other, the rule may be applied by showing what the parties knew at the time they contracted with the State.

Special damages must be proved to a reasonable certainty. " 'Absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion.' " *Weyerhaeuser v. Godwin Building Supply*, 292 N.C. 557, 561, 234 S.E. 2d 605, 607 (1977) (quoting *Perfecting* at 417, 131 S.E. 2d at 22; *Tillis v. Cotton Mills*, 251 N.C. 359, 111 S.E. 2d 606 (1959)). However,

> [w]here the plaintiff can prove the fact of damage, but not the extent of it, the reasonable certainty rule as it is now applied in most courts does not require proof of damages with mathematical precision. It does require that the plaintiff adduce some relevant datum from which a "just and reasonable" estimate of the amount might be drawn, and without any such datum in the evidence, the claim will necessarily be dismissed as speculative and conjectural. Beyond this, the plaintiff is probably expected to prove his damages with as much accuracy as is reasonably possible to him, but precision not attainable in the nature of the claim and circumstances is not ordinarily required.

Dobbs § 3.3 at 151 (1973) (cited with approval in *Largent v. Acuff*, 69 N.C. App. 439, 444, 317 S.E. 2d 111, 114, *disc. rev. denied*, 312 N.C. 83, 321 S.E. 2d 896 (1984)).

Damages for duration-related economic injury, that is, "maintaining required personnel, equipment and services at the project site . . . after the originally scheduled completion date" have been recognized by our Supreme Court. *Davidson and Jones, Inc. v.*

N.C. Dept. of Administration, 315 N.C. 144, 151, 337 S.E. 2d 463, 467 (1985). The method of proof of such damages is difficult:

> The data are not often, if ever, available in the specific detail that would allow a government contractor to price a loss of productivity claim based solely on actual cost data. To do so, it would be necessary for a government contractor to maintain detailed and complete records of each event contributing to the loss of productivity. Accomplishing this would require a cost-tracking system that specifically identifies each instance of additional cost caused by every individual action or inaction of the government. . . . [T]he cost of doing so [would be] prohibitive. The presentation of the proof of damages based upon the pricing of each increase in cost to every item of work, matched with the specific cause, cannot be practically realized in most situations. . . .
>
> . . . Generally, accounting and project records do not isolate the costs for productivity losses separately from the other costs of the project because the work affected by the loss of productivity is integral with the base contract work. There is no precise way to separate the normal or base work that is performed by an employee from the inefficient portion of the work.

Shea, *Proving Productivity Losses in Government Contracts*, 18 Public Contract Law Journal 414, 417-18 (March 1989) (citations to footnotes omitted).

[6] Bolton's items of damage labeled "general conditions" expenses and labor inefficiencies are analogous to the duration-related damages which were allowed to be proved in *Davidson and Jones*. On retrial, Bolton may, with the assistance of properly qualified expert testimony, introduce evidence of duration-related losses resulting from "undue delay" caused by Loving. The method of proof must be as specific as the circumstances will allow. *New Pueblo Constructors, Inc. v. State of Arizona*, 144 Ariz. 95, 696 P. 2d 185, 194 (1985) (Court discussed three methods of proving costs in delay damages cases: actual cost, jury verdict, total cost, and its derivative, modified total cost). Bolton must present whatever evidence is available to tie the loss to the period of "undue delay" attributable to Loving, and, "must also demonstrate why better or more certain evidence is not obtainable." *Shea* at 430.

A review of the record shows that evidence of invoice and actual cost records was refused because the trial court was convinced that the evidence offered included evidence from other jobs, not just this job. On retrial, the burden is on Bolton to make this evidence intelligible to the court and to explain why better and more certain evidence is not obtainable.

[7] Damages for extended home-office overhead may be allowed if they are contemplated in the contract, *Davidson and Jones* at 156, 337 S.E. 2d at 470, and, in this case, if they can be shown to be related to costs incurred as a result of the "undue delay" caused by Loving. *See Perfecting* at 417, 131 S.E. 2d at 22.

[8] Bolton correctly contends that the trial court erred in refusing to allow evidence of damages incurred by Bolton's ductwork subcontractor, Phillips. Article 32 of the contract establishes these attributes of the relationship between contractors and subcontractors:

> The Contractor is and remains fully responsible for his own acts or omissions as well as those of any sub-contractor or any employee of either. The Contractor agrees that no contractual relationship exists between the sub-contractor and the Owner in regard to this contract, and that the sub-contractor acts on this work as an agent or employee of the Contractor.

Article 33 states:

> The Contractor agrees that the terms of these contract documents, including all portions thereof, apply equally to a sub-contractor as to the Contractor, and that the sub-contractor is bound by those terms as an employee of the Contractor.

Article 12 states:

> [Contractors] shall be responsible for any damage to the Owner's property, or of that of others on the job, by them, their men, or their sub-contractors, and shall make good such damages.

A contractor may recover from an owner its subcontractor's "extra costs and services wrongfully demanded" when the subcontractor is not in privity with the owner and could not recover directly. *United States v. Blair*, 321 U.S. 730, 737, 88 L.Ed. 1039, 1045, 64 S.Ct. 820, 824 (1944); *see also Wexler v. Housing Authority*, 149 Conn. 602, 606, 183 A. 2d 262, 265 (1962). The rule is explained:

> The government [owner] did not have, and did not by any implication recognize, any contractual relations whatever with

> [subcontractor], and if he had failed in performing it would not have had any right of action against him . . . . [Contractor] was the only person legally bound to perform the original contract; it was from him that the government demanded the extra service, and under the facts found by the lower court the obligation to pay for that service was to him, whether he performed it personally or through another.

Hunt v. United States, 257 U.S. 125, 128-29, 66 L.Ed. 163, 165, 42 S.Ct. 5, 6 (1921).

In the instant case the issue is whether one prime on a multiple-prime project may sue another prime for damages incurred by the first prime's subcontractor. Though not answering the question directly, our Supreme Court in *Davidson and Jones* allowed a prime to recover duration-related damages related to work performed by a subcontractor. *See also J. A. Tobin Construction Co. v. State Highway Commission*, 680 S.W. 2d 183, 191 (Mo. App. 1984) (contractor may include as part of its claim the amount due a subcontractor, provided that portion of the contractor's claim is not based on speculation and is liquidated).

As set out above, both N.C.G.S. § 143-128 and the contract make contractors liable one to the other for damages. Article 31 of the contract imposes a duty of cooperation on all contractors, and states that when one contractor's work depends on the work of another the "Architect shall be the judge as to the quality of work, and shall settle all disputes on the matter between Contractors." There is no privity of contract between the subcontractor and the owner, nor the subcontractor and the other primes. The subcontractor is viewed under the contract as a mere employee or agent of the prime contractor.

Loving cites *Warren Brothers Co. v. N.C. Dept. of Transportation*, 64 N.C. App. 598, 307 S.E. 2d 836 (1983), and *Ledbetter Brothers v. Department of Transportation*, 68 N.C. App. 97, 314 S.E. 2d 761 (1984), in support of its argument that Bolton cannot assert damages suffered by Phillips. These cases are inapposite. Unlike those cases, the contract here makes each contractor "financially responsible for undue delay caused by him to other Contractors on the project." Furthermore, as set out above, each contractor is fully responsible for the acts of its subcontractors. If a subcontractor were to cause injury to a contractor other than its prime, the other contractor would have an action in contract against the

subcontractor's prime. The logic set out in *Hunt* is applicable here, and we hold that the contract intends for any damages to a subcontractor to be a subset of its prime's damages. In light of this ruling we do not reach the issues raised in the appeal of William Bolton, III.

Finally, Bolton alleges that it should be allowed to prove the cost of delay in payment of retainage. This argument is without merit.

[9] In its order dated 19 January 1988, the trial court allowed Loving's motion for summary judgment as to the fraud and unfair trade practices claim. We affirm.

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56, *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

To withstand a motion for summary judgment on a fraud claim, the forecast of the evidence must present a genuine issue of material fact as to each element of fraud. *Uzzell v. Integon Life Insurance Corp.*, 78 N.C. App. 458, 463, 337 S.E. 2d 639, 643 (1985), *cert. denied*, 317 N.C. 341, 346 S.E. 2d 149 (1986). Summary judgment "is proper where the forecast of evidence shows that even one of the essential elements of fraud is missing." *Id.*

The elements of fraud have been stated:

> (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) *made with intent to deceive*, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 569, 374 S.E. 2d 385, 391 (1988), *citing Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974).

As the court in *Myers & Chapman* points out a more traditional formulation of the elements of fraud is:

> (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false *or made it recklessly without any knowledge of its truth and*

as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Id. at 568, 374 S.E. 2d at 391, *citing Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 92, 261 S.E. 2d 99, 103 (1980). The court disapproved this formulation of the elements of fraud to the extent it suggests that the essential element of the intent to deceive need not be shown. *Id.* at 569, 374 S.E. 2d at 392. Specifically, the court rejected the idea that "it is unnecessary to prove intent to deceive because intent may be inferred by reckless indifference to the truth." *Id.* at 567, 374 S.E. 2d at 391.

Loving argues that Bolton's forecast of the evidence on the issue of fraud failed to present a genuine issue of material fact on the issue of intent to deceive. Paraphrasing, Bolton's complaint on the issues of fraud and unfair and deceptive trade practice states: (1) at the time Loving executed its contract with the State "it knew that it would not be able to finish its work under the contract within 30 months, but rather that it would require a substantially greater time"; (2) Loving did not disclose to the other primes its true estimate of the timing of the project, but rather circulated a work schedule based on 30 months; (3) that this was done with the intention and expectation that the other contractors would rely on the misconceived and erroneous work schedule; and (4) Bolton reasonably relied on this schedule in forming its bid.

In support of its contentions, Bolton presented a series of five letters from Loving to the project architect: 11 July 1980: "We have had reservations all along as to whether 930 days is enough time to build this job"; 19 January 1981: "In order to set the record straight, it is noted that you were advised in the Pre-Bid Conference on August 3, 1979, and several telephone conversations, that the nine hundred thirty (930) days were unrealistic." 13 October 1981: "We are trying our best to build this 36-month job in 33 months. The time allotted is approximately thirty (30) months."

Other evidence presented included a deposition of William Franklin, one of Loving's project estimators, who stated that given the magnitude of the job nine hundred and thirty days was unrealistic, but "if everything went as it should and as best it could, the job could have been built in nine hundred and thirty days."

Even assuming that Loving *knew* that the work schedule was a false representation of the true nature of the project, which we are not certain the evidence suggests, there is no evidence in the record that the projected work schedule was circulated with the intent to deceive Bolton, or any other prime. *Cf. E. C. Nolan Co. v. State of Michigan*, 58 Mich. App. 294, 227 N.W. 2d 323 (1975) (plaintiff entitled to recover when work-progress schedule was at variance with the facts, amounted to a material misrepresentation, and plaintiff had a right to rely on the schedule). It is undisputed that the contract provided for extensions of time, that Bolton was an experienced contractor who would be aware of the fact that "projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill." *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 70, 344 S.E. 2d 68, 77, *cert. granted*, 318 N.C. 284, 347 S.E. 2d 465 (1986), *disc. rev. improvidently allowed*, 319 N.C. 222, 353 S.E. 2d 400 (1987). We agree with the trial court that the forecast of the evidence failed to support Bolton's contention that Loving intended to deceive the other primes who were bidding on the job.

[10] In contrast to fraud, intent is irrelevant to a claim of unfair and deceptive trade practices under N.C.G.S. § 75-1.1. *Wilder v. Squires*, 68 N.C. App. 310, 315 S.E. 2d 63 (1984). Rather, "unfairness and deception are gauged by consideration of the effect of the practice on the marketplace. . . ." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E. 2d 397, 403 (1981). Whether a particular act is unfair or deceptive is a question of law for the court. *Opsahl.* It is the province of the jury to find the facts of the case. *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E. 2d 574, 583 (1977), *cert. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

In *Opsahl*, this Court analyzed the Supreme Court's opinion in *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980), and found that whether an action lies under N.C.G.S. § 75-1.1 can be identified by following these guidelines:

> "The concept of 'unfairness' is broader than and includes the concept of 'deception.' " *Johnson, supra*, 300 N.C. at 263, 266 S.E. 2d at 621. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* Specifically, "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an

> inequitable assertion of its power or position." *Id.* at 264, 266 S.E. 2d at 622. "An act or practice is deceptive . . . if it has the capacity or tendency to deceive." *Id.* at 265, 266 S.E. 2d at 622. "In determining whether a representation is deceptive, its effect on the average consumer is considered." *Id.* at 265-66, 266 S.E. 2d at 622.

Opsahl at 69, 344 S.E. 2d at 76.

Chapter 75 protects against injury to businesses as well as individual consumers. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E. 2d 375, 389 (1988). In a business context, whether a representation is deceptive may be decided by considering its effect on the average businessperson. *See Opsahl.*

We are asked to decide whether by circulating to the other primes a projected work schedule based on 930 days, when it knew that a 930-day schedule was at best overly optimistic, if not impossible, Loving engaged in deceptive conduct which amounted to an inequitable assertion of its power or position as General Contractor. Given the guidelines set out above, an assertion of power is inequitable and within the scope of N.C.G.S. § 75-1.1 if it "offend[s] public policy . . . [is] immoral, unethical, unscrupulous, or substantially injurious . . . ." *Opsahl.*

In *Opsahl*, this Court affirmed the trial court's refusal to recognize an action under N.C.G.S. § 75-1.1 when the plaintiff house buyers alleged that they entered into a real estate contract with the defendant based on completion dates that the defendant represented as firm. As stated above, the court in that case charged the consumer plaintiffs with "the knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill." *Id.* at 70, 344 S.E. 2d at 77. Bolton, too, as a professional contractor, is charged with this knowledge. We hold that Loving's circulation of the 930-day schedule as a basis for bids to other professional contractors did not rise to the level of unscrupulous, immoral conduct.

We have examined the parties' remaining contentions and have determined it is unnecessary to address them since they may not recur at retrial.

Affirmed in part, and reversed in part and remanded for a

New trial.

Judges GREENE and LEWIS concur.

MARY M. WILLIAMS, ADMINISTRATRIX C.T.A. OF THE ESTATE OF CHARLENE WILLIAMS WITHERSPOON, PLAINTIFF v. CLYDE C. RANDOLPH, JR., DEFENDANT

No. 8821SC976

(Filed 5 July 1989)

1. Attorneys at Law § 7.1— administration of estate—recovery of legal fee—judgment n.o.v. for defendant attorney—error

The trial court erred in entering judgment notwithstanding the verdict for defendant attorney in an action in which plaintiff administratrix sought to recover a $98,000 legal fee paid by defendant to his firm for representing plaintiff in the recovery of proceeds from a life insurance policy issued to decedent. The evidence, taken in the light most favorable to plaintiff, was sufficient to require that the issue of reasonableness of the fee be sent to the jury where decedent was issued a life insurance policy for $500,000 less than seven months before her death, with an additional $200,000 accidental death benefit; decedent was shot and killed under suspicious circumstances and newspaper reports linked her death to her alleged trade in narcotic drugs; the estate had no liquid assets and was in jeopardy of losing substantial real estate assets unless the estate could quickly collect on the Nationwide insurance policy; defendant began serving as the attorney for the estate without mentioning hourly rates, although defendant told plaintiff that the number of hours expended was an important consideration, and without disclosing or agreeing on additional fees for filing a lawsuit against Nationwide; Nationwide's initial position was that it was not liable because of material misrepresentations by decedent on her insurance application; Nationwide later offered to settle for $700,000; plaintiff in the meantime had suffered a heart attack and had executed a power of attorney authorizing defendant and his partner to enter into a settlement, to deposit the proceeds into an interest bearing account, and to make disbursements

as necessary for the reasonable and necessary expenses of the estate; defendant and his partner met with plaintiff to discuss the legal fee; plaintiff did not approve of the fee; defendant withdrew the fee from the settlement account; and plaintiff presented evidence that the fee was unreasonable while defendant presented evidence that it was reasonable.

2. **Trial § 51— administration of estates—action to recover legal fee—conditional new trial**

The trial court did not abuse its discretion in an action by the administratrix of an estate to recover an allegedly unreasonable legal fee by conditionally allowing defendant a new trial where, although plaintiff's evidence was sufficient to go to the jury, it could not be said from the record that the judge abused his discretion in determining that the greater weight of credible evidence would not support the verdict returned by the jury. The trial judge is not required to take the testimony of any witness at face value on a motion to set aside a verdict as being against the greater weight of credible evidence.

3. **Fiduciaries § 1— estate administration—power of attorney—payment of legal fee**

The trial court did not err by dismissing plaintiff administratrix's claim that defendant breached his duty under the Uniform Fiduciaries Act by paying an allegedly excessive legal fee to his law firm. Plaintiff's argument that the definition of fiduciary in N.C.G.S. § 32-2 applies to N.C.G.S. § 32-34(a) is not supported by the statute; moreover, the fact situation in this case is distinguishable from that contemplated by N.C.G.S. § 32-34(a) in that defendant held a power of attorney to make disbursements for the reasonable and necessary expenses of the estate, and not the power to make discretionary disbursements of principal or income prohibited by N.C.G.S. § 32-34(a).

4. **Executors and Administrators § 37.1— payment of legal fee—not approved by clerk—no error**

The trial court properly granted a directed verdict for defendant attorney on plaintiff administratrix's claim that defendant violated N.C.G.S. § 32-51 by not having the clerk of superior court approve a legal fee disbursed to his firm where defendant was not serving as the fiduciary or personal repre-

sentative of the estate, but as the attorney for the personal representative.

5. Attorneys at Law § 7— action to recover legal fee—instructions—no error

There was no error in the instructions in an action by plaintiff administratrix to recover an allegedly excessive legal fee where plaintiff requested an instruction that defendant had the burden of proof on whether plaintiff had full knowledge of all material facts before entering into a fee agreement; both parties conceded that plaintiff and defendant did not enter into a contingent fee contract and there was no issue between the parties as to a contingent fee contract; and the court gave an instruction on establishing a reasonable fee which was based on the N.C. Code of Professional Responsibility and which included all of the factors in plaintiff's proposed instruction, but which did not emphasize the number of hours spent on the case.

6. Attorneys at Law § 7.1— action to recover excessive legal fee—failure to instruct on contingent fee—no instruction on determining excessive fee—no error

The trial court did not err in an action by an administratrix to recover an excessive legal fee by failing to instruct that, in order for a contingent fee to be proper, there must be real uncertainty as to whether there will be a recovery at the time of the agreement because the parties never entered into a contingent fee contract. Moreover, the court did not err by instructing that a fee is clearly excessive when a lawyer of ordinary prudence experienced in the area of the law involved would be left with a definite and firm conviction that the fee was in excess of a reasonable fee because the instruction was a verbatim restatement of the Code of Professional Responsibility on the issue of attorney's fees.

7. Attorneys at Law § 7.1— action to recover excessive legal fees—manner in which issues framed for jury—no error

The trial court did not err in an action by an administratrix to recover allegedly excessive legal fees in the manner in which it framed the issues for the jury. Although plaintiff contended that the court erred by not including the question of whether defendant made full disclosure of all facts relevant to the reasonableness of the fee before plaintiff agreed to

the fee, the issue arising from the evidence was whether the amount charged was fair and reasonable and the trial court properly narrowed the issue and instructed the jury on the burden of proof on that issue.

8. **Witnesses § 6.2— contested legal fees—defendant attorney's reputation as to truthfulness—admissible**

The trial court did not err in an action by an administratrix to recover allegedly excessive legal fees by admitting testimony of defendant attorney's reputation as to truthfulness from defendant's character witnesses where plaintiff failed to make timely objection to the testimony and where plaintiff's evidence placed defendant's reputation for truthfulness in issue. N.C.G.S. § 8C-1, Rule 608(a) allows evidence of truthful character after the witness's character for truthfulness has been attacked; also, a lawyer's reputation is a factor to be considered under Rule 2.6(B)(7) of the Rules of Professional Conduct.

APPEAL by plaintiff from *Rousseau (Julius A., Jr.), Judge.* Judgment entered 22 April 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 April 1989.

This is an action brought by plaintiff, administratrix, c.t.a. of the estate of Charlene Williams Witherspoon, to recover from defendant a $98,000.00 legal fee paid by defendant to his firm for representation of plaintiff administratrix in an action to recover the proceeds of a life insurance policy issued on the life of decedent. On account of ill health, plaintiff had executed a power of attorney authorizing defendant to compromise and settle the claim which the estate held against Nationwide Insurance Company (herein "Nationwide") and to place the proceeds of the settlement in a separate savings account in trust for the estate. The proceeds from the claim against Nationwide were collected and deposited on 21 November 1984. On 20 February 1985 defendant withdrew from the account $98,000.00 in payment for legal services rendered to plaintiff.

In her complaint plaintiff alleges: (i) that defendant violated his fiduciary duty to plaintiff because the payment was unauthorized and the amount was grossly excessive; (ii) that defendant's breach of his fiduciary duty violated the Uniform Fiduciaries Act, G.S. § 32.1 *et seq.*, and (iii) in the alternative, if there was an agreement between plaintiff and defendant as to the $98,000.00

payment that the agreement was unconscionable and unreasonable because it was disproportionate to the services rendered and/or a breach of fiduciary duty because defendant failed to disclose to plaintiff all material facts necessary for a determination of a fair and reasonable fee.

At trial defendant moved for a directed verdict at the close of all the evidence. The motion was denied. Two issues were submitted to the jury: (i) "Was the attorney's fee paid by plaintiff to defendant fair and reasonable?" and (ii) "If not, what is a fair and reasonable fee?" The jury determined that $98,000.00 was not a fair and reasonable fee and that a fair and reasonable fee in the present case was $30,000.00. Pursuant to G.S. 1A-1, Rule 50(b)(1), defendant moved for entry of judgment notwithstanding the verdict on the grounds that plaintiff's evidence was insufficient to support the verdict as a matter of law, or, alternatively, for an order setting aside the verdict in the discretion of the court and granting a new trial.

The trial judge allowed defendant's motion for judgment notwithstanding the verdict and, alternatively, granted a new trial should the judgment for defendant be reversed on appeal.

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

Nichols, Caffrey, Hill, Evans and Murrelle, by William D. Caffrey, for defendant-appellee.

PARKER, Judge.

On appeal plaintiff has grouped her assignments of error into five arguments. Plaintiff contends the trial court erred (i) in entering judgment notwithstanding the verdict, (ii) in granting defendant's conditional motion for a new trial, (iii) in dismissing plaintiff's claim that defendant violated the Uniform Fiduciaries Act, (iv) in instructing the jury and (v) in admitting testimony as to defendant's character for truthfulness. We address separately each of plaintiff's contentions.

[1] In reviewing the trial court's entry of judgment notwithstanding the verdict, we note at the outset that the defendant-attorney in this action had the burden of proving that the fee charged to plaintiff-client was fair and reasonable. *Rock v. Ballou*, 286 N.C. 99, 104, 209 S.E. 2d 476, 478 (1974); *Randolph v. Schuyler*, 284

N.C. 496, 504, 201 S.E. 2d 833, 838 (1974). For this reason the Court must closely scrutinize the granting of defendant's motion for judgment notwithstanding the verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E. 2d 333, 338 (1985).

A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for a directed verdict which tests the sufficiency of the evidence to submit an issue to the jury. *Id.* at 368-69, 329 S.E. 2d at 337. As such, the trial court must consider all the evidence in the light most favorable to the non-movant and must resolve in favor of the non-movant contradictions, conflicts and inconsistencies in the evidence. *Id.* at 369, 329 S.E. 2d at 337; *Rappaport v. Days Inn*, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979). Additionally, the non-movant must be given the benefit of all relevant evidence even where such evidence was improperly admitted. *Haney v. Alexander*, 71 N.C. App. 731, 733-34, 323 S.E. 2d 430, 432 (1984), *cert. denied*, 313 N.C. 329, 327 S.E. 2d 889 (1985); *Hart v. Warren*, 46 N.C. App. 672, 678, 266 S.E. 2d 53, 57-58, *disc. rev. denied*, 301 N.C. 89 (1980).

Plaintiff contends that the evidence presented, when taken in the light most favorable to her, was sufficient to take to the jury the issue of whether defendant's fee was reasonable. In order to determine whether the evidence presented was, in fact, sufficient for the issue to be decided by the jury, we must review in some detail the evidence in the record.

Several years before her death, Charlene Williams Witherspoon executed a will prepared by defendant which included a specific bequest of $50,000.00 to Mary M. Williams, decedent's mother. The will also named decedent's father, Charlie Mack Williams, and decedent's son, Roderick Tyronda Witherspoon, as residual beneficiaries.

On 7 December 1983, Nationwide issued a policy insuring the life of decedent in the face amount of $500,000.00. The policy also provided an additional $200,000.00 accidental death benefit. Less than seven months later, as she was leaving a parking lot at Heather Hills Condominium Development in Winston-Salem, North Carolina, on 12 April 1984, decedent was shot through the window of her car and killed. The circumstances of decedent's death were suspicious, and police and newspaper accounts reported that decedent's death was linked to her alleged trade in narcotic drugs.

At the time of her death, decedent's estate consisted primarily of real estate valued at approximately $405,300.00 and the $700,000.00 Nationwide policy. With other assets, the total estate was $1,198,829.46. All the real estate was heavily mortgaged, and decedent was behind in her payments on some of the mortgages. Moreover, the income from rented properties was not sufficient to maintain the mortgage payments. Decedent was also delinquent on both State and federal tax obligations. In short, the estate had no liquid assets and was in jeopardy of losing substantial real estate assets unless the estate could quickly collect on the Nationwide policy.

In late April 1984 defendant began serving as the attorney for decedent's estate. At this time defendant generally discussed with plaintiff attorney fees to be charged to the estate. He did not mention hourly rates, but told plaintiff that the number of hours spent was an important consideration in the cost of services. There was no discussion of, or agreement on, additional fees for filing a lawsuit against Nationwide. As attorney for the estate, defendant began proceedings to qualify plaintiff as administratrix, c.t.a. and to collect on the Nationwide policy.

Defendant's efforts to collect on the life insurance policy entailed meeting with Nationwide's agents, collecting and forwarding information to Nationwide, instituting a civil action against Nationwide, which required preparing various pleadings including a complaint, a set of interrogatories, a request for production of documents, a motion to amend the complaint and amended complaint, a motion for judgment on the pleadings and a calendar request, and negotiating with attorneys for Nationwide. These efforts were necessitated by Nationwide's initial position that it was not liable on its policy on account of material misrepresentations by decedent on her insurance application. On the application decedent had denied that she used narcotic drugs and that she had previously been denied life insurance coverage by another carrier. Nationwide had information to the contrary and, based on this information, attorneys for Nationwide indicated to defendant that the Company was prepared to fight the case through the courts. On 12 October 1984, however, Nationwide offered to settle for $700,000.00.

Plaintiff in the meantime had suffered a heart attack and was still recuperating. For this reason, plaintiff executed a power of attorney on 5 November 1984 authorizing defendant and his part-

ner, David Tamer, to enter into a settlement with Nationwide, to receive the settlement proceeds and deposit them into an interest bearing account with defendant and Tamer as authorized signatories, and to make disbursements from this account for the reasonable and necessary expenses of the estate. On 16 November 1984 plaintiff signed a release and settlement of claims for the insurance proceeds. On 19 November 1984 Mr. Tamer received the proceeds from the policy and filed a notice of dismissal in the action against Nationwide, and on 21 November 1984 defendant opened an account in the name of the estate and deposited the proceeds into the account. The evidence showed that defendant and other members of his firm spent fifty-one hours handling the Nationwide litigation.

On 27 November 1984 defendant and Mr. Tamer met with plaintiff. At that time defendant presented plaintiff with a statement for $21,483.33 for services rendered by the law firm through 19 November 1984 exclusive of the work done on the Nationwide matter. Defendant then discussed with plaintiff the Nationwide litigation, detailing the work performed but not the hours expended. Defendant explained that he believed that $98,000.00 was a reasonable fee for this service based on the factors set out in DR 2-106 of the Code of Professional Responsibility and based on the fact that the payment of any legal fees for the estate had been contingent upon his securing these life insurance proceeds for the estate. Defendant then sent letters to the residual beneficiaries, Charlie Williams and Roderick Witherspoon, both of whom were incarcerated, explaining the fee to be charged for collection of the life insurance proceeds. By letter dated 21 January 1985, Mr. Williams informed defendant that he and plaintiff found the $98,000.00 fee to be grossly excessive. On 1 February 1985 defendant sent another letter to Mr. Williams, with copies to plaintiff and Mr. Witherspoon, suggesting that the claim be submitted for binding arbitration before a committee of the Twenty-First Judicial District Bar. This letter indicated that unless defendant received a positive response he would conclude that arbitration was not acceptable. Mr. Williams did not respond. On 19 February 1985, defendant met with plaintiff and suggested arbitration. Defendant's evidence tended to show that plaintiff indicated that arbitration was not necessary. The evidence most favorable to plaintiff, who had only a ninth grade education and work experience as a housekeeper, tended to show that she did not approve the $98,000.00 fee and thought the matter was going before a committee.

On 20 February 1985 Randolph and Tamer withdrew the $98,000.00 fee from the previously established account and paid the same to the law firm by a check in the amount of $101,556.60, which included additional fees of $3,530.00 and costs of $26.60. Although defendant testified that he sent plaintiff a statement marked "paid" for services rendered in the insurance litigation, plaintiff did not notice that the statement was marked paid. Plaintiff testified that she first learned that the $98,000.00 fee had been paid in September 1985 when she received a draft of the estate accounting to be filed with the Clerk of the Court.

As to the unreasonableness of defendant's fee, plaintiff presented the testimony of two expert witnesses—Norman Lefstein, dean of the Indiana University School of Law and former law professor at the University of North Carolina at Chapel Hill, and George Daly, a practicing attorney in Charlotte, North Carolina. Mr. Lefstein testified that he calculated a reasonable fee for defendant's services based on all the factors set out in the North Carolina Code of Professional Responsibility. In making this calculation he considered that the time and labor involved were the most important factors. Using the attorneys' records of the time spent on the case and the hourly fee charged, Mr. Lefstein calculated a base fee of $4,697.50. He then expressed the opinion that the other factors in the case would justify raising the fee to between $7,000.00 and $8,000.00, but that $98,000.00 was an unreasonable fee.

Mr. Daly testified that he also had calculated a reasonable fee for the work in this case. First, he multiplied the hours expended by the hourly rate. Next, he increased the base amount by one hundred and twenty percent (120%) based on the skill of the attorneys, the results obtained, and defendant's reputation. This calculation yielded the sum of $11,067.00. Based on this sum, Mr. Daly testified that $98,000.00 was an unreasonable fee.

Defendant's experts, Mr. Ralph M. Stockton, Jr. and Mr. David Wesley Bailey, both practitioners in Winston-Salem, testified that they believed the fee to be a reasonable one, but that they either did not consider the amount of time expended or did not consider this to be an important factor in establishing a reasonable fee.

Defendant argues (i) that plaintiff's expert witnesses were not qualified to testify, (ii) that the contingent nature of the recovery rendered the fee proper and (iii) that plaintiff's experts applied a theory of law, the "lodestar" theory, which has not been adopted

in North Carolina. While each of these contentions may have merit, none of them is determinative of the issue of whether the judgment notwithstanding the verdict was proper. We are not unsympathetic to defendant's contention that plaintiff's experts were not qualified to testify as experts by reason of their lack of experience in the area of law involved and their lack of familiarity with fees customarily charged in the locality for similar legal services. Canon II, Rule 2.6(B)(3), N.C. Rules of Professional Conduct [formerly DR2-106(B)(3), N.C. Code of Professional Responsibility, superseded by N.C. Rules of Professional Conduct 7 October 1985]. Mr. Lefstein is not licensed to practice law in North Carolina. He testified that he had practiced law from 1961 to 1963 in Elgin, Illinois, and had not engaged in the private practice of law since that time. He was not familiar with legal fees in Winston-Salem, but had discussed legal fees with North Carolina lawyers and various law professors. The bases for Mr. Lefstein's qualification as an expert witness were that he had taught professional ethics at the University of North Carolina Law School and has published in the area of professional ethics.

Mr. Daly had never handled a civil case in Forsyth County but had tried a criminal case in the United States District Court in Winston-Salem. He relied on Martindale-Hubbell for information as to defendant's skill and reputation and on the results of a North Carolina Bar Association survey to determine usual hourly rates. Mr. Daly had, however, been counsel in civil actions in which legal fees were awarded by the court.

The court allowed opinion testimony as to the reasonableness of the fee from both these witnesses. As noted earlier, once admitted, both competent and incompetent evidence must be considered on a motion for directed verdict and the subsequent motion for judgment notwithstanding the verdict. *Haney v. Alexander*, 71 N.C. App. at 733, 323 S.E. 2d at 432.

Similarly, the contingent nature of the recovery does not avail defendant. Even where there is a contingent fee contract, the contract is upheld only if the fee is "absolutely just and fair." *Rock v. Ballou*, 286 N.C. at 104, 209 S.E. 2d at 479 (citing *Casket Co. v. Wheeler*, 182 N.C. 459, 467, 109 S.E. 378, 383, 19 A.L.R. 391, 397 (1921)); *Harmon v. Pugh*, 38 N.C. App. 438, 444, 248 S.E. 2d 421, 425 (1978), *disc. rev. denied*, 296 N.C. 584, 254 S.E. 2d 33 (1979). Questions of reasonableness and fairness are normally questions for the jury.

Finally, we address defendant's contention that the testimony of plaintiff's expert witnesses was based on the erroneous premise that the "lodestar" theory of fee calculation is the law in North Carolina. The "lodestar" theory was adopted by the federal courts in *Lindy Bros. Builders, Inc. v. Am. Radiator, Etc.*, 540 F. 2d 102 (3d Cir. 1976). Under this theory, an initial determination as to an appropriate hourly rate is made. This rate is multiplied by the number of hours expended and then adjusted upwards or downwards to reflect all other relevant factors, yielding a reasonable attorney fee.

Defendant is correct that the cases decided by our appellate courts subsequent to *Lindy* have not adopted the "lodestar" theory to calculate legal fees. In the present case, however, both plaintiff's experts testified that they considered the factors required by the Code of Professional Responsibility, and stated which factors were most important in their calculation of a reasonable attorney fee. Again, even if testimony based on the "lodestar" theory were improper, once admitted it cannot be disregarded for purposes of a judgment notwithstanding the verdict. *Haney v. Alexander*, 71 N.C. App. at 733, 323 S.E. 2d at 432.

In our view, all the evidence, taken in the light most favorable to plaintiff, was sufficient to require that the issue of the reasonableness of the fee be sent to the jury. Therefore, it was error for the court to enter judgment notwithstanding the verdict in favor of defendant. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. at 378, 329 S.E. 2d at 342; *Horton v. Insurance Co.*, 9 N.C. App. 140, 144, 175 S.E. 2d 725, 727 (1970). Accordingly, we reverse the trial court's grant of judgment notwithstanding the verdict.

[2] Plaintiff next assigns error to the trial court's conditional allowance of defendant's motion for a new trial. Whether to grant a new trial pursuant to G.S. 1A-1, Rules 50(b)(1) and 59 is a decision within the discretion of the trial judge which will not be disturbed absent a showing that the judge's ruling amounts to a substantial miscarriage of justice. *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E. 2d 599, 605 (1982). *See also Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). The trial judge may set aside a verdict and order a new trial whenever, in his opinion, the verdict is contrary to the greater weight of the credible testimony. *Britt v. Allen*, 291 N.C. at 634, 231 S.E. 2d at 611. Although we hold

that plaintiff's evidence was sufficient to submit the issues to the jury, we cannot say from the record that the trial judge abused his discretion in determining that the greater weight of credible evidence in this case would not support the verdict returned by the jury.

> In passing upon a motion to set aside a verdict as being against the greater weight of the evidence, the trial judge is not required to take the testimony of any witness at face value. At any time he is convinced that the jury has been misled by unreliable testimony into returning an erroneous verdict his is the responsibility for awarding a new trial for that reason.

Rayfield v. Clark, 283 N.C. 362, 367, 196 S.E. 2d 197, 200 (1973). Plaintiff's second assignment of error is overruled.

[3] Third, plaintiff argues that the trial court erred in dismissing plaintiff's claim that defendant breached his duty under the Uniform Fiduciaries Act. We disagree. Plaintiff alleged in her complaint that defendant violated G.S. 32-34(a) which prohibits fiduciaries from making distributions to themselves. G.S. 32-34(a) provides in pertinent part:

> Except as provided in subsection (b), a power conferred upon a person in his capacity as fiduciary to make discretionary distributions of principal or income to himself or to make discretionary allocations in his own favor of receipts or expenses as between income and principal cannot be exercised by him.

We first note that Chapter 32 consists of five Articles. Article 1 of Chapter 32 is the Uniform Fiduciaries Act. General Statute 32-34 constitutes Article 4. The word "fiduciary" is defined three times in Chapter 32, G.S. 32-2, G.S. 32-14(4) and G.S. 32-25. Therefore, plaintiff's argument that the definition of fiduciary in G.S. 32-2 applies to G.S. 32-34(a) is not supported by the statute.

Moreover, the fact situation in the present case is distinguishable from that contemplated by G.S. 32-34(a). Defendant, acting for the administratrix in her disability, held a power of attorney to make disbursements for the reasonable and necessary expenses of administration of the estate. This power was not the power to make discretionary disbursements of principal or income. Without question, defendant as an attorney held the proceeds of the settlement in a fiduciary relationship. Canon X, Rule 10.1(B)(2), N.C. Rules of Professional Conduct. The payment, however, by a lawyer to himself of the legal fee for services rendered in a piece of litigation

out of the proceeds of settlement of that litigation is not the discretionary disbursement of principal or income to oneself prohibited by G.S. 32-34(a). *See* Canon X, Rule 10.1(C)(2), N.C. Rules of Professional Conduct.

[4] Plaintiff also argues that defendant violated G.S. 32-51 by failing to have the legal fee approved by the Clerk of Superior Court. This contention is also without merit. First, plaintiff did not allege or argue a violation of G.S. 32-51 in the court below. On appeal plaintiff cannot assert for the first time matters not raised in the trial court. *Rheinberg-Kellerei GMBH v. Vineyard Wine Co.*, 53 N.C. App. 560, 566, 281 S.E. 2d 425, 429, *disc. rev. denied*, 304 N.C. 588, 289 S.E. 2d 564 (1981). Further, defendant was not serving as the fiduciary or personal representative for the estate; rather, he was the attorney for the personal representative. Hence G.S. 32-51 has no applicability to the facts of this case. Accordingly, a directed verdict at the close of all evidence on the issues allegedly raised by Chapter 32 was proper.

[5] Plaintiff next contends that the trial court erred in instructing the jury. Specifically, plaintiff argues that the trial judge failed to give jury instructions as requested by plaintiff. Pursuant to G.S. 1A-1, Rule 51, when a party aptly tenders a written request for a specific instruction which is correct in itself and supported by the evidence, it is error for the court to fail to give the instruction at least in substance. *Bass v. Hocutt*, 221 N.C. 218, 19 S.E. 2d 871 (1942). The court is not required, however, to use the precise language of the tendered instruction so long as the substance of the request is included. *Emerson v. Carras*, 33 N.C. App. 91, 97, 234 S.E. 2d 642, 647 (1977) (citing *King v. Higgins*, 272 N.C. 267, 270, 158 S.E. 2d 67, 69 (1967)).

At trial plaintiff requested a specific instruction that defendant had the burden of proof on two issues: (i) that the fee was fair and reasonable; and (ii) that plaintiff had full knowledge of all material facts relating to the fee when she entered into the agreement. The trial court instructed the jury that defendant had the burden of proving that the fee was fair and reasonable, but refused to give an instruction regarding plaintiff's "agreement" because both parties conceded that plaintiff and defendant did not enter into a contingent fee contract. The purpose of the jury charge is to clarify the issues, eliminate extraneous matters, and explain the law arising on the evidence in the case. *Fish Co. v. Snowden*,

233 N.C. 269, 63 S.E. 2d 557 (1951). Since there was no issue between the parties as to a contingent fee agreement, the court correctly refused to instruct the jury on this point.

Plaintiff also proposed an instruction which elaborated on the factors to be considered in establishing a reasonable fee. The court gave an instruction based on the North Carolina Code of Professional Responsibility. This instruction included all of the factors in plaintiff's proposed instruction, but did not place emphasis on the number of hours spent on the case. As discussed, *supra*, the "lodestar" theory of setting attorney's fees has not been adopted by our courts. Plaintiff in her brief relies heavily on *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974); however, a review of the case reveals that the jury instructions in the case at bar were not inconsistent with the factors outlined in *Johnson*. We hold, therefore, that the trial judge did not err in patterning his instruction to our Code rather than the federal decisions put forward by plaintiff.

Plaintiff contends that the trial court failed to instruct the jury that "fee customarily charged in the locality for similar legal services" refers to the customary hourly rate charged by attorneys in the locality. The court simply instructed the jury that a factor to consider was the fee customarily charged in the locality for similar legal services. The trial court instructed in accordance with the language of the Code of Professional Responsibility and did not err in not limiting the language of the Code to customary hourly rate.

[6] Next, plaintiff objects to the court's failure to instruct the jury that in order for a contingent fee to be proper there must be real uncertainty as to whether there will be a recovery at the time of the agreement. The court instructed the jury as follows:

> The lawyer may very properly demand a larger compensation if it is to be contingent or not certain. A larger compensation is permitted to attorneys only as a reward for skill and diligence exercised in the prosecution of a doubtful or litigated claim. It is not allowed where litigation merely minor services [sic] which any layman or ordinary lawyer or inexperienced lawyer might be able to perform.

The parties in this case never entered into a contingent fee contract or agreement. The Code of Professional Responsibility lists as a

factor merely whether the fee is "fixed or contingent." Moreover, the instruction given was in accord with *Randolph v. Schuyler, supra,* and *Casket Co. v. Wheeler, supra.* We hold, therefore, that the court did not err in giving this instruction.

Plaintiff also objected to the jury instruction that "a fee is clearly excessive when, after reviewing the facts, a lawyer of ordinary prudence experienced in the area of the law involved would be left with the definite and firm conviction that the fee is in excess of a reasonable fee." Plaintiff's contention is that since defendant had the burden of proving that the fee was fair and reasonable, this instruction was misleading. Plaintiff also argues that the standard is not what a lawyer of ordinary prudence, experienced in the area of the law, would consider reasonable, but rather what the jury considers reasonable. The instruction is a verbatim restatement of the Code of Professional Responsibility on the issue of attorney's fees. Therefore, plaintiff's contention is without merit.

[7] Finally, plaintiff objected at trial to the manner in which the court framed the issues before the jury because the court did not include the question of whether defendant made full disclosure of all facts relevant to the reasonableness of the fees before plaintiff agreed to the fee. Both parties conceded that there was no contingent fee contract. The parties disagreed as to whether plaintiff consented to or authorized the payment of $98,000.00 in defendant's 19 February 1985 conference. The evidence, including plaintiff's evidence, clearly supported defendant's entitlement to a reasonable legal fee for services rendered; therefore, whether plaintiff agreed to the fee was not an issue, nor was whether she understood all the facts and circumstances before entering into the agreement. The issue arising from the evidence was whether the amount charged was fair and reasonable, and on this issue defendant had the burden of proof. *Randolph v. Schuyler,* 284 N.C. at 504, 201 S.E. 2d at 838. The trial court properly narrowed the issue and properly instructed the jury that defendant had the burden of proof on that issue. This assignment of error is overruled.

[8] Plaintiff's fifth argument is that the trial judge erred in admitting the testimony of defendant's reputation as to truthfulness from defendant's character witnesses. We first note that, by waiting until after the opinion for truthfulness had been stated, plaintiff failed to make timely objection to this testimony when given by the first three witnesses. *See State v. Banks,* 295 N.C. 399, 408, 245 S.E. 2d 743, 749-50 (1978); 1 Brandis on North Carolina Evidence

§ 27 (3d ed. 1988). Therefore, plaintiff has waived her objection to the testimony of these witnesses and subsequent character witnesses. A party is not prejudiced by testimony received over objection when testimony of the same purport has been previously received without objection. *See Mills, Inc. v. Terminal, Inc.*, 273 N.C. 519, 532, 160 S.E. 2d 735, 745, 43 A.L.R. 3d 591, 605-606 (1968).

Furthermore, plaintiff's evidence placed defendant's reputation for truthfulness in issue when plaintiff testified that defendant paid the fee to himself under the power of attorney without her consent thus implying that defendant had engaged in self-dealing in violation of his fiduciary duty to plaintiff. General Statute 8C-1, Rule 608(a) allows evidence of truthful character after the witness's character for truthfulness has been attacked. In the present case, defendant was entitled to submit evidence of his character for truthfulness to help rebut any presumption that as a fiduciary he was guilty of constructive fraud in procuring a benefit for himself.

Finally, a lawyer's reputation is a factor to be considered under Rule 2.6(B)(7) of the Rules of Professional Conduct. Truthfulness in dealing with other members of the bar is a significant component of a lawyer's reputation at the bar. This assignment of error is also overruled.

We reverse the trial court's entry of judgment notwithstanding the verdict and affirm the order for a new trial.

Affirmed in part; reversed in part and remanded.

Judges PHILLIPS and COZORT concur.

IN THE MATTER OF THE ESTATE OF SHIRLEY ALLRED TUCCI

No. 8821SC793

(Filed 5 July 1989)

Husband and Wife § 12— separation agreement—subsequent reconciliation and death of spouse—right to dissent from will

The trial court incorrectly affirmed the Clerk of Court's conclusion that a reconciliation rescinded a release of the statutory right to dissent from a will where the Tuccis executed a separation/property settlement agreement on 18 November 1983 which stated that they had separated on 15

October 1983; they reconciled in December 1983, lived together until some time in September 1985, and entered into a consent judgment for divorce from bed and board in December 1985 which was later set aside; Mrs. Tucci died in March 1986; Mr. Tucci filed his notice of dissent after her will was probated; the Clerk of Superior Court concluded that the separation agreement had been rescinded by the reconciliation; and the Superior Court affirmed the Clerk's order. The agreement was by its own terms a combined separation agreement and property settlement and clearly stated that the parties' continued separation was not a condition to the property settlement provisions of the agreement. The mere fact that the Tuccis reconciled is not inconsistent with the property settlement provisions of this agreement under these circumstances and therefore did not impliedly rescind Mr. Tucci's release of his right to dissent. N.C.G.S. § 30-1.

Judge EAGLES dissenting.

APPEAL by Estate of Shirley Allred Tucci from *Rousseau (Julius A.), Judge*. Order entered 2 May 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 February 1989.

Womble Carlyle Sandridge & Rice, by Michael E. Ray, Kurt C. Stakeman and Lori P. Hinnant, for appellant-estate.

Harrison, Benson, Fish, North, Cooke & Landreth, by Michael C. Landreth and A. Wayland Cooke, for appellee-dissenter.

GREENE, Judge.

The Estate of Shirley Allred Tucci (the "Estate") appeals from the judgment of the superior court allowing Mrs. Tucci's surviving spouse to dissent from her will under Section 30-1. *Cf.* N.C.G.S. Sec. 30-1 (1984). The Tuccis were married on 4 November 1978 and had one child in 1980. On 18 November 1983, the parties executed a separation/property settlement agreement (the "Agreement") which stated the parties had separated on 15 October 1983. Although the first page of the Agreement is titled "Separation Agreement," the Agreement's fourteen paragraphs are preceded by other titles including, "Custody," "Support," "Debts," and "Property Settlement." The Agreement recited that "it is understood and agreed that the division of the property in this *Separation Agreement and Property Settlement* is a full and complete distribution of the marital and separate property of the parties in a manner deemed by the parties to be equitable under the laws of North

Carolina, including North Carolina G.S. 50-20." (Emphasis added.) The parties divided various items of real and personal property and released each other from the duty of support and "any and all other rights which may have arisen . . . out of the . . . marriage." The Agreement stated with respect to Mr. Tucci that:

> The said husband . . . does hereby release and relinquish unto the said wife, her heirs, administrators, executors, and assigns, all rights or claims of curtesy, inheritance, descent, distribution and all other rights or claims growing out of the marital relationship between the parties . . . and the said husband shall forever be barred from all rights in the estate of the said wife, real, personal and mixed, now owned or hereafter acquired by her.

Paragraph 12 of the Agreement also stated:

> [T]he provisions of this *Separation Agreement and Property Settlement* are executed and in full force and effect on this date and that should at any time in the future the parties resume marital cohabitation in any respect that the provisions of the Separation Agreement and Property Settlement are and shall remain valid and fully enforceable, and of full legal force and effect. [Emphasis added.]

In late December 1983, the couple reconciled and lived together until sometime in September 1985. In December 1985, the parties entered a Consent Judgment for divorce from bed and board; however, as the Consent Judgment contained no findings on any of the grounds for divorce from bed and board under Section 50-2, this court upheld a court order setting aside the Consent Judgment as void. *Allred v. Tucci*, 85 N.C. App. 138, 354 S.E. 2d 291, *cert. denied*, 320 N.C. 166, 358 S.E. 2d 47 (1987).

Mrs. Tucci died on 20 March 1986. After her will was probated, Mr. Tucci filed his notice of dissent. Pursuant to its authority as an ex officio probate judge with original jurisdiction under Section 7A-241 and Section 28A-2-1, the clerk of superior court entered, among others, the following findings and conclusions:

> 10. That the testatrix and the surviving spouse separated and executed a Separation Agreement on or about November 18, 1983. Subsequent thereto, on or about Christmas Day of 1983, the parties reconciled and resumed their marital relations

and lived together in the family homeplace as husband and wife with their minor child through mid-September 1985.

11. That between Christmas Day, 1983 and mid-September, 1985, the testatrix and her surviving spouse travelled together to Mexico, to Lake Tahoe, California, with their child, to Kiawah Island, South Carolina, with their child, entertained friends and family in their home, filed joint federal and state income tax returns, attended church together, shared a bedroom in the family homeplace, and held themselves out as man and wife in the ordinary acceptation of the descriptive phrase.

12. That the surviving spouse did not execute or deliver a quitclaim deed to the homeplace as called for in the Separation Agreement, and further, the deceased testatrix continued, after Christmas Day, 1983, to support the surviving spouse and minor child of the marriage in the same manner in which she had, prior to the parties' separation.

. . . .

14. That the conduct of the parties to the Separation Agreement occurring after Christmas Day, 1983, exhibited the intent on their parts to reconcile, resume their marital relations, hold themselves out as husband and wife, and rescind the terms and provisions of the Separation Agreement.

. . . .

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

. . . .

4. That the parties' reconciliation and the resumption of their marital relationship together with their other manifestations of intent to do so, as hereinabove described, did rescind the terms and provisions of the November 18th, 1983 Separation Agreement, as by North Carolina law provided.

5. That the right of the surviving spouse to dissent from the will of testatrix arose as of the date of her death, and a waiver of that right necessarily required the surviving spouse not to do a particular thing in the future and was, therefore, an executory provision.

. . . .

> IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that James Michael Tucci, the surviving spouse of Shirley Allred Tucci has the right under the law of North Carolina to dissent from the will of the decedent, and that the dissent . . . is valid . . . and hereby allowed pursuant to the laws of the State of North Carolina.

The Estate appealed to a judge of the superior court under Section 1-272. The superior court held the clerk's findings were supported by competent evidence and supported its conclusions of law. The court consequently affirmed the clerk's order allowing the dissent. The Estate appeals.

Although the Estate assigns numerous errors to the proceedings below, the dispositive issue is whether the clerk correctly concluded that the Tuccis' resumption of their marital relationship rescinded Mr. Tucci's release of all rights in Mrs. Tucci's estate. Under the facts of this case, we conclude the Tuccis' reconciliation did not imply any rescission of the provisions of the Agreement settling the parties' property rights, including the provision releasing the parties' statutory right to dissent under Section 30-1. As there is no other evidence of rescission nor any other ground asserted that might invalidate Mr. Tucci's release of his rights as a surviving spouse, we hold the Agreement barred Mr. Tucci's statutory right to dissent under Section 30-1.

The statutory right to dissent as a surviving spouse under Section 30-1 is analogous to the former common law spousal rights of dower and curtesy. *Etheridge v. Etheridge*, 41 N.C. App. 44, 255 S.E. 2d 729 (1979), *disc. rev. denied*, 293 N.C. 253, 267 S.E. 2d 660 (1980). Taking a share of the deceased spouse's estate under the circumstances specified in Section 30-1 is a statutory alternative to taking under the deceased spouse's will. *Hill v. Smith*, 51 N.C. App. 670, 277 S.E. 2d 542, *disc. rev. denied*, 303 N.C. 543, 281 S.E. 2d 392 (1981). In addition, a couple may elect before or after marriage to forego *all* such spousal property rights pursuant to a complete property settlement; for example,

> [i]t is well-settled in this jurisdiction that a man and woman contemplating marriage may enter into a valid contract with respect to the property and property rights of each after the marriage, and such contracts will be enforced as written. . . . After marriage the persons may release and quitclaim any

> rights as they might respectively acquire or may have acquired by marriage in the property of each other. G.S. 52-10. . . . Antenuptial contracts, when properly executed and acknowledged, are not against public policy and may act as a bar to the . . . right to dissent . . .

In re Loftin, 285 N.C. 717, 720-21, 208 S.E. 2d 670, 673-74 (1974); *see also Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973) (complete property settlement barred rights as surviving spouse of intestate); *Sedberry v. Johnson*, 62 N.C. App. 425, 302 S.E. 2d 924, *disc. rev. denied*, 309 N.C. 322, 307 S.E. 2d 167 (1983) (property settlement release barred testamentary share under will). As we stated in *Sedberry*, "to restore to one party, subsequent to the death of the other, rights bargained away in the separation agreement, would deny the agreement its intended 'full and final' effect, in contravention of the policy that such agreements 'shall be legal, valid, and binding in all respects.'" *Sedberry*, 62 N.C. App. at 429, 302 S.E. 2d at 927 (quoting 2 R. Lee, *North Carolina Family Law* Sec. 187 at 461 (4th ed. 1980)).

Although Mr. Tucci's release did not enumerate the statutory right to dissent under Section 30-1, it did release "all rights or claims of curtesy, inheritance, descent, and distribution and all other rights or claims growing out of the marital relationship between the parties . . . [and] all rights in the estate of the said wife, real, personal and mixed, now owned or hereafter acquired by her." This full and final settlement of such rights encompasses the unenumerated statutory right of dissent under Section 30-1. *See Lane*, 284 N.C. at 412, 200 S.E. 2d at 625 (implying release of right to dissent as surviving spouse of intestate under Section 29-13); *Blankenship v. Blankenship*, 234 N.C. 162, 66 S.E. 2d 680 (1951) (implying release of curtesy right); *see also Hagler v. Hagler*, 319 N.C. 287, 354 S.E. 2d 228 (1987) (implying release of right to equitable distribution).

Although one spouse may not unilaterally cancel a valid marital contract, both spouses may rescind the contract by executing an agreement to that effect. *See* 17 Am. Jur. 2d, *Contracts* Sec. 490 at 962 (2d ed. 1964). Clearly, that did not occur in this case. Instead, Mr. Tucci asserted below that his reconciliation with Mrs. Tucci in December 1983 rescinded the Agreement by implication. Whether or not the parties' reconciliation rescinded Mr. Tucci's release of his right to dissent is initially determined by examining the Agree-

ment and the parties' subsequent conduct in light of ordinary contract principles. As the *Hagler* Court stated with respect to marital contracts in general, " 'The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' . . . When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning . . . ." *Hagler*, 319 N.C. at 294, 354 S.E. 2d at 234 (citations omitted).

Furthermore, the trial court must recognize the differing effects of reconciliation on the individual provisions of a single agreement which combines a "separation agreement" with a "property settlement":

> [I]t is particularly necessary to distinguish between 'property settlements' and 'separation agreements' in determining the intended effects of marital agreements: '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*'. . . 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.' . . . 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.

Small v. Small, 93 N.C. App. 614, 379 S.E. 2d 273, 277 (1989) (emphasis added) (citations omitted). Our Supreme 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). Therefore, "a separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation . . ." *Id.* 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). Therefore,

> 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.

Id. at 61-62, 90 S.E. 2d at 549-50 (citations omitted). As we summarized in *Small*:

> 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 . . . [citation omitted]. 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 [v. Higgins*, 321 N.C. 482, 484, 364 S.E. 2d 426, 428 (enforcing parties' express agreement to convey land only if they lived separate and apart for one year)].

Small, 93 N.C. App. at ---, 379 S.E. 2d at 280.

With reference to the contract principle of implied rescission, it is well settled that "a contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties . . . *[T]o be sufficient the acts and conduct must be positive and unequivocal.*" 17 Am. Jur. 2d, *Contracts* Sec. 494

at 967 (2d ed. 1964). Even if rescission is inferred from the parties' conduct, only those provisions of the marital contract that remain executory are rescinded. *See Adamee*, 291 N.C. at 391, 230 S.E. 2d at 545. A partial rescission may be allowed "where the contract is a divisible one and the ground of rescission relates merely to a severable part thereof." 17 Am. Jur. 2d, *Contracts* Sec. 488 at 959. Generally speaking, the provisions of a marital contract dividing real and personal property are severable from provisions concerning alimony or support since "[t]here is a clear distinction between a property settlement and the discharge of the obligation to support." *Shoaf v. Shoaf*, 282 N.C. 287, 291-92, 192 S.E. 2d 299, 303 (1972) (distinguishing between property division and support provisions of consent judgment); *see also* 2 R. Lee, *North Carolina Family Law* Sec. 187 at 463 (4th ed. 1980) (whether provision is part of property settlement or separation agreement depends upon intention of parties derived from contract terms).

As the Agreement repeatedly refers to itself as a "Separation Agreement" and "Property Settlement" the Agreement is by its own term a combined separation agreement and property settlement. (Given the principles stated previously, we do not believe the Clerk's references to the Agreement as the "Separation Agreement" are of dispositive legal significance.) Like the statutory right to equitable distribution, the statutory right to dissent does not affect any marital duties of support and may be released under a valid property settlement. *Cf. Small*, 93 N.C. App. at ---, 379 S.E. 2d at 277 (concerning equitable distribution and duty of support); *see also Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E. 2d 228, 232 (1987). While the provisions of the Agreement dealing with the parties' living separate and apart and issues of custody and support contemplate the parties' continued separation, the Agreement "goes beyond the terms of a mere separation deed and is in effect a good voluntary settlement" of the parties' property rights including the statutory right to dissent under Section 30-1. *Jones*, 243 N.C. at 262, 90 S.E. 2d at 549.

Therefore, the mere fact of the Tuccis' reconciliation did not impliedly rescind that settlement: Since rescission by conduct only arises from conduct which is "positively" and "unequivocally" inconsistent with the contract, Mr. Tucci's contention that his reconciliation with Mrs. Tucci rescinded his release is necessarily founded on the premise that the parties' continuing to live separate and apart was part of the consideration for, or was an implied condition

of, Mr. Tucci's release of his statutory right to dissent. *See Small*, 93 N.C. App. at ---, 379 S.E. 2d at 279 (reconciliation would rescind property settlement only if settlement depended on parties living separate and apart). However, the Tuccis' Agreement clearly states the parties' continued separation was *not* a condition to the property settlement provisions of the Agreement. On the contrary, Paragraph 12 of the Agreement stated that "should at any time in the future the parties resume marital cohabitation in any respect . . . the provisions of this Separation Agreement and Property Settlement are and shall remain valid and fully enforceable and of full legal force and effect."

In *Small*, we held the parties' continuation or resumption of their marital relationship did not rescind a release of the right to equitable distribution where the defendant offered no other proof that the parties' separation was consideration for the settlement of all property rights including the right to equitable distribution. 93 N.C. App. at ---, 379 S.E. 2d at 280. Likewise, we will not presume—contrary to the express language of the Agreement and in the absence of any other evidence in the record—that Mr. Tucci's release of his statutory right to dissent was contingent on the parties' continued separation. As there is no other evidence of rescission in the record, it is immaterial whether Mr. Tucci's release was executory at the time the Tuccis reconciled. Thus, we conclude the Tuccis' reconciliation did not imply a rescission of Mr. Tucci's release of his statutory right to dissent under these circumstances.

In addition to complying with ordinary contract principles, marital agreements must always comply with public policy. *Cf.* N.C.G.S. Sec. 52-10(a) (1984). We note Mr. Tucci has not attempted to show his release was vitiated by any fraud, unconscionability, duress or overreaching. *Cf. Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E. 2d 331, 333 (1985); *see also Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E. 2d 117, 119 (1986) (spouses are fiduciaries until they separate, retain counsel and negotiate as adversaries). Furthermore, Mr. Tucci's release, as well as the contractual provision that the property settlement would continue despite the parties' reconciliation, are consistent with public policy as required of all marital agreements under Section 52-10(a). It is true our Supreme Court has stated as public policy that married parties may not shirk their spousal duties of support and alimony and yet live together as a married couple. *E.g., Motley v. Motley*, 255 N.C. 190, 193, 120 S.E. 2d 422, 424 (1961) (Section 52-10(a) would

not validate antenuptial waiver of support); *see also Gray v. Snyder*, 704 F. 2d 709, 712 (4th Cir. 1983) (under North Carolina law, spouses must separate or intend to separate immediately to execute valid support waiver under Section 52-10.1). However, that policy is not offended by permitting the same spouses to execute a complete settlement of all spousal interests in each other's real and personal property and yet live together. *E.g., Jones*, 243 N.C. at 262, 90 S.E. 2d at 550 (reconciliation does not "abrogate" division of property); *Buffington v. Buffington*, 69 N.C. App. 483, 488, 317 S.E. 2d 97, 100 (1984) ("public policy . . . permits spouses to execute property settlement at any time, regardless of whether they separate immediately thereafter or not"); *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); *but cf. Carlton v. Carlton*, 74 N.C. App. 691, 693, 329 S.E. 2d 682, 684 (1985) (release of equitable distribution executed after separation held void after reconciliation).

It appears public policy under *Motley* would not have permitted these parties to enforce the "separation" provisions of their Agreement, i.e., their waivers of support and alimony, and yet live together as a married couple; however, no public policy is offended by the continued validity of the property settlement provisions of this Agreement. Indeed, in light of Paragraph 12 of the Agreement, it appears the execution of the Agreement was intended to *encourage* the parties to reconcile and improve their marriage. Of course, a contractual provision providing that the contract will continue despite the parties' reconciliation is itself as subject to rescission as any other contractual provision. "[T]he parties to separation agreements must still be able to cancel their agreements, and the indicia of the intent to cancel as developed in our common law . . . must also still be intact." *Carlton*, 74 N.C. App. at 694, 329 S.E. 2d at 685. However, in light of the common law indicia of implied rescission, we hold the mere fact the Tuccis reconciled is not inconsistent with the property settlement provisions of this Agreement under these circumstances and therefore did not impliedly rescind Mr. Tucci's release of his right to dissent.

In passing, we note Mr. Tucci's reliance on our decision in *Carlton* which held the parties' previous release of their right to equitable distribution became void when they resumed marital relations after a period of separation. *Carlton* distinguished itself from

the apparently contrary result in *Buffington* by stating *Buffington* only dealt with common law principles affecting the validity of separation agreements entered into while the parties were still living together. After *Carlton*, this court again considered the case where spouses resumed marital relations after a period of separation and held that "property settlements may be executed before, during or after marriage and are not necessarily terminated by reconciliation." *Love*, 79 N.C. App. at 466, 339 S.E. 2d at 488. Both the majority and dissenters in *Higgins* expressly approved the results in both *Buffington* and *Love*. *Compare Higgins*, 321 N.C. at 485, 364 S.E. 2d at 428 (majority approvingly stated holding was consistent with *Buffington* and *Love*) *with id.* at 491, 364 S.E. 2d at 432 (Whichard, J., dissenting) (approving holdings in *Buffington* and *Love*). The *Higgins* Court did not hold that agreement was "void," but held the contractual provision to transfer property was defeated by the parties' reconciliation because the provision expressly conditioned the transfer on the parties "living continuously separate and apart" for one year. *Id.* at 485, 364 S.E. 2d at 429. The *Higgins* Court divided over the meaning of the phrase "living continuously separate and apart," not over the validity of the agreement. Insofar as the result in *Carlton* may be inconsistent with *Buffington* and *Love*, it has apparently been superseded by the decision of our Supreme Court in *Higgins*.

Accordingly, we hold the trial court incorrectly affirmed the clerk's conclusion that the Tuccis' reconciliation rescinded Mr. Tucci's release of his statutory right to dissent. As the Agreement was executed in accord with Section 52-10(a), the Agreement constitutes a plea in bar to Mr. Tucci's notice of dissent under Section 30-1. We therefore reverse the trial court and remand with the instruction that Mr. Tucci's notice of dissent be dismissed.

Reversed and remanded.

Judge COZORT concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent.

The majority opinion calls the agreement a "separation/property settlement agreement" and concludes that the Tuccis' post

execution marital reconciliation did not rescind their separation agreement. I disagree and would affirm.

The agreement here is clearly a separation agreement. The document is titled "Separation Agreement." From the terms of the agreement and the circumstances of its execution, it is clear that Mr. and Mrs. Tucci intended to create a separation agreement. Paragraph I of the agreement itself states: "That the parties shall continue to live *separate and apart*, each, being free from interference, authority or control by the other as full as if he or she were unmarried. . . ." [Emphasis added.] The clerk of court found as a fact that the parties both separated and executed the separation agreement "on or about" November 18, 1983. Of greater significance here we note that the appellants did not except to the clerk's findings of fact that the document was a separation agreement and that the agreement was executed by the separating spouses "on or about November 18," the date found to be the approximate date of separation.

Since the agreement was a separation agreement, there are well established principles concerning the consequences of reconciliation which apply here. "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 [reconciliation] of the marital relation." *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E. 2d 541, 545 (1976). "Further, a subsequent separation will not revive the agreement." *Id.* at 393, 230 S.E. 2d at 546.

Here, the clerk of superior court's findings of fact clearly indicate that only 37 days after the date of separation and when the agreement was signed, the couple reconciled, re-established a matrimonial home, and for over 20 months held themselves out as man and wife "in the ordinary acceptation of the descriptive phrase." Accordingly, I would hold that the agreement was "terminated for every purpose insofar as it remains executory" upon their resumption of the marital relationship. *Carlton v. Carlton*, 74 N.C. App. 690, 692, 329 S.E. 2d 682, 684 (1985).

"The executory provisions of a separation agreement are those in which 'a party binds himself to do or not to do a particular thing *in the future*'. . . . 'Executed' provisions are those which have been carried out, and which require no future performance." *Id.* at 693, 329 S.E. 2d at 684 [citations omitted].

Here, paragraph XIV of the agreement provides: "each party, nevertheless, agrees in order to fully effectuate this intention *to execute in the future such additional claims*, releases or other acquittances as may be necessary or appropriate for this purpose." This language contemplates loss of the right to dissent, recognizes that it is executory, and may require further action as events occur giving rise to new rights. Here the agreement is void as to the executory portions because of the resumption of the marital relationship and the right to dissent is clearly contemplated by the agreement itself as an executory provision.

Additionally, the public policy of our State should encourage continuation of viable marital relationships and should favor reconciliation of temporarily separated spouses. Resumption of the marital relationship and its attendant legal consequences should be possible without the necessity for any formal revocation of earlier separation agreements or formal reexecution of marriage vows or other artificial complexities.

In the *Carlton* opinion, though speaking on a different issue (the effect of enactment of G.S. 50-20(d) on equitable distribution actions), our court summed up my views:

> We do not believe that . . . the General Assembly intended that a written separation agreement, once entered into, would be forever binding. . . . Rather, the parties to separation agreements must still be able to cancel their agreements, and the indicia of the intent to cancel as developed in our common law, [I] believe, must also still be intact.

Id. at 694, 329 S.E. 2d at 685.

For these reasons, I dissent and would vote to affirm.

IN THE MATTER OF RONNIE LEON LUCAS

No. 8827DC1156

(Filed 5 July 1989)

1. **Criminal Law § 73.5; Rape and Allied Offenses § 4— three-year-old sexual assault victim—statements for medical diagnosis and treatment—admissibility of statements**

Statements of a three-year-old child to her mother regarding what defendant allegedly did to her were made within several days of the alleged incident and resulted in the child's receiving, within fourteen days, medical attention at a local hospital and a subsequent evaluation by another doctor; therefore, the statements were for the purpose of medical diagnosis or treatment and were properly admitted as substantive evidence pursuant to N.C.G.S. § 8C-1, Rule 803(4). Furthermore, the admission of the hearsay testimony did not infringe upon defendant's constitutional right to confrontation as the evidence was both necessary and trustworthy.

2. **Criminal Law § 73.5— three-year-old sexual assault victim—statements to doctor for medical diagnosis and treatment—doctor's testimony admissible**

A doctor could properly testify concerning statements of a three-year-old who was allegedly sexually abused, since the doctor examined the child two weeks after the events in question when the child's mother took her to the doctor at the police officer's suggestion; the doctor examined the child approximately four months prior to trial of the case; after examination, the doctor did not treat the child but determined that she exhibited some of the symptoms and characteristics of sexually abused children and recommended a "psychological follow-up" by another doctor; and the examination was thus for the purpose of medical treatment or diagnosis and was not solely for the purpose of preparing and presenting the State's theory at trial.

3. **Criminal Law § 89.2— three-year-old's statements to officer—admissibility to corroborate testimony of mother and doctor**

An officer's testimony as to statements made to him by a three-year-old who had allegedly been sexually abused was properly admitted to corroborate the testimony of the mother and a doctor concerning statements the child made to them.

4. **Criminal Law § 51; Rape and Allied Offenses § 4— credibility of children in general—doctor's testimony admissible**

The trial court did not err in allowing a doctor to testify as to the credibility of children in general who report sexual abuse, since the pediatrician was in a better position than the trier of fact to have an opinion on that subject.

5. **Criminal Law § 51; Rape and Allied Offenses § 4— sexually abused children in general—doctor's testimony as to symptoms and characteristics admissible**

A pediatrician's failure to give an opinion as to whether a child was sexually abused was not a bar to the doctor's testifying as to the symptoms and characteristics of sexually abused children in general and whether the symptoms exhibited by the child were consistent with sexual or physical abuse.

6. **Rape and Allied Offenses § 5— first degree sexual offense—sufficiency of evidence**

Evidence was sufficient to support the offense of first degree sexual offense where it tended to show that the child was three years old and defendant was fourteen years old at the time of the offense, and there was substantial circumstantial evidence that the juvenile penetrated the anal opening of the child with his penis.

APPEAL by juvenile from *Gaston (Harley B.), Judge*. Order entered 17 June 1988 in District Court, GASTON County. Heard in the Court of Appeals 18 April 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Lane Mallonee, for the State.

Assistant Public Defender Gay R. Atkins for defendant-appellant.

GREENE, Judge.

Ronnie Leon Lucas (hereinafter "juvenile"), age fourteen, was alleged in a juvenile petition to have committed a sexual offense with a three-year-old female (hereinafter "child") in violation of N.C.G.S. Sec. 14-27.4(a)(1) (1986). The trial judge found facts and adjudicated the juvenile to be delinquent and placed him on twelve months probation. The juvenile appeals.

At the adjudicatory hearing, the trial judge, after hearing testimony from the child, determined without objection that she was not competent to be a witness in the case. The State's evidence, to which there was no objection, tends to show the child was allowed by her mother to leave her house on or about 16 February 1988 and go into the woods, approximately twenty-five feet from the child's house, to play with her two brothers, ages six and seven, and the juvenile. Some "five to ten minutes" later the child came out of the woods crying. The mother then was allowed to testify, over objection, that the child told her that "Ronnie was mean to me" and that "her bottom was sore." The mother testified she did not check her child's bottom closely but that it appeared "raw and irritated" and that she put some "cornstarch and . . . Desitin on her." The mother further testified, over the objection of the juvenile, that several days later the child told her the juvenile had taken his "whacker" out and "had stuck it at her" and pointed to her bottom. The mother testified that the child "refers to a boy's . . . privates as a 'whacker,' that's just her term." The mother testified that during the remainder of February and March the child "went through bed wetting," "[s]he was very clinging," "[s]he kinda reverted back to a real babish thing," and that she was afraid to go to church and to pre-school.

Sergeant Bill May of the Belmont Police Department testified that the mother brought the child to his office and that he talked to the mother and the child on the afternoon of 22 February 1988. Over the juvenile's objection, the policeman was allowed to testify that the child told him "that Ronnie pulled [down] her pants and put his 'whacker' in her." The policeman further testified that on that same day he "transported them to Gaston Memorial Hospital to have her examined by a doctor." At the hospital, the child was seen by a doctor and the mother received a prescription for the child. About a week later, at the suggestion of Sergeant May, the mother took the child to another doctor, Dr. Ellis Fisher.

Dr. Fisher, a pediatrician at the Gastonia Children's Clinic, was accepted as an "expert witness in medicine with a specialty in pediatrics" and examined the child in his office on 29 February 1988. The reason for the examination, in the words of the doctor, was to determine "if there was any evidence of sexual abuse." Dr. Fisher was allowed, over the juvenile's objection, to testify that the child told him that the juvenile "pulled his 'whacker' out and pulled my pants down." Dr. Fisher further testified:

A. And then [child] said that he put a spring in me and I questioned her, "Where was this spring?", "On his whacker". Did it hurt when he put this spring in you? She said yes. Did he tell you that he had a spring and she said yes. Then I asked her "Where did he put it in you, can you show me?" Show me on the doll baby where he put it and I asked her to pull the doll baby's pants down and "Where did he put it in?"; she pointed to the vaginal area of the female doll. Then I asked her, "Did he do this one time?" and she indicated two times. She said that it was on two different days.

. . . .

A. . . . In obtaining the rectal culture, she stated that this was where Ronnie put his "whacker". When I did the vaginal exam, she said, "This is not where Ronnie put his whacker." . . . .

. . . .

A. The rectal structure appeared to be normal. There were no tears, lacerations or other abnormalities or alteration than normal [word not audible] tone. It was a normal examination. . . .

The juvenile testified he did go into the woods with the child and her two brothers and his brother, age eight. He testified they were in the woods about an hour and a half "building the clubhouse." He denied ever pulling the child's "pants down" and the only time he had ever touched her was "when she rode to school with us" when I helped "put her in the car."

This appeal presents the issues of whether the trial court erred in: I) allowing into evidence out-of-court statements of the child, who was declared by the trial court to be incompetent to testify, through the testimony of (A) the mother of the child, (B) Dr. Ellis Fisher, and (C) Sergeant Bill May; II) allowing Dr. Fisher to testify that the "ability . . . to create testimony . . . ought to be . . . foreign to the child of pre-school"; III) allowing Dr. Fisher to testify as to the general symptoms and characteristics of sexually abused children; and IV) denying the juvenile's motion to dismiss the petition at the close of all the evidence.

I

After the trial court determined the child "was not competent to be a witness" in the case, the State through the testimony of the mother, Dr. Fisher, and Sergeant May offered the out-of-court statements of the child. This testimony was hearsay "because the statements were made by one other than the declarant at trial and were offered to prove the truth of the matter asserted," *State v. Bullock*, 320 N.C. 780, 782, 360 S.E. 2d 689, 690 (1987), i.e., that the juvenile had sexually assaulted the child. The juvenile contends the evidence is inadmissible hearsay and does not come within the purview of any of the hearsay exceptions. The State contends the out-of-court statements of the child made to the mother and to the doctor are admissible under the medical diagnosis or treatment exception of N.C.G.S. Sec. 8C-1, Rule 803(4) (1988).

Hearsay statements are admissible into evidence if made for the purposes of medical diagnosis or treatment and if reasonably pertinent to the diagnosis or the treatment. N.C.G.S. Sec. 8C-1, Rule 803(4); *State v. Aguallo*, 318 N.C. 590, 596, 350 S.E. 2d 76, 80 (1986). However, in a criminal trial where the person making the out-of-court statements does not testify, the State is prohibited, by virtue of the Confrontation Clauses of the State (Article I, Section 23) and Federal (Sixth Amendment) Constitutions, from introducing hearsay evidence unless the proponent of the testimony shows "the necessity for using the hearsay declaration" and "the inherent trustworthiness of the declaration." *State v. Deanes*, 323 N.C. 508, 525, 374 S.E. 2d 249, 260 (1988), *cert. denied*, --- S.Ct. --- (1989); *State v. Gregory*, 78 N.C. App. 565, 568, 338 S.E. 2d 110, 112 (1985), *disc. rev. denied*, 316 N.C. 382, 342 S.E. 2d 901 (1986).

A

[1] The statements of the child to the mother regarding what the defendant allegedly did to her were made within several days of the alleged incident and resulted in the child receiving, within fourteen days, medical attention at a local hospital and a subsequent evaluation by Dr. Fisher. Therefore, the statements were for the purposes of medical diagnosis or treatment. *See State v. Smith*, 315 N.C. 76, 85, 337 S.E. 2d 833, 840 (1985). Furthermore, the child's statements were pertinent to diagnosis and treatment as they suggested to the doctors the nature of the problem which in turn directed the doctors in their examination of the child. *See Aguallo*, 318 N.C. at 597, 350 S.E. 2d at 81. Therefore, the mother's

testimony regarding her conversations with her child was properly admitted as substantive evidence pursuant to Rule 803(4). *See Smith*, 315 N.C. at 85, 337 S.E. 2d at 840.

We also conclude the admission of the hearsay testimony did not infringe upon the defendant's constitutional right to confrontation as the evidence was both necessary and trustworthy. The unavailability of the child to testify at the trial, as a result of the trial court's declaration of incompetency, and the evidentiary importance of the child's statements adequately demonstrates the necessity for using the hearsay declaration. *See Gregory*, 78 N.C. App. at 568, 338 S.E. 2d at 112-13; *State v. Jones*, 89 N.C. App. 584, 590, 367 S.E. 2d 139, 143 (1988). The trustworthiness of the child's out-of-court statements was not specifically determined by the trial judge. In order to allow effective appellate review, findings of fact and conclusions of law on the trustworthiness issue should appear of record. *See Smith*, 315 N.C. at 94, 337 S.E. 2d at 845. Nonetheless, even in the absence of "a showing of particularized guarantees of trustworthiness," through detailed findings, such out-of-court statements are deemed trustworthy if "the evidence falls within a *firmly rooted* hearsay exception." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed. 2d 597, 608 (1980) (emphasis added); *see* Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. Rev. 1, 47 (1987) (suggesting that presumption of trustworthiness created by evidence within firmly rooted hearsay exception should be rebuttable). The United States Supreme Court recently had an opportunity to apply this rule and held that "a court need not independently inquire into the reliability" of statements sought to be admitted under the co-conspirator exception of the hearsay rule (equivalent to North Carolina Rule of Evidence 801(d)(2)(E)) because that exception is "firmly enough rooted in our jurisprudence." *Bourjaily v. United States*, 483 U.S. 171, 183, 1107 S.Ct. 2775, 2783, 97 L.Ed. 2d 144, 157 (1987). With this holding came an *apparent* rejection of cases holding that *all* statutory exceptions to the hearsay rule *per se* satisfy the confrontation clause. *E.g., United States v. Burroughs*, 650 F. 2d 595, 597, n.3 (5th Cir. 1981), *cert. denied*, 454 U.S. 1037, 102 S.Ct. 580, 70 L.Ed. 2d 483 (1981).

Whether a child's out-of-court statement to her mother, which results in medical treatment or diagnosis, is a "firmly rooted hearsay exception" is questionable. Statements to treating physicians, relevant to diagnosis or treatment, have long been recognized in

North Carolina as an exception to the hearsay rule and are therefore arguably firmly rooted in our jurisprudence. *See* 1 Brandis on North Carolina Evidence Sec. 161, p. 729 (3d ed. 1988); *cf.* Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. Rev. 257, 290 (1989) (statements to physicians that provide the basis for opinions not related to treatment are "not within a firmly rooted hearsay exception"). However, a child's out-of-court statement to her mother, which statement results in medical treatment or diagnosis, is a hearsay exception first recognized by our Supreme Court in 1985 in *Smith*. 315 N.C. at 84-85, 337 S.E. 2d at 840; *see Coy v. Iowa*, 108 S.Ct. 2798, 2803, 101 L.Ed. 2d 857, 867 (1988) (hearsay exception created by Iowa statute in 1985 "could hardly be viewed as firmly rooted").

Irrespective of the United States Supreme Court's guidance on the subject through *Roberts* and *Bourjaily*, this court in *Jones* adopted a *per se* rule and held that trustworthiness is established when the evidence falls within any statutory hearsay exception. 89 N.C. App. at 590, 367 S.E. 2d at 143. In addition to its conflict with cases of the United States Supreme Court, *Jones* conflicts with *Gregory* in which this court held that "[m]erely classifying a statement as a hearsay exception does not automatically satisfy the requirements . . . of the Sixth Amendment." *Gregory*, 78 N.C. App. at 568, 338 S.E. 2d at 112. Nevertheless, as *Jones* has not been overruled by our Supreme Court, we are bound. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, --- S.E. 2d --- (1989). Accordingly, consistent with *Jones*, we determine the out-of-court statements of the child are necessarily trustworthy as they come within the requirements of Rule 803(4).

B

[2] The defendant contends the examination by Dr. Fisher was not for the purposes of medical treatment or diagnosis but instead was for the purpose of preparing and presenting the State's theory at trial and therefore does not support allowing Dr. Fisher to testify as to the out-of-court statements of the child. *See State v. Stafford*, 317 N.C. 568, 574, 346 S.E. 2d 463, 467 (1986) ("prerequisite to admissibility for substantive purposes of statements made to physicians is that they be 'made for purposes of medical diagnosis or treatment . . . .' ").

In determining if a medical examination was rendered for the purpose of "medical diagnosis or treatment" the following factors are relevant:

(1) whether the examination was requested by persons involved in the prosecution of the case; (2) the proximity of the examination to the victim's initial diagnosis; (3) whether the victim received a diagnosis or treatment as a result of the examination; and (4) the proximity of the examination to the trial date.

Jones, 89 N.C. App. at 591, 367 S.E. 2d at 144.

The record in this case reveals the child's mother took the child to Dr. Fisher's office at the suggestion of Sergeant May, approximately two weeks after the alleged sexual abuse. Dr. Fisher examined the child in his office approximately four months prior to the trial of this case in the Juvenile Court. Dr. Fisher testified that "the reason for the visit was to examine the child and see if there was any evidence of sexual abuse." After the examination, Dr. Fisher did not treat the child but determined from his conversations with and examination of the child that she exhibited some of the symptoms and characteristics of sexually abused children and recommended a "psychological follow-up" by another doctor.

The fact Dr. Fisher never treated the child is not determinative of whether his examination qualifies under Rule 803(4). *See United States v. Iron Thunder*, 714 F. 2d 765, 773 (8th Cir. 1983); 4 Weinstein's Evidence Sec. 803(4)[01], p. 803-146 (1988) ("Rule 803(4) rejects the distinction between treating and non-treating physicians"); *but see* Mosteller, *Child Sexual Abuse and Statements For the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. Rev. 257, 273 (1980) (suggesting the rationale of *Stafford* is "where no treatment is sought or intended, hearsay statements may be received only when used to form the basis of the doctor's opinion"). Dr. Fisher used the statements of the child in making his diagnosis and in recommending follow-up visits with another doctor. While Dr. Fisher's examination of the child did prepare him for his testimony at trial, it was clearly not the sole purpose for the examination. *Stafford*, 317 N.C. at 574, 346 S.E. 2d at 467 (physician's testimony not admissible as substantive evidence where sole purpose was for "preparing and presenting the state's . . . theory at trial"). We therefore conclude the trial court properly admitted Dr. Fisher's testimony as to the out-of-court statements of the child pursuant to Rule 803(4). Furthermore, relying on *Jones*, the admission of Dr. Fisher's hearsay testimony did not infringe upon the defendant's constitutional right to confrontation as the evidence was both necessary and trustworthy.

C

[3] Sergeant May's testimony as to the child's statements to him were admissible to corroborate the testimony of the mother and Dr. Fisher concerning the statements of the child made to them. *See State v. Chandler*, 324 N.C. 172, 182, 376 S.E. 2d 728, 734 (1989). We agree with the juvenile that the evidence is inadmissible for substantive purposes. *See Smith*, 315 N.C. at 82, 337 S.E. 2d at 838. The record reveals that Sergeant May's testimony was offered by the State and received by the trial court as corroborative evidence, not as substantive evidence. Accordingly, we find that Sergeant May's testimony was properly admitted.

II

[4] The juvenile next argues the trial court erred in allowing Dr. Fisher to testify as to the credibility of the child through the following testimony:

> Q. . . . Have you made any studies with references to the truthfulness of young children, specifically under the age of five years or so?
>
> . . . .
>
> A. . . . That the younger children certainly can be altered but basically the ability to tell, to create testimony, artificially, especially in the area as sensitive as this is for the most part, ought to be pretty foreign to the child of pre-school as a rule. . . .

This court in *State v. Oliver*, 85 N.C. App. 1, 12, 354 S.E. 2d 527, 534, *disc. rev. denied*, 320 N.C. 174, 358 S.E. 2d 64 (1987), answered the question as to whether an expert can testify as to the "credibility of children in general." In *Oliver*, this court held that a pediatrician "was in a better position than the trier of fact to have an opinion on the credibility of children in general who report sexual abuse . . . [and] [h]is opinion is therefore admissible under Rule 702." *Id.* We also, like the *Oliver* court, determine that Dr. Fisher's opinion related to the general credibility of children, not credibility of the child in question, and that this testimony was more probative than prejudicial under Rule 403. Therefore, we conclude the trial court did not err in allowing Dr. Fisher to testify on the credibility of children in general who report sexual abuse.

III

[5] The juvenile argues the trial court erred in allowing the following testimony of Dr. Fisher:

> Q. Dr. Fisher, what are some of the symptoms and characteristics of sexually abused children?
>
> . . . .
>
> A. Frequently the child would present symptoms relative, a female to the genitalia, bed wetting, changes in the urinary and voiding patterns, they may demonstrate things like vaginal discharge and rashes in the vaginal area.
>
> Q. Is that with regard to whether penetration has been vaginally or anally?
>
> . . . .
>
> A. Yes, I think that they can have nonspecific irritations or even psychological directions of the hands to the vaginal area on that basis. There are the more nonspecific areas of symptomatology such as behavioral withdrawal, sleep disturbances, etc. That outside the physical findings and symptoms, those would be the major areas.
>
> Q. Were the symptoms that you observed in [the child] consistent with the symptoms and characteristics you just testified to?
>
> A. Yes, I think so, she was having bed wetting and then there was a rash in the vaginal area, certainly doesn't prove anything but they are certainly consistent as you said.

Specifically, the juvenile argues as Dr. Fisher never gave an opinion as to whether the child was abused, "he should not have been allowed to testify about children in general and [the child's] specific complaints." We disagree. In *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E. 2d 359, 366 (1987), our Supreme Court allowed two experts, who at trial were prohibited from testifying as to whether the victim had been sexually abused, to testify as to the "symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse." *Id.* That Court determined that the testimony of the experts could be helpful to the jury in understanding "the behavior patterns of sexually abused

children" and could assist the jury in "assessing the credibility of the victim." *Id.* Therefore, consistent with *Kennedy*, Dr. Fisher's failure to give an opinion as to whether the child was sexually abused was not a bar to Dr. Fisher testifying as to the symptoms and characteristics of sexually abused children in general and whether the symptoms exhibited by the child were consistent with sexual or physical abuse.

Additionally, we reject any argument of the defendant that Dr. Fisher's testimony should be excluded under N.C.G.S. Sec. 8C-1, Rule 403. Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. Sec. 8C-1, Rule 403 (1988). However, whether or not to exclude the evidence under Rule 403 is a matter "within the sound discretion of the trial judge," *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986), and there has been no showing that the trial court's decision to allow the evidence "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E. 2d 78, 82 (1985).

IV

[6] The juvenile finally argues the trial court erred in denying his motion to dismiss at the close of all the evidence on the grounds that the evidence was insufficient to support the offense charged.

A motion to dismiss for insufficiency of the evidence, made pursuant to N.C.G.S. Sec. 15A-1227 (1988), is essentially a motion for non-suit under N.C.G.S. Sec. 15-173 (1983). *State v. Griffin*, 319 N.C. 429, 432, 355 S.E. 2d 474, 476 (1987). The question for the court, when presented with a motion for dismissal, is "whether there is substantial evidence (1) of each essential element of the offense charged, or the lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980). The evidence, whether "direct, circumstantial or both," *State v. Malloy*, 309 N.C. 176, 178-79, 305 S.E. 2d 718, 720 (1983), must be viewed in the light most favorable to the State and "the State is entitled to every reasonable inference that may be drawn therefrom supporting the charges against the defendant." *Griffin*, 319 N.C. at 433, 355 S.E. 2d at 476. The trial court is not required "to determine that the evidence excludes every reasonable hypothesis of innocence," *Malloy*, 309 N.C. at 178, 305 S.E. 2d at 720, as the test is whether the State has "offered substantial evidence of each element of the

charged offenses sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt." *Griffin*, 319 N.C. at 433, 355 S.E. 2d at 476.

The elements essential to proof of first-degree sexual offense, N.C.G.S. Sec. 14-27.4(a)(1), are namely: "(1) the defendant engaged in a 'sexual act,' (2) the victim was at the time of the act twelve years old or less, and (3) the defendant was at least twelve years old and four or more years older than the victim." *Griffin*, 319 N.C. at 433, 355 S.E. 2d at 477. "A 'sexual act' includes anal intercourse, N.C.G.S. Sec. 14-27.1(4) (1986), which requires penetration of the anal opening by the penis." *Id.*

The evidence viewed in the light most favorable to the State, establishes the child was three years old and the defendant was fourteen years old at the time of the offense. Furthermore, there is substantial circumstantial evidence that the juvenile, with his penis, penetrated the anal opening of the child. Therefore, a reasonable inference of the juvenile's guilt of the crime charged may be drawn from the evidence and the trial court did not err in denying the juvenile's motion to dismiss. *See Powell*, 299 N.C. at 99, 261 S.E. 2d at 117 (where sufficiency of circumstantial evidence is questioned, the issue is "whether a reasonable inference of defendant's guilt may be drawn from the circumstances").

Affirmed.

Judges ARNOLD and LEWIS concur.

TREANTS ENTERPRISES, INC. v. ONSLOW COUNTY, THE SHERIFF OF ONSLOW COUNTY IN HIS OFFICIAL CAPACITY; AND THE ONSLOW COUNTY TAX COLLECTOR IN HIS OFFICIAL CAPACITY

No. 884SC739

(Filed 5 July 1989)

1. Constitutional Law § 18— regulation of escort businesses— overbroad

An ordinance regulating escort bureaus was void for overbreadth where the ordinance required escort bureaus to keep a record of transactions with clients or customers; the record

book was required to be kept on the premises and made available for inspection by the sheriff of the county or one of his deputies; and information concerning the customers or clients and the escorts was required to be recorded, including the names and addresses of each party involved in a transaction. The county established that it had a compelling interest in preventing the use of escorts for pandering and prostitution, the protection of minors and the furtherance of public health, safety and welfare, but the county failed to show that the means employed were drawn so as not to infringe on the associational freedoms of persons who may seek the services of an escort.

2. **Constitutional Law § 18— regulation of escort businesses— void for vagueness**

An ordinance regulating escort bureaus was void for vagueness and therefore violative of due process of law in that the term "escort," while susceptible to the apparent intended meaning of the ordinance, was also susceptible of other connotations. In modern society the term "escort" as defined by the ordinance could include, for example, dance instructors, golf and tennis professionals, personal or social secretaries, and chauffeurs.

3. **Constitutional Law § 14— regulation of escort bureaus— violation of law of the land**

An ordinance regulating escort bureaus violated Art. I, § 19 of the North Carolina Constitution where, although the county had established that it had a legitimate objective in promulgating the ordinance in the present case, the means chosen by the county were not reasonable in light of their effect on rights of association guaranteed by the First Amendment.

APPEAL by plaintiff from *Johnson, E. Lynn, Judge.* Judgment entered 19 April 1988 in JONES County Superior Court. Heard in the Court of Appeals 15 February 1989.

Plaintiff is a corporation organized and existing under the laws of the State of North Carolina. Plaintiff operates the following three business establishments in defendant Onslow County: Adult World, Man's World, and Video World, all of which are located in the City of Jacksonville, North Carolina. Each of these businesses exhibits and rents motion pictures and video tapes and sells books

and magazines. These businesses also offer a service whereby, upon the payment of a fee, a customer can have a person watch a movie with him on the premises of the establishments.

On 4 January 1988, the Onslow County Board of Commissioners enacted an ordinance entitled, "An Ordinance Regulating Escort Bureaus." This ordinance was to become effective on 1 March 1988.

The Ordinance

The ordinance provides that in order to operate an escort bureau a corporation must apply for and receive a license from the Onslow County Tax Collector. A fee of $25.00 is imposed for this license. Before the license can be issued, the applicant must have a "certificate of compliance" from the Sheriff of Onslow County for each escort who is employed by the applicant. In order to obtain or maintain a license every corporation operating as an escort bureau is responsible for making sure that every employee who is an escort is registered by name and address with the Onslow County Sheriff's Department within five days after being employed. Once this is accomplished the escort is issued a certificate of compliance. "Escort" is defined as:

> (1) Any person who, for hire or reward, accompanies others to or about social affairs, entertainment or places of amusement.
>
> (2) Any person who, for hire or reward, consorts with others for purposes of socializing and/or amusement and/or entertainment about any place of public resort or within any private quarters.

An "escort bureau" is defined as: "any business or agency which, for a fee, commission, hire, reward or profit, furnishes or offers to furnish escorts." Massage parlors and related businesses are expressly excluded from the ordinance due to being regulated by another county ordinance.

An applicant for a license to operate an escort bureau is required to furnish to the Onslow County Sheriff's Department his full name, address, physical description, age, driver's license number and social security number so as to assist in an investigation of the applicant's criminal record and character. A fee of $25.00 is charged for each escort employee for whom an application for a certificate of compliance is made. A $25.00 fee is also charged for each applicant who is required to be investigated. Applicants

can be denied a license if persons who are required to be investigated under the ordinance have been convicted of a felony or of a crime involving prostitution, assignation or a related offense in the five years immediately preceding the date of the license application. Licenses can be revoked if any persons required to be investigated under the ordinance are convicted of the above criminal offenses. The ordinance also prohibits employment of new escort employees who have been convicted of a felony, prostitution, assignation or a related offense within a specific time period. Violations of this prohibition constitute grounds for revocation of the license issued to the escort bureau. Continued employment of existing employees as escorts hired prior to or after the effective date of the ordinance who are convicted of the offenses mentioned above in regard to an offense occurring subsequent to the effective date of the ordinance or whose initial employment is known by the licensee to have violated the ordinance is prohibited and a violation of this prohibition is grounds for immediate revocation of the escort bureau's license.

The ordinance also requires escort bureaus to keep a record of client or customer transactions for a period of one year beyond the date of the transaction. The information which is required to be recorded is as follows:

> (1) an accounting of the name, address and age of the patron, customer or client or person involved with the transaction and the date of the transaction.
>
> (2) the name and address of each escort employed, furnished or arranged for.

The record book is required to be kept "at all times on the premises of the escort bureau" and "shall be made available for inspection during regular business hours only to the Sheriff of Onslow County or one of his sworn deputies." The ordinance also contains provisions establishing security measures for protecting and destroying information obtained from the record books of the escort bureau.

The ordinance also prohibits transactions with and employment of juveniles. The ordinance further provides for penalties for violation of the ordinance and for the severability of the various provisions of the ordinance should a given provision be found to be invalid or unconstitutional.

On 16 February 1988 plaintiff filed a complaint alleging that the ordinance was "illegal, invalid and unconstitutional under the General Statutes and Constitution of North Carolina and the Constitution of the United States . . . ." The plaintiff further alleged that the ordinance was unconstitutional because it "is overly broad and vague, infringes upon the freedoms of speech and press, imposes a tax not authorized by state law, impermissibly invades the privacy of the plaintiff's employees and customers . . . [purports] to regulate an area that has been pre-empted by state law. . . ." The plaintiff sought a preliminary injunction and a permanent injunction of the enforcement of the ordinance and a judgment declaring the ordinance to be unconstitutional, illegal and invalid. Plaintiff made a motion for a preliminary injunction on 16 February 1988 which was later stipulated to be treated as a motion for permanent injunction by the parties. Defendants answered on 14 April 1988 generally denying the averments of plaintiff's complaint and asserting that plaintiff had no standing to litigate its claims on behalf of its customers. Defendants requested that plaintiff's complaint be dismissed or that the court find that the ordinance was valid and a denial of the relief sought by plaintiff. The matter came on for hearing at the 28 March 1988 mixed session of Jones County Superior Court. On 19 April 1988 the trial court entered an order denying plaintiff's motion for a permanent injunction and dismissing plaintiff's complaint. Plaintiff appealed from this order.

Robert T. Hargett and Jeffrey S. Miller for plaintiff-appellant.

Roger A. Moore for defendant-appellees.

WELLS, Judge.

Plaintiff assigns error to the trial court's conclusion that the ordinance at issue in the present case is not vague or overly broad and not in violation of the Fourteenth Amendment of the United States Constitution and Article 1, Section 19 of the North Carolina Constitution.

[1] Plaintiff contends that the ordinance is vague and overbroad, violating both the federal and state constitutions. The doctrines of vagueness and overbreadth are primarily concerned with rights and privileges protected by the federal constitution. In defining the vagueness doctrine the Supreme Court of the United States has stated: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Coates v. Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed. 2d 214 (1971). " 'It is a basic principle of due process that an enactment is void for vagueness if its *prohibitions* are not clearly defined.' " *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed. 2d 152 (1982) (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972)) (emphasis in original).

"The overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right." *Clark v. City of Los Angeles*, 650 F. 2d 1033 (9th Cir. 1981), *cert. denied*, 456 U.S. 927, 102 S.Ct. 1974, 72 L.Ed. 2d 443 (1982). "The overbreadth doctrine has been applied almost exclusively in the areas of first amendment expressive or associational rights." *Id.* at 1039. Furthermore, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973).

In the present case the stated purpose of the ordinance is "to prevent the use of ostensibly legitimate businesses as blinds for pandering and prostitution" and "to protect minors from involvement with such business practices and also to further public health, safety and welfare." Each of these objectives is clearly within the scope of the police power of the state. However, as noted above, legislation may be overbroad if it impermissibly infringes upon protected rights. One such right is the right of association.

"The Fourteenth Amendment protects from state interference the First Amendment right of citizens to freedom of association." *Thomas S. By Brooks v. Flaherty*, 699 F. Supp. 1178 (W.D.N.C. 1988). "Freedom of association is a fundamental right, implicit in the concept of ordered liberty." *Id.* at 1203. The ordinance at issue in the present case requires escort bureaus to keep a record of transactions with clients or customers. This record book must be kept on the premises and shall be made available for inspection

to the Sheriff of Onslow County or one of his deputies. Information concerning the customers or clients and the escorts is required to be recorded, including the names and addresses of each party involved in a transaction. We hold that the record requirements of the ordinance constitute an impermissible infringement on the right of association of the customers, clients and patrons of an escort bureau. "A state violates the fourteenth amendment when it seeks to interfere with the social relationship of two or more people." *Wilson v. Taylor*, 733 F. 2d 1539 (11th Cir. 1984). The ordinance patently interferes with the social relationships.

The ordinance acts to impose the tangible presence of the State in the social affairs of its citizens each time a citizen wishes to utilize the services of an escort. This type of governmental presence is the type of interference expressly prohibited by the First Amendment guarantee of right of association. As the court stated in *Thomas S. By Brooks, supra*, "[e]ven an indirect infringement on associational rights is impermissible and subject to the closest scrutiny." Though the ordinance is intended to directly affect and regulate the escort bureaus, it has the indirect effect of infringing on the associational rights of customers, clients or patrons. Therefore, the ordinance interferes with the social relationship of two or more people and is subject to the closest or strictest scrutiny.

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment. . . ." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958). Subsequent decisions have established that "[t]he constitutional guarantee not only protects an individual's associations with others for the purpose of advancing shared political and religious beliefs, but encompasses the right simply to meet with others and applies to social and personal associations." *Thomas S. By Brooks, supra* at 1203. "[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963). The State must also "[employ] means closely drawn to avoid unnecessary abridgment of associational freedoms" in achieving its objectives. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976). In the present case the county has established that it has a compelling interest in preventing the use of escorts for

pandering and prostitution, the protection of minors and the furtherance of public health, safety and welfare. The county has failed to show, however, that the means employed are drawn so as not to infringe on the associational freedoms of persons who may seek the services of one escort.

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed. 2d 231 (1960). We hold that the county's objectives can be pursued by less drastic means than the ordinance at issue. The preamble to the ordinance indicates that other law enforcement methods, such as undercover officers, have been used to police adult entertainment businesses such as escort bureaus. These methods, including police surveillance, informants and other traditional methods of law enforcement would be less intrusive on the rights of association of the escort bureaus' customers than the recordkeeping provisions of the ordinance. Though we note that the ordinance states that use of undercover officers has not always been successful in preventing these criminal offenses, lack of success does not serve as an excuse for an infringement on First Amendment rights of association.

> A plausible challenge to a law as *void for overbreadth* can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach.

L. Tribe, *American Constitutional Law* § 12-27 (2d ed. 1988) (emphasis in original). The ordinance states in the preamble: "Accomplishing the objectives of this ordinance can only be effectively achieved through the records requirement." The ordinance's target is "all such adult-entertainment businesses which offer that sort of companionship involved with socializing and amusement." The protected activity in the present case—the rights of association of the escort bureau's customers—is a significant part of the target of the ordinance. The type of companionship involved with socializing and amusement mentioned in the ordinance is nonexistent without

the participation of the customers who must exercise their rights of association to engage in this activity. We can perceive no satisfactory way to excise the unconstitutional application of the ordinance's records requirement while still effectively achieving the ordinance's stated constitutional objectives. If the records requirement is removed the ordinance will be made, by its own implicit admission, ineffectual. The unconstitutional effect of the ordinance is not only real but is substantial when judged against the ambit of its legitimate application. Therefore, we hold that the ordinance at issue in the present case is unconstitutional as written, being void for overbreadth.

[2] We also hold the ordinance to be void for vagueness. As noted above, an ordinance is violative of the due process of law when it forbids or requires the doing of an act in terms which are so vague that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application. The ordinance in the present case presents this problem.

The term "escort" is defined as "[a]ny person who, for hire or reward, accompanies others to or about social affairs, entertainment or places of amusement," or "[a]ny person who, for hire or reward, consorts with others for purposes of socializing and/or amusement and/or entertainment about any place of public resort or within any private quarters." Though the term "escort" is susceptible to the apparent intended meaning of the ordinance, the term is also susceptible to other connotations. Our Supreme Court has stated that the term "escort" "connotes a companion for purposes of socializing and amusement . . . ." *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 360 S.E. 2d 783 (1987). In modern society the term "escort" as defined by the ordinance could include, for example, dance instructors, golf and tennis professionals, personal or social secretaries, and chauffeurs. The wording of the Onslow County ordinance "provide[s] only a vague, uncertain and unintelligible notion of [its] scope, at which persons of common intelligence must necessarily guess." *Eaves v. Board of Clark Co. Comm'rs*, 96 Nev. 921, 620 P. 2d 1248 (1980). "The imprecision in the language of the ordinance permits, and is likely to encourage, arbitrary and discriminatory enforcement." *Id.* at 924, 620 P. 2d at 1250. The *Eaves* court in construing a substantially similar ordinance to the one in the present case stated:

> The mere existence of Ordinance No. 595, as written, is likely to deter law-abiding citizens from conduct which may

> or may not be covered by its provisions. As written, Ordinance No. 595 fails to provide law enforcement officials with adequate guidance concerning the precise scope of the activities it aspires to proscribe. Consequently, Ordinance No. 595 is void for vagueness on its face.

Id. at 924-925, 620 P. 2d at 1250. The ordinance at issue in the present case presents the same problems. The imprecision and ambiguity of the wording of the Onslow County ordinance causes the ordinance to be void for vagueness on its face.

[3] We next turn our attention to plaintiff's argument concerning the validity of the ordinance under Article I, Section 19 of the North Carolina Constitution. Article I, Section 19, provides in part, the following: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. We note that the predecessor to the ordinance at issue in the present case was previously found to be invalid under this section by this Court in *Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 350 S.E. 2d 365 (1986), and the North Carolina Supreme Court, *Treants, supra.* The two ordinances are substantially the same with the exception of the substitution of the words "escort bureau" for "a business providing male or female companionship" and "escort" for "employee (whose duties involve the conducting of said business)." This Court held that the prior ordinance was overbroad and vague stating that "the ordinance lacks any rational, real and substantial relation to any valid objective of Onslow County and . . . it thus offends Article 1, Secs. 1 and 19 of the Constitution of North Carolina." *Treants*, 83 N.C. App. at 357, 350 S.E. 2d at 373. Our Supreme Court affirmed this decision holding that the prior Onslow County ordinance, "by reason of its overbreadth, . . . is not rationally related to a substantial government purpose and violates our state constitution." *Treants*, 320 N.C. at 780, 360 S.E. 2d at 786. In its opinion the Supreme Court stated that "[t]he terms 'escort bureau' and 'escort service' are often regarded as euphemisms for prostitution. . . ." *Id.* The substitution of the words "escort" and "escort bureau" in the ordinance in the present case appears to be an attempt by the county to correct the problems posed by the earlier version of the ordinance.

"Our Supreme Court has held that the term 'law of the land,' as used in Article I, Section 19 of the North Carolina Constitution,

is synonymous with 'due process of law' as that term is applied under the Fourteenth Amendment to the United States Constitution." *In re Petition of Kermit Smith*, 82 N.C. App. 107, 345 S.E. 2d 423 (1986). "For a statute to be within the limits set by the federal due process clause and the North Carolina 'law of the land' provision, all that is required is that the statute serve a legitimate purpose of state government and be rationally related to the achievement of that purpose." *Shipman v. N.C. Private Protective Services Bd.*, 82 N.C. App. 441, 346 S.E. 2d 295, *disc. rev. denied and appeal dismissed*, 318 N.C. 509, 349 S.E. 2d 866 (1986). "The inquiry is thus two-fold: (1) Does the regulation have a legitimate objective? and (2) If so, are the means chosen to implement that objective reasonable?" *Treants, supra* at 352, 350 S.E. 2d at 370.

The county, as discussed above, has established that it has a legitimate objective in promulgating the ordinance in the present case. The prevention of the use of ostensibly legitimate businesses as blinds for prostitution, the protection of minors from involvement with such businesses and the furtherance of public health, safety and welfare are valid and legitimate governmental objectives. However, the means chosen by the county in the present case to implement these objectives are not reasonable in light of their effect on rights of association between the public at large and escorts. Though the use of the term "escort bureau" in the present ordinance may serve to narrow the scope of the ordinance's application and effect, thereby avoiding the overbreadth problem posed by its predecessor, the sweep of the present ordinance infringes on rights of association guaranteed by the First Amendment. Therefore, the ordinance is patently unreasonable and violative of Article I, Section 19 of the North Carolina Constitution.

For the foregoing reasons, we hold that the Onslow County ordinance is void as it violates the First and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

As a result of our decision above, it is unnecessary for us to address plaintiff's other assignments of error.

Reversed.

Chief Judge HEDRICK and Judge ARNOLD concur.

CARROLL BOSTON CORRELL v. MAURILLA CHRISTINE ALLEN

No. 8811DC973

(Filed 5 July 1989)

1. **Divorce and Alimony § 25.9— child custody changed from mother to father—deterioration of child's emotional health—sufficiency of evidence of changed circumstances**

The trial court did not err in ordering a change in child custody from defendant to plaintiff where the evidence tended to show that the child's emotional health deteriorated between the ages of three and five; defendant had the greater parental influence upon the child during this time; and the psychological problems suffered by the child were attributable to defendant and were in part due to her refusals to comply with visitation orders.

2. **Divorce and Alimony § 25.12— child custody—visitation privileges—limitation proper**

The trial court did not err in imposing restrictions on defendant's visits with the parties' child where the trial court found that defendant's demonstrations of anger and hostility in the presence of the child and her frustration of the relationship between the child and plaintiff necessitated, for the child's best interest, the restrictions, and evidence in the record supported the finding.

3. **Divorce and Alimony § 24.1— child support—failure to determine child's needs—award improper**

The trial court erred in ordering defendant to pay $480 per month in child support without first making adequate findings as to the child's reasonable needs.

4. **Divorce and Alimony § 24.6— entitlement to back child support—sufficiency of evidence**

The trial court erred in failing to award defendant back child support on the basis that she had offered no evidence which would indicate that she was entitled to it, since plaintiff testified that he was not in arrears but also testified that he reduced his child support payments in 1985 because he experienced a decrease in salary, and plaintiff testified that she was owed back child support.

APPEAL by defendant from *William A. Christian, Jr., Judge.* Order entered 7 March 1988 in District Court, JOHNSTON County. Heard in the Court of Appeals 23 March 1989.

Mast, Morris, Schulz & Mast, by George B. Mast and Bradley N. Schulz, for plaintiff-appellee.

Howard, From, Stallings & Hutson, P.A., by Robert E. Howard and Catherine C. McLamb, for defendant-appellant.

BECTON, Judge.

In this domestic action, plaintiff, Carroll Boston Correll, and defendant, Maurilla Christine Allen, filed motions on matters related to the custody, visitation, and support of Carroll Boston Correll, Jr., the parties' son. Following a hearing, the trial judge entered an Order which, among other things, changed custody of the child from the defendant to the plaintiff, granted defendant visitation subject to certain conditions, directed that defendant pay $480 per month in child support, and denied defendant's motion for payment to her of back child support. Defendant appealed. We affirm in part, vacate and remand in part.

I

The factual and procedural history of this case is lengthy. Some 40 pages of the record on appeal consist of court orders alone. However, as the history of this case is necessary to our discussion of the issues defendant has raised, we recite it fully.

A

Carroll Boston Correll, Jr. ("the child") was born to Carroll Boston Correll and Maurilla Christine Allen on 20 July 1982 in the State of Georgia. Three months later, Mr. Correll and Ms. Allen separated, and they divorced in 1983. Pursuant to a settlement agreement they entered into that year, Ms. Allen received custody of the child.

Mr. Correll exercised his visitation rights until March of 1984. On Palm Sunday, 1984, Mr. Correll abducted the child and remained missing with him for three-and-a-half weeks. Canadian law enforcement officials apprehended Mr. Correll after he and his son boarded a flight bound for Zurich, Switzerland. When she recovered the child, Ms. Allen moved with him to her home in North Carolina. Also, in 1984, Mr. Correll, who received a two-year suspended

sentence for abducting the child, secured a teaching position in North Carolina and moved to this State to live.

Orders entered on 7 August 1985 and 7 April 1986 continued custody of the child in Ms. Allen. Mr. Correll was granted restricted visitation, the court ordering all visits to take place in the presence of a psychologist. An alleged incident at one of the sessions resulted in the issuance of a Protective Order for the benefit of the psychologist. On 19 August 1986, Ms. Allen was held in contempt of court for failing to abide by instructions that she not attend the meetings between Mr. Correll and the child.

On the same day Ms. Allen was held in contempt, the court, finding that "the . . . previous visitation privileges set up by . . . this Court have gone well and proceeded smoothly," ordered that the conditions of Mr. Correll's visitations with his son be relaxed. Among other things, the court granted Mr. Correll weekend custodial visitations, Ms. Allen being ordered to deliver the child to a hotel in Greensboro on the first and third Fridays of each month, and Mr. Correll being ordered to return the child there on the following Sundays. On 1 April 1987, the court denied Ms. Allen's motion to "modify the method of transporting the minor child to and from Greensboro."

Ms. Allen was found in contempt of court a second time on 10 June 1987 for "fail[ing] and refus[ing] to comply with the terms of the [visitation order] on at least two . . . occasions." In the same order, the court, finding that "the minor child has to travel some 800 to 900 miles every other weekend," modified the visitation schedule, giving Mr. Correll custody of the child one weekend each month and expanding Mr. Correll's summer and holiday visitations with his son. The court also ordered both parties "not to make any statement to the minor child about the other party which could be . . . considered derogatory."

B

On 18 August 1987, Mr. Correll filed a motion asking that the court award him custody of the child and require Ms. Allen to pay child support. On 25 November, Ms. Allen filed a motion to compel Mr. Correll to pay back child support and medical expenses of the child, to terminate Mr. Correll's visitation privileges, and to increase the amount of child support. The judge held a hearing on the respective motions and entered his Order on 7

March 1988. Mr. Correll and Ms. Allen each testified, as did Dr. Linda Norris, a Raleigh psychologist who had evaluated the child.

The judge made 24 findings of fact covering some nine pages in the Order. Among his findings, which we renumber and paraphrase were these:

1) That Dr. Norris testified the child was experiencing emotional problems; that these problems were not the result of the child's visits with his father; that the child was anxious and found the world to be a "scary place"; that he had low self-esteem and had feelings of self-loathing; that he felt helpless and vulnerable and felt that his life was "out of control"; that it was unlikely that the child distinguished between the real and the unreal; that he did not handle change well; and that the conflict between his parents put him at risk of developing serious adjustment problems later in life, including depression and withdrawal from others.

2) That, according to Dr. Norris, the child's personality deficiencies needed to be addressed immediately "to avoid serious and lasting problems . . .";

3) That immediate action was necessary to prevent irreparable damage and injury to the child's emotional and physical development;

4) That the child had been with Ms. Allen during the majority of his developmental years, with the exception of limited visitations with his father;

5) That Ms. Allen had failed to provide for the child in the area of self-esteem, and that his ability to deal with reality was lacking;

6) That Mr. Correll, by reason of his limited access to the child, had not contributed to the child's emotional problems;

7) That Ms. Allen had continually frustrated the efforts of Mr. Correll to visit with the child and that she had exhibited anger and hostility toward Mr. Correll in the child's presence, all of which appeared to have interfered with the emotional development of the child, to his emotional detriment.

The judge concluded that there had been "a material and substantial change of circumstances which require[d] th[e] Court

to terminate the existing Orders relating to custody, visitations and support, by reason of the emotional condition of the minor child, and other matters set forth in the Findings of Fact in th[e] cause. . . ." The judge ordered that the custodial parent be changed from Ms. Allen to Mr. Correll, that Ms. Allen have restricted visitations, that she pay $480 per month in child support, and that she recover nothing from Mr. Correll by way of back child support. The judge likewise found Ms. Allen in contempt of court and ordered her to serve five days in jail.

II

[1] Ms. Allen first assigns error to the judge's order that custody be changed from herself to Mr. Correll. She contends that the judge's findings of fact are unsupported by the evidence in the record and that there is no showing that any of the changed circumstances had adversely affected the child's welfare.

An order of a court for the custody of a minor child may be modified upon a showing of changed circumstances. N.C. Gen. Stat. Sec. 50-13.7(a)(1987). "Changed circumstances" means a "substantial change of circumstances affecting the welfare of the child . . . ." *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974) (citation omitted). Appellate review of the trial judge's determination in a custody matter concerns whether the judge's findings of fact are supported by competent evidence in the record. *E.g., Pritchard v. Pritchard*, 45 N.C. App. 189, 196, 262 S.E. 2d 836, 840 (1980). Findings so supported are conclusive on appeal. *Id.* In addition, the trial judge enjoys "broad discretion" in child custody matters, the judge being the person with the opportunity to see and hear the parties and witnesses involved in the case. *See, e.g., Blackley*, 258 N.C. at 362, 204 S.E. 2d at 681.

Ms. Allen takes issue with the reasons given by the judge for finding changed circumstances. She discusses each of these reasons in her brief. Because, in our view, the judge's findings about the child's emotional problems and about Ms. Allen's frustration of Mr. Correll's visitation privileges are sufficiently supported by the record, and are an adequate basis to order a change of custody, we do not address Ms. Allen's arguments about the other findings made by the judge.

That the child's emotional health had deteriorated between the ages of three and five clearly appears in the record. In the

7 August 1985 order, the court directed that Dr. Norris evaluate the child. In the 7 April 1986 order, the judge, using reports and depositions of Dr. Norris and her associates, found as fact that "[the] psychological testing revealed . . . that the child of the parties is emotionally healthy and is developing along normal lines for most three . . . year olds." Dr. Norris evaluated the child a second time, at Ms. Allen's request, after the court increased Mr. Correll's summer visitation with the child in 1987. Dr. Norris testified at the 1988 custody hearing that the child 1) had difficulty distinguishing the real from the unreal; 2) felt vulnerable, insecure and helpless; 3) seemed to have low self-esteem and seemed to be unhappy and fragile; and 4) had problems with interpersonal relationships. Dr. Norris said that the child could not overcome his problems as long as tension persisted between his parents. She further stated that the child's condition was not the result of Mr. Correll's visitations but could have been caused by "Maurilla Allen's hostility." The child's insecurity, Dr. Norris said, possibly stemmed from the abduction when he was 18-months old.

The findings made by the judge about the child's psychological state are based upon Dr. Norris' testimony, and that testimony plainly reveals a substantial change of circumstances negatively affecting the child's welfare. The disappearance of the child's emotional equilibrium occurred during a period when the predominate parental influence upon him was Ms. Allen. Dr. Norris opined that a possible cause of the child's problems was his mother's hostility.

Evidence in the record suggests that this hostility was centered around the child's visitations with Mr. Correll, visitations which were often interfered with by Ms. Allen. Ms. Allen testified that she believed the summer visitation schedule ordered by the court on 10 June 1987 was "too long for a four-year-old child." She contended that the child would cry and beg not to go on the visits with Mr. Correll, and that on some of these occasions Ms. Allen would take the child back home with her. On one occasion, Ms. Allen made a tape recording of her son in a crying fit. The judge concluded from the tape that Ms. Allen was "egging" the child on, doing nothing to prepare him psychologically to visit with Mr. Correll. We have listened to the same tape and cannot say that the judge's conclusion is unfounded.

In *Woncik v. Woncik*, we held that interference with the noncustodial parent's visitation could constitute a substantial change

of circumstances sufficient to warrant a change of custody if that interference had a negative impact on the child's welfare. 82 N.C. App. 244, 249, 346 S.E. 2d 277, 280 (1986). In this case, evidence in the record suggests Ms. Allen's frustration of Mr. Correll's visitation privileges contributed to the child's emotional problems. The evidence about the child's psychological state, in part resulting from the visitation problems, support the judge's finding of a substantial change of circumstances and support the change of custody ordered by the judge.

Ms. Allen maintains, however, that the judge's decision cannot stand as it is contrary to the recommendations of Dr. Norris, whose testimony the judge used as the basis for many of his findings of fact. Dr. Norris believed that custody should continue with Ms. Allen and that a more regular visitation schedule, with no overnight visits, should be instituted.

Expert testimony does not bind a trier of fact. "Even though unimpeached and uncontradicted," expert testimony is not conclusive upon the trier "since the trier may apply his own experience or knowledge in determining how far to follow the expressed opinion." *Security-First Nat'l Bank of Los Angeles v. Lutz*, 322 F. 2d 348, 355 (9th Cir. 1963); *cf. State v. Allen*, 322 N.C. 176, 185, 367 S.E. 2d 626, 631 (1988) (merely because one psychologist testified at hearing did not mean judge obligated to find his opinion dispositive, particularly when some of underlying data he consulted and partially agreed with had reached contrary conclusion). In this case, Dr. Norris testified that the child had severe emotional problems requiring "substantial immediate change." Her opinion was that the visitation schedule be limited, that one parent (Ms. Allen) exercise more control. The judge agreed with Dr. Norris that the child's problems needed immediate remedy; he believed, however, that Mr. Correll should be the parent to exercise more control. This judge was the person with the opportunity to hear the witnesses and to evaluate all of the evidence in the record. We cannot say that it was an abuse of his discretion to order a change of custody.

In summary, the record supports the findings of the judge that the psychological problems suffered by the child were attributable to Ms. Allen and were in part due to her refusals to comply with the visitation orders. Given that a substantial change affecting the welfare of the child had occurred, it was not an abuse of discretion for the judge to order a change of custody. This assignment of error is overruled.

III

[2] Ms. Allen next argues that the judge erred by imposing excessive restrictions on her visitations with her son. The judge ordered that for a period of six months Ms. Allen would be permitted one monthly visitation with the child, each visit to be conducted under the supervision of the Caldwell County Department of Social Services. Ms. Allen contends that such restrictive conditions on her visitations are unwarranted.

As with a custody order, the trial judge must make appropriate findings that support the imposition of severe restrictions on a parent's right of visitation. N.C. Gen. Stat. Sec. 50-13.5(i) (1987); *Falls v. Falls*, 52 N.C. App. 203, 208-09, 278 S.E. 2d 546, 551, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981). These findings must be supported by competent evidence in the record. *Id.* at 208, 278 S.E. 2d at 551. Visitations may be denied if visitation is not in the child's best interest. Sec. 50-13.5(i).

The judge found that Ms. Allen's "demonstrations of anger and hostility" in the presence of the child, and her "frustration of the relationship" between the child and Mr. Correll, necessitated, for the child's best interest, the restrictions he imposed on the visitation. The evidence in the record supports this finding.

As we specified above, Dr. Norris testified that Ms. Allen exhibited "hostility." Mr. Correll's testimony, moreover, alleged several instances of violent conduct on the part of Ms. Allen. For example, Mr. Correll charged that, on one occasion, Ms. Allen attempted to "ram" the car in which he and the child were riding. We hold that the evidence in the record supports the restrictions the judge placed on the initial visitations.

Ms. Allen has argued that both the change of custody and the restricted visitations ordered by the judge were done to punish her for contempt. We note this argument, and we find it to be without merit. Our review of the record reveals a substantial evidentiary basis to support the judge's findings of fact on the custody and visitation issues. The record does not reveal an abuse of discretion by the judge in taking the actions he did, and we reject Ms. Allen's contention that the judge's rulings were retaliatory.

This assignment of error is overruled.

IV

[3] Ms. Allen next argues that the judge erred by ordering her to pay $480 per month in child support. We agree that the judge erred and remand for further findings on this issue.

An order for child support must be based upon the trial judge's conclusions of law as to the amount of support necessary "to meet the reasonable needs of the child" and his conclusions as to the parties' abilities to provide that amount. N.C. Gen. Stat. Sec. 50-13.4(c) (1987); *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). "In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of *specific fact* on the child's actual past expenditures and present reasonable expenses." *Atwell v. Atwell*, 74 N.C. App. 231, 236, 328 S.E. 2d 47, 50 (1985) (emphasis added and citation omitted).

Initially, we note that Ms. Allen failed to obey a subpoena that she bring her financial records to the custody hearing. We will not countenance, therefore, her complaint on appeal that the judge's order is deficient concerning his findings as to the ability of Ms. Allen to provide financial support to the child. The judge's findings are inadequate, however, concerning the child's reasonable needs, and we cannot attribute this inadequacy to Ms. Allen's conduct.

Concerning the child's needs, the judge found that

> . . . considering the emotional condition of the minor child and the needs of the minor child for medical and psychological treatment, as well as the child's need for food, clothing, utilities, transportation, housing, [etc.] . . . the Court finds that the parties have made past expenditures . . . in excess of $500.00 per month, and at the present time, the minor child has needs which the Court finds as reasonable of no less than $480 per month.

The figures of $500 and $480 are not supported by any evidence we find in the record on appeal. Even given the absence of Ms. Allen's financial records, the judge could have determined the child's reasonable needs through evidence offered by Mr. Correll. The figures the judge arrived at, however, are unsupported by Mr. Correll's testimony, and are not supported by any of the previous orders entered in this case. Consequently, we vacate and remand this portion of the order for further findings as to the child's reasonable needs.

V

[4] Ms. Allen's last argument is that the judge erred by failing to award her back child support. On this point, as well, we agree with Ms. Allen, and we remand for further findings on this question.

Ms. Allen alleged that Mr. Correll owed her $2,915 in back child support. The judge, however, found as fact "[t]hat [Ms. Allen] offered *no evidence* that would indicate [she] is entitled to payment of back child support." (Emphasis added.) This finding is belied by the record.

First, although Mr. Correll contended he was not in arrears on his child-support payments, he testified that "in 1985, since I had suffered about a $30,000 decrease in salary, *I reduced the amounts* [of payments] to about $250 per month." (Emphasis added.) Second, Ms. Allen testified that she was owed back child support. There was, in short, evidence that Mr. Correll had not met his child-support obligations, and thus the judge's finding is not supported by the record. We vacate, therefore, this portion of the order and remand for further findings.

VI

In summary, that portion of the judge's order changing custody from Ms. Allen to Mr. Correll is affirmed. That portion ordering restricted visitation between Ms. Allen and the child is affirmed. Those portions of the order directing that Ms. Allen pay to Mr. Correll $480 per month in child support and denying Ms. Allen payment of back child support from Mr. Correll are vacated and remanded for additional findings.

Affirmed in part, vacated and remanded in part.

Judges JOHNSON and ORR concur.

EVELYN BURKETTE HILL v. ROBERT LEE HILL

No. 883DC661

(Filed 5 July 1989)

1. **Principal and Agent § 1— property settlement agreement between parents—son not agent of father**

There was no merit to plaintiff's contention that her signature on a property settlement agreement and an amended agreement was procured by fraud, duress, and undue influence exerted by the husband through the parties' adult son, since there was no evidence that the son acted or had authority to act as agent for the husband when he threatened to terminate his relationship with plaintiff unless she settled the case or when he misrepresented that plaintiff's attorney had reviewed and approved the agreement when in fact he had not; there was no evidence that defendant had control over the adult son; plaintiff, not defendant, asked the son to go with her to her lawyer's office, and she, not defendant, instructed the son to bring the agreement to her and to take her to have it notarized; and even if the son did act as agent for defendant and did wrongfully procure plaintiff's signature, plaintiff was bound by her subsequent ratification of the agreements and acceptance of benefits under the agreements.

2. **Divorce and Alimony § 30— property settlement agreement—agreement not unfair or unconscionable**

There was no merit to plaintiff's contention that the parties' property settlement agreement was patently unfair and unconscionable where the husband did not affirmatively misrepresent or conceal the extent of the marital estate; the settlement terms were, for the most part, proposed by the wife; and the evidence plainly showed that plaintiff considered the agreements equitable when she entered into them.

3. **Divorce and Alimony § 30— property settlement agreement—no constructive fraud**

There was no merit to plaintiff's contention that the parties' property settlement agreements were a constructive fraud, since the fiduciary obligation normally existing between parties to a marriage had long been extinguished, and each party had employed independent counsel to represent them in the settlement negotiations and in the equitable distribution action.

APPEAL by plaintiff from *E. Burt Aycock, Jr., Judge*. Judgment entered 10 March 1988 in District Court, CRAVEN County. Heard in the Court of Appeals 14 February 1989.

Stubbs, Perdue, Chesnutt & Wheeler, by Trawick H. Stubbs, Jr., Marcus W. Chesnutt, Gary H. Clemmons, and Norman B. Kellum, for plaintiff-appellant.

Charles William Kafer and Dallas Clark, Jr., for defendant-appellee.

BECTON, Judge.

The question presented by this appeal is whether the trial judge properly entered summary judgment in favor of the defendant-husband in the plaintiff-wife's equitable distribution action.

Evelyn Burkette Hill ("the wife") and Robert Lee Hill ("the husband") were married in April 1959. In September 1985, the wife filed the present action seeking an absolute divorce and an equitable distribution of marital property. Although the divorce was granted in March 1986, the equitable distribution claim remained to be resolved at a later date. The parties ostensibly settled the outstanding claim by entering into a property settlement agreement on 14 May 1987 and an amended agreement on 26 May 1987. In January 1988, the husband moved for summary judgment, raising the agreements as a bar to equitable distribution. The motion was granted.

The wife appeals, contending that her signature on the agreements was procured by fraud, duress, and undue influence exerted by the husband and by the parties' adult son Kevin. She also contends that the agreements are patently unfair and a constructive fraud, and that the husband breached the agreements by failing to provide her with medical insurance. For the reasons that follow, we affirm the order of the trial judge.

I

The following facts, drawn from the pleadings, depositions, and affidavits appearing in the record on appeal, show the circumstances which led to the wife signing the 14 May 1987 property settlement agreement and the 26 May 1987 amended agreement.

A. 14 May Property Settlement Agreement

The wife experienced emotional stress, and her relationship with her son Kevin suffered during the 14 months after the divorce that the equitable distribution claim remained unresolved. Believing that her relationship with Kevin would improve once the case was over, the wife called him weekly during this period to discuss the case, her desire to settle it, and what she hoped to obtain in settlement. Kevin, who lived with and worked for the husband, felt he had been cast in the role of mediator, delivering messages from his mother to his father. Several times Kevin urged the wife to "get the thing over with." The parties' other two children also had told the wife "they couldn't get on with their li[ves]" until this issue between their parents was resolved.

On 11 May 1987, the wife called Kevin at work. She was crying and upset because he had failed to call her on Mother's Day. During their conversation, she told Kevin that although she wanted to settle the case, one of her attorneys, Mr. Kellum, did not want her to. She explained that "[s]he wanted the documents drawn up the way she wanted . . ., and *[her lawyer] didn't think that was right.*" (Emphasis added.) She asked Kevin to meet her at Mr. Kellum's office later that day to provide "moral support" when she told the attorney of her plans to "drop everything." Kevin agreed to come to the meeting.

The wife was "crying real hard" when Kevin got to Mr. Kellum's office. She told Kevin that Mr. Kellum "was not going to stop this case." Kevin reiterated to the attorney the wife's wish to "drop everything," and "just told [Mr. Kellum] to do what she wanted." At some point during the meeting, Kevin threatened to sever his relationship with his mother unless she settled the case.

In the wife's presence, Mr. Kellum then discussed with Kevin what she had said she wanted in settlement. These terms included: (1) a $90,000 to $100,000 house; (2) furniture for the house; (3) $1,000 a month for life; (4) hospital and medical insurance coverage for life; (5) a late-model automobile; and (6) $25,000 to $30,000 for costs and attorneys' fees. Kevin relayed the proposal to the husband, and later informed Mr. Kellum that the husband agreed to the terms. Mr. Kellum then communicated the terms to the husband's lawyer, Mr. Kafer, who was to draw up the agreement.

On 13 May, the wife called the husband and told him that she preferred to receive $60,000 in lieu of the house because Kevin,

who was in the building supply business, had told her that he could have a new house worth $100,000 built for that amount. The husband instructed his lawyer to make that change to the agreement. He also instructed Mr. Kafer to make the following changes—changes of which the wife was unaware—to wit: (1) that the agreement obligate the husband only to "ascertain" that the wife was covered with medical insurance, since she had recently remarried and was covered by her new husband's insurance policy; (2) that the $1,000 monthly payment be designated "alimony" payable until his death or her death; and (3) that her attorneys be paid "reasonable attorney[s'] fees" at a rate of $90 per hour.

On 14 May, the wife called Kevin and asked him to pick up the completed agreement from the husband's attorney, to bring it to her at work, and to take her to have it notarized. Neither the wife nor Kevin had been told about the additional changes in the agreement.

According to the wife's affidavit, when Kevin arrived, she asked if the papers could be taken to Mr. Kellum for his review, "but Kevin indicated that . . . the papers [could be] notarized anywhere and that *everything between the lawyers was 'all set.'* " (Emphasis added.) In fact, Mr. Kellum had not had an opportunity to review the agreement until after it was signed; had he reviewed it, he would have advised the wife not to sign it.

"At Kevin's suggestion that [they] not go to Mr. Kellum's office," the agreement was taken to the wife's bank to be notarized. Although she "glanced at the papers," she "did not review [the agreement] thoroughly [and] did [not] go through each paragraph" before signing it. After the agreement was signed and notarized, the wife was given a $60,000 check.

B. 26 May Amended Agreement

A few days later, the wife asked the husband to provide her with $8,500 instead of the late-model car. He agreed. An amended agreement, to which the 14 May agreement was attached and incorporated by reference, was drawn up to reflect that change. The amended agreement provided that the parties ratified the remaining provisions of the 14 May agreement. On 21 May, the husband's attorney delivered the amended agreement to Mr. Kellum's office, along with a copy of the 14 May agreement and a letter asking Mr. Kellum to call him immediately about the matter. However,

for reasons not apparent from the record on appeal, Mr. Kellum did not do so, and did not communicate with the wife until sometime in June.

On 26 May 1987, the wife went to Mr. Kellum's office to sign the amended agreement left there by Mr. Kafer. Although her attorney was not in the office, the wife obtained the amended agreement from his secretary. After the amended agreement was signed and notarized, the wife was given the $8,500 check.

In addition to the $68,500, the wife has received $1,000 each month since June 1987, as well as new living room, dining room, and bedroom furniture, and a washer, a dryer, a refrigerator, and a color television set. The husband has not provided medical insurance for the wife, although he did speak to insurance representatives and told her she needed to make an appointment for a physical, which she did not do.

II

[1] The wife contends that summary judgment in the husband's favor was inappropriate because her signature on the 14 May and 26 May 1987 agreements was procured by fraud, duress, and undue influence exerted by the husband through Kevin.

Summary judgment was properly granted only if the pleadings, depositions, affidavits, and admissions showed that no genuine issue existed as to any material fact and that the husband was entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, R. Civ. P. 56(c) (1983). The husband demonstrated his entitlement to summary judgment by presenting evidence of the 14 May and 26 May agreements, which, by their terms, settled the equitable distribution issue. The burden thus shifted to the wife to forecast evidence showing that a genuine issue of material fact remained.

To challenge the motion, the wife averred in her affidavit that Kevin induced her to sign the 14 May agreement (1) by threatening to terminate his relationship with her unless she settled the case, and (2) by misrepresenting that her attorney had reviewed and approved the 14 May agreement when in fact he had not. However, even viewing all of the evidence in the light most favorable to the wife, we cannot say that any genuine issues of material fact remained for trial.

First, the wife forecast no evidence that Kevin acted—or had authority to act—as agent for the husband when he made the misrepresentations and threats which allegedly induced her to enter the 14 May agreement. Nor was evidence forecast that the husband had control over Kevin. *See Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 91, 245 S.E. 2d 892, 895 (1978), *aff'd*, 296 N.C. 683, 252 S.E. 2d 792 (1979). The evidence concerning Kevin's agency shows that the wife, not the husband, asked Kevin to go with her to her lawyer's office, and the wife, not the husband, instructed Kevin to bring the agreement to her and to take her to have it notarized. Moreover, Kevin was not aware of or involved with the 26 May agreement. Because "[i]t would be manifestly unjust to hold one party liable for the actions taken by [a third] person if that person did not have authority to act for him," *id.*, an alleged principal is entitled to summary judgment when, as here, insufficient evidence was presented to raise a genuine issue as to the existence of an agency relationship. *McGarity v. Craighill*, 83 N.C. App. 106, 109, 349 S.E. 2d 311, 313 (1986), *disc. rev. denied*, 319 N.C. 105, 353 S.E. 2d 112 (1987).

Second, even if Kevin had acted as agent for the husband and had wrongfully procured the wife's signature on the 14 May agreement, we would nonetheless be compelled to conclude that the wife was bound by her subsequent ratification of the agreements. "It is elementary that a transaction procured by either fraud, duress or undue influence may be ratified by the victim" so long as, at the time of ratification, "the victim had full knowledge of the facts and was then capable of acting freely." *Link v. Link*, 278 N.C. 181, 197, 179 S.E. 2d 697, 706 (1971). Here, the wife forecast no evidence that the alleged fraud, duress, or undue influence continued to operate at the time she signed the 26 May agreement, or that these forces operate even now when she accepts the $1,000 paid each month by the husband. The materials before us plainly show that the wife has continued to accept the benefits of both agreements long after she became aware of the alleged wrongdoing. She cannot now avoid the same contracts she acquiesced in for months and the benefits of which she still enjoys. *Accord Jones v. Jones*, 261 N.C. 612, 613, 135 S.E. 2d 554, 556 (1964); *Ridings v. Ridings*, 55 N.C. App. 630, 632-33, 286 S.E. 2d 614, 615, *disc. rev. denied*, 305 N.C. 586, 292 S.E. 2d 571 (1982); *Harris v. Harris*, 50 N.C. App. 305, 318-19, 274 S.E. 2d 489, 497, *appeal dismissed*, 302 N.C. 397, 279 S.E. 2d 351 (1981).

III

The wife contends that the 14 May property settlement agreement and the 26 May amended agreement should be set aside as "patently unfair" and a "constructive fraud." We disagree.

A. Judicial Review of Property Settlement Agreements

Parties to a marriage may, by written agreement, forego their statutory right to equitable distribution and decide between themselves how their marital estate will be divided following divorce. N.C. Gen. Stat. Sec. 50-20(d) (1987); *see also* N.C. Gen. Stat. Secs. 52-10, 52-10.1 (1984). Whether entered into before, during, or after marriage, "[t]hese agreements are favored in this state, as they serve the salutary purpose of enabling marital partners to come to a mutually acceptable settlement of their financial affairs." *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E. 2d 228, 232 (1987). A valid property settlement agreement which waives rights to equitable distribution "will be honored by the courts and will be binding upon the parties." *Id.* To be valid, a property settlement agreement must be in writing, executed and acknowledged before a notary or other certifying officer, and "deemed *by the parties* to be equitable." Sec. 50-20(d) (emphasis added). Like other marital agreements, a property settlement agreement must also be entered into voluntarily, without fraud, duress, or coercion. *See generally McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E. 2d 600, 602 (1985). *See also Small v. Small*, 93 N.C. App. 614, 379 S.E. 2d 273 (1989) (comparing property settlement agreements with other marital contracts).

Because property settlement agreements are "viewed today like any other bargained-for exchange between parties who are presumably on equal footing," a court will make no independent determination regarding the "fairness" of the substantive terms of the agreement, so long as the circumstances of execution were fair and the terms are not plainly unconscionable. *See Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E. 2d 331, 333 (1985). *See also Lane v. Scarborough*, 284 N.C. 407, 409, 411, 200 S.E. 2d 622, 624 (1973) (marital contracts are governed "by the same rules which govern interpretation of contracts generally[,] . . . 'according to the intention of the parties at the time of executi[on, as shown by] the language [they] employed. . . .'" (citation omitted)). *But see McIntosh*, 74 N.C. App. at 556, 328 S.E. 2d at 602 (separation agreements " 'must be in all respects fair, reasonable and just' "

to be valid) (quoting *Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E. 2d 562, 567 (1968)). Of course, as with any contract, a property settlement agreement which is unconscionable or which was procured by fraud, duress, or undue influence will not be enforced by the courts, unless it is later ratified. *See Link*, 278 N.C. at 197, 179 S.E. 2d at 706; *Knight*, 76 N.C. App. at 398, 333 S.E. 2d at 333. However, absent a showing of such wrongdoing by a party to the agreement (or his agent), "we must assume that this arrangement was satisfactory to both spouses at the time it was entered into." *Hagler*, 319 N.C. at 293, 354 S.E. 2d at 234.

B. Patent Unfairness or Unconscionability

[2] Considering all of the facts and circumstances shown by the parties' evidence, we cannot say the agreements in this case were "unconscionable" or "patently unfair" as a matter of law. *See Garris v. Garris*, 92 N.C. App. 467, 472, 374 S.E. 2d 638, 641 (1988).

First, the forecast of the evidence demonstrates that the husband did not affirmatively misrepresent or conceal the extent of the marital estate. *See Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E. 2d 117, 119, *disc. rev. denied*, 317 N.C. 703, 347 S.E. 2d 41 (1986) (duty to disclose ends when parties become adversaries negotiating over terms of separation); *cf. Lee v. Lee*, 93 N.C. App. 584, 378 S.E. 2d 554 (1989) (husband's breach of *contractually-imposed* obligation to disclose assets permitted rescission of separation agreement). Indeed, on 7 May 1987, one week before she entered the first agreement, the wife attended depositions of the husband and three financial experts, during which the husband's business was valued by each of them at approximately $2,000,000. Following the depositions, Mr. Stubbs, one of her attorneys, told her that the husband "would probably offer around $100,000 to settle the matter . . . [a]lthough . . . *the case was worth much more than that figure*. . . ." (Emphasis added.) In June, when Mr. Kellum told the wife that her share of the marital estate might have been around $1,000,000, she told him "that she knew that she got 'screwed' but that she just wanted it all over with."

Second, the settlement terms, for the most part, were proposed by the wife. The 14 May agreement is not unconscionable simply because the terms she proposed—through her attorney—left her with less than she might have had if the case had proceeded to trial. Nor are the agreements invalid simply because the wife failed to read them and to obtain legal advice before signing. *Accord*

Biesecker v. Biesecker, 62 N.C. App. 282, 285, 302 S.E. 2d 826, 828-29 (1986). Here, the wife had ample opportunity in the ensuing twelve days before she signed the amended agreement to read the 14 May agreement and to talk to her lawyer about it. Moreover, she does not contend that she was denied an opportunity to read the 26 May agreement or to consult her attorney before signing it.

The wife has forecast no evidence from which we can conclude that the agreements were unconscionable. Instead, the evidence in the record plainly shows that she considered the agreements equitable when she entered into them. Not only did the 14 May agreement recite that each party considered the terms "fair, just and reasonable given the facts and circumstances of each party's situation and in consideration . . . of the interests of the parties . . . [and] the interests of their children," but, in addition, the wife wrote a letter to her lawyers regarding attorneys' fees on 22 May, stating in part that "[o]n May 14, 1987[,] an agreement was reached between Bob Hill and I [sic] *which both of us are pleased about.*" In our view, the wife knowingly chose to bring an end to the continuing aggravation and stress associated with the outstanding equitable distribution claim. We will not step in now to set the agreement aside simply because she later decided the bargain she struck was a bad one.

C. Constructive Fraud

[3] We summarily reject the wife's contention that the agreements were a constructive fraud. Here, the fiduciary obligation normally existing between parties to a marriage had long been extinguished. Not only were the parties divorced before the agreements were entered, but each had employed independent counsel to represent them in the equitable distribution action and the settlement negotiations, and through counsel, they hammered out the terms of the property settlement. *Accord Avriett v. Avriett*, 88 N.C. App. 506, 508, 363 S.E. 2d 875, 877, *aff'd*, 322 N.C. 468, 368 S.E. 2d 377 (1988). "Being *sui juris* [the wife] was free to so contract and nothing in the record suggests that she is not bound thereby." *Id.*

IV

The wife's final contention is that the husband breached the agreements by failing to provide medical insurance, and that this breach created genuine issues of material fact, thereby precluding summary judgment. The husband argues that he did not breach

the agreement since, in his view, the obligation to "ascertain" that the wife was insured required him to provide her with insurance only in the event she was no longer covered by her present husband's policy.

We decline to address this question since the wife's Reply to the husband's amended Answer raised only the fraud, duress, and undue influence defenses to the agreements, and did not raise the breach of contract defense. A contention not raised in the court below will not be addressed on appeal. *Hall v. Hall*, 35 N.C. App. 664, 665-66, 242 S.E. 2d 170, 172, *disc. rev. denied*, 295 N.C. 260, 245 S.E. 2d 777 (1978).

V

We hold that summary judgment was properly entered in favor of the husband in the wife's equitable distribution action.

Affirmed.

Judges PARKER and ORR concur.

G & S BUSINESS SERVICES, INC. D/B/A AMERICAN SPEEDY PRINTING CENTERS OF RALEIGH v. FAST FARE, INC. AND JERRY HILL

No. 8810DC875

(Filed 5 July 1989)

1. Rules of Civil Procedure § 56.4— summary judgment—failure to submit opposing materials

The trial court properly granted summary judgment dismissing plaintiff's claim against the individual defendant for advertising materials furnished for the corporate defendant where plaintiff failed to submit affidavits or other materials opposing the individual defendant's affidavit establishing that he was a mere employee and not liable on any obligation of defendant corporation. Plaintiff's failure to respond to defendants' summary judgment motion was not excused by plaintiff's contention that it was unable through several telephone contacts to get any information from the corporate defendant concerning the individual defendant's title or position with

the company, since defendant should have utilized the provisions of Rule 56(f) to obtain such information.

2. **Quasi Contracts and Restitution § 2— allegation of express contract—no claim for quantum meruit**

Even if a marketing company was the corporate defendant's agent in contracting with plaintiff for advertising materials to be used in an advertising campaign for the corporate defendant, plaintiff's allegation of an express contract with the marketing company barred its claim for quantum meruit against the corporate defendant.

3. **Rules of Civil Procedure § 19— action for advertising materials—marketing company as necessary party**

A marketing company was a necessary party to plaintiff's action to recover for advertising materials furnished for the benefit of the corporate defendant, notwithstanding plaintiff alleged that the marketing company was the corporate defendant's agent, since plaintiff's mere allegations are not binding, and depending on the marketing company's status as agent or third party, a fact finder could establish that the marketing company, the corporate defendant, both or neither are liable to plaintiff for the advertising materials.

4. **Rules of Civil Procedure § 21— joinder of necessary party not permitted by bankruptcy court—dismissal without prejudice—reinstitution of claim at conclusion of bankruptcy**

The trial court properly dismissed a claim without prejudice under Rule 12(b)(7) when plaintiff failed to secure a bankruptcy court's permission to join a necessary party which had declared bankruptcy. The claim may be raised again once the necessary party can be joined upon the conclusion of the bankruptcy proceeding.

5. **Rules of Civil Procedure § 52.1— failure to state claim—failure to join necessary party—findings unnecessary to support dismissal order**

The trial court was not required by Rule 52(a)(2) to make findings of fact and conclusions of law supporting its dismissal of one of plaintiff's claims for failure to state a claim for relief or its dismissal of plaintiff's second claim for failure to join a necessary party.

APPEAL by plaintiff from *Hamilton (Joyce A.), Judge.* Order entered 19 April 1988 in District Court, WAKE County. Heard in the Court of Appeals 15 March 1989.

David H. Rogers for plaintiff-appellant.

Smith, Debnam, Hibbert & Pahl, by Bettie Kelley Sousa and Elizabeth B. Godfrey, for defendant-appellees.

GREENE, Judge.

This appeal arises from plaintiff's action against defendants Fast Fare, Inc. and Jerry Hill for non-payment of an account for services and materials. Plaintiff alleged that defendant Hill was believed to be a proprietor of a Fast Fare convenience store or a manager or director of Fast Fare, Inc. Plaintiff alleged that it had contracted with Three M Marketing and Media Merchandising Inc. ("Three M") as defendants' agent to supply services and materials for an advertising campaign for Fast Fare. Plaintiff also alleged a claim for *quantum meruit* against defendants based on its allegations that it rendered services which were accepted by defendants under circumstances which reasonably notified defendants that plaintiff expected payment. In response, defendants moved under Rule 12(b)(6) to dismiss plaintiff's complaint for failure to state a claim and also moved to dismiss the complaint under Rule 12(b)(7) for failure to join Three M in the action. Defendants filed the affidavit of defendant Hill in connection with their motions to dismiss.

On 20 January 1987, the trial court entered an order dismissing plaintiff's *quantum meruit* claim under Rule 12(b)(6) but refusing to dismiss plaintiff's claim against Fast Fare arising from its dealings with Fast Fare's alleged agent, Three M. The court's order also held defendants' motion as to defendant Hill had been converted into a motion for summary judgment and, based on the summary judgment materials, dismissed the claims against Hill. Finally, the trial court held Three M was a necessary party to the action such that failure to join Three M would result in the dismissal of plaintiff's complaint. Accordingly, the trial court granted a continuance so that plaintiff could attempt to join Three M which had filed for protection under the bankruptcy laws. Plaintiff's appeal from this January 1987 order was dismissed by this court as a non-appealable interlocutory order.

After plaintiff failed to secure the bankruptcy court's permission to join Three M, defendants filed a motion dated 16 December

1987 requesting the trial court dismiss the action for failure to join Three M. On 19 April 1988, the trial court entered an order dismissing plaintiff's complaint without prejudice for failure to join Three M. Plaintiff assigns several errors to the trial court's orders.

Plaintiff raises the following issues: I) whether the trial court properly granted summary judgment dismissing plaintiff's claims against defendant Hill; II) whether the trial court properly dismissed plaintiff's claim for *quantum meruit* under Rule 12(b)(6); III) whether the trial court properly ruled that Three M was a necessary party such that plaintiff's failure to join Three M would result in dismissal; and IV) whether the trial court properly denied plaintiff's request for findings and conclusions in connection with the interlocutory order dated 20 January 1987.

I

[1] In support of their motion to dismiss, defendants offered the affidavit of defendant Hill which stated facts showing Hill had no ownership interest in the corporate defendant Fast Fare, was in fact an employee of Fast Fare, and had otherwise incurred no personal liability on any corporate obligation between Fast Fare and plaintiff. *Cf.* R. Robinson, *North Carolina Corporation Law and Practice* Sec. 3-8 at 52 (2d ed. 1974) (corporate agent not individually liable to third party on corporate obligations); *see also Air Traffic Conf. v. Marina Travel Inc.*, 69 N.C. App. 179, 316 S.E. 2d 642 (1984). Plaintiff did not respond to defendants' motion for summary judgment with any supporting materials of its own. Rule 56(e) of the North Carolina Rules of Civil Procedure states that, "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be granted against him." N.C.G.S. Sec. 1A-1, Rule 56(e) (1983). Plaintiff contends it was not required to respond to defendants' motion and Hill's affidavit with evidence of its own since it was unable through several telephone contacts "to get any information from defendant Fast Fare as to who Mr. Jerry Hill was or what his title or position with the company was . . . ." We reject plaintiff's excuse. Rule 56(f) addresses this situation by providing that:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Sec. 1A-1, Rule 56(f).

Defendant Hill's affidavit, if true, establishes that he was not liable to plaintiff on any corporate obligation of Fast Fare. "To hold that courts are not entitled to assign credibility as a matter of law to a moving party's affidavit when the opposing party has ignored the provisions of sections (e) and (f) would be to cripple Rule 56." *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976); *see also Nasco Equip. Co. v. Mason*, 291 N.C. 145, 150-51, 229 S.E. 2d 278, 282 (1976) (party without access to facts necessary to respond is protected by compliance with Rule 56(f)). As plaintiff failed to comply with sections (e) and (f) of Rule 56 and has not pointed to any specific ground for impeaching Hill's affidavit which establishes his right to summary judgment, we hold the trial court properly granted summary judgment against plaintiff on its claims against Hill. Therefore, although plaintiff alleged its claims against both defendants, we shall hereafter refer only to defendant Fast Fare concerning those claims.

II

[2] Under Rule 12(b)(6), the trial court also dismissed plaintiff's claim for *quantum meruit*. Plaintiff's complaint alleged that Three M was Fast Fare's agent and that Three M "had contracted with Plaintiff to provide various printed materials and items, which Plaintiff did." Plaintiff has attached to its complaint a statement of account showing a contract between Three M and plaintiff with the notation "For: Fast Fare Account." Plaintiff's allegations of fact are treated as true for purposes of determining a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Harris v. N.C.N.B. Nat'l Bank*, 85 N.C. App. 669, 355 S.E. 2d 838 (1987). If the face of the complaint discloses an insurmountable bar to recovery, the complaint is properly dismissed under Rule 12(b)(6). *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E. 2d 222 (1985).

Plaintiff's complaint discloses such an insurmountable bar to recovery: plaintiff has clearly alleged an express contract existed

between it and Three M to provide goods and services for the benefit of Fast Fare. Where there is an express contract between two parties, there can be no implied contract between them covering the subject matter dealt with in the express agreement; likewise, where there is a contract between two parties to furnish goods and services for the benefit of a third, the third party is not liable on an implied contract or under *quantum meruit* for those goods and services. *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713-15, 124 S.E. 2d 905, 908-09 (1962) (collecting cases). Thus, whether or not Three M was Fast Fare's agent, plaintiff's allegation of this express contract bars its claim for *quantum meruit*. Therefore, the trial court properly dismissed plaintiff's *quantum meruit* claim under Rule 12(b)(6). *See Suffolk Lumber Co. v. White*, 12 N.C. App. 27, 182 S.E. 2d 215 (1971) (dismissing claim for implied contract where express contract alleged for third party's benefit).

III

[3] The only remaining claim in plaintiff's complaint is its claim against Fast Fare by virtue of its dealings with Fast Fare's alleged agent, Three M. Since plaintiff's complaint alleges Three M was an agent for Fast Fare, plaintiff contends Three M was not a necessary party to its claim against Fast Fare. However, since Three M is not bound by plaintiff's allegations, plaintiff's argument overlooks the fact its mere allegations do not determine whether Three M was in fact Fast Fare's agent or was an independent third party for purposes of determining whether Three M was a necessary party under Rule 19. *American Air Filter Co., Inc. v. Robb*, 267 N.C. 583, 586, 148 S.E. 2d 580, 582 (1966).

A person is considered a necessary party "when he is so vitally interested in the controversy that a valid judgment cannot be rendered in the action, completely and finally determining the controversy, without his presence." *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E. 2d 360, 365-66 (1978). All of plaintiff's claims arise from the same series of transactions with Three M. Depending on Three M's status as agent or third party, a fact finder could possibly establish that Three M, Fast Fare, both, or even neither were liable to plaintiff for the goods and services allegedly supplied. Given these circumstances, it appears Three M was a necessary party to plaintiff's action against Fast Fare.

[4] Since Three M had not been joined, the trial court followed the proper procedures under *Booker* and continued the case until

it could be determined whether plaintiff could join Three M, which had declared bankruptcy. When plaintiff failed to secure the bankruptcy court's permission to join Three M, the trial court properly dismissed the action under Rule 12(b)(7). Even assuming Three M was not a necessary party, the trial court had the discretion under Rule 19(b) to dismiss the action in any event. N.C.G.S. Sec. 1A-1, Rule 19(b) (1983); *see Crosrol Carding Developments, Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 452-53, 183 S.E. 2d 834, 837-38 (1971). Accordingly, we reject this assignment of error.

We note the trial court's dismissal for failure to join Three M was without prejudice and was therefore not a determination on the merits of plaintiff's remaining claim against Fast Fare. *Cf.* N.C.G.S. Sec. 1A-1, Rule 41(b) (1983) (dismissal for failure to join necessary party is not on merits). Accordingly, it appears the remaining claim against Fast Fare may be raised again once Three M can be joined as a necessary party upon the conclusion of the bankruptcy proceeding. While plaintiff would normally have up to only one year to refile the action under Rule 41(b), that time period is presumably extended under Section 108(c) of the Bankruptcy Code which provides in part that:

> . . . if applicable non-bankruptcy law, an order entered in a non-bankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under sections 1201 and 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of (1) the end of such period, including any suspension of such period on or after the commencement of the case; or (2) thirty days after notice of the termination or expiration of the stay under sections 362, 922, 1201 or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C.A. Sec. 108(c) (West 1989 Supp.).

IV

[5] Plaintiff contends the trial court improperly refused its request for findings of fact and conclusions of law under Rule 52(a)(2) with respect to the trial court's interlocutory order dated 20 January 1987. (Plaintiff did not request findings with respect to the trial

court's final order dated 19 April 1988.) We note that Rule 52 of the Federal Rules of Civil Procedure specifically provides that no findings or conclusions are required on motions under Rules 12 and 56. However, Rule 52(a)(2) of our own rules of procedure states that "findings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested by a party and as provided by Rule 41(b)." N.C.G.S. Sec. 1A-1, Rule 52(a)(2) (1983). Our own courts have held that Rule 52(a)(2) does not apply to summary judgments such as that entered on plaintiff's claim against defendant Hill. *E.g., Mosley v. Nat'l Finance Co., Inc.*, 36 N.C. App. 109, 111, 243 S.E. 2d 145, 147, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978). Under the same rationale, Rule 52(a)(2) does not apply to the trial court's dismissal of plaintiff's *quantum meruit* claim since it was based only on plaintiff's pleadings under Rule 12(b)(6). *See J. F. Wilkinson Contracting Co., Inc. v. Rowland*, 29 N.C. App. 722, 225 S.E. 2d 840, *disc. rev. denied*, 290 N.C. 660, 228 S.E. 2d 452 (1976) (no findings required on judgment on pleadings under Rule 12(c)). Similarly, as a dismissal for failure to join a necessary party is not a dismissal on the merits under Rule 41(b), the trial court was not required to enter findings and conclusions as to that ruling under Rule 52(a)(2) since they are not required under Rule 41(b). 9 C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2575 at 693-94 (1971) (findings required under Rule 41(b) only in case of dismissal after a non-jury trial); *see also O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 231, 252 S.E. 2d 231, 234 (1979) (no findings or conclusions required concerning non-appealable interlocutory rulings). Accordingly, we also reject this assignment of error.

As there is no indication in the record that plaintiff raised any constitutional objections before the trial court, we need not consider the constitutional objections now raised in plaintiff's brief. *State v. Elam*, 302 N.C. 157, 159, 273 S.E. 2d 661, 663 (1981); N.C.R. App. P. 14(b)(2). However, as we have above held, the trial court's rulings were based on a correct application of our case law and rules of procedure, we fail to see any basis for plaintiff's argument that its rights to equal protection and due process were prejudiced.

The trial court's judgments dated 20 January 1987 and 19 April 1988 are therefore

Affirmed.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. RAYMOND LEE OUTLAW, DEFENDANT

No. 886SC1149

(Filed 5 July 1989)

1. **Criminal Law § 86.2— pleas of no contest—convictions for impeachment purposes**

Defendant's pleas of no contest in prior cases constituted "convictions" about which defendant could be cross-examined for impeachment purposes pursuant to N.C.G.S. § 8C-1, Rule 609(a).

2. **Criminal Law § 86.3— admission of conviction—further cross-examination about details—harmless error**

Although the trial court erred in allowing the State to cross-examine defendant about the details of a prior assault conviction after defendant admitted the conviction, this single inquiry about a single assault was not prejudicial to defendant.

Judge BECTON dissenting.

APPEAL by defendant from *Stephens (Donald W.), Judge*. Judgment entered 4 May 1988 in Superior Court, BERTIE County. Heard in the Court of Appeals 11 May 1989.

Defendant was charged and found guilty of felonious breaking and entering and felonious larceny arising from a break-in at Bertie County High School and the theft of six VCR machines valued at $7,500. Defendant, the school custodian, pled not guilty and provided alibi witnesses. There was no physical evidence at the scene linking defendant to the break-in. The State provided witnesses who implicated defendant. One of these witnesses, also involved in the break-in, named defendant as the mastermind behind the crime.

Prior to trial defendant filed a motion *in limine* seeking to prevent introduction of or cross-examination for impeachment purposes as to two prior cases in which defendant pled "no contest" to misdemeanor breaking and entering and larceny. Defendant argued that North Carolina did not recognize a "no contest" or *nolo contendere* plea to be an admission of guilt or a "conviction." Therefore introduction of such evidence would be inadmissible under evidence rules allowing the use of prior convictions for impeachment purposes. The court denied defendant's motion stating that a "convic-

tion" under G.S. 8C-1, Rule 609(a) included a conviction that resulted from a "no contest" plea.

At trial, defendant testified on his own behalf and was cross-examined about the misdemeanor "convictions." He was also questioned over objection about details regarding prior convictions for assaults on females. From a judgment imposing an active sentence of five years, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Henry T. Rosser, for the State.

M. Braxton Gillam, III, for defendant-appellant.

LEWIS, Judge.

[1] Defendant brings forward two assignments of error. First, he contends that the court erred in permitting the State to use his "no contest" plea in prior cases as "convictions" for purposes of impeachment. Second, defendant contends that the court erred in allowing the State's cross-examination of him as to underlying facts surrounding his prior admitted assault convictions.

G.S. 8C-1, Rule 609(a), effective 1 July 1984, provides in pertinent part that "[f]or the purpose of attacking the credibility of a witness, evidence that he had been convicted of a crime . . . shall be admitted if elicited from him during . . . cross-examination." In prior cases our courts have held that a *nolo contendere* plea is not a "conviction" but an implied admission of guilt only for the purposes of the case in which it is entered. *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E. 2d 920 (1984); *See North Carolina State Bar v. Hall*, 293 N.C. 539, 238 S.E. 2d 521 (1977); *State v. Stone*, 245 N.C. 42, 95 S.E. 2d 77 (1956); *State v. Thomas*, 236 N.C. 196, 72 S.E. 2d 525 (1952). In *Hedgepeth*, decided prior to our current rules of evidence, this Court specifically addressed the issue of using a prior *nolo contendere* plea as a "conviction" for purposes of impeachment and held that "[i]n North Carolina, a plea of *nolo contendere* is not a conviction. . . . The State, therefore, may not ask the defendant about the plea of *nolo contendere* for purposes of impeachment by prior convictions." *Id.* at 401, 310 S.E. 2d at 925 (citations omitted).

However, in a recent Supreme Court case, *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), the Court held that for purposes of considering prior convictions as an aggravating factor under

G.S. 15A-2000(e) a *nolo contendere* plea was a conviction. The court there reasoned:

> A no contest plea is not an admission of guilt. It is a statement by the defendant that he will not resist the imposition of a sentence in the case in which the plea is entered. In that case the defendant is treated as if he had pled guilty. A court may not accept a plea of no contest without first determining there is a factual basis for the plea. N.C.G.S. Section 15A-1022. A no contest plea may not be used in another case to prove that the defendant committed the crime to which he pled no contest because he has not admitted he committed the offense. That is not what was done in this case. It is important that the statute does not require proof that the defendant actually committed the offense. It only requires proof that he was convicted of the offense. The question presented in this case is not whether the no contest plea may be used to prove the aggravating circumstance but whether proof of the no contest plea and final judgment entered thereon constitute a conviction within the meaning of the statute. We hold it is a conviction within the statute's meaning and was properly found as an aggravating circumstance.

Id. at 161-62, 362 S.E. 2d at 536. We are of the opinion that this reasoning is applicable to the situation here where the *nolo contendere* plea is not being used to prove defendant committed the offense but merely to prove that he was convicted of the offense.

Holden was a capital case in which the death penalty was upheld. Thus, our Supreme Court held, under G.S. 15A-2000(e) that a *nolo contendere* plea may be used to aggravate a crime so as to sustain a death sentence. From this we reason that evidence of past convictions resulting from a *nolo* plea should also be properly admitted under G.S. 8C-1, Rule 609(a) for purposes of impeachment especially when a defendant has voluntarily taken the stand to testify and be cross-examined, at which time he could explain his plea if he desired and assert his innocence.

This opinion is buttressed by federal case law which has held that for purposes of using prior convictions to impeach under Federal Rule 609(a), there is no difference between a conviction arising from a *nolo contendere* plea or one arising from an actual finding of guilt.

> [F]ederal precedents are not binding on the courts of this State . . . [however they] should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules. Uniformity of evidence rulings . . . should be a goal of our courts in construing those rules that are identical.

Commentary, G.S. 8C-1, Rule 102. Although the federal and state versions are not exactly identical, we believe that they are sufficiently similar in this case to consider federal precedent.

In *United States v. Williams*, 642 F. 2d 136 (5th Cir. 1981), the court noted that Rule 609(a) does not distinguish between convictions resulting from a guilty plea or from a *nolo contendere* plea and that in fact an exception for *nolo contendere* pleas in earlier drafts of the rule was specifically deleted. The court concluded that this deletion evidenced Congress' intent not to recognize any distinction between the two pleas.

> Once convicted, whether as a result of a plea of guilty, *nolo contendere*, or of not guilty (followed by trial), convictions stand on the same footing, unless there be a specific statute creating a difference. Clearly, the rule governing our issue, Fed. R. Evid. 609, creates no difference between convictions according to the pleas that preceded them. . . .
>
> 'As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. . . .' As a nolo plea is an admission of every element of the offense . . . a conviction based on such a plea is as conclusive for the purposes of Fed. R. Evid. 609 as a conviction based on a guilty plea or verdict.

Id. at 139-40, *quoting* Advisory Committee Note to Rule 609, 10 Moore's Federal Practice, Section 609, .01 [1-10] at VI-117 (1979 ed.) (citations omitted). For the reasons set forth herein and because our G.S. 8C-1, Rule 609(a), like its federal counterpart, does not by its language create a difference between convictions based on their underlying plea we hold that the court did not err in allowing defendant's prior convictions to be used to attack his credibility during cross-examination.

[2] Defendant next contends that the trial court erred in allowing the State to cross-examine defendant about underlying facts surrounding two prior assault convictions after defendant had ad-

mitted to the convictions. Initially, we note that defendant only specifically objected to the State's cross-examination as to one of two alleged prior assault convictions. Thus, we will only address the propriety of allowing that particular testimony. *See* App. R. 10(a). The State questioned defendant as follows:

> Q. What else have you been convicted of?
>
> A. I've been convicted of ahh, two assaults on a female in 1984 and assault on a female in 1985.
>
> Q. Isn't that three assaults on a female?
>
> A. Yes, Sir. . . .
>
> Q. One involved a Betty Holley—you hitting her with your fist. . . .
>
> Mr. Gillam: Your Honor, I object.
>
> Court: Ahh, overruled. He can answer that question.
>
> EXCEPTION NO. 4
>
> (Mr. Newbern): Is that right?
>
> A. Excuse me?
>
> Q. You were convicted on August 20, 1984, of striking a Betty Holley with your fist and twisting her arm. Is that right?
>
> A. That's what was said.

For purposes of impeachment, where a witness has admitted to a prior conviction, further inquiry into that conviction is limited to the time and place of the conviction and punishment imposed. *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). However, one may not ordinarily go into details of the crime. *Id.* "Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial of the case." *Id.* at 141, 235 S.E. 2d at 824.

However, we do not believe the cross-examination here constitutes reversible error. *See State v. Rathbone*, 78 N.C. App. 58, 336 S.E. 2d 702 (1985). Unlike *State v. Greenhill*, 66 N.C. App. 719, 311 S.E. 2d 641 (1984), in which our Court determined that the State's inquiry into the weapons used and victims involved

in *thirteen* prior assault convictions constituted reversible error and *State v. Bryant*, 56 N.C. App. 734, 289 S.E. 2d 630 (1982), in which our Court held that the State's somewhat lengthy inquiry into the details of a defendant's prior larceny conviction constituted reversible error, the prosecution here made a single inquiry about a single assault. In this case we do not think that such a brief inquiry unduly distracted or confused the jury, or harassed the defendant, or that defendant, on trial for larceny, was unduly prejudiced.

Based on the foregoing we find defendant's trial free of prejudicial error.

No error.

Judge PHILLIPS concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that a plea of no contest may not be used as a "conviction" for purposes of impeachment at a criminal trial, I dissent. *See State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E. 2d 920 (1984).

Our Supreme Court has never retreated from the well-entrenched rule that a no contest plea may not be used against a defendant in the guilt or innocence phase of a subsequent trial. *State v. Thomas*, 236 N.C. 196, 72 S.E. 2d 525 (1952). Not even the words "guilty as charged" and "convicted" can change the effect of a no contest plea in a subsequent proceeding. *State Bar v. Hall*, 293 N.C. 539, 238 S.E. 2d 521 (1977); *see also In Re Stiers*, 204 N.C. 48, 167 S.E. 382 (1933) (introduction of the judgment, based upon a plea of nolo contendere, was insufficient to disbar an attorney). In *Thomas*, our Supreme Court specifically said that "the super-added clause 'and was found guilty by the court' would be a misapprehension of the effect of a plea of nolo contendere in a criminal action, and could not be upheld." 236 N.C. at 202, 72 S.E. 2d at 529 (citation omitted).

The above-referenced cases were neither explicitly nor implicitly overruled by *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988), upon

which the majority relies. Indeed, the *Holden* court cited *Hall* with approval before narrowing its focus to defendant Holden's post-conviction sentencing hearing. The narrow question in *Holden* was whether proof of the no contest plea and final judgment entered thereon constituted a conviction within N.C. Gen. Stat. Sec. 15A-2000(e) and was therefore properly found as an aggravating circumstance. 321 N.C. at 162, 362 S.E. 2d at 536.

The court summarily concluded that Holden's no contest plea was "a conviction within the [sentencing] statute's meaning and was properly found as an aggravating circumstance." *Id.* Holden's responsiveness to punishment and his potential for rehabilitation were relevant at the sentencing hearing, and the Supreme Court presumably considered these factors in allowing the no contest plea to be used as an aggravating circumstance. Such a presumption would have been consistent with the *single* legislative exception concerning the use of no contest pleas in subsequent sentencing proceedings to establish an aggravating factor under the Fair Sentencing Act. *See* N.C. Gen. Stat. Sec. 15A-1340.2 (1988). This single statutory exception, however, is narrowly limited to determining the length of a sentence in subsequent felony cases and does not apply to the guilt or innocence phase of trial. *Holden* simply extends the *sentencing* exception to capital cases.

In my view, N.C. Gen. Stat. Sec. 8C-1, R. Evid. 410 (1986) is dispositive. The new rules of evidence did not change prior case law concerning the use of no contest pleas in the guilt or innocence phase of trials. In pertinent part, Rule 410 states that:

> [e]xcept as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible for or against the defendant who made the plea or was a participant in the plea discussions: . . .
>
> (2) A plea of no contest. . . .

The commentary to Rule 410, citing *Brandis on North Carolina Evidence*, Sec. 177 (1982), states that subsection (2) is consistent with North Carolina law. Significantly, the legislature had a specific opportunity to change the developed body of case law when it enacted Rule 410 but chose not to do so.

The no contest plea serves a useful purpose. Judicial economy is only one of its practical utilities. Further, "[f]undamental fairness would preclude making an ex post facto exception to the long

established rule that the plea of nolo contendere has no effect beyond the particular case in which it was entered. . . ." *Hall*, 293 N.C. at 545, 238 S.E. 2d at 525.

I vote for a new trial.

DORIS MIDGETTE v. LARRY ED PATE AND WIFE, REBECCA PATE, TOWN OF SNOW HILL, NORTH CAROLINA, MELVIN OLIVER, IN HIS CAPACITY AS MAYOR OF THE TOWN OF SNOW HILL, R. BEN RAYFORD, PAUL MILLER, LIONEL MOORE, NORMAN C. LEWIS AND LLOYD FOREMAN, JR., IN THEIR CAPACITY AS COMMISSIONERS OF THE TOWN OF SNOW HILL, AND HARRELL MANNING, IN HIS CAPACITY AS ZONING ADMINISTRATOR OF THE TOWN OF SNOW HILL

No. 888SC1006

(Filed 5 July 1989)

1. **Municipal Corporations § 31— swimming pool and bathhouse— special use permit—12(b)(6) dismissal—correct**

The trial court correctly granted a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) as to special use permits in plaintiff's action against town officials connected to the issuance of permits for a swimming pool and bathhouse in a subdivision. Plaintiff's complaints specifically concerning defendants' special use, or building permits, may only be remedied by first appealing to the Board of Zoning Adjustment, which she failed to do. Plaintiff's complaints connected to the issuance of the permits are limited to the procedures outlined in N.C.G.S. § 160A-388.

2. **Municipal Corporations § 31— swimming pool and bathhouse— mandamus alleging that zoning administrator failed to enforce ordinance—12(b)(6) dismissal improper**

The trial court improperly granted defendants' motion for a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of plaintiff's action against the town for mandamus alleging that the zoning administrator failed to enforce a zoning ordinance related to defendants' construction of a swimming pool. Plaintiff's request that the alleged violations be corrected, the fact that she is an adjacent property owner subject to the same zoning restrictions as defendants Pate, and the fact that she alleged special damages is sufficient to assert her legal right to enforcement of the ordinance, and plaintiff has set forth adequate

facts to state a claim that there had been violations of the zoning ordinance.

3. Deeds § 20.7— subdivision restrictive covenants—enforcement—12(b)(6) dismissal improper

The trial court improperly granted defendants' motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6), of plaintiff's action against the defendant Pates for violation of subdivision protective covenants regarding the construction of a swimming pool and bathhouse. N.C.G.S. § 1A-1, Rule 8(a)(1) and (2).

APPEAL by plaintiff from *Preston, Judge*. Judgment entered 18 April 1988 in Superior Court, GREENE County. Heard in the Court of Appeals 13 April 1989.

In this civil action plaintiff seeks a writ of mandamus and an injunction to compel town officials to enforce the local zoning ordinance. Defendants moved to dismiss the complaint pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. After hearing the motions the trial court entered an order dismissing the complaint against the defendants, from which plaintiff appeals. The following facts are alleged in plaintiff's complaint:

Plaintiff's home, which she owns, is located on Lot 17, Block A of the Indian Head Estates Subdivision in Greene County. The defendants, Larry Ed and Rebecca Pate, own a home and property located on two adjoining lots in the Indian Head subdivision. Both plaintiff's and defendants Pate's properties are located within the zoning jurisdiction of the Town of Snow Hill, and are also subject to the Protective Covenants for the Indian Head Estates Subdivision.

At the time this action was initiated defendant Oliver was the Mayor of the Town of Snow Hill; defendants Rayford, Miller, Moore, Lewis and Foreman served as Commissioners of the Town of Snow Hill; defendant Manning was employed as Zoning Administrator for the Town of Snow Hill.

On 10 July 1985 a building permit was issued by defendant Manning, as the Snow Hill Building Inspector, to defendant Pate to allow construction of a swimming pool and bathhouse on the Pate lots in the Indian Head subdivision. On 15 July 1988, the Snow Hill Board of Zoning Adjustment approved a special use permit for a swimming pool on the Pate lots in the Indian Head subdivision.

The swimming pool and bathhouse were subsequently built. It is alleged that the swimming pool is less than twenty feet from the right-of-way known as Arrow Head Circle; that the pool and bathhouse were enclosed by a wooden fence which is at least seven feet high; that the fence is located less than three feet from Arrow Head Circle, a right-of-way, and approximately eighteen feet from Indian Head Drive, another right-of-way. Plaintiff alleges that the pool, bathhouse and fence violate the zoning ordinances of the Town of Snow Hill and the Protective Covenants of the Indian Head subdivision.

It is further alleged that during the summers of 1985 and 1986 the Pates sold memberships to individuals and families for use of the pool and bathhouse facilities. Plaintiff alleges that the sale of memberships to the Pate pool and associated activities are in violation of the zoning ordinances of Snow Hill and the Protective Covenants of the Indian Head subdivision.

It is admitted in defendants Pate's answer to plaintiff's complaint that a letter was written to Larry Ed Pate by defendant Manning as Zoning Administrator for the Town of Snow Hill which mentioned certain violations of the zoning ordinance. Plaintiff alleges that following this letter the Pates took no action to change the pool, its facilities, or use of the pool by paid membership. Plaintiff states that despite her requests the Town of Snow Hill and the Zoning Administrator have refused to enforce the zoning ordinance and take action against the Pates for the alleged violations.

Defendants Pate admit in their answer that the protective covenants were established for the mutual benefit of all lots in Indian Head estates and the owners and purchasers of lots therein. The Pates further admit in their answer that they had notice and knowledge of the covenants. Plaintiff alleges that the construction of the pool, bathhouse and fence violated the protective covenants in five specific respects.

Plaintiff asked that a writ of mandamus issue to direct the town officials to enforce the zoning ordinance; that a permanent injunction issue to force compliance with the protective covenants; or, in the alternative, that plaintiff be allowed to recover damages.

H. Jack Edwards for plaintiff appellant.

James R. Fitzner for defendant appellees.

George Lee Jenkins for defendant appellees Larry Ed Pate and wife, Rebecca Pate.

ARNOLD, Judge.

Plaintiff appeals the trial court's dismissing her complaint for failure to state a claim on which relief can be granted pursuant to N.C.R. Civ. P. 12(b)(6), N.C.G.S. § 1A-1.

A plaintiff's complaint setting forth a claim for relief must include:

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled.

N.C.G.S. § 1A-1, Rule 8(a)(1)(2); *see generally Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

As the defendants each made their motions pursuant to N.C.R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted, the factual allegations of the complaint set forth above must be taken as true for purposes of this appeal. *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 288 (1976). "A claim should not be dismissed under Rule 12(b)(6) unless it appears that the plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim." W. Shuford, *N.C. Civil Practice and Procedure* § 12-10 (1988).

Plaintiff's complaints can be sorted into three subgroups: those which arise as result of the permits which were granted to the Pates; those which would be the result of a refusal by town officials to enforce the ordinance; and those which are connected to the alleged violations of the protective covenants.

[1] The defendant Town officials correctly contend that the plaintiff may only proceed against them as set out in N.C.G.S. § 160A-388. Therefore, plaintiff's complaints connected to the issuance of the permits are limited to the procedures outlined in N.C.G.S. § 160A-388:

> (b) The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part.

> An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city.
>
> * * * *
>
> (e) The concurring vote of four-fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance adopted pursuant to this Part, or to decide in favor of the applicant any matter upon which it is required to pass under any ordinance, or to grant a variance from the provisions of the ordinance. Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari.

The board of adjustment is an administrative body with quasi-judicial power whose function is to review and decide appeals which arise from the decisions, orders, requirements or determinations of administrative officials, such as building inspectors and zoning administrators. *Id. See In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E. 2d 1 (1941); *see generally* M. Brough, *The Zoning Board of Adjustment in North Carolina* 7-9 (1984). It is the job of the board of zoning adjustment to interpret the ordinance and to apply that interpretation when reviewing acts of administrators. *See Harden v. Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926); *Brough* at 5. The enabling statute which grants power to local governments to enact zoning ordinances states that a board of zoning adjustment may be authorized to:

> 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 [in the local ordinance] and may impose reasonable and appropriate conditions and safeguards upon these permits. . . .

N.C.G.S. § 160A-381. A special use permit, like the one issued to the defendants Pate in this case, is allowed "to permit certain exceptional uses *that the ordinance authorizes under stated conditions. Brough* at 9 (emphasis in original).

N.C.G.S. § 388(b) confers on the board appellate jurisdiction to review the acts of those charged with enforcing the zoning ordinance. *Tate v. Board of Adjustment of the City of Asheville*, 83 N.C. App. 512, 513, 350 S.E. 2d 873, 874 (1986). Once the municipal official has acted, for example by granting or refusing a permit,

"any person aggrieved" may appeal to the board of adjustment. N.C.G.S. § 160A-388(b).

Plaintiff has alleged the special damages required to assert standing under N.C.G.S. § 160A-388(b) as an aggrieved person. *Heery v. Town of Highlands Zoning Board of Adjustment*, 61 N.C. App. 612, 300 S.E. 2d 869 (1983). Thus, she could have contested the permits had she timely filed with the board of adjustment. N.C.G.S. § 160A-388(b). Plaintiff's complaints specifically concerning defendants' special use, or building permits, may only be remedied by first appealing to the board of zoning adjustment. She failed to do so and therefore she cannot now attack these permits.

[2] However, plaintiff has stated a proper claim against the Town for mandamus by alleging that the zoning administrator failed to enforce the ordinance. Insofar as the complaint attacks the sale of memberships for use of the pool, the building of structures not covered by the permits, and parking, plaintiff has alleged that her requests to town officials have been ignored. Further, as there has been no decision by a zoning administrator from which she may appeal, she may not go forward under N.C.G.S. § 160A-388(b) to contest the use the Pates made of the pool after they were permitted to build it. *Tate* at 515, 350 S.E. 2d at 874.

In North Carolina the rule has been stated that "Mandamus will lie to compel the performance of a purely ministerial duty imposed by law." *Bryan v. City of Sanford*, 244 N.C. 30, 35, 92 S.E. 2d 420, 423 (1956); *see Lee v. Walker*, 234 N.C. 687, 68 S.E. 2d 664 (1952) (mandamus appropriate to compel officials to issue zoning permit when plaintiff showed he had met all requirements for permit); *Rebholz v. Floyd*, 327 So. 2d 806, 808 (Fla. App. 1976); *see generally* A. Rathkopf, 3 *The Law of Zoning and Planning* § 44.01 *et seq.*

"Where the law prescribes and defines a duty with such certainty as to leave nothing to the exercise of judgment or discretion the act is ministerial . . . ." *Harden* at 397, 135 S.E. at 152. The legislature has prescribed the duties of local zoning inspectors including: "the issuance of orders to correct violations, the bringing of judicial actions against actual or threatened violations." N.C.G.S. § 160A-412(4); *see generally* P. Green, *Legal Responsibilities of the Local Zoning Administrator in North Carolina*, Institute of Government (1987). Though the zoning administrator may exercise discretion in assessing the alleged violations, this does not lessen

the duty to investigate the charges of a plaintiff who has legal right to have the duty enforced:

> Where a duty to make a decision is imposed upon a body or officer, even though discretion is involved in the determination, mandamus will lie to compel the body or officer to make the decision, since there is no discretion involved in whether action is to be taken. 3 *Rathkopf* § 44.03[2].

Plaintiff asserts a legal right to enforce the ministerial duties of a zoning administrator if she has standing to assert the right and has performed any acts required to evoke action on the part of the officer. *Id.* at § 44.02; *see also Heery* at 614, 300 S.E. 2d at 870. Plaintiff's request that the alleged violations be corrected, the fact that she is an adjacent property owner subject to the same zoning restrictions as the defendants Pate, and the fact that she alleged special damages is sufficient to assert her legal right to enforcement of the ordinance. *See id.* Plaintiff has set forth adequate facts to state a claim that there have been violations of the zoning ordinance related to the use of the pool, parking, and fence, and that the zoning inspector has failed to make a determination concerning the violations and to pursue correction of the violations.

[3] Finally, as against the Pates, we hold that plaintiff has sufficiently stated a claim that the Protective Covenants have been violated. Though plaintiff has neglected to include a complete copy of the covenants in the record, she does state the following violations of the covenant in her complaint:

a) They erected a building on the property not permitted by the covenants.

b) They failed to submit the construction plans and specifications and a plan showing the location of the structures to the architectural control committee.

c) They failed to meet the minimum setback requirements for the location of buildings, structures and fences on their property.

d) They use the property for other than residential purposes.

e) They are allowing a use of their property which has become an annoyance or nuisance to the neighborhood.

This portion of the complaint put the defendants on notice of the claim concerning violation of the covenants. N.C.G.S. § 1A-1, N.C.R. Civ. P. 8(a)(1)(2). In our view plaintiff's complaint states a claim on the issue of whether there has been a violation of the covenants.

Our holding is that plaintiff has stated a claim for mandamus to compel the Town and its zoning administrator to scrutinize alleged violations of the zoning ordinance relating to the use of the pool, the fence, and parking, and to enforce the ordinance. Plaintiff has stated a claim against the Pates for alleged violations of protective covenants. Only that portion of the trial court's order dismissing these two claims is reversed.

Affirmed in part and reversed in part.

Judges GREENE and LEWIS concur.

IN RE: SUSPENSION OF THE LICENSE TO OPERATE A MOTOR VEHICLE OF RHONDA RICKER ROGERS, NCDL #: 7677137

No. 885SC1416

(Filed 5 July 1989)

Automobiles and Other Vehicles § 2.4— refusal to take breathalyzer test—revocation of license—validity of testing procedures irrelevant

The validity of testing procedures is not relevant in a review of a license revocation for willful refusal to submit to a breathalyzer test, since review is limited to the issues set out in N.C.G.S. § 20-16.2(d), and compliance with testing procedures is not included therein. Therefore, the superior court erred in ruling that a breathalyzer operator's failure to perform a simulator test as well as the actual test in the presence of petitioner's witness precluded the revocation of petitioner's license for refusal to take the test.

APPEAL by respondent from *Llewellyn (James D.), Judge.* Order entered 12 September 1988 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 17 May 1989.

Hewlett, Collins & Mahn, by John C. Collins, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William B. Ray, for respondent-appellant.

PARKER, Judge.

Following her arrest for driving while impaired, petitioner was notified by the Division of Motor Vehicles that her license to drive was revoked for twelve months pursuant to G.S. 20-16.2 for her refusal to take a breathalyzer test. Petitioner obtained a hearing before the Division under G.S. 20-16.2(d) and the Division sustained the revocation. Petitioner then appealed to the Superior Court pursuant to G.S. 20-16.2(e) and G.S. 20-25. The Superior Court found that the test which petitioner allegedly refused to take was not administered in compliance with G.S. 20-16.2(a) and regulations promulgated by the Department of Human Resources. The trial court's order enjoined respondent Commissioner of Motor Vehicles from revoking petitioner's license.

Respondent contends that the trial court erred in enjoining him from revoking petitioner's license on the grounds that proper procedures were not followed in administering the breathalyzer test. We agree and reverse the trial court's order in this case.

By statute, a hearing before the Division of Motor Vehicles to determine whether a revocation for failure to submit to chemical analysis will be sustained must be limited to consideration of whether:

(1) The person was charged with an implied-consent offense;

(2) The charging officer had reasonable grounds to believe that the person had committed an implied-consent offense;

(3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of his rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis upon the request of the charging officer.

G.S. 20-16.2(d). Although the Division's determination is subject to *de novo* review by the Superior Court, the hearing in Superior Court is limited to the same five issues. G.S. 20-16.2(e). If all

five conditions are met, the revocation must be sustained. G.S. 20-16.2(d).

In the present case, petitioner has stipulated to conditions (1) and (2). She has also stipulated that the charging officer requested her to take a breathalyzer test and that there was present at that time a qualified breathalyzer operator who held a valid permit as required by G.S. 20-139.1. Condition (3) is not relevant in this case. Therefore, the only issues to be determined by the trial court related to conditions (4) and (5). The issues were (i) whether petitioner was notified of her rights as required by G.S. 20-16.2(a) and (ii) whether petitioner willfully refused to take the test.

General Statute 20-16.2(a) provides that a person charged with an implied-consent offense must be given oral and written notification of his rights with regard to chemical analysis and the consequences of taking or refusing to take a test. The evidence in this case tends to show that petitioner received notification of her rights at 11:10 P.M. Under G.S. 20-16.2(a)(6), petitioner had the right to select a witness to view the testing procedures so long as the test would not be delayed for more than thirty minutes from the time she was notified of her rights. Petitioner exercised this right and her witness arrived at 11:30 P.M. Following the witness's arrival, the breathalyzer operator attempted to conduct the test.

Although the actual testing of petitioner occurred in the presence of the witness, it is undisputed that the breathalyzer operator performed a "simulator test" for the purpose of calibrating the apparatus prior to the witness's arrival. The simulator test is part of the Department of Human Resource's required procedure to be followed when testing with the apparatus used in this case. 10 N.C. Admin. Code 7B.0336. Compliance with the Department's procedures is required by statute. G.S. 20-139.1. Under G.S. 20-16.2(a)(6), a person has the right to select a witness to view the "testing procedures." In this case, the trial court found that this statutory provision required the breathalyzer operator to perform the simulator test in the witness's presence and the failure to do so precluded respondent from revoking petitioner's license for her refusal to take the test.

Under the facts of this case, we find it unnecessary, however, to decide whether the trial court correctly ruled that petitioner had the right to have her witness view the simulator test as well as the actual test. Petitioner's license was revoked based upon her

willful refusal to take the test. In reviewing this revocation, the trial court could properly consider only those issues specified in G.S. 20-16.2(d) and, in this case, the only unresolved issues are whether petitioner was properly notified of her rights and whether she willfully refused to take the test. The evidence clearly establishes that petitioner received proper notification of her rights and the trial court made a finding of fact to that effect. Therefore, petitioner's license is subject to revocation unless she did not willfully refuse to take the test.

The trial court's order contains no findings or conclusions regarding the willful refusal issue. The evidence tends to show that the operator could not perform the test because, despite the operator's repeated requests, petitioner refused to expel sufficient air into the apparatus to provide an adequate breath sample. This evidence could support a finding that petitioner willfully refused to take the test. *See Bell v. Powell, Comr. of Motor Vehicles*, 41 N.C. App. 131, 254 S.E. 2d 191 (1979). The trial court did not reach this question, however, because it ruled that the failure to perform the simulator test in the witness's presence precluded revocation.

Although the trial court did not phrase its order in terms of willful refusal, the clear meaning of the order is that no willful refusal could occur because the operator did not perform the test in compliance with the requirements of G.S. 20-16.2(a). General Statute 20.16.2(d) requires only notification of the rights specified in subsection (a); a violation of those rights is not listed as a reviewable issue in a hearing to determine the validity of a revocation for willful refusal to submit to chemical analysis. Accordingly, we find that the trial court erred in enjoining the revocation of petitioner's license on that basis.

Obviously, notification of a right is of little value if there is no remedy for the denial of the right. In the present case, however, any violation of petitioner's rights was unrelated to her alleged decision to refuse the test. Under G.S. 20-16.2, a willful refusal occurs where a motorist:

> (1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test.

Etheridge v. Peters, Comr. of Motor Vehicles, 301 N.C. 76, 81, 269 S.E. 2d 133, 136 (1980). The purpose of the statute is fulfilled when the motorist is given the option to take or refuse to take the test after being informed of his statutory rights. *Rice v. Peters, Comr. of Motor Vehicles*, 48 N.C. App. 697, 700-01, 269 S.E. 2d 740, 742 (1980).

Petitioner in this case was informed of and exercised her right to have a witness view the test. The evidence tends to show that she did not object to the test on any grounds but feigned compliance by placing her mouth on the apparatus. The operator's determination that she willfully refused to take the test was based upon her failure to blow into the apparatus. There is no evidence that her failure to do so was in any way related to the prior simulator test. The operator testified that the simulator test took no longer than three-and-a-half minutes to complete. Thus, the operator could have repeated the simulator test in the presence of the witness if petitioner had requested him to do so.

The purpose of statutory provisions and regulations governing chemical tests for impaired driving charges is to ensure the fairness and accuracy of such tests. This purpose is served by allowing a motorist to have a witness view the test. Considerations of fairness and accuracy are not present, however, when a motorist refuses to take a test for wholly unrelated reasons. Under G.S. 20-16.2(a), a motorist impliedly consents to chemical analysis if he is charged with impaired driving. Revocation under the statute is a penalty for failing to comply with a condition for the privilege of possessing a license; it is not punishment for the crime for which the motorist was arrested. *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 234-35, 182 S.E. 2d 553, 559 (1971).

Among other jurisdictions considering the issue there is a split of authority. Several have held that defects in testing procedures are irrelevant in determining whether to suspend or revoke a motorist's license for his refusal to submit to a test. *Halloway v. Martin*, 143 Ariz. 311, 693 P. 2d 966 (Ct. App. 1984); *Moran v. Commonwealth*, 44 Pa. Commw. 105, 403 A. 2d 637 (1979); *Bell v. Department of Motor Vehicles*, 6 Wash. App. 736, 496 P. 2d 545 (1972). *But see Mullens v. Department of Pub. Safety, Drivers License Div.*, 327 So. 2d 492 (La. Ct. App.), *cert. denied*, 331 So. 2d 851 (La. 1976) and *Gibb v. Dorius*, 533 P. 2d 299 (Utah 1975) (holding that revocation cannot be based upon a refusal to submit

to an invalid test). Our legislature has expressly limited review of revocations for refusal to submit to chemical analysis to the issues set out in G.S. 20-16.2(d), and compliance with testing procedures is not included therein. Accordingly, we join those jurisdictions which have held that the validity of testing procedures is not relevant where a motorist has refused to take the test.

We emphasize that our decision in this case does not relieve law-enforcement personnel of their duty to comply with all statutes and regulations governing chemical tests. A motorist under arrest for impaired driving has the right to insist on such compliance and there may be cases where defects in testing procedures will entitle a motorist to refuse to submit. In this case, however, there is no evidence of any causal relationship between the defect, if any, and petitioner's alleged refusal. Petitioner received notice of the consequences of a refusal. She cannot now avoid those consequences by attacking the validity of the test if she made an informed choice not to take it. We express no opinion as to whether the test results would have been admissible evidence if the test had been completed.

Accordingly, we reverse the trial court's order enjoining respondent from revoking petitioner's license. Because the trial court made no findings of fact or conclusions of law as to whether petitioner's conduct amounted to a willful refusal to take the breathalyzer test, the case is remanded for a determination on that issue.

Reversed and remanded.

Judges EAGLES and ORR concur.

H. McBRIDE REALTY, INC., AND MARLO INVESTMENTS, INC., D/B/A REALTY WORLD, A LANDMARK COMPANY v. GARY W. MYERS

No. 8826SC831

(Filed 5 July 1989)

1. **Judgments § 37.5— action to collect real estate commission— judgment and execution—res judicata—motion in the cause dismissed**

In an action arising from a judgment against defendant for a real estate commission and an execution against defendant's real property to satisfy the judgment, the trial court properly found that defendant's 1987 action was res judicata and denied defendant's 1988 motion in the cause where a monetary judgment was entered against defendant in 1983; an order of execution was returned unsatisfied in 1984; another order of execution was served in 1987 by levying on and selling defendant's real property; defendant filed an action in 1987 to have the sale of his property declared void; defendant filed a motion in 1988 to consolidate the 1981 action which had been brought against him and the 1987 action which he had originated; the 1987 action was dismissed when the motion to consolidate was heard in 1988; all issues concerning the 1981 action have been resolved, judgment entered, and no appeal was taken; defendant subsequently filed this motion in the cause requesting essentially the same relief as that requested in the 1987 action; and the court denied this motion and ordered that defendant's counsel pay plaintiffs' legal fees.

2. **Attorneys at Law § 7.7; Rules of Civil Procedure § 11— sanctions under Rule 11—no error**

The trial court correctly ordered defendant's attorney to pay plaintiffs' attorney fees where defendant filed a motion in the cause which was in all substantial respects the same as an action which had been dismissed. Although defendant contends that the trial court directed him to file the motion in the cause after the earlier action was dismissed, that contention has absolutely no support in the record. N.C.G.S. § 1A-1, Rule 11.

APPEAL by defendant from *Snepp, Frank W., Judge*. Orders entered 13 May 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 March 1989.

Plaintiffs instituted this action on 3 April 1981 to collect a real estate commission which they contended defendant had agreed to pay for the sale of his residence. The jury awarded plaintiffs $2,700.00 and $1.00 plus interest and costs. The judgment was unsatisfied and plaintiffs executed against defendant's real property to satisfy the judgment.

Morrison & Peniston, by Dale S. Morrison, for plaintiff-appellees.

William D. McNaull, Jr. for defendant-appellant.

JOHNSON, Judge.

The facts of this case pertinent to this appeal occurred after the monetary judgment was entered against defendant on 12 September 1983. Defendant was served with notice of right to have exemptions designated on 7 October 1983. On 1 August 1984 an order of execution was issued against defendant and was returned unsatisfied on 16 August 1984. A statement was noted thereupon to the effect that neither real property nor personal property owned by defendant was found. A notation dated 17 August 1984 also appears on the face of the instrument stating that a $500.00 check was received on 27 August 1984 as payment on the judgment. No subsequent payments on the judgment were made.

On 10 July 1987 another order of execution was issued which was later amended on 4 December 1987 to correct an error. The 4 December 1987 order of execution was served by levying on and selling defendant's real property located at Rt. 5, Box 196 Marshall Acres Dr., Charlotte, N.C. The closing bid on the property was $31,600.00.

Defendant filed an action on 4 December 1987 against the original plaintiffs, Mecklenburg County Sheriff C. W. Kidd, Louise C. Liles, and Domer Reeves. At the time the 1987 action was instituted, a temporary restraining order enjoining the sheriff from delivering a deed to the property was issued. Defendant sought in his complaint to have the sale of his property declared to be void. Defendant's complaint also contained a motion for a preliminary injunction. The motion was heard and denied at the 14 December 1987 session of court. The court also allowed disbursement of the funds obtained pursuant to the sale, and authorized the sheriff to sign a deed to the property. However, the court specifically enjoined the holder of the deed from alienating the property until a full hearing on the merits could be had.

On 8 March 1988 defendant filed a motion to consolidate the 1981 action which had been brought against him, and the 1987 action which he had originated. When this motion was heard, the 1987 action was dismissed by order entered 25 March 1988. This order of dismissal was subsequently affirmed on appeal by this Court. *Myers v. H. McBride Realty, Inc.*, 93 N.C. App. 689, --- S.E. 2d --- (1989). We note parenthetically that all issues concerning the original 1981 action had been resolved, judgment entered, and no appeal was taken therefrom. Therefore, this motion wherein defendant requested that the 1987 action "be treated as a motion in the cause in the first captioned action [the 1981 action]" is at best puzzling.

On 5 April 1988 defendant filed a motion in the cause requesting essentially the same relief as that requested in the 1987 action. He alleged that the execution sale, confirmed more than 3 months earlier, should be declared void and set aside. Defendant sought to prevent finalization of the execution sale and delivery of title to the purchaser of the property. The grounds for the motion included, *inter alia*, improper notice of right to have exemptions designated; improper satisfaction of judgment from realty as opposed to personalty; and improper notice of the sale.

In its 20 May 1988 order, the court denied defendant's motion in the cause and found that his 1987 action was *res judicata* and that he was not at liberty to pursue a motion in the cause on the issues which were resolved against him in the 1987 action. The court then ordered defendant's counsel to pay plaintiffs' attorney's fees for defending the action as authorized by G.S. sec. 1A-1, Rule 11. From this order defendant appeals.

[1] By his first question for review defendant contends that the trial court erred by refusing to enjoin the sheriff from delivering a deed to the property in question prior to a full hearing on the motion in the cause to set aside the execution sale. We disagree.

In its 20 May 1988 order ruling upon defendant's motion in the cause, the court found as fact the following:

> 3. In 1987, in Mecklenburg County Superior Court Case 87CVS14566, Gary W. Myers through his attorney, William D. McNaull filed an action as a Plaintiff against H. McBride Realty, Inc., Marlo Investments, Inc., and others seeking the identical relief which he now seeks in the Motion in The Cause.

4. This Court on December 14, 1987 denied Mr. Myers' Application for Preliminary Injunction in the 1987 lawsuit (87CVS14566) and further found that Mr. Myers had failed to show or establish justiciable issues concerning H. McBride Realty, Marlo Investments, Inc., and others.

5. That the 1987 lawsuit (87CVS14566) was dismissed by this Court on March 15, 1988 [order entered 25 March 1988] pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for the complaint failing to state a claim upon which relief could be granted.

. . .

9. That the 1987 action is *res judicata* and Mr. Myers may not file a Motion in The Cause in this action (81CVS3466) when he received an unfavorable ruling in 87CVS14566.

The Court in *Morris v. Perkins*, 6 N.C. App. 562, 566, 170 S.E. 2d 642, 644 (1969), *cert. denied*, 276 N.C. 184 (1970), *quoting Shaw v. Eaves*, 262 N.C. 656, 661, 138 S.E. 2d 520, 525 (1964) stated the following:

> 'The doctrine of *res judicata* as stated in many cases is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.' In order for a judgment to constitute *res judicata* in a subsequent action there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual. In order for a party to be barred by the doctrine of *res judicata*, it is necessary not only that he should have had an opportunity for a hearing but also that the identical question must have been considered and determined adversely to him.

(Citations omitted.)

It is clear to us that defendant is forever precluded from raising the issues which he advanced in his motion in the cause. A full and fair determination of these issues was made in the order entered on 25 March 1988 dismissing defendant's 1987 action for failure to state a claim upon which relief may be granted.

In the 1987 action and defendant's motion in the cause there was identity of the parties (some of the parties defendant sued in the 1987 action were not involved in the motion in the cause, but all the parties in the motion in the cause were involved in the 1987 action); the subject matter (the execution sale of defendant's property) was the same; the issues and relief demanded (to have the sale declared null and void and set aside) were also the same; and the estoppel was mutual, since all parties were estopped from further litigating the issues. The dismissal of the 1987 action pursuant to G.S. sec. 1A-1, Rule 12(b)(6) was a complete bar to defendant's subsequent motion in the cause requesting essentially the same relief. A judgment upon demurrer for failure of the complaint to state a claim upon which relief may be granted bars subsequent actions on substantially identical allegations. *Davis v. Anderson Industries*, 266 N.C. 610, 146 S.E. 2d 817 (1966); *Cobb v. Clark*, 4 N.C. App. 230, 166 S.E. 2d 692 (1969).

We therefore hold that the 1987 action was *res judicata* and barred defendant's subsequent motion in the cause. The trial court committed no error in dismissing the motion in the cause.

By his second Assignment of Error defendant contends that the trial court committed reversible error in denying defendant's motion in the cause as a matter of law. Because we have resolved this question in our first analysis, we overrule it without discussion.

[2] Defendant next argues that the trial court erred by ordering his counsel to pay plaintiffs' attorney's fees. We disagree. Although defendant concedes at the outset of his argument that the 1987 action was dismissed pursuant to G.S. sec. 1A-1, Rule 12(b)(6), he contends that the court made this ruling because a motion in the cause, not the institution of a separate action, was the proper vehicle for challenging the court's original ruling. He thus submits that he filed the motion in the cause pursuant to the court's directive and with its authorization and should therefore be insulated from sanction.

We have before us nothing in the record to indicate that this was the basis of the court's ruling. Defendant even recognizes that the "[r]ecord does not so reflect." We therefore evaluate the sanction of payment of attorney's fees in light of the evidence in the record.

G.S. sec. 1A-1, Rule 11 (1988 Cum. Supp.) provides, in part, the following:

> 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 or a good faith argument for the extension, modification, or reversal of an 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 the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee.

Appellate review of sanctions imposed pursuant to this rule appears to be a consideration of "whether the trial court based its decision on the relevant factors before it and whether the judgment was clearly erroneous." *Turner v. Duke University*, 91 N.C. App. 446, 449, 372 S.E. 2d 320, 323 (1988), *citing Westmoreland v. CBS, Inc.*, 770 F. 2d 1168 (D.C. Cir. 1985).

In its order of 20 May 1988 ruling upon defendant's motion in the cause, the trial court found as a fact that defendant's counsel had raised nonjusticiable issues in the motion in the cause, and had failed to make a reasonable inquiry as required by G.S. sec. 1A-1, Rule 11 before filing the motion. The court then ordered defendant's attorney to pay $187.50 to plaintiffs' counsel.

Defendant's only argument to support his claim that the Rule 11 sanction was erroneously entered is a contention, having absolutely no support in the record, that the trial court directed him to file the motion in the cause after dismissing his 1987 action. In the absence of record evidence, we cannot entertain defendant's theory.

The record does show that there was no appeal taken from the original action in which the execution sale and distribution of the proceeds were allowed. The record also reflects that the 1987 action was dismissed pursuant to a 12(b)(6) motion. The motion in the cause contained essentially the same allegations and demanded essentially the identical relief as that demanded in the 1987 action which was dismissed in a final order entered by the

trial court. In spite of this dismissal, defendant filed a motion in the cause which was in all substantial respects the same action which had been dismissed.

In light of the aforementioned facts, we cannot find that the trial court's judgment was erroneous. The relevant factors noted above constituted adequate grounds for imposing Rule 11 sanctions. Therefore, the order is

Affirmed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RONALD LEE MORRISON, A/K/A ROLAND LEE MORRISON

No. 8816SC909

(Filed 5 July 1989)

1. **Rape and Allied Offenses § 4.1— evidence of defendant's prior acts of sexual conduct—testimony of prosecutrix admissible**

In a prosecution for rape of a thirteen-year-old, the trial court did not err in allowing the prosecutrix to testify concerning prior acts of sexual conduct between her and defendant, since the testimony tended to illustrate defendant's opportunity to commit these acts and a plan to molest his girlfriend's daughter in her absence, both physical and constructive. N.C.G.S. § 8C-1, Rule 404(b).

2. **Rape and Allied Offenses § 5— constructive force—parent-child relationship shown—sufficiency of evidence**

In a prosecution for rape, constructive force could be inferred from evidence that defendant began living with the prosecutrix's family when she was eight; he assumed parental responsibilities, often babysitting the victim and her sister while their mother, his girlfriend, worked; the victim "adopted" defendant as her father and sat on his lap and called him "daddy"; the victim and defendant had both participated in this simulated parent-child relationship for four or five years when the acts of sexual intercourse between them began; the

victim was thirteen when the act for which defendant was convicted occurred; and the victim had therefore known defendant as a father for one-third of her life when the incident of sexual intercourse was committed.

APPEAL by defendant from *Britt, Samuel E., Judge.* Judgment entered 10 December 1987 in Superior Court, ROBESON County. Heard in the Court of Appeals 21 March 1989.

Defendant was arrested pursuant to a magistrate's order charging him with first-degree rape. The grand jury returned a true bill of indictment sufficient to charge either first-degree or second-degree rape. Defendant was convicted of second-degree rape and was sentenced to the presumptive term of twelve years.

Attorney General Lacy H. Thornburg, by Associate Attorney General H. Bright Lindler, for the State.

Huggins and Rogers, by D. Jeffrey Rogers, for defendant-appellant.

JOHNSON, Judge.

The evidence adduced at trial tended to show that defendant moved into the home of prosecutrix's mother, which she shared with her two minor daughters, sometime in 1982 or 1983. When defendant began living with them, the prosecutrix was about eight years old. The prosecutrix and defendant developed a father-daughter relationship. Defendant would babysit for the children at times while the mother worked and he also assisted in parenting and disciplinary matters.

During the summer of 1987 when the prosecutrix was thirteen years old, defendant was the primary care giver for the two girls during the day while their mother worked. The prosecutrix testified that on Tuesday, 28 July 1987 she wore a nightgown and panties to bed. She awakened to find her panties pulled down and defendant on top of her with his penis inside her vagina. She testified further that he then had sexual intercourse with her, ejaculated, and told her that he would kill her if she ever told anyone. Defendant then took plaintiff to the bathroom and prepared a douche for her.

The prosecutrix also testified that on the following Saturday her aunt came over to her house to pick her up at around 3:30 p.m. She told her aunt what had happened between her and the

defendant. Prosecutrix's aunt then called the prosecutrix's mother and prosecutrix told her mother about the incident when she arrived. Over defendant's objection the prosecutrix testified that defendant had engaged in sexual relations with her about twenty times between 26 December 1986, when the first incident occurred, and 28 July 1987, when the incident for which defendant was convicted was committed.

Defendant testified in his own behalf and unequivocally denied ever having sex with his girlfriend's daughter. He testified that on the night in question, 28 July 1987, he was being driven around in his girlfriend's car by someone by the name of McNeill. Defendant further stated that his girlfriend's family did not like him, wanted his relationship with his girlfriend to end, and wanted to gain custody of the children.

[1] On appeal, defendant first argues that the trial court erred by allowing the prosecutrix to testify over his objection concerning prior acts of sexual conduct between the prosecutrix and defendant. He relies upon G.S. sec. 8C-1, Rule 404(b) to support his contention.

G.S. sec. 8C-1, Rule 404(b) provides the following:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Our courts have been quite liberal in construing the noted exceptions to the general rule to admit evidence of similar sex offenses. *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981). It has also been consistently held that evidence of prior sexual activity between a defendant and a child victim is admissible when it is relevant to prove a fact in issue.

In *State v. Spaugh*, 321 N.C. 550, 364 S.E. 2d 368 (1988), the Court held that the child victim's testimony concerning her father's previous sexual activity with her was relevant and admissible where it clearly tended to establish that the defendant father often took advantage of her availability and vulnerability when she was left in his care. Also, in *State v. Oliver*, 85 N.C. App. 1, 354 S.E. 2d 527, *disc. rev. denied*, 320 N.C. 174, 358 S.E. 2d 64 (1987), the prosecuting witness was allowed to testify concerning other acts of

sexual abuse committed by her mother where the evidence tended to establish a common plan or scheme by defendant to sexually abuse her child. *See also State v. Boyd*, 321 N.C. 574, 364 S.E. 2d 118 (1988), and *State v. Jones*, 89 N.C. App. 584, 367 S.E. 2d 139 (1988).

In the case *sub judice* the prosecuting witness testified to the following concerning previous sexual activity between defendant and her.

Q. [Prosecutrix] before this night of July 28th, had Ronald Morrison ever felt of you before?

A. Yes.

Q. Do you recall when the first time was?

A. I don't remember the day, but my mother was outside and my sister was on her bike.

Q. Do you know approximately when it was?

A. No.

Q. Before the night of July 28, had he ever had sexual relations with you before?

A. Yes.

Q. Do you recall when the first time was that he had sexual relations with you?

A. The 26th of December.

Q. What year?

A. 1986.

Q. How do you remember the 26th of December?

A. Because that was the day before my birthday.

Q. What happened on that occasion?

A. He came into my room and pulled up my nightgown and pulled my panties off and stuck his penis in my vagina.

Q. Up until then had he ever felt of you or rubbed you in any way?

A. Yes.

Q. Now, from the day before your birthday up until July 28, did he have sexual relations with you any other time?

MR. ROGERS: Object to leading.

THE COURT: Overruled.

A. Yes.

Q. Can you tell us about how many times he had sex relations with you from the 26th of December up until the 28th of July?

A. About twenty.

Q. Where would your mother be when this was going on?

A. In her room. She be a sleep.

Q. Was that on all occasions?

A. Most times she be gone.

Q. Pardon?

A. Most time she be gone.

. . .

Q. Did anything ever happen to you other than between you and Ronald other than having intercourse?

A. He told me to suck his penis one time.

Q. What day was that on?

A. August 1.

Q. Had he ever done that before?

A. No.

Q. Did he ever ask you to touch it?

A. Once.

Q. When was that?

A. When he was back in my room on the 28th of July.

The court allowed this testimony pursuant to the exception of G.S. sec. 8C-1, Rule 404(b). Because the testimony tended to illustrate defendant's opportunity to commit these acts, and a plan to molest his girlfriend's daughter in her *absence*, both physical

and constructive, we hold that the trial court committed no error in admitting this testimony as an exception included in G.S sec. 8C-1, Rule 404(b).

Next, defendant argues that the trial court erred by denying his motion to dismiss because the evidence was insufficient to establish each and every element of the offense charged. We cannot agree.

G.S. sec. 14-27.3(a) provides, in part, the following: "A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person: (1) By force and against the will of the other person; . . ." Defendant contends that the State failed to introduce evidence sufficient to establish the element of force. We note here that defendant has advanced two inconsistent theories of innocence. At trial he offered an alibi defense. He now argues that the requisite force necessary to sustain a conviction of second-degree rape was absent. Although he does not admit that he engaged in sexual intercourse with the prosecuting witness, an admission that sexual intercourse occurred necessarily precedes the "absence of force" argument. We will, however, analyze defendant's argument as presented.

The requisite force necessary to convict on a charge of rape may either be actual, physical force or constructive force in the form of fear, fright, or acts of coercion. *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975). Evidence of physical resistance is not necessary in our jurisdiction to show lack of consent by the victim. *State v. Hall*, 293 N.C. 559, 238 S.E. 2d 473 (1977). A threat of serious bodily harm which reasonably places fear in a person's mind is sufficient to demonstrate the use of force and the lack of consent. *State v. Burns*, 287 N.C. 102, 214 S.E. 2d 56, *cert. denied*, 423 U.S. 933 (1975).

[2] Defendant argues that the State failed to show either actual or constructive force and therefore his conviction cannot stand. He argues further that the reasoning of *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987), which infers constructive force in sexual offense cases involving a parent-child relationship, is inapplicable in the case *sub judice*. With this, we cannot agree.

In *Etheridge, supra*, where defendant was convicted of fifteen counts of various sex offenses committed against his minor son and daughter, the Court refused to apply the "general fear" theory of *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), which

held that "[a]lthough Brown's general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape." *Id.* at 409, 312 S.E. 2d at 476. (Emphasis in original.)

The *Etheridge* Court held the following, and specifically overruled *State v. Lester*, 70 N.C. App. 757, 321 S.E. 2d 166, *aff'd per curiam*, 313 N.C. 595, 330 S.E. 2d 205 (1984), a case which applied the *Alston* general fear rationale to overturn defendant's conviction of the second degree rape of his daughter.

> We now disavow *Lester's* misapplication of the *Alston* "general fear" rationale to a case of intrafamilial sexual abuse. As we noted in *State v. Strickland*, 318 N.C. 653, 351 S.E. 2d 281 (1987), the "general fear" theory should be applied only to those situations which are factually similar to *Alston. Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse.* The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.

Etheridge, supra, at 47, 352 S.E. 2d at 681. (Emphasis added.)

In the case *sub judice*, defendant was not a parent but was the live-in boyfriend of the prosecuting witness' mother. He began living with the family when the victim was only eight years old and he assumed parental responsibilities, often babysitting the victim and her sister while his girlfriend worked. The victim had no appreciable relationship with her biological father, so she "adopted" defendant as her father and sat on his lap and called him "daddy." She and defendant had both participated in this simulated parent-child relationship for four or five years when the acts of sexual intercourse between them began. The victim was thirteen years old when the act of intercourse for which defendant was convicted occurred. She had therefore known defendant as a father for one-third of her life when the incident of sexual intercourse was committed. This is ample time for the type of dominance and control stated in *Etheridge, supra*, to develop by a person

in defendant's position over a child in the prosecutrix's position. Constructive force could therefore be inferred from these circumstances.

We therefore find no reason to refuse to extend the *Etheridge* rationale to a situation of this nature merely because defendant was a parent neither in the biological nor the legal sense. His relationship with the victim encompassed nearly all the practical incidents of parenthood.

It is for the foregoing reasons that in the trial of defendant's case we find

No error.

Judges BECTON and ORR concur.

ANTON A. VREEDE, M.D., P.C., EMPLOYEES' PENSION PLAN, A/K/A EMPLOYEES' PENSION TRUST, PLAINTIFF/APPELLEE v. RICHARD G. KOCH AND CHRISTINE KOCH, DEFENDANTS/APPELLANTS

No. 8810SC871

(Filed 5 July 1989)

1. **Bills and Notes § 13— acceleration clause—demand for payment—not sufficient to invoke**

In an action to collect unpaid principal and interest on a note which defendants personally guaranteed, plaintiff's demand for payment in July of 1983 was not sufficient to invoke an acceleration clause and did not operate to start the statute of limitations period running.

2. **Limitation of Actions § 4.4— installment debt—limitations period—began running from date final performance due**

An action for the entire unpaid principal and interest due on a debt that defendants guaranteed was not barred under the three year statute of limitations of N.C.G.S. § 1-52(3) where the suit was filed within three years of the date upon which the final performance was due. There was no evidence that plaintiff treated defendants' failure to pay as a total repudiation of the contract so that future performance was still pos-

sible, and continued performance was possible under the terms of the contract.

3. **Usury § 3— corporate debt—guaranteed by individuals—defense of usury not available to guarantors**

The defense of usury was unavailable to defendants in an action in which plaintiffs sought to collect unpaid principal and interest on a debt defendants personally guaranteed. The defense of usury cannot be interposed by a corporation; RKC, which executed the note, is unquestionably a corporation and defendants as guarantors are attempting to claim a defense that is unavailable to the debtor corporation. N.C.G.S. § 24-9.

APPEAL by defendants from Judgment of *Judge D. M. McLelland* entered 25 March 1988 in WAKE County Superior Court. Heard in the Court of Appeals 15 March 1989.

Smith, Debnam, Hibbert & Pahl, by Vickie Winn Martin, for plaintiff appellee.

Randolph Riley for defendant appellants.

COZORT, Judge.

Plaintiff sued defendants to collect unpaid principal and interest due on a debt that defendants personally guaranteed. Defendants answered claiming in part that plaintiff's suit was barred by the statute of limitations. The trial court granted plaintiff's summary judgment motion. Defendants appeal. We affirm. The facts follow.

On 20 October 1978, plaintiff loaned $15,000 to R. K. Consulting Ltd. (RKC), a New York corporation. The note provided for RKC to make monthly installment payments of $165.81 from 1 December 1978 until all principal and interest were paid in full. The note also provided for a one time "balloon payment" of $5,000 due on 31 December 1979. The note expressly provided as follows: "Notwithstanding the foregoing [installment provisions], any unpaid balance, including any unpaid interest, shall be due and payable on the first day of October 1985." The note contained an acceleration clause which provided: "The whole of the principal sum or any part thereof, shall, forthwith or thereafter, at the option of the [plaintiff], become due and payable if default be made in any payment under this bond." Plaintiff received an initial payment

from RKC and a total of fifteen monthly installment payments thereafter. The unpaid principal balance was $14,448.61. Interest ran at 10.5% per year. Plaintiff received the last payment RKC made on 1 January 1980.

Richard G. Koch and Christine Koch, defendants herein, signed a written guarantee for RKC's indebtedness on 20 October 1978, the same date as the underlying note. Richard Koch executed the note as President of RKC. As additional security, plaintiff accepted a second mortgage on defendants' house.

In July 1983, plaintiff, acting through his New York counsel, contacted defendants, who were then living in North Carolina, by phone and demanded payment of RKC's debt. Defendant Richard Koch responded to plaintiff's counsel by letter in part as follows: "I regret to inform you that I am in no position at this time to make any payments on the note nor does it appear that I will be in the near future. As I told you, I left the bank in January to form Professional Plan Administrators on the premise that I could expect a substantial amount of business from a source in Raleigh. To date, that source has not been able to produce." On 16 June 1987, plaintiff sued defendants seeking to collect the unpaid principal and interest on RKC's debt. Defendants answered claiming in part that plaintiff's suit was barred by North Carolina's statute of limitations. The trial court granted plaintiff summary judgment on 25 March 1988. Defendants appeal.

The issues presented by this appeal are: (1) Did plaintiff accelerate and make defendants' debt due in July 1983, when plaintiff requested his attorney to contact defendants and demand payment? (2) If the due date was not accelerated in July 1983, when did default occur and the statute of limitations begin to run? (3) Was plaintiff's suit timely filed? On the first issue we hold that plaintiff did not accelerate the maturity of the note. On the second issue we hold that the statute of limitations did not begin to run until the date that final performance was due, 1 October 1985, because the parties' agreement was a continuing contract. Third, the action was timely filed. We shall address the acceleration issue first.

[1] Generally, an acceleration clause provides that the maturity date of the note may be accelerated and the entire contract declared due and payable immediately upon default by the obligor. Without such a clause the obligee would have to wait until each installment was due and then sue for each individual defaulted installment.

See generally 18 S. Williston, *Contracts* §§ 2027, 2027B at 791, 794-95 (3d ed. 1978) (hereinafter cited as *Williston*). Acceleration does not occur automatically upon default, even if the contract does not expressly provide for acceleration at the option of the obligee. *Williston*, § 2027 at 791; 11 Am. Jur. 2d *Bills & Notes* § 294 at 318 (1963). The rationale is that the acceleration clause is for the sole benefit and security of the creditor and he must elect to take advantage of it. *Id.*

The acceleration clause in the contract between the debtor, R. K. Consulting, Ltd., and plaintiff provided that, "[t]he whole of the principal sum or any part thereof, shall, forthwith and thereafter, *at the option of the obligee* [plaintiff above], become due and payable if default be made in any payment under this bond." This acceleration clause was clearly operative at plaintiff's option. "The exercise of the option to accelerate maturity of a note should be in a manner so clear and unequivocal as to leave no doubt as to the holder's intention." *Id.* § 296 at 321 (1963).

We find that plaintiff's demand for payment made by his New York counsel in July 1983 was not sufficient to invoke the acceleration clause and did not operate to start the limitations period running. " '[A] mere mental intention to declare the full amount due is not sufficient.' " *Shoenterprise Corp. v. Willingham*, 258 N.C. 36, 39-40, 127 S.E. 2d 767, 770 (1962) (citation omitted). In a letter written to plaintiff's counsel after demand was made, defendant Richard Koch wrote, "[Y]ou of course have the option of filing suit and bringing a judgment against me . . . ." While it is not entirely clear from the letter that defendants were threatened with a suit to collect RKC's debt, "a mere threat to commence suit followed by a subsequent statement that 'all are now due' is not sufficient either to set in motion the limitations statute or to establish an earlier maturity date for any purpose." *Wentland v. Stewart*, 236 Iowa 661, 666, 19 N.W. 2d 661, 663 (1945). Since we find that plaintiff did not accelerate the note, the statute of limitations did not begin running in July 1983. *See generally Williston*, § 2027 at 792.

[2] We now address the issue of when the statute of limitations began to run. The general rule regarding the running of the statute of limitations for installment contracts is that the limitations period begins running from the time each individual installment becomes due. *U.S. Leasing v. Everett*, 88 N.C. App. 418, 426, 363 S.E.

2d 665, 669, *disc. rev. denied*, 322 N.C. 329, 369 S.E. 2d 364 (1988). Plaintiff would be barred under such a rule from recovering installment payments due before 16 June 1984, three years before the date plaintiff filed suit, 16 June 1987, because the statute of limitations for a guaranty not under seal is three years from the breach triggering the obligation of the guarantors. *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 364, 344 S.E. 2d 302, 304 (1986); N.C. Gen. Stat. § 1-52(1) (1983); *Everett*, 88 N.C. App. at 425, 363 S.E. 2d at 669. We find in this case that the three-year statutory period did not begin to run until 1 October 1985, the date upon which defendant's final performance was due.

In the case of *In Re Foreclosure of Lake Townsend Aviation*, 87 N.C. App. 481, 361 S.E. 2d 409 (1987), *disc. rev. denied*, 321 N.C. 473, 364 S.E. 2d 922 (1988), this Court implicitly recognized an exception to the general rule that the statute of limitations begins to run on installment contracts at the time each individual installment becomes due. In that case the mortgagee, James Williams, loaned money to the mortgagor, Lake Townsend Aviation, Inc. (LTA). One of the notes provided that the mortgagor would repay a $12,000 loan with monthly installment payments to begin 1 July 1971 and to end on 1 June 1976. The mortgagor never made a single installment payment. *Id.* at 482, 361 S.E. 2d at 410. The property upon which the mortgagee held the deed of trust was later sold. After the mortgagee's demands for payment were not met, he began foreclosure proceedings on 11 March 1986. *Id.* at 483, 361 S.E. 2d at 410-11. This Court held that the ten-year statute of limitations in N.C. Gen. Stat. § 1-47(3) did not begin to run until 1 June 1976, the date the last installment payment was due. *Id.* at 486, 361 S.E. 2d at 412. The mortgagee's foreclosure was timely because it was filed on 11 March 1986, within ten years of 1 June 1976. *Id.*

Lake Townsend Aviation is not inconsistent with *Everett*, which held that the statutory clock begins to run when each individual installment becomes due, not when the last installment is due. The distinction between *Everett*, on the one hand, and *Lake Townsend Aviation* and this case, on the other hand, is that in *Everett* the injured party was unwilling to continue the contract once a material breach occurred. In *Everett*, the plaintiff-lessor, U.S. Leasing, signaled its intention not to continue the contract once the defendant law firm ceased its installment payments when plaintiff-lessor tried unsuccessfully to repossess the leased office furniture.

Everett, 88 N.C. App. at 425, 363 S.E. 2d at 668. Future performance of the contract in *Everett*, therefore, became impossible because the injured party had signaled his intention to treat the contract as repudiated. *See Williston*, §§ 2027B, 2028 at 796, 811 (1978). In short, in a case such as *Everett* the injured party cannot elect to continue that which cannot be continued. *See Williston*, § 2028 at 811.

In contrast, in this case future performance was possible because there is no evidence that plaintiff treated defendants' failure to pay as a total repudiation of the contract. First, RKC's failure to make the $5,000 balloon payment due on 31 December 1979 was not treated by plaintiffs as a repudiation, nor were RKC's repeated failures to make monthly installment payments from 1 January 1980. Second, there is no evidence that plaintiff foreclosed on the second mortgage held on defendant's residence. Finally, in the letter to plaintiff's lawyer, defendant Richard Koch did not completely rule out the possibility of future payment. He wrote that he could not pay "at *this time* [22 July 1983]" or "in the *near future*." (Emphasis added.) Plaintiff should not be penalized and barred from recovering the unpaid balance of the debt because plaintiff elected to wait to see whether defendants could fulfill their obligation in the future.

Moreover, continuing performance by defendants was possible in this case because the contract provided that notwithstanding the provisions regarding installment payments "any unpaid balance, including any unpaid interest, shall be due and payable on the first day of October 1985." Professor Williston explains the theory supporting the notion that the limitations period should not begin to run until the time that final performance was due:

> The right to receive in advance partial payments or performances was provided for the plaintiff's benefit. If he chooses to surrender this right and continue performance, and the other party is willing that this should be done, continuance should be allowed without prejudice. To compel the injured party, in order to protect his rights, to bring actions from time to time is undesirable.
>
> It has been held accordingly under such circumstances that a plaintiff may recover damages, based on the entire performance due from the defendant, at any time before the

Statute has run from the time when the last part of the performance was due.

Williston, § 2028 at 811-12.

Plaintiff's suit was filed on 13 June 1987, within three years of 1 October 1985, the date upon which final performance was due. Plaintiff's suit for the entire unpaid principal and interest due is, therefore, not barred under the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(3). It is unnecessary for us to reach the question whether New York's six-year or North Carolina's three-year limitations period applied because plaintiff's suit for the entire debt is allowable under either statute.

[3] Finally defendants argue that the contract between RKC and plaintiff was usurious and, therefore, void. Regardless of whether New York or North Carolina law applies to the contract, the defense of usury is unavailable to defendants because the defense of usury cannot be interposed by a corporation. N.C. Gen. Stat. § 24-9 (1986); N.Y. Gen. Oblig. Law § 5-521 (1989). RKC is unquestionably a corporation. As guarantors defendants are attempting to claim a defense that is unavailable to the debtor corporation. Since defendants guaranteed the corporation's debt, defendants are likewise prohibited from asserting the usury defense. *See Schneider v. Phelps*, 41 N.Y. 2d 238, 391 N.Y.S. 2d 568, 359 N.E. 2d 1361 (1977).

Summary judgment for plaintiff is

Affirmed.

Judges EAGLES and GREENE concur.

FRED H. POORE AND WIFE, MARIE C. POORE v. SWAN QUARTER FARMS, INC., A. H. VAN DORP AND MARY H. VAN DORP

No. 882SC856

(Filed 5 July 1989)

Quieting Title § 2.1— judicial admissions as to title of land

In plaintiffs' action to remove clouds upon the title to certain real property in which they claimed a one-half undivided interest in fee simple, the trial court erred in denying

defendants' motions for a directed verdict and judgment n.o.v. where the existence of a deed conveying the property from plaintiffs and individual defendants to the corporate defendant and the existence of a deed conveying the property from the corporate defendant to one of the individual defendants was alleged in the complaint and admitted in the answer; by virtue of these judicial admissions, record title was shown in defendants; and plaintiffs failed to offer any evidence proving defendants' title was defective.

APPEAL by defendants from *Griffin (William C.), Judge.* Judgment filed 12 May 1988 in Superior Court, HYDE County. Heard in the Court of Appeals 24 February 1989.

Wayland J. Sermons, Jr., P.A., by Wayland J. Sermons, Jr., for plaintiff-appellees.

Lee E. Knott, Jr. for defendant-appellants.

GREENE, Judge.

On 30 March 1983, plaintiffs instituted this action seeking to remove clouds upon the title to certain real property in which they claim a one-half undivided interest in fee simple. The trial court granted defendants' motion for summary judgment and plaintiffs appealed. This court reversed and the case was tried by a jury in Hyde County in May 1988. At trial, after plaintiffs had presented their evidence, defendants made a motion for a directed verdict which was denied by the trial court. The defendants offered no evidence and made a motion for a directed verdict at the close of all the evidence. The motion was denied and the case was submitted to the jury. The jury found in favor of the plaintiffs and the judge entered an order in accordance with the verdict which stated that plaintiffs are the owners of a one-half interest in the property. Defendants made a motion for a judgment notwithstanding the verdict which was denied. Defendants appealed.

By deed dated 2 June 1962, the real property in dispute was conveyed from A. B. Berry and Marriotte C. Berry to Fred H. Poore and Marie C. Poore, plaintiffs, and A. H. Van Dorp and Mary H. Van Dorp, defendants. Plaintiffs and individual defendants conveyed this property to defendant corporation, Swan Quarter Farms, Inc. by deed dated 16 June 1962 and recorded 3 July 1962. Defendant corporation conveyed this property to individual defendant

Mary H. Van Dorp by deed dated 25 March 1969 and recorded 1 April 1969. Plaintiffs allege in their complaint that the 16 June 1962 deed purporting to convey the property from the plaintiffs and individual defendants to the defendant corporation has no legal effect and fails to convey plaintiffs' interest because "the defendant corporation was never properly constituted to do business, was never a proper corporate entity, and therefore had no legal existence from the time of its purported incorporation until the suspension of its charter." Plaintiffs allege in the alternative that if the defendant corporation was a legal corporate entity at the time the 16 June 1962 deed was recorded, or thereafter became a legal corporate entity, the 25 March 1969 deed to defendant Mary H. Van Dorp was of no legal effect because "defendant corporation never obtained proper corporate authority approving said conveyances as required by the laws and statutes of the state of North Carolina."

Plaintiffs prayed the court to remove from the records the 16 June 1962 deed "as a cloud upon the plaintiffs' title to said land and that plaintiffs be declared the owners in fee simple of a one-half undivided interest in said land." They prayed in the alternative that if the 16 June 1962 conveyance was found valid, the court would remove the subsequent 25 March 1969 conveyance as a cloud upon the title of the defendant corporation and declare defendant corporation owner in fee simple of the property.

This appeal presents the following issue for review: did the trial court err in denying defendants' motions for a directed verdict and judgment notwithstanding the verdict where pleadings show record title in defendants and plaintiffs failed to offer any evidence proving defendants' title was defective.

The standard for appellate review of a trial court's decision on a motion for directed verdict is the same as the standard of review for a judgment notwithstanding the verdict (JNOV). *Colony Assoc. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637, 300 S.E. 2d 37, 39 (1983). A motion for a directed verdict or a JNOV must be granted if the evidence when taken in the light most favorable to the non-movant is insufficient as a matter of law to support a verdict in favor of the non-movant. *Harvey v. Norfolk Southern Ry. Co., Inc.*, 60 N.C. App. 554, 556, 299 S.E. 2d 664, 666 (1983). The evidence is sufficient to withstand either motion if there is

more than a scintilla of evidence supporting each element of the non-movant's case. *See Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E. 2d 32, 35 (1986).

Defendants allege that the court committed reversible error by denying their motions for directed verdict and their motion for JNOV "because the judicial admissions and the evidence prove a superior title from a common source in the defendants and because plaintiffs failed to offer any evidence by way of attack on the deeds alleged by them to constitute a cloud on the title claimed by them." We agree.

In an action to remove a cloud upon a title, also known as an action to quiet title, "the burden of proof is on the plaintiff to establish his title." *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E. 2d 244, 247 (1983). The plaintiff may meet his burden by traditional methods or by reliance on the Real Property Marketable Title Act. *Id.; see Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889) (sets out the traditional methods by which *prima facie* showing of title may be made, *e.g.*, adverse possession with color of title, adverse possession without color of title, common source of title). In attempting to meet this burden, the plaintiffs in this case relied on the common source of title doctrine, one of the traditional methods of proving title set out in *Mobley*, 104 N.C. at 115, 10 S.E. at 142-43. The common source of title doctrine, as stated in *Mobley*, provides that a plaintiff may make a *prima facie* showing of title by "connect[ing] the defendant with a common source of title and show[ing] in himself a better title from that source." *Mobley*, 104 N.C. at 115, 10 S.E. at 142-43.

At trial, plaintiffs introduced into evidence a deed dated 2 June 1962 conveying the real property in dispute from A. B. Berry and Marriotte C. Berry to Fred H. Poore and Marie C. Poore, plaintiffs, and A. H. Van Dorp and Mary H. Van Dorp, defendants. At trial, defendants admitted the authenticity of the deed and that defendants and plaintiffs are claiming the property through A. B. Berry. The 2 June 1962 deed establishes a common source of title, as both the plaintiffs and the defendants claim the real property directly from the same grantor. Annot. "Common Source of Title Doctrine," 5 A.L.R. 3d 387, Sec. 4[a] (1966). Therefore, the question remaining is whether plaintiffs presented more than a scintilla of evidence that they had "a better title from that source." *Mobley*, 104 N.C. at 115, 10 S.E. at 142-43.

Plaintiffs claim they met their burden by showing a deed from a common source of title granting plaintiffs one-half interest in the property and because defendants offered no evidence to refute this title. Plaintiffs rely on the following statement from *Brothers v. Howard*, 57 N.C. App. 689, 292 S.E. 2d 139 (1982), in support of their proposition:

> Plaintiffs have introduced their record title to the property. They are not bound to introduce defendants' chain of title in order to make out a case for the jury that they possess the better title. They do not have to show the invalidity of defendants' claim.

Id. at 691, 292 S.E. 2d at 141 (citations omitted).

Brothers is not applicable to the facts of this case because in that case, after establishing that the parties had a common source of title to the property in question, plaintiffs introduced into evidence a deed conveying the property from the common source to them. *Id.* In *Brothers*, defendants' chain of title from the common source was not introduced into evidence. *Id.* The court, in answering the question of which party had better title from the common source, concluded plaintiffs did because they introduced their record title to the property and there was no evidence of a better title in defendants. *Id.* It was in this context that the *Brothers* court held the plaintiffs were not bound to introduce defendants' chain of title or show the invalidity of defendants' claim in order to make out a case for the jury that they had better title. *Id.*

Plaintiffs allege the same facts are involved in this case because defendants did not introduce evidence of their chain of title from the common source and therefore the 2 June 1962 deed introduced by plaintiffs conclusively establishes that they have one-half ownership in the property and the defendants have one-half ownership. However, defendants' chain of title, although not introduced by defendants into evidence at trial, was established by judicial admissions. *See* 2 Brandis on North Carolina Evidence Sec. 177 at 36 (1988) (a judicial admission is an admission in the final pleadings defining the issues and on which the case goes to trial). The existence of the 16 June 1962 deed conveying the property from plaintiffs and individual defendants to Swan Quarter Farms, Inc. and the existence of the 25 March 1969 deed conveying the property from Swan Quarter Farms, Inc. to Mary H. Van Dorp was alleged

in the complaint and admitted in the answer and therefore has the effect of a judicial admission. *Harris v. Pembaur*, 84 N.C. App. 666, 670, 353 S.E. 2d 673, 677 (1987) ("[f]acts alleged in the complaint and admitted in the answer are conclusively established"). A judicial admission "is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence." 2 Brandis on North Carolina Evidence Sec. 166 at 2 (1988). Admissions are as effectual as if the facts admitted were found by a jury, and "such fact[s] [are] to be taken as true for all purposes connected with the trial. This is so even though the admissions [are] not introduced into evidence." *Wells v. Clayton*, 236 N.C. 102, 106, 72 S.E. 2d 16, 18-19 (1952). Therefore, as the pleadings show the defendant, Mary H. Van Dorp, was the holder of the record title to the property, she "must be assumed to be its true owner unless the contrary appears." *Wells*, 236 N.C. at 108, 72 S.E. 2d at 20.

Plaintiffs failed to offer any evidence of noncompliance with legal formalities in order to extinguish the alleged clouds on their title created by the deed from plaintiffs and individual defendants to defendant Swan Quarter Farms, Inc. and by the deed from defendant Swan Quarter Farms, Inc. to defendant Mary H. Van Dorp. *See Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 292, 338 S.E. 2d 817, 820 (1986) (issue raised by pleadings in present case is "whether non-compliance with legal formalities voids the two deeds"). Plaintiffs *must* show the invalidity of the adverse claim if "it is essential for the plaintiff[s] to overcome such claim in order to establish [their] own title." *Wells*, 236 N.C. at 108, 72 S.E. 2d at 20. Here, it was necessary for plaintiff to show the invalidity of defendants' record title in order to establish "better title" from the common source. As they offered no evidence in the way of an attack on defendants' deeds, we conclude defendants' motion for a directed verdict should have been granted.

Accordingly, we vacate the verdict in favor of the plaintiffs and remand for entry of a directed verdict in favor of the defendants.

Vacated and remanded.

Judges EAGLES and COZORT concur.

JOHN EDWARDS YELVERTON, EXECUTOR OF THE ESTATE OF PATRICIA BANDY YELVERTON, PLAINTIFF v. JOSEPH RONALD LAMM, AND PREMIER INDUSTRIAL CORPORATION, DEFENDANTS

No. 888SC866

(Filed 5 July 1989)

Master and Servant § 3— defendant as independent contractor rather than employee—sufficiency of evidence

Evidence that the individual defendant worked when, in his judgment, he felt he needed to, was paid solely on a commission basis, was not reimbursed for his expenses, and operated his business as he saw fit was sufficient to support a finding that the individual defendant was an independent contractor and was not an employee of the corporate defendant, and evidence that the corporate defendant procured insurance policies for the individual defendant at group rates did not create a genuine issue of material fact as to whether the individual defendant was the corporate defendant's employee or worked as an independent contractor.

APPEAL by plaintiff from Orders of *Judge Paul M. Wright* entered 2 May 1988 and 31 May 1988 in the WAYNE County Superior Court. Heard in the Court of Appeals 24 February 1989.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams and Anna Neal Currin; and Lane and Boyette, by William H. Boyette, Jr., for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Grady S. Patterson, Jr., for Premier Industrial Corporation, defendant appellee.

COZORT, Judge.

Plaintiff-executor brought an action to recover damages for the death of his intestate which was allegedly caused by defendant Lamm's negligent operation of his automobile while acting as agent and employee for defendant Premier Industrial Corporation (hereinafter "Premier"). The trial court granted Premier's motion for summary judgment and thereafter denied motions by which plaintiff sought to resolve the question of whether a release of defendant Lamm, pursuant to a contemplated settlement, would

also release Premier. We hold that defendant Lamm was an independent contractor and not an employee or agent of Premier as a matter of law. Therefore, all issues, procedural and otherwise, raised by plaintiff with respect to the effect of a release need not be herein addressed.

Plaintiff's intestate, Patricia Yelverton, died as a result of injuries sustained when an automobile owned and driven by defendant Lamm crossed the center line and struck the automobile driven by Ms. Yelverton. Plaintiff brought suit against Lamm and Lamm's alleged employer, Premier. According to plaintiff's Amended Complaint, Premier was vicariously liable for Lamm's alleged negligence, and, in addition, was independently liable for its own acts of negligence, namely: (1) allowing Lamm to operate a motor vehicle when it knew or should have known of Lamm's health problems; (2) entrusting Lamm with a vehicle when it knew or should have known that Lamm was taking a prescribed tranquilizer which could render a person impaired while operating a vehicle; and (3) negligent supervision.

Defendant Lamm answered, denying negligence and relying on the defense of sudden incapacitation due to a cerebral vascular thrombosis, or stroke. Premier, in its answer, alleged that Lamm was not its agent, servant, or employee, but was employed solely as an independent contractor.

The issue of Premier's liability came on for hearing pursuant to Premier's motion for summary judgment, which was granted by the trial court on 2 May 1988. Notice of appeal was filed 9 May 1988. Thereafter, at the 30 May 1988 Civil Session of Wayne County Superior Court, the following came on for hearing before the trial court: plaintiff's Petition for Approval of Settlement, Motion for Summary Judgment, and Motion to Amend Complaint to Add a Count Seeking Declaratory Judgment. By the petition and motions, plaintiff sought approval of a settlement between plaintiff and defendant Lamm conditioned on a ruling by the trial court that a release of defendant Lamm pursuant to settlement would not, as a matter of law, further release Premier from liability. The trial court denied the motions, ruling in open court that it had no jurisdiction. Plaintiff gave notice of appeal in open court from that ruling. The trial court then entered its written order, which combined plaintiff's appeal from the 2 May 1988 Order of Summary Judgment for Premier with plaintiff's appeal from the 31 May 1988 ruling.

Plaintiff first assigns error to the 2 May 1988 Order of Summary Judgment in favor of Premier.

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 therefore one of the parties 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 ruling on a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant. *Peterson v. Winn-Dixie of Raleigh, Inc.*, 14 N.C. App. 29, 187 S.E. 2d 487 (1972). Plaintiff contends that summary judgment was error because there existed a genuine issue of material fact as to whether Lamm's status was that of employee or independent contractor. We do not agree.

An independent contractor, as distinguished from an employee, is "one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Cooper v. Asheville-Citizen Times Publishing Co.*, 258 N.C. 578, 587, 129 S.E. 2d 107, 113 (1963) (quoting *McCraw v. Calvine Mills, Inc.*, 233 N.C. 524, 526, 64 S.E. 2d 658, 660 (1951)). The test in determining a worker's status is whether the employer has the right to control the worker with respect to the manner or methods of doing the work or the agents to be employed in it, or has the right merely to require certain results according to the parties' contract. *Id.; Bass v. Fremont Wholesale Corp.*, 212 N.C. 252, 193 S.E. 1 (1937). If the requisite right to control is found to exist, then an employer is held liable, albeit vicariously, for the negligent acts of its agents, servants, or employees which cause injuries to third persons; but an employer is not liable to third parties for the negligence of an independent contractor. *See id.*

Whether one is an independent contractor or an employee is a mixed question of law and fact. The factual issue is: What were the terms of the parties' agreement? Whether that agreement establishes a master-servant or employer-independent contractor relationship is ordinarily a question of law. *Beach v. McLean*, 219 N.C. 521, 525, 14 S.E. 2d 515, 518 (1941). As this Court has stated:

> [W]here the facts are undisputed or the evidence is susceptible of only a single inference and a single conclusion, it is a question of law for the court whether one is an employee or an

> independent contractor, but it is only where a single inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the court.

Little v. Poole, 11 N.C. App. 597, 600, 182 S.E. 2d 206, 208 (1971) (quoting 41 Am. Jur. 2d, *Independent Contractors* § 53).

In the case below, the evidence before the trial court was that, since 1963, Lamm had represented Premier as a sales agent who took orders from customers for a certain line of Premier's products. The relationship between Lamm and Premier was governed by a written contract entitled "Independent Agent Agreement" wherein Lamm, as "Independent Agent," was given a nonexclusive right to sell Premier's products in a designated territory. The Agreement provided that all orders were subject to acceptance by Premier and were not binding upon Premier until so accepted.

Pursuant to the contract, Lamm was paid by commission only and did not receive a commission for any order which was rejected by Premier. All expenses incurred by Lamm in his business as sales agent for Premier were to be borne by Lamm. Lamm was allowed to work on a self-determined schedule, retain assistants at his own expense, and render services to or sell the products of other companies not in competition with Premier. The Agreement could be terminated by either party "with or without cause." In addition, the Agreement contained the following provision:

> Independent Agent and the Company recognize that the Company has no right to control Independent Agent in the manner in which he or she performs his or her obligations under this Agreement and that Independent Agent is free to perform such obligations in the manner he or she sees fit.

Uncontradicted testimony given by affidavit and depositions confirms that the parties conducted their relationship as delineated in the Independent Agent Agreement. Plaintiff does not appear to dispute testimony that Lamm worked when, in his judgment, he felt he needed to, was paid solely on a commission basis, was not reimbursed for his expenses, and operated his business as he saw fit. Premier's sales manager stated in his affidavit that Lamm was "among the most independent of independent contractors taking orders for Premier" that he "did not want, or accept, any guidance or suggestions as to how he should operate his business";

and that he "was not required to, and generally did not, follow any suggestions I made but instead adopted his own methods, and he was perfectly entitled to do this." Affiant also stated that from time to time he had gone with Lamm to make calls and on one occasion had seen in the trunk of Lamm's car "hundreds of pairs" of men's socks which Lamm said he was selling to customers, as he was entitled to do under the terms of the parties' Agreement.

In addition, Premier deducted no income taxes from Lamm's commissions and made no deductions or payments for social security for Lamm. Premier filed Forms 1099 rather than W-2 forms with the Internal Revenue Service; payments to Lamm were designated "nonemployee compensation." Finally, the evidence showed that Lamm participated in two group insurance plans—life and disability, and hospitalization—procured by Premier from Prudential Insurance Company. Lamm's premium payments were deducted from his commission checks.

It is this latter piece of evidence, Premier's procurement of insurance policies for Lamm at group rates, which plaintiff contends creates a genuine issue of material fact as to whether defendant Lamm was Premier's employee or worked as an independent contractor. We disagree.

It is true that "a mere contractual declaration is not determinative of the relationship and the rights of the parties." *Watkins v. Murrow*, 253 N.C. 652, 657, 118 S.E. 2d 5, 8 (1961). But this is simply to say that the court will not ignore the true relationship existing between the parties, and that an employer who exercises control in spite of a contractual declaration to the contrary may be held vicariously liable. *See id.* The undisputed evidence in the case before us, however, establishes more than a "mere contractual declaration"; it clearly shows that the parties intended Lamm's status to be that of an independent contractor and in fact conducted their dealings according to those express intentions. While we believe that Premier's procurement of insurance coverage for Lamm is a factor that may be considered in determining Lamm's status as an employee or independent contractor, such evidence, standing alone, is insufficient to change the nature of the relationship between the parties as established by contract and course of dealing. Given the evidence to the contrary, we cannot accept plaintiff's contention that Premier's use of Prudential's insurance forms, on which Lamm's name appears in the appropriate space for "Name

of Employee," constituted an admission that Lamm was in fact Premier's employee.

Although the issue of Premier's direct or independent negligence was not addressed by plaintiff in his argument to this Court, we further hold that, in the absence of an employer-employee relationship or any other relationship which might create duties of care the breach of which would give rise to liability in tort as alleged in plaintiff's complaint, plaintiff's evidence was insufficient to withstand Premier's Rule 56 motion on those claims as well.

We therefore affirm the trial court's ruling that Premier was entitled to judgment in its favor as a matter of law. In so holding, we need not address plaintiff's remaining assignment of error.

Affirmed.

Judges EAGLES and GREENE concur.

SYMONS CORPORATION, PLAINTIFF v. INSURANCE COMPANY OF NORTH AMERICA, DEFENDANT

No. 8814SC1201

(Filed 5 July 1989)

1. **Principal and Surety § 10— labor and material payment bond— leased equipment not in actual use—beginning of notice period**

The time for giving notice of a claim under a labor and material payment bond for the cost of equipment leased to a subcontractor began to run on the date the equipment was last available for use rather than on the date the subcontractor quit the construction project. The equipment was available for use on the project until it was returned from the construction site to plaintiff in June 1987, and the notice period did not begin to run until that date, although the subcontractor abandoned the project on 4 February 1987 and the equipment was not actually used after that date.

2. **Interest § 2— contract interest rate—summary judgment**

The trial court properly entered summary judgment awarding plaintiff interest at one and one-half percent per month

in an action to recover under a labor and material payment bond for the lease and sale of equipment to a subcontractor where plaintiff alleged and submitted affidavits of its employees that the contract interest rate was one and one-half percent per month, and defendant made general denials in its answer to plaintiff's allegations but failed to present any evidence to contradict such an interest rate or to challenge the affiants' credibility.

APPEAL by defendant from *Hight (Henry W., Jr.), Judge.* Judgment entered 2 July 1988 in Superior Court, DURHAM County. Heard in the Court of Appeals 11 May 1989.

Raleigh-Durham Meridian, Ltd. (R/D Meridian) hired Monitor Construction Co. (Monitor) as a general contractor to build the Pickett Suite Hotel in Durham, North Carolina. Monitor executed a Labor and Material Payment Bond with defendant as surety, Monitor as principal and R/D Meridian as obligee. Monitor also subcontracted out a portion of the construction work to West Coast Forming Co. (Forming). Forming in turn contracted with plaintiff to supply, through sale and lease, various equipment to be used on the Pickett Suite Hotel project. On 4 February 1987 Forming allegedly abandoned the project. Plaintiff's equipment remained on the construction site. On 5 June 1987 plaintiff filed a notice of claim with Monitor seeking payment for the equipment sold and leased to Forming. On or about 10 June 1987 and after learning of plaintiff's notice of claim Monitor shipped the leased equipment back to plaintiff. On 4 January 1988, plaintiff filed a complaint against defendant as surety on the labor and material bond seeking payment and interest for the equipment plaintiff provided to the construction project. On 2 July 1988 the trial court denied defendant's motion for summary judgment but granted a similar motion filed by plaintiff. The court also awarded plaintiff $41,066.07, the amount allegedly owed for the equipment plus interest. Defendant appeals the summary judgment and award and the denial of its own summary judgment motion.

Howard, From, Stallings & Hutson, P.A., by Leigh L. Leonard, for plaintiff-appellee.

Harlow, Reilly, Derr & Stark, by William L. London, for defendant-appellant.

LEWIS, Judge.

Defendant brings forward three assignments of error. First, the trial court erred in denying its motion for summary judgment. Second, the trial court erroneously granted summary judgment to plaintiff. Third, the court erroneously awarded interest at a rate of one and one-half percent a month from 31 May 1987 until the amount is paid.

Initially we note that plaintiff argues that defendant has abandoned its assignments of error by failing to comply with certain Rules of Appellate Procedure. Plaintiff contends that defendant did not identify the record page on which each exception appeared as required under App. R. 10(c) and 28(b)(5).

Appellate rules are mandatory and failure to comply subjects an appeal to dismissal. *Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E. 2d 566 (1984). This Court, however, may suspend or vary the requirements of the rules to prevent "manifest injustice." App. R. 2. Although defendant in this case did not technically follow the rules by failing to list specific page numbers where exceptions could be found in the record and did not set out these exceptions in the brief, we do not find these omissions so egregious as to invoke dismissal. We further note that this Court has previously held that where, as here, the issue is whether summary judgment was proper, exceptions or assignments of error were not required. *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 326 S.E. 2d 316 (1985).

[1] Defendant contends in his brief that plaintiff is precluded from asserting its claim because it failed to file timely notice. Paragraph 3(a) of the Labor and Material Payment Bond executed by Monitor provides in pertinent part:

> 3. No suit or action shall be commenced hereunder by any claimant:
>
> (a) Unless claimant, other than one having a direct contract with the Principal, shall have given written notice to any two of the following: the Principal, the Owner, or the Surety above named, within ninety (90) days after such claimant . . . furnished the last of the materials for which said claim is made.

In this case, there is little or no distinction between the private contractor bond and public bonds, governed by G.S. 44A-14 *et seq.*

and we may construe the two together in considering the rights of laborers and materialmen. *See Equipment Co. v. Smith*, 292 N.C. 592, 234 S.E. 2d 599 (1977); *see generally*, G.S. 44A-27. Contractor payment bonds were designed for the protection of laborers and materialmen and are to be construed liberally for their benefit. *Id.; RGK, Inc. v. Guaranty Co.*, 292 N.C. 668, 235 S.E. 2d 234 (1977); *Owsley v. Henderson*, 228 N.C. 224, 45 S.E. 2d 263 (1947).

Liability for the cost of rental equipment is not restricted to times when the equipment is actually in use. *Owsley, supra.* Equipment is considered "on the job" if it is on hand and available for use. *Id.* "[I]t is [not] reasonable to say that the contractor may refuse to pay the rental for 'mechanical labor equipment' when not in actual use. It must be 'on the job' ready at hand when needed and the contractor must pay for the time it thus serves his purpose." *Id.* at 228, 45 S.E. 2d at 266. In this case, although defendant claims plaintiff's equipment was not actually used after February 1987, it is undisputed that the equipment was on the job site and available for use by the contractor. It is further apparent from the record that while the rental equipment may have been unused after February 1987, defendant did not return the equipment to plaintiff until June 1987 when the notice of claim was filed. We find on these facts and the case law that since liability extends to those times when equipment is available but unused, the last day the equipment was available for use is the last day the equipment was furnished for the purpose of the notice requirement.

This same conclusion was reached in *United States v. Scotland Concrete Company*, 294 F. Supp. 1299 (E.D.N.C. 1968), a case construing the notice requirement under the Miller Act, 40 U.S.C. Section 270(b). The notice provision contains almost identical language to our state provision under G.S. 44A-27 so we consider their interpretation. *See Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980), *overruled on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E. 2d 385 (1988). *Scotland*, a case from the Eastern District of North Carolina, involved the use of rental equipment and the question as to when the notice period began to run. The Court there held that the time for giving notice began from the date the equipment was "last *available* for use." *Id.* at 1302. (Emphasis added.) The equipment here was undisputedly *available* for use on the project until defendant returned it in June 1987; thus the notice period did not begin to run until that time. We are aware of other federal

cases which, confronted with facts similar to those now before us, have held that under the Miller Act the notice period began to run when the subcontractor quit the construction project. *See United States v. Kelly*, 327 F. 2d 590 (9th Cir. 1964); *U.S. For Use of S.G.B. Universal Builders v. Fid. & Deposit*, 475 F. Supp. 672 (E.D.N.Y. 1979). We believe *Scotland* to be the better reasoned case. Defendant's argument is without merit.

[2] Defendant next contends that the court erred in awarding plaintiff interest at a rate of one and one-half percent per month from 31 May 1987 until paid. Defendant argues that there was no evidence, except for affidavits of plaintiff's employees, that one and one-half percent was the agreed upon contract rate and that absent such proof, the court should have awarded the legal rate of eight percent. *See* G.S. 25-4.

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 judgment as a matter of law." G.S. 1A-1, Rule 56(c). A party moving for summary judgment has the burden of establishing no genuine issue of material fact. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Here, plaintiff alleged in its complaint that the contract interest rate was one and one-half percent per month. Defendant made general denials to plaintiff's allegations in its answer. In support of its summary judgment motion plaintiff submitted affidavits of its employees that the interest rate was one and one-half percent.

G.S. 1A-1, Rule 56(e) provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

While we note that in some cases courts have been slow to grant summary judgment when the movant presents only his own affidavits, which are unchallenged, a non-movant is still required to point out the existence of a triable issue. *Kidd, supra.* Our Supreme Court has held that:

> [S]ummary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate.

Id. at 370, 222 S.E. 2d at 410. In this case defendant has failed to put forth any evidence to contradict plaintiff's assertions regarding the interest rate or to challenge the affiants' credibility. Further, the record reveals that defendant has failed to show the existence of any genuine issue of material fact. It is undisputed that Monitor's subcontractor, Forming, was covered under the Labor and Material Payment Bond and that it contracted with plaintiff for the sale and lease of equipment to be used on the project covered by the bond. It is also undisputed that an outstanding balance was due to plaintiff under the contract between Forming and plaintiff and that as a "claimant" under Paragraph 1 of the bond, plaintiff could look to defendant, as surety, for payment. Thus, the court having correctly determined that plaintiff timely filed its notice of claim, the summary judgment and award was proper in this case.

For the foregoing reasons, the lower court's judgment and order is

Affirmed.

Judges BECTON and PHILLIPS concur.

WILLIAM D. McNAULL, JR. v. JAMES NEAL McNAULL AND WIFE, FAYE W. McNAULL, JENNIE McNAULL SIMS, HELEN McNAULL STONE & HUSBAND, WILLIAM H. STONE, JR., & NCNB NATIONAL BANK OF NORTH CAROLINA (FORMERLY NORTH CAROLINA NATIONAL BANK), TRUSTEE UNDER THE WILL OF JEAN MAXWELL McNAULL

No. 8826SC949

(Filed 5 July 1989)

1. **Wills § 28.6— construction of word "either"—construction favoring complete testacy**

Where testatrix's will devised property in trust for her sister with the remainder in fee to her two brothers in equal shares and further provided that if "either" of her brothers died prior to termination of the trust leaving issue surviving him, such issue shall thereafter represent, per stirpes, such deceased brother, the word "either" is interpreted to mean "one or both" so that the will provides for the distribution of trust assets when both brothers predeceased the trust beneficiary and both were survived by issue, and nieces and nephews therefore take per stirpes under the will rather than per capita under the laws of intestate succession.

2. **Wills § 73.3— costs not awarded—no "common fund"—misapprehension of the law by trial court**

In an action contesting the distribution of property pursuant to a will, the trial court acted under a misapprehension of the law in stating that as a matter of law the court did not have the authority to award costs because there was no "common fund." N.C.G.S. § 6-21(2).

APPEAL by plaintiff and defendants McNaull and Sims from *Snepp, Judge.* Order entered 27 May 1988 in Superior Court, MECKLENBURG County. Appeal by defendants Stone and NCNB from *Snepp, Judge.* Orders entered 18 and 20 July 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 March 1989.

Plaintiff and defendants McNaull and Sims contest the distribution of property held in trust by NCNB as trustee. In her will Jean Maxwell McNaull left the bulk of her estate in trust for her sister, Mary McNaull. The trust was to terminate on Mary's death with the remaining principal and interest to go to Thaddeus McNaull and William D. McNaull, Sr., the testator's brothers. The

will provided, *inter alia*, that upon the death of the principal beneficiary,

> my Trustee shall . . . distribute and deliver the then balance principal and income . . . share and share alike, in fee simple and free from trust, to my brothers, [Thaddeus and William], and my Residuary Trust shall thereupon terminate. If either of my brothers dies prior to the termination of my Residuary Trust leaving issue surviving him, such issue shall thereafter represent, per stirpes, such deceased brother both as to income and principal distributions, but if either of my said brothers dies prior to the termination of my Residuary Trust without leaving issue surviving, the trust or share of such deceased brother shall fall into and become a part of the trusts or shares into which said trust or share would have fallen if such deceased brother had not existed.

Both brothers predeceased Mary. Thaddeus was survived by one child (defendant Helen McNaull Stone) and William was survived by three children (William D. McNaull, Jr., James Neal McNaull and Jennie McNaull Sims).

NCNB, as trustee, distributed the trust assets on a per stirpes basis; one-half (1/2) to Helen McNaull Stone and one-sixth (1/6) each to plaintiff, James McNaull, and Jennie McNaull Sims. Plaintiff sued, claiming that each of the four distributees was entitled to one-fourth (1/4) of the trust assets. Plaintiff asserted that the will did not provide for the distribution of assets in the event both brothers died survived by issue and therefore the assets should pass to the nieces and nephews of testator according to the laws of intestate succession.

The trial court granted summary judgment in favor of Stone and NCNB, upholding the original distribution. Stone and NCNB petitioned for costs, including reasonable attorney's fees, under G.S. 6-21. In ruling on the petitions, the trial court held that if the court had the authority to award costs in its discretion, it would do so but that, as a matter of law, costs could not be awarded in this case. Plaintiff and defendants McNaull and Sims appeal from the entry of summary judgment in favor of NCNB and Stone. NCNB and Stone appeal from the orders denying their petitions for costs.

William D. McNaull, Jr., pro se.

James Neal McNaull, pro se.

Jennie McNaull Sims, pro se.

Walker, Ray, Simpson, Warren, Blackmon, Younce, Dowda and White, by Perry N. Walker and Juanita H. Blackmon, for defendant-appellees and defendant-appellants Stone.

Smith, Helms, Mulliss and Moore, by Catherine E. Thompson and Irving M. Brenner, for defendant-appellee and defendant-appellant NCNB.

EAGLES, Judge.

Three issues are presented in these appeals. The first two relate to the trial court's rulings on the parties' motions for summary judgment. The third issue involves the question of allowing costs, including reasonable attorney's fees, under G.S. 6-21. We hold that the trial court was correct in granting summary judgment in favor of NCNB and Stone, upholding the original distribution, and therefore affirm that order of the trial court. However, we disagree with the trial court's determination of the costs issue and therefore reverse that order and remand the case for further proceedings.

I. Summary Judgment

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 judgment as a matter of law." G.S. 1A-1, Rule 56(c). The record discloses that the essential facts in this case are not in dispute. Here, the parties dispute the interpretation of the will's language. This is a question of law. *See Wachovia v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246 (1956). Therefore, the trial court's conclusion that there was no genuine issue of material fact was correct and summary judgment was appropriate. *Accord, Wachovia v. Livengood*, 306 N.C. 550, 294 S.E. 2d 319 (1982). Plaintiff and defendants James McNaull and Jennie Sims contend summary judgment should have been granted in their favor. The issue before us is whether the will of Jean Maxwell McNaull provides for the distribution of trust assets when both brothers predeceased the primary trust beneficiary

and both brothers were survived by issue. We hold that it does and summary judgment for NCNB and Stone was correct.

The primary object in interpreting a will is to give effect to the intention of the testator. *Misenheimer v. Misenheimer*, 312 N.C. 692, 325 S.E. 2d 195, *reh'g denied*, 313 N.C. 515, 334 S.E. 2d 778 (1985). This intention will be given effect unless it violates some rule of law or is contrary to public policy. *Clark v. Connor*, 253 N.C. 515, 117 S.E. 2d 465 (1960). The testator's intent is to be gathered from a consideration of the will from its four corners. Where the intent of the testator is clearly expressed in plain and unambiguous language, there is no need to resort to the general rules of construction for an interpretation; rather, the will is to be given effect according to its obvious intent. *Price v. Price*, 11 N.C. App. 657, 660, 182 S.E. 2d 217, 219 (1971).

[1] It is argued by plaintiff and defendants McNaull and Sims that the word "either" in Jean McNaull's will should be defined as "one or the other of two alternatives," not "both" or "the one and the other." Plaintiff and defendants McNaull and Sims rely heavily on the case of *Dew v. Barnes*, 54 N.C. 149 (1854), and cases from other states where the word "either" has been defined. In *Dew* the court stated that "[t]he word 'either' taken by itself signifies 'one or another of any number.' " *Id.* at 151. However, as our Supreme Court has stated,

> [t]wo wills of exactly the same wording may be differently construed by reason of the different circumstances surrounding the testator at the time he made the will. . . . At best, therefore, the courts can make use of previously decided cases only as meager aid in the ascertainment of the testator's intent.

Morris v. Morris, 246 N.C. 314, 316, 98 S.E. 2d 298, 300 (1957).

Our reading of the will draws us to the conclusion that in this particular clause testator used the word "either" to mean "one or both." It is clear that testator's general scheme of disposition was to bequeath to her brothers equally the assets that remained in the trust on the death of the primary beneficiary. Testator used the terms "share and share alike" when referring to the gift to her brothers. However, when testator referred to the possible gift over to her nieces and nephews she used the term "per stirpes." "When a . . . testator uses technical words or phrases to express his intent in conveying or disposing of property, he

will be deemed to have used such words or phrases in their well-known legal or technical sense." *Whitley v. Arenson*, 219 N.C. 121, 127, 12 S.E. 2d 906, 910 (1941). The term "per stirpes" means by roots or stocks and denotes a method of dividing an estate where a class of distributees take the share to which their deceased would have been entitled. *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949). It is clear from the language used by testator that her nieces and nephews were to take, if at all, by representation, not per capita.

Even if the language used by testator is seen to be ambiguous, construction of the will under established rules of construction requires a per stirpital distribution. When construing a will to determine testator's intent, courts are guided by the presumption that "one who makes a will is of disposing mind and memory and does not intend to die intestate as to any part of his property." *Ferguson v. Ferguson*, 225 N.C. 375, 377, 35 S.E. 2d 231, 232 (1945). When a will is capable of two interpretations, one resulting in complete testacy and another in partial testacy, the law favors complete testacy. *Wing v. Wachovia*, 301 N.C. 456, 463, 272 S.E. 2d 90, 95 (1980). Interpretation of the word "either" to mean "both" would result in complete testacy and supports the per stirpital distribution.

II. Costs

[2] Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

. . .

(2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder;

. . .

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow. . . .

G.S. 6-21. Defendants NCNB and Stone appeal the court's ruling that as a matter of law costs were not available to them in this action. Plaintiff and defendants McNaull and Sims argue that the

trial court was correct in denying costs because there is no "common fund" from which the costs could be paid. We hold that the trial court was acting under a misapprehension of the law when it denied costs *as a matter of law.*

Plaintiff and defendants McNaull and Sims argue that in all cases where costs have been allowed under G.S. 6-21(2), a "common fund" has been available. For that reason, plaintiff and defendants McNaull and Sims argue that costs are not recoverable in this case. We disagree with their argument. We find no requirement in the statute that there be a "common fund." When the language of a statute is clear and unambiguous, courts must give the statute its plain and definite meaning without superimposing provisions and limitations not contained in it. *See Evans v. Roberson,* 314 N.C. 315, 317, 333 S.E. 2d 228, 229 (1985). We also note that the statute does not require the trial court to tax costs in any given case but allows the court to do so in its discretion. Here, the trial court stated in its order denying costs that "it would, in its discretion, award attorneys' fees to NCNB." Further, the sole reason stated for denying fees to Stone was that "as a matter of law . . . [the court] does not have authority to award attorney fees . . . because there is no 'common fund.' "

Because we find the trial court was acting under a misapprehension of the law in denying costs under G.S. 6-21(2) as a matter of law, we reverse these orders denying costs and remand for further proceedings on the issue of costs.

Affirmed in part; reversed in part and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

THE FEDERAL LAND BANK OF COLUMBIA, A CORPORATION v. MICHAEL B. LACKEY AND WIFE, DEBRA C. LACKEY, AND EARL DAVID GREER AND WIFE, BETTY GREER

No. 8825SC933

(Filed 5 July 1989)

Mortgages and Deeds of Trust § 26.1— notice of foreclosure sale— attempt at personal service required

Defendant was not properly served with notice of a foreclosure hearing pursuant to N.C.G.S. § 45-21.16 and for that reason was not liable for any deficiency arising from the foreclosure sale where the trustee admitted in his deposition that he made no effort to serve defendant personally even though he had an address for defendant in his files; at the time of the foreclosure hearing, the trustee knew defendant had been served by posting only; the trustee did not attempt to mail the notice to defendant; and N.C.G.S. § 45-21.16 allows service upon a party by posting the notice only in those instances where the party's name and address are not reasonably ascertainable.

APPEAL by defendant Michael B. Lackey from *Lamm, Judge.* Judgment entered 28 March 1988 in Superior Court, CALDWELL County. Heard in the Court of Appeals 10 April 1989.

On 24 March 1983 defendants Michael B. Lackey (Lackey) and Debra C. Lackey, then husband and wife, negotiated a deed of trust with plaintiff covering approximately 90.5 acres of real property to secure a loan of $44,000 and any further future advances not to exceed a total amount of $100,000. On 13 May 1983 defendants Earl David Greer and Betty Greer assumed the Lackeys' loan. However, both Mr. and Mrs. Lackey were not released and remained personally liable for the debt.

Defendants Greer defaulted on the loan. Upon default the trustee filed a foreclosure action. Each of the defendants was personally served with the notice of the foreclosure hearing except Lackey. A deputy sheriff purported to serve Lackey by posting a copy of the notice on the property. The trustee sold the property on 22 April 1986 and the sale was confirmed on 9 May 1986. Plaintiff brought this action seeking a deficiency judgment against defendants following the foreclosure.

Lackey answered and claimed that he had not been properly served with the notice of the foreclosure hearing and therefore was not liable for any deficiency. From the trial court's order granting plaintiff's motion for summary judgment, defendant Lackey appeals.

Faison & Brown, by Mark C. Kirby, John F. Logan, and Aida Fayar Doss, for plaintiff-appellee.

Wilson and Palmer, by W. C. Palmer and David S. Lackey, for defendant-appellant.

EAGLES, Judge.

The issue presented is whether the trial court erred in granting summary judgment in favor of plaintiff in this deficiency judgment action. Defendant argues that he was not properly served with notice of the foreclosure hearing pursuant to G.S. 45-21.16 and for that reason is not liable for any deficiency arising from the foreclosure sale. We agree and reverse. Summary judgment is properly granted when there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In appropriate cases summary judgment may be granted in favor of the non-movant. G.S. 1A-1, Rule 56(c); *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979). Lackey argues that whether the deputy's efforts in personally serving him with the notice of foreclosure hearing were reasonable and diligent constitutes a material issue of fact. He also contends that plaintiff is not entitled to judgment as a matter of law.

G.S. 45-21.16(b)(2) mandates that notice of a foreclosure hearing must be given to "[a]ny person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor." Though defendants Greer assumed the Lackeys' loan, defendant Michael Lackey remained personally liable for the debt. Accordingly, he was entitled to notice of any foreclosure hearing. The statute further provides that if Lackey failed to receive notice of the foreclosure hearing he "shall not be liable for any deficiency remaining after the sale." G.S. 45-21.16(b)(2).

G.S. 45-21.16(a) mandates the manner and method for serving notice of the foreclosure hearing. In part it provides

> [t]he notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested; provided, that in those instances in which service by publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of the hearing; provided further, if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of the hearing, which 20-day period may run concurrently with any other effort to effect service.

Plaintiff argues that the deputy sheriff made a reasonable and diligent effort to personally serve Lackey, was unable to locate him within Caldwell County, and properly posted the notice on the property. The deputy's affidavit stated that his efforts included "attempting to reach the party by telephone, to locate the work site of the [party], to locate a place of residence." Plaintiff argues further that since the deputy sheriff diligently attempted to personally serve Lackey with the notice and was unsuccessful, posting the notice on the property complies with the statute.

In his deposition the trustee admitted that he made no effort to personally serve Lackey even though he had an address for Lackey in his files. At the time of the foreclosure hearing the trustee knew Lackey had been served by posting only. Additionally, the trustee did not attempt to mail the notice to Lackey.

Lackey argues that G.S. 45-21.16 allows posting notice on the property only when service by publication would be permitted under Rule 4 of the North Carolina Rules of Civil Procedure. In addition, Lackey contends that posting of the notice was guaranteed not to give him actual notice of the hearing and violated the due process requirements of the Fourteenth Amendment.

Initially, we note that the General Assembly passed G.S. 45-21.16 in response to *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975). *Turner* held that the foreclosure procedures then in force did not comply with the minimum due process requirements of the Fourteenth Amendment and were unconstitutional. The foreclosure statutes in effect then required notice be given to per-

sons with an interest in the property only by posting at the courthouse door and by newspaper publication; no personal notice or foreclosure hearing was required. G.S. 45-21.16 was enacted to meet the minimum due process requirements of personal notice and a hearing. *In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 266 S.E. 2d 686, *disc. rev. denied*, 301 N.C. 90 (1980).

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 77 L.Ed. 2d 180, 103 S.Ct. 2706 (1983), the Supreme Court addressed the issue of whether notice by publication and posting provided a mortgagee with sufficient notice to apprise it of the impending sale of the mortgaged property. There Adams brought suit to quiet title to property he purchased at a tax sale. The Mennonite Board of Missions held a mortgage on the property. In opposing Adams' motion for summary judgment the mortgagee argued that it had not received "constitutionally adequate notice of the pending tax sale." *Id.* at 795, 77 L.Ed. 2d at 185, 103 S.Ct. at 2709. The Supreme Court agreed that the mortgagee could not be deprived of its property interest without "notice reasonably calculated to apprise him of a pending tax sale." *Id.* at 798, 77 L.Ed. 2d at 187, 103 S.Ct. at 2711. The Court further held that

> [w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane [v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950)].

Id.

The evidence presented here shows that by the posting of the property Lackey received only constructive notice of the foreclosure hearing. However, constructive notice alone is not sufficient to comply with minimum due process requirements. "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, . . ., if its name and address are reasonably ascertainable." *Id.* at 800, 77 L.Ed. 2d at 188, 103 S.Ct. at 2712. [Emphasis in original.]

We interpret G.S. 45-21.16 to allow service upon a party by posting the notice only in those instances where the party's name

and address are not reasonably ascertainable. Otherwise, posting will suffice only when "supplemented" by notice mailed to the party's last known address or by personal service. The facts here are undisputed and demonstrate that Lackey's name and address were, in fact, reasonably ascertainable. The trustee testified he had Lackey's name and address in his files. The trustee did not supplement the constructive notice with notice "reasonably calculated to apprise him" of the foreclosure hearing.

We hold that plaintiff's failure to supplement constructive notice with notice by mail fails to comply with the minimum due process requirements of the Fourteenth Amendment. Accordingly, we reverse the trial court's grant of summary judgment in favor of plaintiff and direct entry of summary judgment in favor of defendant Lackey.

Reversed and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

DONALD HARRELSON, EMPLOYEE, PLAINTIFF v. TATE SOLES D/B/A TATE'S AUTO SALES, EMPLOYER; NON-INSURER, DEFENDANT

No. 8810IC1358

(Filed 5 July 1989)

Corporations § 1.1; Master and Servant § 93— workers' compensation—individual as alter ego of corporation—remand for findings

A workers' compensation proceeding against Tate Soles d/b/a Tate's Auto Sales is remanded for findings as to whether Tate Soles is in fact the alter ego of the corporate employer, Tate's Auto Sales, Inc., so that he could properly be named as the liable employer.

APPEAL by defendant from the North Carolina Industrial Commission. Opinion and Award filed 18 July 1988. Heard in the Court of Appeals 17 May 1989.

Plaintiff sustained injuries in a truck accident on 16 September 1985. To protect his interests plaintiff filed two actions, a civil

action on 7 November 1985 in Columbus County captioned Harrelson v. Tate's Auto Sales, Inc., and a Workers' Compensation claim which is the subject of this appeal, Harrelson v. Tate Soles d/b/a Tate's Auto Sales. In the civil action, it is alleged that the employer is the corporation Tate's Auto Sales, Inc.; in this action the individual, Tate Soles, is named as defendant.

On 14 December 1987, Deputy Commissioner Lawrence B. Shuping, Jr. filed an opinion and award in favor of plaintiff. Findings of fact and conclusions of law made by the Deputy Commissioner which are pertinent to this appeal include:

FINDINGS OF FACT

1. Plaintiff is a 41-year old married male who did not have an antecedent history of any type of visual or other occular [sic] difficulties prior to the injury by accident giving rise hereto and has nonetheless since been able to return to work driving a truck where he presently earns $400.00 per week.

2. At the time in question defendant-Tate Soles d/b/a Tate's Auto Sales was in the business of hauling cars to and from various locations along the eastern seaboard and was subject to and bound by the provisions of the North Carolina Workers' Compensation Act because he regularly employed four or more persons, including drivers for each of his seven car carriers as well as someone in both his shop and office.

3. In April of 1985 plaintiff was hired as a full-time driver by defendant-Tate Soles who not only provided and maintained the vehicle that plaintiff subsequently drove, but paid for the necessary fuel and overnight expenses. In addition to driving the car carrier furnished by Mr. Soles, plaintiff was responsible for loading and unloading the same, which he was trained to do after being hired. As a driver plaintiff earned an average of $450.00 weekly based on the number of loads hauled and a percentage of the hauling price established between Mr. Soles and the particular customer whose load he was hauling at the time; however, there were no deductions taken from plaintiff's earnings for either Social Security or Federal or State income taxes; but rather, he remained responsible therefor. Although plaintiff was free to select his own route; defendant-Tate Soles not only told him when and where to pick up and deliver each load of cars; but made all the necessary ar-

rangements therefor with the customers involved such that Mr. Soles retained actual control with respect to the manner and method that plaintiff drove his assigned car carrier; thus he was an employee of defendant-Tate Soles and not an independent contractor when injured.

4. At approximately 12:00 midnight on the September 16, 1985 date in question plaintiff and two other of defendant-employer's drivers were on Interstate Highway 95 North in South Carolina returning in their separate trucks with loads of cars picked up in Orlando, Florida when plaintiff lost control of his vehicle striking one of the adjacent concrete pillars supporting a highway overpass thereby resulting in the otherwise compensable injury by accident . . . .

5. As a result of the injury by accident giving rise hereto plaintiff was totally incapacitated from work for a period of eight months following the same injury.

* * * *

9. Plaintiff's involved injuries were not the proximate result of his being under the influence of any controlled substance listed in the N.C. Controlled Substances Act G.S. 90-86, et seq, or his own willful intent to injure himself or another.

CONCLUSIONS OF LAW

1. At the time in question defendant-employer Tate Soles d/b/a Tate's Auto Sales regularly employed four or more persons, the plaintiff among them, and was thus subject to and bound by the provisions of the North Carolina Workers' Compensation Act. (G.S. 97-2(1)(2)(3), *Hayes v. Board of Trustees* 224 N.C. 11, 29 S.E. 2d 137 (1944), *Alford v. Victory Cab Company* 30 N.C. App. 657, 228 S.E. 2d 43 (1976))

2. On September 16, 1985 plaintiff sustained an injury by accident which arose out of and in the course of his employment by defendant-Tate Soles d/b/a Tate's Auto Sales and (which injury) was not the proximate result of his being under the influence of any controlled substance listed in the N.C. Controlled Substance Act, G.S. 90-86, et seq, or his own willful intent to injure himself or another. (G.S. 97-2(6), G.S. 97-12)

3. As a result of the injury by accident giving rise hereto plaintiff was temporarily totally disabled from work for a period

of eight months following the date of his injury thereby entitling him to compensation at a rate of $280.00 per week during the same period because he earned a sufficient average weekly wage so as to entitle him to the maximum weekly compensation benefits then statutorily applicable. (G.S. 97-29)

The opinion and award of the Deputy Commissioner was appealed to the Full Commission. In its opinion and award filed 18 July 1988 the Full Commission affirmed the opinion of the Deputy Commissioner, Ernest C. Pearson, Chairman, dissenting. From the opinion and award of the Commission, defendant appeals.

Giacomo Ghisalberti for plaintiff appellee.

Ralph G. Jorgensen for defendant appellant.

ARNOLD, Judge.

In his first assignment of error defendant contends that the Deputy Commissioner erred in determining as a fact and concluding as a matter of law that the plaintiff was employed by defendant Tate Soles d/b/a Tate's Auto Sales, a sole proprietorship, and not by Tate's Auto Sales, Inc., a North Carolina corporation.

Chairman Pearson frames the issue in his dissent. Summarizing, Chairman Pearson objects to the identification of the defendant as "Tate Soles d.b.a. Tate's Auto Sales, a sole proprietorship" with the necessary result that the judgment is against Tate Soles, an individual. Chairman Pearson concludes:

> I find that plaintiff-appellee has failed to name his true employer as defendant, and as such, this Commission is without jurisdiction in the matter. The exercise of jurisdiction in this case results in a *de facto* piercing of the corporate veil of Tate Auto Sales, Inc. without proper pleadings and facts, and with total disregard for the importance of the corporate form.

"[T]o maintain a proceeding under the Workmen's Compensation Act the claimant must have been an employee of the alleged employer at the time of his injury. . . ." *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E. 2d 257, 261 (1976). The question of whether an employee-employer relationship exists between the named parties is jurisdictional, therefore it is reviewable on appeal. *Hicks v. Guilford County*, 267 N.C. 364, 365, 148 S.E. 2d 240, 241 (1966). A corporation is a type of employer under the terms of N.C.G.S. § 97-2(3), and a corporation is a legal entity "distinct from its in-

dividual members or stockholders." 9 Am. Jur. Proof of Facts 57 *Alter Ego of Corporation* § 1. Before the enactment of N.C.G.S. § 55-3.1, at least three stockholders were required to form a corporation. 3 N.C. Index 3d, Corporations § 1.1. By the enactment of N.C.G.S. § 55-3.1 "acquisition of the entire capital stock of a corporation by one person does not affect the corporate entity. . . ." *Id.* However, when

> the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.

Henderson v. Security Mortgage and Finance Co., 273 N.C. 253, 260, 160 S.E. 2d 39, 44 (1968). The corporate veil may be pierced "to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E. 2d 326, 330 (1985). *See* 9 Am. Jur. Proof of Facts 57 *Alter Ego of Corporation* § 4.

In his opinion and award, the Deputy Commissioner concludes, without any findings, that Tate Soles d/b/a Tate's Auto Sales was Harrelson's employer and not Tate's Auto Sales, Inc. We remand for findings on the question whether Tate Soles is in fact the alter ego of Tate's Auto Sales, Inc., and thus is properly named as the liable employer in this action.

Three elements support an attack on separate corporate identity under the instrumentality rule:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn at 455, 329 S.E. 2d at 330 (citation omitted). In his civil complaint defendant alleges that Tate's Auto Sales Inc. was subject to the Workers' Compensation Act, "but it did not keep in effect a policy of insurance against compensation liability" as required by N.C.G.S. § 97-93. If proved, the fact that Tate's Auto Sales Inc. violated its statutory duty to maintain Workers' Compensation Insurance for its employees would go to the second of the three elements to be proved to support an attack on the separate corporate entity.

Factors dispositive as to whether a court should pierce the corporate veil include: inadequate capitalization; noncompliance with corporate formalities; complete domination and control of the corporation so that it has no independent identity, "non-payment of dividends, insolvency of the debtor corporation, siphoning of funds by the dominant shareholder, non-functioning of other officers and directors, absence of corporate records." *Id.* at 455, 458, 329 S.E. 2d 330-31, 332. Each case is "treated as *sui generis* with the burden on the plaintiff to establish the existence of factors that would justify disregarding the corporate entity." *Id.* at 459, 329 S.E. 2d at 333.

We have reviewed defendant's two remaining assignments of error and find that they are without merit.

The opinion and award of the Industrial Commission is remanded for further findings as required by this opinion.

Remanded.

Chief Judge HEDRICK and Judge WELLS concur.

EDWARD C. HUDSON, JR., D/B/A HUDSON'S CLEANERS, PLAINTIFF v. JIM SIMMONS PONTIAC-BUICK, INC., FIRST DEFENDANT, JIM SIMMONS, SECOND DEFENDANT, SOUTHERN STATES PONTIAC, BUICK, GMC TRUCK, INC., THIRD DEFENDANT

No. 8819DC885

(Filed 5 July 1989)

1. **Principal and Agent § 5— apparent authority of service manager to sign contract—sufficiency of evidence**

Evidence was sufficient to support the trial court's finding that defendant's acting service manager had apparent authority to sign a contract between the parties which required plaintiff to supply and clean uniforms where the evidence tended to show that the individual defendant personally named the acting service manager; service department employees in need of a uniform were to request one from the acting service manager; and defendant knew it was customary to have written contracts for the rental of uniforms.

2. **Corporations § 13— sale of corporation—failure to provide for corporate debt to plaintiff—president and sole shareholder personally liable**

The individual defendant, president and sole shareholder of the corporate defendant, received substantial compensation from the sale of the corporation's assets without informing plaintiff of the sale or making provision for the corporate defendant's contractual debt to plaintiff for uniforms and cleaning services; therefore, pursuant to N.C.G.S. § 55-32(e) and (l), the individual defendant could be held personally liable to the extent of plaintiff's damages under the contract.

APPEAL by defendants Jim Simmons Pontiac-Buick, Inc. and Jim Simmons, individually, from *Montgomery, Frank M., Judge.* Judgment entered 20 April 1988 in District Court, ROWAN County. Heard in the Court of Appeals 15 March 1989.

This is a civil action for breach of a written contract for the rental of uniforms in which plaintiff seeks liquidated damages and the value of property not returned to him pursuant to the agreement.

Crowell, Porter, Blanton & Blanton, by Theodore A. Blanton and J. Andrew Porter, for plaintiff-appellee.

Williams, Boger, Grady, Davis & Tuttle, P.A., by M. Slate Tuttle, Jr., for defendant-appellants.

JOHNSON, Judge.

In response to plaintiff's complaint, defendants Jim Simmons Pontiac-Buick, Inc. (Simmons, Inc.) and Jim Simmons, individually, answered, denying liability, and alleging, *inter alia*, that the contract at issue was not signed by a person authorized to act on behalf of Simmons, Inc. Defendant Southern States Pontiac, Buick, GMC Truck, Inc. (Southern States), which acquired control over Simmons, Inc.'s operations after execution of the agreement in question, answered, denying liability on the grounds that it was not a party to the contract, had no knowledge of the contract, and did not assume it.

After a nonjury trial of this matter, the trial judge dismissed the action as to defendant Southern States and entered judgment against defendants Simmons, Inc. and Jim Simmons, individually, in the amount of $6,806.85 liquidated damages and $842.92 damages for the value of property not returned to plaintiff. Simmons, Inc. and Jim Simmons gave notice of appeal in open court.

The trial judge made the following findings of fact: Plaintiff is a North Carolina resident doing business as Hudson's Cleaners. Defendant Jim Simmons, president of defendant Simmons, Inc., has been in the automobile business for thirty-eight years and has knowledge of how rental uniform suppliers operate. On 22 October 1985, plaintiff entered into a written contract with defendant Simmons, Inc., signed by Simmons, Inc.'s acting service manager, Gary Willis, to provide uniforms and cleaning services. Plaintiff began performing in the fall of 1985. Simmons, Inc. made payments to plaintiff until the early spring of 1986. The assets of Simmons, Inc. were transferred by written agreement to Southern States on 4 June 1985. According to Jim Simmons' testimony, control and operation of the automobile dealership was turned over to Southern States on 21 December 1985.

The trial court found that Southern States accepted and paid for plaintiff's product and services during the spring and summer of 1986, but that Southern States was not presented with a copy

of the contract entered into between plaintiff and defendant Simmons, Inc. In September of 1986, Southern States refused to receive further services from plaintiff, and also, upon demand by plaintiff, refused to return numerous rental uniforms in its possession.

Based on these findings of fact, the court concluded that defendant Simmons, Inc.'s acting service manager had apparent authority to enter into the contract with plaintiff; that defendant Southern States is not bound by the contract because, although it accepted and paid for services under the agreement, it did not adopt or ratify the contract because it did not have the opportunity to review it; and that based on defendant Jim Simmons' actions with regard to the sale of the assets of Simmons, Inc. to Southern States, Simmons is personally liable to plaintiff.

By this appeal, defendant presents various questions for review. Defendant basically contends that (1) the contract was improperly introduced at trial; (2) the trial court erred in denying defendants' motion for involuntary dismissal because plaintiff had no right to relief under the written agreement; (3) evidence was insufficient to prove that defendant Simmons, Inc.'s acting service manager signed the contract; (4) evidence was insufficient to prove that Simmons, Inc.'s acting service manager had authority to sign the contract; and (5) errors of law appear on the face of the judgment.

We observe initially that the record on appeal in a civil action must contain "so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned." N.C. Rule of App. Pro. 9(a)(1)(v). These rules are mandatory. Further, it is the duty of the appellant to see that the record on appeal is properly made up and transmitted to the appellate court. *Tucker v. Telephone Co.*, 50 N.C. App. 112, 272 S.E. 2d 911 (1980); *West v. Reddick, Inc.*, 48 N.C. App. 135, 268 S.E. 2d 235 (1980), *rev'd on other grounds*, 302 N.C. 201, 274 S.E. 2d 221 (1981).

The first three arguments raised by defendant, stated above, relate to the written contract entered into by the parties which is plaintiff's only basis of recovery. Unfortunately, however, defendant has not seen fit to include in the record on appeal the written agreement at issue. Absent this necessary writing, we are unable to give adequate review to the first three arguments raised by defendant and therefore we must dismiss defendant's assignments of error which are based on these arguments.

[1] We turn now to defendant's contention that his acting service manager, Gary Willis, had no authority, either actual or apparent, to sign the written agreement. It is well established that a principal is bound by the acts of his agent acting within the scope of his authority, either express or apparent. *Morpul Research Corp. v. Hardware Co.*, 263 N.C. 718, 140 S.E. 2d 416 (1965). The scope of an agent's apparent authority is determined not by the agent's own representations, but by the manifestations of authority which the principal accords to him. Restatement (Second) of Agency sec. 27 (1958). Before applying these standards to the instant case, we note that in a nonjury trial such as this, the court's findings of fact are conclusive on appeal if there is evidence to support them, even though there may be evidence to support contrary findings. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

Defendant has chosen to present the trial testimony in the record on appeal by a summary of testimony in mostly narrative form as allowed by N.C. Rule of App. Pro. 9(c)(1). Our review of the narrative indicates adequate evidence to support the court's finding that Gary Willis had apparent authority to sign the agreement in question. Defendant Simmons personally named Gary Willis to be acting service manager; service department employees in need of a uniform were to request one from Gary Willis; and defendant Simmons knew it was customary to have written contracts for the rental of uniforms. This assignment of error is overruled.

[2] By his last Assignment of Error, defendant Simmons argues, *inter alia*, that the trial court was not justified in disregarding the corporate entity merely on findings that he was the sole shareholder of Simmons, Inc.; was officer and director of the corporation; and received substantial monetary compensation as a result of the sale of the corporation's assets to Southern States. We find no error.

G.S. sec. 55-32, entitled "Liability of directors in certain cases," provides in subsection (e) as follows:

> The directors of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known or reasonably ascertainable debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed,

to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

G.S. sec. 55-32(l) further states that, "any creditor damaged by a violation of this section may in one action obtain judgment against the corporation and enforce the liability of one or more of the directors to the corporation imposed by this section to the extent necessary to satisfy his claim."

These provisions are applicable to, and govern, the instant case. Defendant Simmons, president and sole shareholder of Simmons, Inc., received substantial compensation from the sale of the corporation's assets without informing plaintiff of the sale or making provision for the contractual debt to plaintiff. Therefore, pursuant to G.S. secs. 55-32(e) and (l), defendant Simmons may be held personally liable to the extent of the plaintiff's damages under the contract.

For all the foregoing reasons we find defendants Simmons and Simmons, Inc. received a fair trial free of prejudicial error.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

KEVIN RAY HOOPER AND GRACE ANN HOOPER v. C.M. STEEL, INC., AND WILLIAM TROY SMITH

No. 8826SC1234

(Filed 5 July 1989)

1. Appeal and Error § 6.2— summary judgment for fewer than all parties—judgment not final but appealable

In an action to recover for injuries sustained in an automobile accident, entry of summary judgment for fewer than all defendants was not a final judgment but was nevertheless appealable, since plaintiffs had a substantial right to have the liability of both defendants determined in the same trial in order to avoid the possibility of inconsistent verdicts.

2. Automobiles and Other Vehicles § 102— employee driving home from work—employee not acting in course of employment—employer not liable for injuries resulting from employee's negligence

There was no genuine issue of fact as to whether defendant employee was acting within the course of his employment at the time of the accident giving rise to this action where the evidence showed that defendant had completed his work for defendant employer and was giving a ride home to a fellow employee at the time of the accident; defendant's job did not require him to drive employees home and he received no compensation for doing so; and defendant employer did not order or request defendant employee to drive his co-worker home.

APPEAL by plaintiffs from *Snepp (Frank W.), Judge.* Judgment entered 19 May 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 May 1989.

Plaintiffs filed this action to recover damages for personal injuries and loss of consortium resulting from an automobile accident. Plaintiff Kevin Hooper was involved in a collision with a vehicle owned and operated by defendant William Troy Smith. At the time of the accident, defendant Smith was an employee of defendant C.M. Steel, Inc.

Plaintiffs appeal from the entry of summary judgment for defendant C.M. Steel, Inc.

Olive-Monnett, P.A. & Associates, by Jon McCachren, for plaintiff-appellants.

Collie and Wood, by George C. Collie and James Wood, III, for defendant-appellee.

PARKER, Judge.

[1] As a preliminary matter, we note that the entry of summary judgment for fewer than all the defendants is not a final judgment and may not be appealed in the absence of certification pursuant to Rule 54(b) of the N.C. Rules of Civil Procedure unless the entry of summary judgment affected a substantial right. G.S. 1-277, 7A-27(d); *Bernick v. Jurden*, 306 N.C. 435, 438-39, 293 S.E. 2d 405, 408 (1982). In the present case, plaintiffs have a substantial right to have the liability of both defendants determined in the same

trial in order to avoid the possibility of inconsistent verdicts. *See Bernick v. Jurden, supra.* Therefore, plaintiffs' appeal is not premature.

Plaintiffs contend that the trial court erred in entering summary judgment for defendant C.M. Steel, Inc. We disagree and affirm the summary judgment.

[2] Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), N.C. Rules Civ. Proc.; *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). In the present case it is undisputed that defendant William Troy Smith (hereinafter "Troy Smith") was the owner and driver of the truck which collided with plaintiffs' car, that Troy Smith was at that time employed by defendant C.M. Steel, Inc. (hereinafter "defendant"), and that Troy Smith was leaving his place of employment when the collision occurred. An employer is liable for injuries caused by his employee's negligent operation of the employee's vehicle when the vehicle is being used in the pursuit of the employer's business. *Ellis v. Service Co., Inc.*, 240 N.C. 453, 456, 82 S.E. 2d 419, 420-21 (1954). An employee is not engaged in the prosecution of his employer's business, however, while using his own vehicle for transportation to or from the place of employment. *Id.* (citing *Wilkie v. Stancil*, 196 N.C. 794, 147 S.E. 296 (1929) and *Rogers v. Garage*, 236 N.C. 525, 73 S.E. 2d 318 (1952)).

In the present case, plaintiffs contend that there is a genuine issue of fact as to whether Troy Smith was acting within the course of his employment at the time of the accident. The evidence shows that Smith was giving a ride home to a fellow employee and the accident occurred as Smith was turning into the parking lot of a Hardee's restaurant. Smith and the other employee, Robert Carr, had been working overtime and they left work at about 9:00 p.m. Earlier in the day, Smith had told Carr that Carr needed to work overtime to complete a job. Carr, who did not own a vehicle, told Smith that he would need a ride home, and Smith agreed to drive him home.

We first note that, if Smith was acting within the course of his employment while driving Carr home, his decision to stop at a restaurant would not be a deviation of sufficient magnitude to preclude defendant's liability as a matter of law. *See Hinson v. Chemical Corp.*, 230 N.C. 476, 480, 53 S.E. 2d 448, 452 (1949). It

is clear, however, that an employee is not acting within the scope of his employment merely because he is transporting fellow employees to or from work. *See Peters v. Tea Co.*, 194 N.C. 172, 138 S.E. 595 (1927). In cases where the employee is involved in an accident while returning from work, the employer's liability depends upon whether the employee's work had been completed at the time of the accident. 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 707 (1980). If there is uncertainty as to whether the employee had completed his work, the question is an issue of fact for the jury. *See* Annotation, *Employer's Liability for Negligence of Employee in Driving His Own Car*, 52 A.L.R. 2d 287, 311-12 (1957). An employee who provides transportation for coworkers may be acting within the scope of his employment if he does so at the request of the employer. *Caldwell v. A.R.B., Inc.*, 176 Cal. App. 3d 1028, 1037-38, 222 Cal. Rptr. 494, 500 (1986). *See also Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E. 2d 485 (1966).

In the present case, uncontradicted evidence establishes that Smith and Carr had completed their work and were driving home at the time of the accident. We find no merit in plaintiffs' contentions that Smith's act of driving Carr home was part of his employment. Although Smith's brother was the president and a part-owner of the business, Smith had no ownership interest and worked for an hourly wage. Both Smith and Carr had clocked out prior to leaving for home. Smith's job did not require him to drive employees home and he received no compensation for doing so. Because Carr did not own a vehicle, he usually obtained a ride from his father, who apparently worked nearby. When Carr worked overtime, which was not uncommon, he regularly relied on other employees for transportation and he had obtained rides from Smith on previous occasions.

Under these facts, we find no evidence from which a jury could infer that Troy Smith was acting within the course of his employment at the time of the accident. Plaintiffs contend that defendant benefited from Smith's actions because Carr stayed late to finish an overdue job and he would not have stayed if Smith did not offer to drive him home. These circumstances are insufficient to warrant a departure from the general rule that an employee is not engaged in the employer's business while driving to or from work. Any transportation obtained by an employee provides the employer with the benefit of the employee's presence. An employee leaving work does not enter into the course of his employment

merely because his presence is more important on a particular day or because he works overtime at the employer's request.

The evidence in this case establishes that Troy Smith had completed his work for defendant at the time of the accident and his purpose in driving at the time was to provide transportation for himself and Carr. The evidence also establishes that providing transportation for other employees was not one of Smith's job responsibilities and his employer did not order nor request him to drive Carr home. Under these circumstances, defendant is not liable for Smith's negligent driving as a matter of law. *See Caldwell v. A.R.B., Inc., supra.* Therefore, the trial court's entry of summary judgment for defendant C.M. Steel, Inc. is affirmed.

Affirmed.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. ANTHONY D. SUITT

No. 889SC823

(Filed 5 July 1989)

Receiving Stolen Goods § 5.2— possession of stolen vehicle—insufficient evidence of guilty knowledge

The State's evidence in a prosecution for possession of a stolen vehicle in violation of N.C.G.S. § 20-106 was sufficient to show that defendant had possession of the stolen car where it tended to show that defendant was driving the car when it was stopped by an officer some fifty minutes after it was stolen. However, the State failed to provide substantial evidence that defendant had knowledge or should have had knowledge that the car was stolen where it failed to contradict defendant's evidence that a co-defendant was driving the car when he picked up defendant at his girlfriend's house, that defendant began driving the car because the co-defendant did not have a valid license, and that defendant did not run from the car when it was stopped by an officer.

APPEAL by defendant from *Hight (Henry W., Jr.), Judge.* Judgment entered 2 March 1988 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 23 February 1989.

Defendant was charged with possession of a stolen vehicle under G.S. 20-106 and possession of a stolen firearm. After a jury trial, defendant was found not guilty of possession of a stolen firearm, but was convicted of possession of a stolen vehicle and a sentence was imposed. Defendant appeals.

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

Willie S. Darby for defendant-appellant.

ORR, Judge.

The State's evidence tended to show that on 2 January 1988, Reverend David McCallum's yellow and gold 1981 Oldsmobile was stolen from his Durham, North Carolina townhouse around 12:00 a.m. While warming up his car, Reverend McCallum went back inside his apartment. Shortly thereafter, he returned to the driveway and found his car was gone. He immediately called the Durham Police Department.

At about 12:45 a.m., a Granville County Deputy Sheriff noticed a car traveling slowly and followed it. The car pulled off the road into a driveway and turned its lights off. Deputy Hicks went down the road, turned around in a driveway, went back down the road and parked his car. Approximately three minutes later, the car pulled out of the driveway and passed the deputy's parked car. The deputy called in the license plate number at about 12:50 a.m. and discovered the car was stolen. He then stopped the car.

Defendant claims he was at his girlfriend's house at about midnight on 2 January 1988 when the co-defendant, Walter Williams, a neighbor of McCallum's, went by the girlfriend's house and picked up defendant. Williams and defendant decided to go to a party in Creedmoor. Williams drove the car until they pulled in the driveway and turned out the lights. Then Williams asked defendant to drive the car because he did not have a driver's license. Defendant began driving whereupon the car was stopped by the deputy sheriff.

Defendant argues the trial court erred in denying his motion for nonsuit at the close of the State's evidence, or in the alternative,

at the close of all the evidence. We agree. When a motion for nonsuit is made, the court must determine if there is substantial evidence to show the crime as charged may have taken place and that the defendant could have been the perpetrator. *State v. Price*, 280 N.C. 154, 157, 184 S.E. 2d 866, 868 (1971). The court is to consider the State's evidence in the light most favorable to the State. Uncontradicted evidence which favors the State is considered true. Where the State's evidence is contradicted by the defendant both sides are considered. *Id.*

The defendant was charged under G.S. 20-106. The statute reads:

> Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer shall be punished as a Class I felon.

The State must provide substantial evidence for the two elements of the charge against defendant. First, the State must provide substantial evidence that defendant had possession of the stolen car. Second, the State must provide substantial evidence that defendant knew or had reason to know the car was stolen. *State v. Lofton*, 66 N.C. App. 79, 83, 310 S.E. 2d 633, 635-36 (1984).

I.

The State argues the uncontested fact that defendant was driving the car was sufficient evidence to go to the jury on the possession element. To support this proposition, the State cites *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972), and *Lofton*, 66 N.C. App. 79, 310 S.E. 2d 633.

In *Harvey*, the defendant claimed the State failed to show he was in possession of the marijuana because the narcotics were in his storage room and not on his person. The North Carolina Supreme Court disagreed. The Court held, "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Harvey*, 281 N.C. at 12, 187 S.E. 2d at 714.

In *Lofton*, the defendant was charged with possession of stolen property. This Court reviewed several factors in trying to determine if the defendant was in possession of a stolen vehicle. This Court cited the fact the defendant had a key to the trunk of the vehicle where many of his belongings were stored. The defendant also had personal belongings in the glove compartment. Yet, the Court stated, "Although defendant was never seen actually driving the vehicle, the evidence showed that defendant, whether alone or in conjunction with his brother, had control and possession of the vehicle." *Lofton*, 66 N.C. App. at 83, 310 S.E. 2d at 636.

In the case *sub judice*, defendant did have control over the vehicle as set out in *Harvey* since he was driving it. The inference in *Lofton* is that the defendant had possession over the car *even though* he was not seen driving the car. We believe the State's uncontested evidence in the case *sub judice* was sufficient to go to the jury on the element of possession.

II.

The other element of the charge of possession of a stolen vehicle under G.S. 20-106 is whether or not the defendant had knowledge or should have had knowledge that the car was stolen. We do not believe the State met its burden of providing substantial evidence of defendant's knowledge to carry this issue to the jury.

The State's evidence on this element is that defendant's girlfriend knew the car that Williams was driving was not his own. Further, defendant was a passenger and later the driver of the car. Yet, this Court has held that the State has not provided substantial evidence of knowledge when they simply show a defendant was riding in a stolen car. *State v. Franklin and State v. Hughes*, 16 N.C. App. 537, 540-41, 192 S.E. 2d 626, 628 (1972). Without further evidence in the record, the defendant could easily have been a hitchhiker or any other friend simply riding in the car. *Id.*

In *Lofton*, the defendant fled the parking lot where the stolen car was located when a sheriff's deputy arrived. This Court held the defendant's attempt to flee the sheriff was the most damaging factor in proving the defendant knew the vehicle was stolen. *Lofton*, 66 N.C. App. at 84, 310 S.E. 2d at 636.

In the case at bar, defendant claims he began the ride as a passenger in the car. Later, Williams asked defendant to drive the car because Williams did not have a valid driver's license.

The State does not contest this evidence. Further, defendant did not run from the car when the deputy sheriff pulled them over. There is in fact no evidence to impose defendant with knowledge that the car was stolen or evidence from which defendant could even have concluded that it was stolen.

We believe the State has failed to provide substantial evidence that defendant had knowledge or should have had knowledge that the car was stolen. Therefore, the trial court erred in denying defendant's motion to dismiss. Defendant's conviction and the judgment thereon are vacated.

Vacated.

Judges BECTON and PARKER concur.

CLINE SELLERS, EMPLOYEE, PLAINTIFF v. THE LITHIUM CORPORATION, EMPLOYER, DEFENDANT AND NORTHWESTERN NATIONAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8810IC1297

(Filed 5 July 1989)

1. **Master and Servant § 68— workers' compensation—hearing loss—failure to show causal connection between employment and injury**

Plaintiff failed to prove that noise in his work environment was the proximate cause of his hearing loss after 1974 where plaintiff was not in constant and immediate proximity to noise after that time and wore protective headgear, and medical evidence indicated that the hearing loss after 1974 might have resulted from a combination of aging, the incidence of hereditary hearing loss, or the blood-thinning medication plaintiff was taking.

2. **Master and Servant § 68— workers' compensation—hearing loss—sufficiency of showing of causal connection between employment and injury**

The Industrial Commission properly concluded that plaintiff met his burden of proof with regard to hearing loss for the

period of time between October 1971, the effective date of N.C.G.S. § 97-53(28), and May 1974 where expert medical testimony clearly indicated that during this time, in which plaintiff was exposed to noise above 90 decibels in immediate proximity without the benefit of protective headgear, plaintiff's pattern and degree of hearing loss correlated to the kind of noise to which he was exposed.

3. Master and Servant § 68— workers' compensation—hearing loss as occupational disease

Though plaintiff's original awareness of hearing loss was precipitated by a single event, medical testimony indicated that the resulting disability was caused by repeated exposure to heightened levels of noise prior to 1974; therefore, plaintiff's claim was one for compensation for occupational disease rather than one for injury by accident, and plaintiff met the necessary filing requirements of N.C.G.S. § 97-58(b).

APPEAL by plaintiff and defendants from the North Carolina Industrial Commission. Opinion and award filed 25 January 1988. Heard in the Court of Appeals 6 June 1989.

On 25 January 1988 the Deputy Commissioner filed an opinion and award in favor of plaintiff. Upon appeal by plaintiff and defendants, the Full Commission affirmed. Both plaintiff and defendants appeal.

Charles R. Hassell, Jr. for plaintiff.

Michael K. Gordon for defendants.

LEWIS, Judge.

Plaintiff was employed by defendant, The Lithium Corporation, beginning in 1956 until his retirement in 1987. Plaintiff was born in 1924 and had not experienced problems with his hearing before his employment. In 1960 he was transferred to a department where his responsibilities included cleaning chemical residue from large metal pots. The pots were cleaned by beating them with a sledge hammer and throwing them down on a concrete slab to break loose the residue. On 13 May 1965 plaintiff was beating out a pot with a sledgehammer when he experienced pain, ringing in his ears and some hearing loss. Plaintiff made a report to his company superior and received medical attention. The ringing con-

tinued for the three-year period he worked in that department. From 1968 to 1974 plaintiff was employed in the Research and Development Department during which time he ran grinder machines without benefit of protective hearing devices. In May 1974 plaintiff was transferred to the shipping department where he did wear protective hearing devices and in which, according to his own testimony, the noise to which he was exposed was significantly reduced and no longer loud.

On 25 January 1988, the Deputy Commissioner filed an opinion awarding plaintiff compensation for 61.5% permanent binaural sensorineural hearing loss. Lithium Corporation was ordered to pay in a lump sum 92.25 weeks compensation at a rate of $80.00 per week beginning 12 May 1974. In addition to medical expenses and costs of the action, defendants were ordered to pay for a hearing aid evaluation and to provide plaintiff with proper hearing devices. Defendant and plaintiff appealed to the full Industrial Commission, which affirmed the Deputy Commissioner in an order filed 25 January 1988.

Plaintiff contends the Industrial Commission erred in finding that plaintiff was last exposed to harmful noise in May 1974 and in concluding that compensation should be calculated based on his wages at that time. Plaintiff also contends that compensation should be calculated instead from the date of his retirement in 1987.

Defendants bring forward two assignments of error. First, defendants contend that the Industrial Commission erred in finding that plaintiff suffered occupational hearing loss caused by exposure to noise after 1 October 1971 or at all. Second, they contend that plaintiff's claim for damages was not timely filed.

This Court's review of the Industrial Commission's decisions is limited to determining whether there is competent evidence to support the Commission's findings and whether the findings of fact support the Commission's conclusions of law. *Clark v. Burlington Industries, Inc.*, 78 N.C. App. 695, 338 S.E. 2d 553 (1986), *cert. denied*, 316 N.C. 375, 342 S.E. 2d 892 (1986). Where no crucial element of evidence is ignored and no error of law made, it is not the role of this Court to substitute our judgment for that of the Commission.

[1] To establish a prima facie case for compensation under G.S. 97-53(28) plaintiff must prove (1) loss of hearing in both ears which

was (2) caused by harmful noise in his work environment. *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 303 S.E. 2d 795 (1983). Once these requirements are met, the burden of proof shifts to the employer. If the employer then proves that the ambient noise level was less than 90 decibels, plaintiff cannot recover. "Ambient" is a term used in OSHA records and cases. The term was first used by a North Carolina court in *Clark v. Burlington Industries, Inc.* but is not defined as to proximity. A plaintiff who proves exposure to noise above 90 decibels must still prove in addition that this noise caused his hearing loss. *McCuiston v. Addressograph-Multigraph Corp., supra.* Though the evidence may suggest that plaintiff was exposed to ambient noise above 90 decibels subsequent to 1974, he also wore protective ear devices. We conclude that plaintiff has not proven that noise was the proximate cause of his later hearing loss.

As the Industrial Commission indicated in its finding, plaintiff himself testified that he did not hear particularly loud noises after May 1974. Subsequent to that time plaintiff was not in constant and immediate proximity to noise and wore protective headgear. The expert medical testimony plaintiff cites to substantiate that hearing loss was caused by noise levels between 1971 and 1977 is subsequently qualified for the period of time after 1974 when the facts of the plaintiff's transfer are brought to light. Plaintiff contends that his hearing loss was progressively worse after 1974 and that there was no cause for such loss other than prolonged occupational exposure to noise. We find this argument unpersuasive. For as Dr. Kenan's testimony indicates this later hearing loss may have resulted from a combination of aging, the incidence of hereditary hearing loss, or the blood-thinning medication plaintiff was taking. The presence of both circumstantial and medical factors makes it impossible for us to conclude that plaintiff's augmented hearing loss after 1974 resulted from the levels of noise to which he was thereafter exposed. In the absence of any omission of evidence or mistake of law, the Commission's judgment balancing these factors against ambient noise levels must be upheld. *Clark v. Burlington Industries, Inc., supra.*

[2] We also affirm the Commission's conclusion that plaintiff has met the burden of proof for the period of time between October 1971, effective date of G.S. 97-53(28), and May 1974. Expert medical testimony clearly indicates that during this time, in which plaintiff was exposed to noise above 90 decibels in immediate proximity

without the benefit of protective headgear, plaintiff's pattern and degree of hearing loss correlates to the kind of noise to which he was exposed. In *Clark v. Burlington Industries, Inc., supra,* this Court held that any augmentation of previously existing occupational hearing loss "however slight" entitles plaintiff to compensation for the entire disability from the date of last exposure. Plaintiff is therefore entitled to compensation according to his wages at the time of last exposure in 1974.

[3] Finally, we consider defendant's contention that plaintiff's claim was not timely filed. Defendants contend that since the original hearing loss was caused by a specific event, the claim is one for compensation for injury by accident and should meet the requirements of G.S. 97-22 for reporting an injury by accident. We believe plaintiff's claim is one for compensation for occupational disease and that plaintiff has met the necessary filing requirements set forth in G.S. 97-58(b) and (c). Though plaintiff's original awareness of hearing loss was precipitated by a single event, medical testimony indicates that the resulting disability was caused by repeated exposure to heightened levels of noise prior to 1974.

Affirmed.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RICHARD BENNETT MILLOWAY

No. 885SC1304

(Filed 5 July 1989)

Searches and Seizures § 24— issuance of search warrant—probable cause shown—incriminating statements from informants

There was a substantial basis for the trial court's finding that probable cause existed for issuance of a search warrant where the informants' reliability was demonstrated by their making incriminating statements, and statements that defendant sold marijuana out of his residence and had hired three people to steal additional marijuana and deliver it to his residence supported a finding that a fair probability existed that evidence of a crime involving possession of a controlled substance would be found at his residence.

APPEAL by defendant from *Llewellyn, James D., Judge.* Judgment entered 7 September 1988 in NEW HANOVER County Superior Court. Heard in the Court of Appeals 17 May 1989.

This is a criminal case wherein defendant seeks the reversal of the trial court's denial of his motion to suppress evidence obtained during a search of his residence, as well as to set aside his conviction based in part upon that evidence. The evidence presented at the suppression hearing tended to show that law enforcement officers investigating a break-in at the Morningstar Mini Storage business in Wilmington, North Carolina arrested three individuals at the scene. The officers found over fifteen pounds of marijuana in the individuals' possession at that time, and discovered that a lock securing one of the storage units had been broken. A police canine alerted the officers to the presence in the unit of a residue of a controlled substance.

Scott Renner, one of the individuals arrested at the storage facility, told the officers that a man named Richard, who lived at 115 Lion's Gate, had approached him and his friends with the idea of breaking into the storage unit and removing the marijuana contained therein. Richard was supposed to sell the drugs for a man from California, but he told Renner that if they were stolen from the storage unit then the man would not hold him responsible for the loss. Renner was told to take the marijuana, hide it under the porch of Richard's house at 115 Lion's Gate, and take money out of the electrical box on the side of the house.

Another one of the three persons arrested at the storage facility, John Stawicki, told officers that a man named Richard, who lived at 115 Lion's Gate, told him that he could earn $1,000.00 if he stole marijuana from storage unit #43 and put it under Richard's house. He also stated that he had purchased marijuana from Richard in the past. No evidence regarding statements made by the third individual, James Keith, was presented at the hearing.

Law enforcement officers determined that the storage unit that had been broken into was rented to Richard M. Bennett. Detective E. C. Gibson of the Wilmington Police Department testified that he learned from Carolina Power & Light Company that one Richard Bennett Milloway paid for utilities at 115 Lion's Gate. Gibson and other officers went to this apartment, found defendant there, and served a warrant for his arrest. He denied their request

to search the apartment. Gibson left defendant with the other officers and obtained a search warrant.

Lieutenant S. A. Causey of the New Hanover County Sheriff's Department testified that defendant consented to a search of his apartment approximately thirty minutes after Detective Gibson left. Lieutenant Causey decided to wait until Detective Gibson returned with the warrant. When Gibson returned he served the search warrant, and then the officers obtained defendant's permission to search in writing. Causey denied having said anything to defendant in an attempt to coerce his consent.

The law enforcement officers seized items including a weapon and controlled substances during the search. The trial court denied defendant's motion to suppress the evidence. Defendant received a sentence of eighteen months' imprisonment for possession with intent to sell and deliver marijuana following his guilty plea.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General Robert E. Cansler and William B. Ray, for the State.

Peters, Register, Satterfield & Mitchell, by Anthony L. Register, for defendant-appellant.

WELLS, Judge.

Defendant assigns error to the trial court's denial of his motion to suppress, arguing first that the search warrant application lacked any indicia of probable cause. In evaluating this contention we quote the standard adopted by our Supreme Court in *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984):

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

Id. (*quoting Illinois v. Gates*, 462 U.S. 213 (1983)).

The search warrant application completed by Detective Gibson stated, in part, the following:

> [O]n 4 May 1988, James Leon Kieth II [sic], Scott Christopher Renner, and John Wesley Stawicki were charged . . . with the possession of . . . marijuana. These subjects gave statements stating that they were hired by Richard Bennett Milloway to break into Unit #43 of Morningstar Mini Storage and steal the marijuana for which they were to receive $1000.00 when they carried the marijuana to Milloway's apartment at #115 Lion's Gate. These subjects further stated that they have purchased marijuana from Richard Bennett Milloway at 115 Lion's Gate and that Milloway owns a M-14 rifle.

Defendant's criticism of the application centers on its reliance upon statements made by the three people arrested at the storage business; he argues that it did not establish the informants' reliability. This argument fails to recognize the degree of flexibility inherent in the totality of the circumstances standard for determining probable cause. *See State v. Barnhardt*, 92 N.C. App. 94, 373 S.E. 2d 461, *disc. rev. denied*, 323 N.C. 626, 374 S.E. 2d 593 (1988). Although the affidavit did not state that the informants had been reliable in the past, its recitation of their self-incriminating remarks provided an alternative ground upon which to find their statements to be reliable.

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search.

Arrington, supra (*quoting United States v. Harris*, 403 U.S. 573 (1971)).

Defendant also criticizes the application because he contends that it did not set out any basis of knowledge from which to believe that evidence would be found in his apartment. We disagree and note that the affidavit stated that defendant had sold marijuana out of his residence, and that defendant had hired three people to steal additional marijuana and deliver it to his residence. These statements support the finding that a fair probability existed that evidence of a crime involving possession of a controlled substance would be found at his residence.

We hold that there was a substantial basis for the trial court's finding that probable cause existed. We overrule this assignment of error.

Defendant next contends that the trial court erred in denying his motion to suppress because the affidavit "recklessly misrepresented and misstated facts." He asserts that although the affidavit purported to rely on statements made by each of the three individuals arrested at the storage business, testimony at the suppression hearing revealed that in fact only one of the three gave a complete statement. We note that the officers' testimony at the suppression hearing did not present the statements made by Keith or Stawicki in as great a detail as those of Renner, but all of the testimony regarding these statements was entirely consistent with that supplied in the affidavit. Defendant did not, furthermore, attempt to elicit any clarifying testimony during cross-examination from the officers regarding the statements made by Keith or Stawicki.

Defendant also points to the portion of the affidavit that stated his full name. The three individuals identified the person who hired them only as Richard; the full name, Richard Bennett Milloway, was found during subsequent research based upon the address they supplied. Although the affidavit did not clearly state the source of the information regarding the suspect's full name, this does not render the affidavit invalid. The magistrate's inquiry in a probable cause determination focuses on the circumstances set forth in the affidavit; the inquiry does not extend to investigating the correctness of those circumstances. *State v. Kramer*, 45 N.C. App. 291, 262 S.E. 2d 693, *disc. rev. denied*, 300 N.C. 200, 269 S.E. 2d 627 (1980).

Because we hold that the trial court correctly determined that the search warrant was supported by probable cause we do not address defendant's remaining assignment of error.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. FRANK TURNER, DEFENDANT

No. 8810SC935

(Filed 5 July 1989)

Searches and Seizures § 20— warrantless arrest and search of bus passenger—probable cause to believe drugs being transported

Sufficient reasonable grounds existed to believe that defendant possessed and was transporting illegal drugs, and his warrantless arrest and search were therefore lawful, where defendant, a passenger on a bus, had the same point of departure and destination as a man arrested minutes before defendant for transporting "crack"; both men had Jamaican accents; the arresting officer observed a bulge in defendant's pants which was similar in size and shape to ball-shaped packages found on the other suspect; and defendant refused to explain the bulge when questioned by the detective.

APPEAL by defendant from Judgment of *Judge Robert L. Farmer* entered 13 June 1988 in WAKE County Superior Court. Heard in the Court of Appeals 22 March 1989.

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

David H. Rogers for defendant appellant.

COZORT, Judge.

Defendant was arrested and was charged with trafficking cocaine by possession and transportation. Defendant moved to suppress the evidence on the grounds that his arrest was illegal because it was made without probable cause. The trial court denied defendant's suppression motion. Defendant gave notice of intention to appeal the denial of the motion and entered a plea of guilty to both charges in accordance with a negotiated plea bargain. The appeal is before us pursuant to N.C. Gen. Stat. § 15A-979. We affirm.

The facts are essentially undisputed. On 25 January 1988, Ronnie Stewart, detective with the Wake County Sheriff's Department, and Terry Turbeville, agent with the State Bureau of Investigation, were working at the Raleigh Bus Terminal and were part of a narcotics interdiction operation. As part of that program they periodically boarded buses to search for people they thought to

be drug couriers. On the day in question, they boarded a bus day traveling from Miami, Florida, to New York City.

Starting from the back of the bus, the two officers interviewed all the passengers. They identified themselves as law enforcement officers as they went from person to person. They were also wearing jackets which indicated they were law enforcement officers. The bus was stopped, and the doors were open. Passengers were entering and exiting the bus while the officers conducted interviews.

Detective Stewart and Agent Turbeville interviewed defendant and a man named Dwight Ricketts, who was seated near defendant, and discovered that both men departed from Ft. Lauderdale, Florida, and were bound for Winchester, Virginia. Detective Stewart testified that both defendant and Mr. Ricketts had what he thought were Jamaican accents. In response to questions, defendant denied that he was traveling with Mr. Ricketts.

While the officers spoke to Mr. Ricketts, Agent Turbeville observed several bulges in Mr. Ricketts' coat. The coat was lying in the seat next to him. Agent Turbeville requested Mr. Ricketts' permission to search the coat. Mr. Ricketts responded by attempting to flee. He was caught and arrested outside of the bus. After Mr. Ricketts was placed under arrest, Agent Turbeville, with Detective Stewart present, searched Mr. Ricketts and discovered four round ball-shaped objects hidden in the lining of Ricketts' coat. Each of these objects was about the size of a tennis ball and was wrapped tightly with duct tape. The officers cut into one of the balls and, based on their experience and familiarity with illegal drugs, determined that it contained a cocaine-type substance commonly known as "crack." While Mr. Ricketts was placed in custody, Detective Stewart returned to the bus.

Detective Stewart went directly to defendant's seat and asked defendant to stand. When defendant stood Detective Stewart observed a bulge in defendant's pants just below his belt. The bulge looked "identical" to the balls which had been removed from Ricketts' coat. Detective Stewart asked defendant what the bulge was and defendant gave no reply. The officer asked defendant again if he was traveling with Mr. Ricketts and defendant gave no reply. After getting no response to his questions, Detective Stewart placed defendant under arrest, reached into defendant's pants and retrieved the round ball which was wrapped in duct tape. He opened the tape and discovered a substance he identified as "crack." De-

fendant was charged with trafficking cocaine by possession and transportation.

Defendant's only assignment of error was to the entry of the order denying the motion to suppress. He did not assign error to any of the trial court's findings of fact, among them a finding that, prior to being arrested, defendant was free to leave the bus. Nonetheless, defendant argues that he was illegally seized before being formally arrested when he was ordered to stand up and was asked questions about the bulge in his pants. At oral argument defendant asked this Court to review the sufficiency of the evidence to support the trial court's findings under the plain error exception to Rule 10 of the Rules of Appellate Procedure. *See, e.g., State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). We have done so and find no error. Thus, since the evidence supports a finding that defendant was free to leave up until the time that he was arrested, the Fourth Amendment "seizure" occurred in this case when defendant was arrested. *See United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S.Ct. 1870 (1980); and *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968).

Accordingly, the issue is whether there was probable cause to arrest defendant, considering (1) that defendant had the same point of departure and destination as a man arrested minutes before defendant for transporting "crack," and (2) that the bulge the officer observed in defendant's pants was similar in size and shape to the ball-shaped packages found on the other suspect. We hold that the officers had probable cause to arrest defendant.

The United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated . . . ." U.S. Const. amend. IV (emphasis added). An arrest is a seizure and is unreasonable if not based on probable cause. 1 W. Lafave and J. Israel, *Criminal Procedure* § 3.3(a) at 184 (1984). Probable cause to arrest exists when there are reasonable grounds to believe a crime has been committed and that the suspect committed it. *State v. Streeter*, 283 N.C. 203, 207, 195 S.E. 2d 502, 505 (1973).

The size, shape, and position of the bulge Detective Stewart observed in defendant's pants gave the officer reasonable grounds to believe that defendant was transporting illegal drugs. *United States v. Lehmann*, 798 F. 2d 692, 694 (4th Cir. 1986); *Wright*

v. State, 418 So. 2d 1087, 1091 (1982), *rev. denied*, 426 So. 2d 29 (1983). First, the size and shape of the bulge the officer observed on defendant was similar to the size and shape of the packages of cocaine found on Mr. Ricketts minutes before defendant's arrest. In fact, the cocaine package taken from defendant's trousers was ball-shaped and wrapped tightly in duct tape in the same fashion as the packages taken from Ricketts. Second, the tennis ball-shaped bulge Detective Stewart saw in defendant's pants was, according to the officer's testimony, just below defendant's belt and above the crotch. The position of the bulge gave the officer reasonable grounds to conclude that it was not part of defendant's anatomy. *See id.* Furthermore, the officer testified that drugs are often transported inside clothing. Third, defendant's refusal to explain the bulge when questioned by Detective Stewart, immediately after another passenger was arrested with similar sized and shaped packages, gave the officer additional grounds to believe that defendant possessed illegal drugs. *United States v. Ilazi*, 730 F. 2d 1120, 1127 (8th Cir. 1984).

Finally, Detective Stewart knew from his previous interviews that defendant and Mr. Ricketts departed from the same city, Ft. Lauderdale, Florida, and were both destined for the same city in Virginia. The officer also testified that both men had Jamaican accents. Moreover, while defendant denied that he was traveling with Mr. Ricketts when the officers conducted their initial interviews, defendant said nothing when Detective Stewart asked defendant a second time if he was traveling with Mr. Ricketts after Ricketts was arrested and defendant was told to stand. The cumulative effect of all of the evidence furnished sufficient reasonable grounds to believe that defendant possessed and was transporting illegal drugs. Since the arrest was lawful, the warrantless search of defendant was also lawful. *Streeter*, 283 N.C. at 207, 195 S.E. 2d at 505.

Affirmed.

Judges PHILLIPS and PARKER concur.

JOSEPH O. JOYNER AND WIFE, ANN C. JOYNER; JUANITA PROFFITT; MARY TRAXLER; LAWRENCE SPRINKLE, JR.; AND DAVID BELL, PLAINTIFFS v. THE TOWN OF WEAVERVILLE, A MUNICIPAL CORPORATION, DEFENDANT, AND KENMURE ENTERPRISES, INC., INTERVENOR

No. 8828SC872

(Filed 5 July 1989)

Municipal Corporations § 2.4— annexation of noncontiguous area— owners of property outside area to be annexed—no standing to sue

Plaintiffs who were citizens, residents, property owners, and taxpayers in defendant town had no standing to challenge defendant's annexation of 89.68 acres of noncontiguous property, since N.C.G.S. §§ 160A-38 and 160A-50 allow only the owners of property in the annexed territory to challenge the annexation in court.

APPEAL by plaintiffs from Judgment of *Judge Robert D. Lewis* entered 16 June 1988 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 15 March 1989.

Patla, Straus, Robinson & Moore, P.A., by Harold K. Bennett, for plaintiff appellants.

Carter and Kropelnicki, P.A., by Steven Kropelnicki, Jr.; and Barnes & Wadford, P.A., by William A. Barnes, for defendant appellee.

Van Winkle, Buck, Wall, Starnes & Starnes, P.A., by Albert L. Sneed, Jr., for intervenor appellee, Kenmure Enterprises, Inc.

COZORT, Judge.

Plaintiffs, residents and property owners in defendant Town of Weaverville, instituted an action in which they sought to enjoin the Town from placing into effect an ordinance annexing into the corporate limits of the Town 89.68 acres of noncontiguous property belonging to intervenor Kenmure Enterprises, Inc. The trial court held that, while plaintiffs had standing to challenge the ordinance, the annexation was nonetheless lawful. We hold that plaintiffs did not have standing. We therefore affirm judgment in favor of defendants.

The facts are as follows: By petition dated 12 January 1988, Kenmure Enterprises, Inc. ("Kenmure"), petitioned the Town of Weaverville to annex an 89.68-acre, noncontiguous parcel, which was part of a larger 250-acre tract belonging to Kenmure. Attached to the petition was an unrecorded plat showing three parcels: (1) the 89.68-acre parcel in the northern part of the tract, (2) a smaller parcel (approximately 25 acres) in the northeast corner, and (3) a larger parcel (approximately 135 acres) in the southern part of the tract. Pursuant to N.C. Gen. Stat. § 160A-58.2, the Town held a public hearing and thereafter determined that the parcel met the statutory requirements and should be annexed. *See* N.C. Gen. Stat. § 160A-58.2 (1988). An ordinance annexing the parcel was enacted, effective 1 July 1988.

Plaintiffs, as "citizens, residents, property owners and taxpayers in the Defendant, Town of Weaverville" brought suit to enjoin the Town from placing the ordinance into effect. The Town filed Answer, praying that plaintiffs' suit be dismissed for lack of standing. Kenmure's Motion to Intervene was granted.

The matter thereafter came on for hearing before the trial court. Plaintiffs' position was that the Town had improperly annexed part of a subdivision, in contravention of N.C. Gen. Stat. § 160A-58.1(b)(4). In support of their position, plaintiffs relied upon various exhibits (unrecorded maps or plats) allegedly showing that the entire 250-acre tract comprised the "Reems Creek" subdivision, which had been divided into lots or divisions "for the purpose of sale or building development (whether immediate or future)" and involved street dedications. *See* N.C. Gen. Stat. §§ 160A-58.1(b)(4) and 160A-376 (1988). Defendant Town and Kenmure argued that the entire tract was undeveloped, that the plat attached to the petition showed that the two unannexed parcels were each larger than ten acres, and that no recorded plat showed any further division or street or highway dedication. Kenmure's position was that, were it not for the 10% limitation contained in N.C. Gen. Stat. § 160A-58.1, they would have petitioned the Town to annex all of the 250-acre tract, and that, until such time as further annexation was allowed by law, there would be no development of the unannexed parcels into lots with street dedications.

After ruling that plaintiffs had standing to challenge the annexation, the trial court found, *inter alia*, that no recorded plat showed any street or highway dedications; that a plat showing lots in

all of the 250 acres had been prepared but was later redrawn to show lots only in the annexed area; that the brochure distributed by Kenmure at the public hearing showed the lay-out of a residential subdivision, including lots and street dedications, all within the annexed area; and that there were no contracts of sale between Kenmure and buyers for property outside the annexed area. The court concluded that "for the purposes of this decision the entire 250 acres is considered to be a 'subdivision' within the purview of G.S. 160A-376," but that, since the entire tract could not lawfully be annexed and the property was in the "development stage," the statute did not prevent annexation of part of the tract. The court therefore denied plaintiffs' prayer for injunctive relief. Plaintiffs appeal to this Court.

When an annexation ordinance is challenged, the first issue to be addressed is whether the plaintiffs are authorized to maintain their action. *Taylor v. City of Raleigh*, 290 N.C. 608, 617, 227 S.E. 2d 576, 581 (1976). The rule governing the resolution of the issue of standing was stated in *Taylor* as follows:

> [U]nless an annexation ordinance be absolutely void (*e.g.*, on the ground of lack of legislative authority for its enactment), in the absence of specific statutory authority to do so, private individuals may not attack, collaterally or directly, the validity of proceedings extending the corporate limits of a municipality.

Id., 227 S.E. 2d at 581-82. The question therefore becomes one of whether the plaintiffs fall within the class of designated persons authorized by the Legislature to contest the validity of annexation ordinances.

Judicial review of annexations involving adjacent or contiguous areas is authorized by N.C. Gen. Stat. §§ 160A-38 and 160A-50. N.C. Gen. Stat. §§ 160A-38(a), -50(a) (1988). Those sections allow only the owners of property in the annexed territory to challenge the annexation in court. *See id.* In contrast, no judicial review is provided for annexations of noncontiguous territory, as such annexations are, by statute, the result of voluntary petitions by the property owners. *See* N.C. Gen. Stat. § 160A-58.1 (1988).

Section 160A-58.2, relied upon by the trial court, grants to residents and owners of property in the area to be annexed, and to residents of the annexing city, the right to be heard on the annexation issue at the public hearing. *See* N.C. Gen. Stat. § 160A-58.2

(1988). Nothing in that section extends the power of judicial review. *Taylor*, 290 N.C. at 617, 227 S.E. 2d at 581.

We therefore hold that plaintiffs had no standing to seek judicial review of the Town's annexation ordinance. In so holding, we do not address the merits of plaintiffs' appeal.

Judgment in favor of defendant Town of Weaverville is therefore

Affirmed.

Judges EAGLES and GREENE concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. MELINDA BAREFOOT WARREN AND CATHERINE POPKIN

No. 883SC1070

(Filed 5 July 1989)

Insurance § 85— nonowned vehicle—availability on restricted basis—vehicle not available for regular use—no exclusion under driver's insurance policy

A nonowned vehicle available for defendant's use for a limited number of weeks and for the limited purpose of transporting herself and medical students between Greenville and Goldsboro was not for defendant's exclusive, unrestricted use; therefore, the vehicle was not furnished for her "regular use" and so was not excluded from coverage under her insurance policy with plaintiff.

APPEAL by plaintiff from *Reid (David E., Jr.), Judge.* Judgment entered 5 August 1988 in Superior Court, PITT County. Heard in the Court of Appeals 18 April 1989.

Though no exception was taken, in its brief plaintiff poses the question of justiciable controversy as to the amended complaint. Considering that this Court previously so found *ex mero motu* in the first appeal of this case that there was no justiciable controversy, the suggestion is not frivolous. However, we find the matter properly before us on this appeal.

Baker, Jenkins & Jones, P.A., by Ronald G. Baker, for plaintiff-appellant.

Henderson, Baxter & Alford, P.A., by B. Hunt Baxter, Jr., for defendant-appellee Melinda Barefoot Warren.

Marvin Blount, Jr., by Marvin Blount, Jr., and Albert Charles Ellis, for defendant-appellee Catherine Popkin.

LEWIS, Judge.

The only question before us is the correctness of the order granting summary judgment for defendants on the issue of the meaning of a clause in an auto liability insurance policy excluding non-owned autos provided for "regular use." We affirm the trial court's granting of summary judgment.

Both defendants were students of the East Carolina University Medical School. Melinda B. Warren (Dr. Warren) was a resident, and Catherine Popkin (Dr. Popkin) was a medical student. At all relevant times, plaintiff, North Carolina Farm Bureau, provided an insurance policy for Dr. Warren and her husband stating its commitment to pay damages for any "concerned person" and to settle or defend any claim against the insured. The listed exclusions included the following:

> B. We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> 1. Any vehicle other than your covered auto, which is:
>
> a. owned by you *or*
>
> b. furnished for your *regular use.*

(Emphasis added.)

In January 1985, Dr. Warren was on rotation at the Wayne Memorial Hospital. Eastern Area Health Education Agency (AHEC) furnished an automobile for her use in travelling between Greenville and Goldsboro. She obtained the keys to this car approximately three weeks before the accident complained of and expected to use the car for several more weeks. Hers was not an exclusive use as medical students drove the car from time to time and she only drove it to make her scheduled trips, at least five times each week to Goldsboro. Dr. Warren never drove the car for personal reasons.

On 29 January 1985, Dr. Warren was operating the AHEC auto en route to the Wayne Memorial Hospital with Dr. Popkin as a passenger. Both had medical duties at the hospital. An accident occurred, and Dr. Popkin was injured. Dr. Popkin has sued Dr. Warren in another case. Plaintiff, Dr. Warren's private insurer, filed this case to determine its liability under the policy.

Plaintiff contends it is not liable under Dr. Warren's personal insurance policy as the AHEC auto was furnished for her regular use. North Carolina cases interpreting the regular use exclusion in auto policies examine not whether the vehicle is "furnished for regular use" but rather whether it is actually used frequently or regularly.

In *Whaley v. Insurance Co.*, 259 N.C. 545, 131 S.E. 2d 491 (1963), the manager of a store was furnished an automobile for business use only. Nevertheless, he used it on numerous occasions for both company and personal matters. The manager had an accident while on a personal fishing trip. Our Supreme Court held the vehicle was furnished for his regular use and coverage was excluded under his personal insurance policy. *Id.*

In *Whisnant v. Insurance Co.*, 264 N.C. 195, 141 S.E. 2d 268 (1965), the employer furnished its employee a vehicle for business purposes. The employee consistently used the vehicle only for business. In an emergency, the employee used the car only one time for personal reasons and was involved in an accident. Our Supreme Court found that the vehicle was not furnished for regular use and thus was not excluded from coverage under the employee's personal insurance policy. *Id.* As in *Whaley, supra,* the Court examined the availability for and frequency of use of the automobile.

When the vehicle was available but mechanically unsound and used only once in two years prior to the accident which gave rise to the case, the Court held the vehicle was not available for regular use. *Jenkins v. Aetna Casualty and Surety Company*, 324 N.C. 394, 378 S.E. 2d 773 (1989). "Available for regular use" is thus interpreted to mean actually used on an unlimited and unrestricted basis. *See also Gaddy v. Insurance Co. and Ramsey v. Insurance Co.*, 32 N.C. App. 714, 233 S.E. 2d 613 (1977); *Insurance Co. v. Bullock*, 21 N.C. App. 208, 203 S.E. 2d 650 (1974). Unlike Worker's Compensation cases, this line of legal precedent does not turn on the use of the vehicle in the course and scope of employment or within the restricted use.

In this case, the vehicle was available for Dr. Warren's use for a limited number of weeks and for the limited purpose of transporting herself and the students to and from Goldsboro. The car was not for Dr. Warren's exclusive use as other students drove the car when Dr. Warren had to stay over at the Goldsboro hospital. Under these facts, we find the vehicle was not furnished for Dr. Warren's regular use and is therefore not excluded from coverage under her insurance policy with plaintiff. Summary judgment for defendants was proper.

Affirmed.

Judges ARNOLD and GREENE concur.

MICHAEL C. AND LYNN M. KOHN v. MUG-A-BUG, BEN KNOWLES D/B/A MUG-A-BUG, ALLENTON REALTY AND INSURANCE COMPANY CORPORATION, SHELLI, INC., SHELLI LIEBERMAN D/B/A SHELLI, INC., COLLINS BABER, HETTI JOHNSON

No. 8814SC728

(Filed 5 July 1989)

1. **Rules of Civil Procedure § 41.1— voluntary dismissal without prejudice—effect of motions for summary judgment and attorney fees**

Defendants' motions for summary judgment and for attorney fees under N.C.G.S. §§ 6-21.5 and 75-16.1 were not claims for affirmative relief which prevented plaintiffs from taking a voluntary dismissal without prejudice under Rule 41(a)(1).

2. **Attorneys at Law § 7.5; Rules of Civil Procedure § 11—voluntary dismissal without prejudice—attorney fees not allowable**

Attorney fees could not be awarded to defendants under N.C.G.S. §§ 6-21.5 and 75-16.1 after plaintiffs took a voluntary dismissal without prejudice because there was no adjudication on the merits and thus no "prevailing party." Furthermore, even if plaintiffs filed the complaint against defendants without making reasonable inquiry as to either the facts or law of

the case, attorney fees could not be awarded to defendants under N.C.G.S. § 1A-1, Rule 11(a) since that statute applies only to pleadings filed after 1 January 1987 and plaintiffs' complaint was filed before that date.

APPEAL by defendants Shelli, Inc. and Shelli Lieberman, d/b/a Shelli, Inc., from *Gudger, Judge*, and *Lee, Judge*. Orders entered 4 June 1987 and 20 January 1988, *nunc pro tunc* 1 June 1987, 2 June 1987 and 14 December 1987, in Superior Court, DURHAM County. Heard in the Court of Appeals 23 February 1989.

This appeal is from an order denying the motions of defendants Lieberman and Shelli, Inc. for summary judgment and attorney's fees. The pertinent facts follow: Upon moving to Durham in May, 1984 plaintiffs bought a house that was shown to them by defendant Shelli Lieberman, a real estate agent who does business through Shelli, Inc. The property was listed by another agent and before the transaction was completed the owner-seller and the listing agent had the house examined for termites by defendant Mug-A-Bug, who certified that it was free of termites and termite damage. Shortly after moving in the house plaintiffs discovered that it had substantial termite damage and they sued everyone that had had any part in the purchase and sale transaction—the owner-seller, the listing agents, the exterminator and its manager, and defendant appellants. Based in substance upon allegations that the defendants wantonly and willfully conspired to conceal from, and misrepresent to, plaintiffs the true condition of the house, causes of action for breach of contract, fraud, and unfair trade practices were stated against all of the defendants jointly. In answering the complaint defendants Lieberman and Shelli, Inc. denied any part in the termite inspection or certification, alleged that all the causes of action against them were frivolous, and asked that they be awarded attorney's fees under G.S. 6-21.5, G.S. 75.16.1, and G.S. 1A-1, Rule 11(a), N.C. Rules of Civil Procedure; and on 30 April 1984, following some discovery, they moved for summary judgment as to all of the causes and renewed their motion for attorney's fees. On 8 May 1987 plaintiffs took a voluntary dismissal without prejudice as to defendants Lieberman and Shelli, Inc. under Rule 41(a)(1), N.C. Rules of Civil Procedure; and on 4 June 1987 when defendants' motions for summary judgment and attorney's fees came on for hearing Judge Gudger concluded that the action as to them had terminated with no party prevailing and denied the motions. This

order was later revised by Judge Lee, pursuant to defendants' motion, to state that it was a final judgment as to them and on that day they noticed their appeal to this Court.

Henry E. Moss for plaintiff appellees.

Womble, Carlyle, Sandridge and Rice, by William E. Moore, Jr., for defendant appellants Shelli, Inc. and Shelli Lieberman d/b/a Shelli, Inc.

PHILLIPS, Judge.

Waiving defendants' failure to notice their appeal from the order involved within the time stated by Rule 3, N.C. Rules of Appellate Procedure, we treat the appeal as a petition for *certiorari* and affirm the order appealed from, since Judge Gudger's refusal to grant defendants' motions for attorney's fees and summary judgment was clearly correct.

[1] The action against defendants having been voluntarily dismissed without prejudice under Rule 41(a)(1)—as plaintiffs had an unqualified right to do, since the case was still in the pre-trial stage and defendants had not sought any affirmative relief, *Lowe v. Bryant*, 55 N.C. App. 608, 286 S.E. 2d 652 (1982); W. Shuford, N.C. Civil Practice and Procedure Sec. 41-4, p. 339 (3d ed. 1988)—no action against the defendant appellants was pending in which the court could act. *Caroon v. Eubank*, 30 N.C. App. 244, 226 S.E. 2d 691 (1976). Defendants' argument that the dismissal was ineffective because affirmative relief was sought by their motions for attorney's fees and summary judgment is fallacious. "Affirmative relief" in a lawsuit is "[r]elief for which defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it." Black's Law Dictionary 56 (5th ed. 1979). The fees were obtainable, if at all, under the statutes relied upon, G.S. 6-21.5 and G.S. 75-16.1, only as a cost of court in *this* action; they could not have been recovered in a separate action. Furthermore, under the terms of the statutes relied upon, fees are awardable only to a "prevailing party"; and there is no prevailing party in this case since the voluntary dismissal without prejudice was not an adjudication on the merits. *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973). And, of course, defendants' motion for summary judgment was not a claim for affirmative relief, but a request to dismiss the action, which the court was without

power to do since the action had already been dismissed by plaintiffs. *Lowe v. Bryant, supra.*

[2] And, contrary to defendants' further argument, even if the court found, as defendants urged it to do, that plaintiffs filed the complaint against them without making reasonable inquiry as to either the facts or law of the case, attorney's fees could not have been awarded to defendants under the provisions of Rule 11(a), N.C. Rules of Civil Procedure. For the amended provisions of Rule 11(a) which authorize the imposition of sanctions, including attorney's fees, against parties who file pleadings and other papers without reasonable inquiry apply only to pleadings and other court papers filed on or after 1 January 1987, and plaintiffs' complaint was filed on 23 October 1986.

Affirmed.

Judges ARNOLD and JOHNSON concur.

E. D. ELDRANGE DRAUGHON, APPELLEE v. LOUISE BILL DRAUGHON, APPELLANT

No. 8812DC889

(Filed 5 July 1989)

Divorce and Alimony § 30; Rules of Civil Procedure § 60.2 — equitable distribution award — inability to agree to modification — setting aside of order improper — use of Rule 60 as substitute for appeal

The trial court erred in setting aside an equitable distribution award pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6) because the parties could not agree as to a modification of the order and plaintiff failed to preserve his right of appeal while the modification was being considered, since that was not a justifiable reason for setting the order aside; the stability of the judicial order arrived at after an adversarial hearing could not be made to depend upon the parties' agreement to it; setting the order aside because plaintiff lost his right to appeal through his own oversight amounted to using Rule 60(b) as a substitute for appeal; and plaintiff had previously upheld the order's validity by seeking its enforcement and defendant's punishment for not complying with its terms.

APPEAL by defendant from *Cherry, Judge.* Order entered 5 May 1988 in District Court, CUMBERLAND County. Heard in the Court of Appeals 15 March 1989.

This appeal concerns the second equitable distribution order entered in this case by Judge Hair. The first order, entered on 27 November 1985, was vacated because of errors in valuing certain assets. *Draughon v. Draughon*, 82 N.C. App. 738, 347 S.E. 2d 871 (1986), *cert. denied*, 319 N.C. 103, 353 S.E. 2d 107 (1987). The second order, entered on 27 August 1987, divided the marital property and, *inter alia*, required defendant, who received assets of much greater value, to make an equalizing payment to plaintiff in the amount of $52,361. This order was not appealed, though neither party was satisfied with it and plaintiff was extremely dissatisfied. Plaintiff's dissatisfaction led Judge Hair to encourage counsel for both parties to recommend a settlement. The lawyers recommended to their clients that defendant pay plaintiff $5,000 more than the order required and that plaintiff accept it in lieu of appealing. The recommendations were based on the expedient ground that an appeal would probably cost each party as much as the proposed settlement. Plaintiff was willing to settle on the basis proposed, but defendant was not and never indicated that she was. After several months went by without the order being complied with by either party, each filed a motion in the cause urging that the other be adjudged in contempt; plaintiff's motion was filed on 4 March 1988 and defendant's on 26 April 1988. On 2 May 1988 plaintiff also moved under Rule 60(b), N.C. Rules of Civil Procedure, to set the order aside and grant a new trial. The motion was not based on any of the specific grounds authorized by subsections (1) through (5) of Rule 60(b) of the N.C. Rules of Civil Procedure—such as excusable neglect, fraud, mistake, inadvertence, newly discovered evidence, etc. It was based on subsection (6) of Rule 60(b)—"Any other reason justifying relief from the operation of the judgment"; and the only reason stated in the motion and argued at the hearing was that plaintiff let the time for appealing go by in the reasonable belief or expectation that defendant would settle the case on the basis recommended by her lawyer. All the motions were heard by Judge Cherry, who set aside the equitable distribution order, and in so doing stated only that: "Well, the only thing that concerns me is that he lost his right of appeal. I would not be concerned about it other than that." The contempt motions, rendered moot, were not ruled upon.

Blackwell, Russ & Strickland, by John Blackwell, Jr. and Jill C. Miller, for plaintiff appellee.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell and W. Trent Fox, Jr., for defendant appellant.

PHILLIPS, Judge.

The order setting aside the equitable distribution award has no authorized basis, in our opinion, and must be vacated. Though subsection (6) of Rule 60(b), N.C. Rules of Civil Procedure, gives the trial court broad power to serve the ends of justice by vacating a judgment or order for justifiable reasons, *Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E. 2d 163 (1979), the record plainly establishes that the order involved was not set aside for such a reason. The order was not set aside because it was deemed to be erroneous, unjust, or unfairly arrived at; it was set aside, as the record plainly shows, because the parties could not agree as to a modification of the order and plaintiff failed to preserve his right of appeal while the modification was being considered. The parties' failure to agree as to the order's modification is not a justifiable reason for setting the order aside; for they resorted to the court in the first place because of their inability to agree and the stability of the judicial order arrived at after an adversarial hearing cannot be made to depend upon their agreement to it. And setting the order aside because plaintiff lost his right to appeal through his own oversight amounted to using Rule 60(b)(6) as a substitute for appeal, which our law does not permit. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E. 2d 115, *disc. rev. denied, appeal dismissed*, 303 N.C. 319, 281 S.E. 2d 659 (1981). If the order remained set aside we have no reason to suppose that the next equitable distribution order would be acquiesced in by both parties; and under the circumstances recorded the integrity and stability of our judicial process requires that the duly entered and presumably correct order be reinstated and upheld. *Highfill v. Williamson*, 19 N.C. App. 523, 199 S.E. 2d 469 (1973).

Another reason that the order should not have been set aside at plaintiff's request is that he had previously upheld the order's validity by seeking its enforcement and defendant's punishment for not complying with its terms; for the law does not look with favor upon parties who attack court orders they have previously relied upon. *Amick v. Amick*, 80 N.C. App. 291, 341 S.E. 2d 613

(1986); *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E. 2d 659 (1984); *Harris v. Harris*, 50 N.C. App. 305, 274 S.E. 2d 489, *disc. rev. denied, appeal dismissed*, 302 N.C. 397, 279 S.E. 2d 351 (1981); 31 C.J.S. *Estoppel* Sec. 117 (1964).

Vacated.

Judges ARNOLD and JOHNSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JULY 1989

BATTLE v. NASH TECH. No. 887SC1171	Nash (87CVS495)	Reversed & Remanded
BRUNSWICK COUNTY v. DAWSON No. 8913DC170	Brunswick (88CVD216)	No Error
ELLIOTT, ADM. v. SISK No. 8829SC1265	Rutherford (87CVS349)	No Error
GALLOWAY v. SNYDER No. 8828DC913	Buncombe (87CVD3779)	Vacated & Remanded
GUNN v. SOUTHERN RAILWAY CO. No. 8826SC1138	Mecklenburg (87CVS13433)	Reversed & Remanded
GUTHRIE v. HARRELL, ALEXANDER & CO. No. 8821SC1077	Forsyth (86CVS4337)	Affirmed
SCHALL v. JENNINGS No. 8821SC776	Forsyth (87CVS2249)	Affirmed in part, vacated in part & remanded
SPRUILL v. SPRUILL No. 885DC1072	New Hanover (81CVD2694)	Affirmed
STATE v. BOZEMAN No. 885SC1381	New Hanover (88CRS2774)	No Error
STATE v. CUNNINGHAM No. 8826SC1005	Mecklenburg (87CRS047776) (87CRS047772)	No Error
STATE v. GRAY No. 8821SC1074	Forsyth (87CRS34906) (87CRS34908)	No Error
STATE v. McRAE No. 8816SC1196	Robeson (88CRS968) (88CRS1922) (88CRS1923)	In 88CRS968, 88CRS1922 & 88CRS1923, the convictions are affirmed & the cases remanded for resentencing
WILLINGHAM v. THE BD. OF LAW EXAMINERS No. 8810SC1180	Wake (85CVS7449)	Affirmed

WILLIAM O. OVERCASH, EXECUTOR OF THE ESTATE OF PAULINE RILEY OVERCASH, DECEASED v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA

No. 8819SC1047

(Filed 18 July 1989)

1. **Courts § 20.3— ERISA—claim for benefits due—jurisdiction in state court**

The state trial court properly exercised jurisdiction over plaintiff's claim for breach of an insurance contract where plaintiff was seeking benefits under a health insurance plan maintained by plaintiff to provide insurance for employees of businesses he owned. The plan is subject to ERISA, the Employee Retirement Insurance Security Act, which vests exclusive jurisdiction in the federal courts with an exception including claims for benefits due. 29 U.S.C. 1132(a)(1)(B).

2. **Courts § 20.3— ERISA—claim for benefits due—de novo review**

In an action in which plaintiff was claiming benefits under a health insurance plan within the scope of ERISA, defendant insurer's denial of benefits was subject to de novo review because a policy provision that benefits are payable "for medically necessary reasonable and customary charges as determined by [defendant]" did not clearly vest defendant with discretion to determine eligibility for benefits. The denial of benefits under ERISA is subject to de novo review unless the benefit plan gives the administrator discretionary authority to determine eligibility for the benefits or to construe the plan's terms.

3. **Courts § 20.3— ERISA—claim for benefits due—plaintiff not entitled to summary judgment**

Plaintiff was not entitled to summary judgment on a claim for benefits due under a health insurance policy on the grounds that defendant's denial of benefits was based upon an allegedly erroneous interpretation of the contract where defendant's interpretation was supported by the plain meaning of the contract provisions.

4. **Courts § 20.3— health insurance—benefits—necessity for services—genuine issue of fact**

There was a genuine issue of material fact which precluded summary judgment in an action to collect benefits under

a health insurance policy where private duty nursing [PDN] was required to be medically necessary within the meaning of the contract and there was a clear difference of opinion between plaintiff's expert and defendant's experts as to the necessity for the services in question.

5. Courts § 20.3; Evidence § 34— ERISA—answer to interrogatory—necessity of treatment—not an admission

In an action to collect health insurance benefits under a policy which covered private duty nursing [PDN] only if it was medically necessary, defendant's answer to an interrogatory that the services were necessary after plaintiff's decedent was hospitalized was not an admission that PDN was necessary earlier. Although many of the services rendered in the hospital were the same as those rendered earlier, two of the services rendered in the hospital were the type of invasive procedures which ordinarily require skilled care and one of defendant's consultants testified that decedent's condition had significantly deteriorated at that time.

6. Courts § 20.3— ERISA—action to collect benefits—jury trial

Plaintiff was entitled to a jury trial in an action to collect benefits under a health insurance plan despite the federal view that ERISA is equitable in nature and no jury trial is available. State rules governing jury trials generally control actions under federal law brought in state courts, although federal law must control where the right to a jury trial is a substantial part of the rights accorded by federal statute. The right to a jury trial under the law of North Carolina does not conflict with any of the substantive provisions of ERISA and, even if the federal courts' characterization of the action as equitable is accepted, the N.C. Supreme Court has held that issues of fact must be tried by a jury regardless of the equitable nature of the action. Art. I, § 25 of the North Carolina Constitution.

7. Courts § 20.3; Attorneys at Law § 7— ERISA—attorney's fees—test for awarding

The five-factor test for awarding attorney's fees in ERISA actions, which is almost unanimously accepted by the federal courts, is adopted for ERISA actions brought in the courts of this state. Both the decision to award fees and the amount of the award are matters within the trial court's discretion

and, if supported by proper findings, an award will not be disturbed absent an abuse of discretion.

8. **Attorneys at Law § 7.7; Rules of Civil Procedure § 11—ERISA—Rule 11 sanctions—vacated**

An award of attorney's fees to plaintiff in an ERISA action as a sanction under N.C.G.S. § 1A-1, Rule 11 was vacated and remanded for reconsideration where the fee was awarded for expenses in defending defendant's post-trial motion for attorney's fees under ERISA and Rule 11. Defendant had appealed from the earlier denial of its claim for attorney's fees under ERISA, its post-trial motion was based upon the ERISA action, and any award of attorney's fees would be governed by 29 U.S.C. 1132(g). Since the substantive basis of defendant's motion had been adjudicated in the earlier order, defendant's appeal therefrom divested the trial court of its jurisdiction to entertain the post-trial motion; nevertheless, defendant's motion did not warrant sanctions under Rule 11 because defendant's contention that plaintiff's claims were baseless was not without merit.

APPEAL by defendant from *Collier (Robert A., Jr.), Judge, Davis (James C.), Judge*, and *Rousseau (Julius A., Jr.), Judge*. Judgment entered 19 April 1988 and orders entered 24 May 1988 and 15 August 1988 in Superior Court, CABARRUS County. Heard in the Court of Appeals 14 April 1989.

Faison & Brown, by Charles Gordon Brown and M. LeAnn Nease, for plaintiff-appellee.

Weinstein & Sturges, P.A., by William H. Sturges and L. Holms Eleazer, Jr., for defendant-appellant.

PARKER, Judge.

I.

This action arises out of an alleged breach of an insurance contract. Plaintiff's decedent was a beneficiary of a group medical insurance contract issued by defendant. Decedent suffered from systemic amyloidosis, a progressive, chronic disease that affects several internal organs. Decedent's condition began to deteriorate in the spring of 1986. At first, her family was able to care for her at home with weekly visits from a nurse. On 4 August 1986,

decedent was hospitalized on account of her increased weakness and inability to eat. Decedent was discharged from the hospital on 15 August 1986. At that time, decedent's physician felt that her condition had deteriorated to the point where she required twenty-four hour nursing care. After consulting with the physician, decedent's family decided to obtain home nursing care for decedent.

Decedent remained under twenty-four hour home nursing care until 9 January 1987 when she was again hospitalized. She was discharged on 15 January 1987 and resumed treatment at home. She died on 12 March 1987.

Defendant provided coverage for nursing services rendered prior to the August 1986 hospitalization and subsequent to the January 1987 hospitalization. Defendant denied coverage, however, for home nursing services rendered from 15 August 1986 to 9 January 1987. Plaintiff filed a complaint in which he stated causes of action based on breach of contract, unfair and deceptive trade practices, and violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* Plaintiff sought compensatory and punitive damages, treble damages pursuant to G.S. 75-16, and attorney's fees. Defendant filed an answer, asserted a counterclaim for attorney's fees under ERISA, and moved to strike plaintiff's request for a jury trial as to the causes of action arising under ERISA.

Both parties filed motions for partial summary judgment. On 19 April 1988, Judge Robert A. Collier, Jr. entered an order finding that the action was governed by ERISA, dismissing plaintiff's claims based upon State law, granting summary judgment for plaintiff on his claim under ERISA for payment of benefits, denying defendant's motion to strike plaintiff's demand for jury trial, and reserving for trial plaintiff's remaining claims under ERISA for extra-contractual and punitive damages. The matter came on for hearing before Judge James C. Davis on 24 May 1988. Judge Davis determined that plaintiff was entitled to $37,757.08 in attorney's fees and costs and so ordered in open court whereupon plaintiff gave notice that he was voluntarily dismissing all remaining claims. On 1 June 1988, defendant filed both a notice of appeal from the 24 May order and a motion for attorney's fees pursuant to ERISA and Rule 11 of the N.C. Rules of Civil Procedure. In response, plaintiff filed a motion for sanctions pursuant to Rule 11. On 15 August 1988, Judge Julius A. Rousseau, Jr. entered an order deny-

ing defendant's motion and awarding plaintiff $500.00 under Rule 11 for the expense of defending against defendant's motion.

Defendant appeals from the trial court's entry of summary judgment for plaintiff in the amount of $40,419.80, the court's award of attorney's fees and costs to plaintiff in the amount of $37,757.08, and the court's award of $500.00 to plaintiff as sanctions under Rule 11. Defendant contends that each of these actions was error and further asserts that should this Court reverse plaintiff's summary judgment, plaintiff is not entitled to jury trial on his claim for benefits. Defendant also contends the court erred in denying defendant's motion for attorney's fees pursuant to ERISA and Rule 11.

II.

[1] Before determining the merits of defendant's appeal, we must clarify the law governing plaintiff's claims. The trial court found that this action was governed by ERISA rather than State law. Plaintiff filed a notice of appeal which specifically addressed this point but abandoned his appeal. In his brief, however, plaintiff states that he abandoned his appeal only out of concern for the complexity of the case on appeal, but he does not concede that the action is controlled by ERISA. We cannot review the trial court's actions in this case without first determining whether the court applied the correct law to plaintiff's claims.

Subject to certain well-defined exceptions, ERISA covers any "employee benefit plan" which is established or maintained by an employer or an employee organization. 29 U.S.C. § 1003. The definition of "employee benefit plan" includes medical insurance plans. 29 U.S.C. § 1002(1), (3). Although the exact details of the group insurance plan at issue in this case are unclear, the record does show that the plan was maintained by plaintiff, who was decedent's husband, to provide insurance for employees of businesses he owned. Therefore, the plan is subject to the provisions of ERISA.

Under ERISA, a beneficiary of a covered plan may bring a civil action to obtain several types of relief. 29 U.S.C. § 1132(a). Jurisdiction of civil actions is vested exclusively in the federal courts with the exception of actions under subsection (a)(1)(B) of 29 U.S.C. § 1132, for which jurisdiction is concurrent in state and federal courts. 29 U.S.C. § 1132(e)(1). Subsection (a)(1)(B) of the statute provides that a beneficiary may bring an action "to recover

benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." The claim on which plaintiff obtained summary judgment was a claim for benefits due. Therefore, the trial court could properly exercise its jurisdiction over that claim.

III.

Having determined that plaintiff's claim for benefits is within the scope of ERISA, we proceed to consider whether the trial court erred in entering summary judgment in plaintiff's favor.

A.

[2] We begin by noting that the provisions of ERISA pre-empt all state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). The pre-emption includes state decisional law as well as statutes. 29 U.S.C. § 1144 (c). ERISA also pre-empts state common-law contract and tort actions. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed. 2d 39 (1987). The civil enforcement provisions of ERISA are exclusive and are governed by federal substantive law. *Id.* at 54-56, 107 S.Ct. at 1556-58, 95 L.Ed. 2d at 52-53. This broad pre-emption of state law requires this Court to follow federal decisional law in actions arising under ERISA. *See Treadway v. Railroad Co.*, 53 N.C. App. 759, 760, 281 S.E. 2d 707, 709 (1981) (federal decisional law followed in actions arising under the Federal Employers' Liability Act).

Until recently, the federal courts have refused to reverse a denial of benefits in an action under ERISA unless the decision to deny benefits was arbitrary or capricious. *See, e.g., Holland v. Burlington Indus., Inc.*, 772 F. 2d 1140, 1148 (4th Cir. 1985), *aff'd mem.*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed. 2d 559, *cert. denied*, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986). In a recent decision, however, the United States Supreme Court held that a denial of benefits under ERISA is subject to *de novo* review unless the benefit plan gives the plan administrator discretionary authority to determine eligibility for benefits or to construe the plan's terms. *Firestone Tire and Rubber Co. v. Bruch*, --- U.S. ---, ---, 109 S.Ct. 948, 956, 103 L.Ed. 2d 80, 95 (1989). The Supreme Court's decision was based upon established principles of trust law. *Id.*

In the present case, the contract of insurance provides that benefits are payable "for medically necessary reasonable and

customary charges as determined by [defendant]." Although this provision could be interpreted as granting discretionary authority to defendant, it does not clearly vest defendant with discretion to determine eligibility for benefits. Under the law of trusts, the authority of the trustee is determined from the language of the instrument but, if the language is unclear, the nature of the trustee's authority depends upon several factors including the situation of the beneficiary, the effect of classifying the power as discretionary, and the purposes of the trust. G. Bogert & G. Bogert, Trusts and Trustees § 552 at 66 (2d rev. ed. 1980). *See also Davison v. Duke University*, 282 N.C. 676, 708, 194 S.E. 2d 761, 781, 57 A.L.R. 3d 1008, 1035 (1973) (the extent of the trustee's discretion depends upon the terms of the trust and the nature of the trustee's powers interpreted in light of the circumstances at the time of execution). Applying these principles to the contract in this case, we find that it does not grant defendant discretionary authority to determine eligibility for benefits or to interpret the contract terms. Accordingly, defendant's denial of benefits is subject to *de novo* review.

B.

[3] Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E. 2d 228, 231 (1987). Defendant does not dispute that the contract of insurance in this case provides coverage for home nursing care under appropriate circumstances. The contract's list of benefits includes "fees for private duty nursing by a registered or licensed practical nurse." The contract defines "private duty nursing" (hereinafter "PDN") as follows:

> [S]pecial medically necessary nursing care ordered by a doctor when routine nursing care is insufficient because of a patient's condition. Private duty nursing does not include the services of a sitter or services rendered by a member of the patient's family or household.

The contract also contains the following definition of the term "medically necessary":

> The use of services or supplies as provided by a hospital, skilled nursing facility, doctor or other provider required to identify or treat a participant's illness or injury and which, as determined by the Corporation are

1. consistent with the symptoms or diagnosis and treatment of the participant's condition, disease, ailment, or injury,

2. appropriate with regard to standards of good medical practice,

3. not solely for the convenience of the participant, his or her doctor, hospital or other provider, and

4. the most appropriate supply or level of service which can be safely provided to the participant. When specifically applied to an inpatient, it further means that the participant's medical symptoms or condition require that the diagnosis or treatment cannot be safely provided to the participant as an outpatient.

Plaintiff contends that he is entitled to summary judgment because: (i) defendant's interpretation of the term "medically necessary" is erroneous as a matter of law, and (ii) the undisputed facts show that the PDN provided for decedent from 15 August 1986 to 9 January 1987 was medically necessary.

C.

We first consider plaintiff's contentions concerning the interpretation of contract terms. Plaintiff's contention that any ambiguities must be resolved in his favor is without merit. Plaintiff mistakenly relies on the general rule for construction of insurance contracts. *See Industrial Center v. Liability Co.*, 271 N.C. 158, 162, 155 S.E. 2d 501, 504-05 (1967). The federal courts have held that, because actions under ERISA are controlled by federal substantive law, state contract law does not apply. *See Brown v. Retirement Comm. of the Briggs & Stratton Retirement Plan*, 797 F. 2d 521, 528-29 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094, 107 S.Ct. 1311, 94 L.Ed. 2d 165 (1987); *Jung v. FMC Corp.*, 755 F. 2d 708, 713-15 (9th Cir. 1985). The Supreme Court's decision in *Firestone Tire and Rubber Co. v. Bruch, supra* merely changed the standard of review in actions for benefits due; it did not alter the substantive law governing the interpretation of benefit plans. The Court affirmed that part of the decision of the Court of Appeals for the Third Circuit which rejected the arbitrary and capricious standard of review. In doing so, the Supreme Court also tacitly adopted that part of the decision by the Court of Appeals for the Third Circuit which expressly rejected a rule of construction that would resolve all ambiguities in favor of the beneficiaries. *Bruch v. Firestone Tire and Rubber Co.*, 828 F. 2d 134, 145 (3d Cir. 1987), *aff'd in part and rev'd in part*, --- U.S. ---, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989).

The Court of Appeals applied principles governing construction of contracts between parties bargaining at arm's length. *Id.*

In any event, we find no ambiguity in the contract terms at issue in this case. Plaintiff contends that defendant erroneously interpreted the contract to provide coverage for PDN only when the patient requires "skilled" as opposed to "custodial" care. The record does show that defendant's decision to deny benefits was based on its conclusion that decedent did not require skilled nursing services for the period in question and that the nurses who cared for decedent during that time provided primarily custodial services. Defendant's internal guidelines for review of claims for PDN services make clear that such services are covered only when the patient requires skilled care. Plaintiff argues that the skilled care requirement is inconsistent with the contract's definition of "medically necessary." We disagree.

The contract defines PDN as "special medically necessary nursing care ordered by a doctor when routine nursing care is insufficient because of a patient's condition." Under the contract, services are "medically necessary" if they are required to identify or treat the patient's illness, they are not provided solely for purposes of convenience, and they are "the most appropriate supply or level of service which can be safely provided to the participant." The contract specifically excludes coverage for custodial care, which is defined as services or supplies provided to an individual "primarily to assist him or her in the activities of daily living."

Thus, defendant's interpretation is supported by the plain meaning of the contract's provisions. Even under State law, courts must enforce insurance contracts according to their terms where the language of the policy is plain, unambiguous, and susceptible of only one reasonable construction. *Duke v. Insurance Co.*, 286 N.C. 244, 247, 210 S.E. 2d 187, 189 (1974). Although "skilled care" is not included in the definitions of PDN or "medically necessary," it is clear that coverage does not extend to services which are not required by the patient's condition. Since PDN does not include routine nursing services and custodial services are expressly excluded, coverage for PDN must be limited to those cases where the patient requires skilled nursing services. Accordingly, plaintiff is not entitled to summary judgment on the grounds that defendant's denial of benefits was based upon an erroneous interpretation of the contract.

D.

[4] Therefore, in order to prevail on his motion for summary judgment, plaintiff must establish that defendant's conclusion that decedent did not require skilled nursing services for the period in question is erroneous as a matter of law.

There is no dispute in this case as to the nature of decedent's illness, the treatment she received, or the actual services performed by the nurses who cared for her. Defendant's decision to deny benefits was based upon its review of decedent's hospital records and the notes of the nurses. The records show that, as of August 1986, decedent's disease had progressed to the point where she was suffering from congestive heart failure, respiratory problems, and renal failure. Her mobility was extremely limited, but she was able to feed herself and walk to the bathroom with assistance. Because there is no effective treatment for amyloidosis, the treatments decedent received were designed to prolong her life and alleviate her symptoms.

Decedent's condition required her to receive oxygen during the entire period in question. Her treatment included a variety of medications, all of which were taken orally. Her intake and output of fluids and solids was carefully monitored, and she also required care for a skin condition. Her condition and treatment remained substantially the same until her hospitalization in January 1987.

To support his contention that decedent required skilled nursing services, plaintiff primarily relies upon the affidavit and deposition of Dr. James H. Black, the physician who recommended the services. Dr. Black admitted on deposition that most of the services recorded in the nurses' notes were not of the type that ordinarily require skilled nurses. He maintained, however, that the severity of decedent's illness, her complex medication regime, and the possibility that her condition could become life-threatening at any time required skilled nurses to constantly monitor her condition. For this reason, he believed that decedent required twenty-four hour skilled care, either at home, in a hospital, or in a nursing home.

Applied to defendant's own standards, Dr. Black's opinion could provide a sufficient basis to justify payment of benefits for PDN. The services performed by the nurses in this case were not the type of "invasive" procedures, such as intravenous injections, which

ordinarily require skilled care under defendant's standards. Defendant's internal guidelines clearly show, however, that the determination of whether a patient requires skilled care does not depend solely upon the type of services provided but also must be based upon the patient's particular circumstances. For example, the guidelines provide that the administration of oral medication is a skilled service when it requires close monitoring for possible side effects or changes in dosage. One of defendant's medical consultants stated on deposition that even purely custodial tasks may rise to the level of skilled care when the patient's condition requires constant attention. By the same token, however, the guidelines also provide that normally skilled services may become non-skilled when they are prolonged and a non-skilled person may be taught to administer them—such as insulin injections for diabetics.

Under these standards, defendant's employees and consultants concluded that decedent did not require skilled care during the period in question. Defendant offered the depositions of three physicians who reviewed decedent's case and disagreed with Dr. Black's opinion that she required twenty-four hour skilled care. Defendant's position is supported by Dr. Black's admission that the bulk of the nurses' services were custodial rather than skilled and plaintiff's own deposition testimony that he either could have performed or learned to perform most of those services. Although the nurses occasionally performed skilled services such as drawing blood, one of defendant's consultants testified on deposition that these services could have been performed by a visiting nurse. Decedent had received care from visiting nurses prior to her hospitalization in August 1986, and another of defendant's consultants testified that her condition was no worse after the hospitalization. Defendant's experts were of the opinion that neither decedent's condition nor her treatment required the constant attention of skilled nurses.

With the evidence in this posture, the trial court erred in entering summary judgment for plaintiff on his claim for benefits due under the contract. In opposition to plaintiff's motion, defendant offered evidence tending to show that decedent did not require skilled nursing services and that the PDN provided for her was, therefore, not medically necessary within the meaning of the contract. There is a clear difference of opinion between plaintiff's expert and defendant's experts as to the necessity for the services in question. Because the insurance contract only provides coverage

for medically necessary services, there is a genuine issue of material fact which precludes summary judgment.

E.

[5] We note that plaintiff also contends that defendant admitted that the services were medically necessary in its answer to an interrogatory. Plaintiff's argument is based upon the following interrogatory and answer:

> 16. Describe in detail each and every nursing service provided to Mrs. Overcash between January 15, 1987, and March 10, 1987, which you contend was "medically necessary."
>
> ANSWER: Nursing services provided to Mrs. Overcash on a regular basis between January 15, 1987 and March 10, 1987 which were covered by the certificate included: (1) Nursing observation related to (a) congestive heart failure, (b) pulmonary function and respiratory distress, (c) renal failure, (d) seizure activity, and (e) electrolyte imbalance; (2) adjustment of oxygen flow according to patient's condition; (3) adjustment of complex medical program frequently; (4) insertion and expert management of foley catheter; (5) communication of patient's status to doctors; (6) received and carried out doctor's orders; and (7) administration of I.M. medications for pain, nausea and swelling.

The above-quoted answer concerns the services rendered after decedent's hospitalization in January 1987, and defendant paid benefits for those services. Although many of the services are the same as those rendered during the period for which defendant denied coverage, two of the services—insertion and management of a catheter and I.M. (intramuscular) medication—are the type of invasive procedures that ordinarily require skilled care. Also, one of defendant's consultants testified that decedent's condition had significantly deteriorated at that time and, therefore, skilled care was required. We have already noted that the same services may be classified as skilled or non-skilled depending upon the patient's condition. Therefore, the answer to the interrogatory does not constitute an admission as to the necessity for PDN from 15 August 1986 to 9 January 1987.

IV.

[6] Having determined that a triable issue of fact exists, we now consider whether plaintiff has the right to trial by jury. The prevail-

ing view in the federal courts has been that actions under ERISA being equitable in nature, there is no right to a jury trial in actions for benefits due unless the plan administrator has admitted to owing a monetary obligation to the beneficiary. *See Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F. 2d 820, 829-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed. 2d 841 (1981); Note, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 Harv. L. Rev. 737 (1983). Some courts have held, however, that actions for benefits under 29 U.S.C. § 1132(a)(1)(B) are legal in nature and may be appropriate for jury trial. *See Abbarno v. Carborundum Co.*, 682 F. Supp. 179 (W.D.N.Y. 1988). In arguing for the right to a jury trial, plaintiff contends that State constitutional law provides such a right and the pre-emptive effect of ERISA does not abridge that right. We agree.

Preliminarily, we note that those courts which have found no right to a jury trial in actions under ERISA have not based their decisions solely upon the equitable nature of the action. The courts have also reasoned that jury trials are incompatible with the application of the arbitrary and capricious standard of review. *See Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F. 2d at 830. Since denial of benefits is now subject to *de novo* review, that consideration is no longer present.

Article I, § 25 of the North Carolina Constitution guarantees the right to trial by jury in "all controversies at law respecting property." The constitutional right to trial by jury applies in all cases where the right existed at common law or by statute in 1868. *N.C. State Bar v. DuMont*, 304 N.C. 627, 641, 286 S.E. 2d 89, 98 (1982). Although the present case is an action under ERISA, the right to benefits under the plan is a matter of contract and, prior to the enactment of ERISA, courts would review the denial of benefits in the same manner as any other contract claim. *See Firestone Tire and Rubber Co. v. Bruch*, --- U.S. at ---, 109 S.Ct. at 955, 103 L.Ed. 2d at 94. Even were we to accept the federal courts' characterization of the action as equitable, our Supreme Court has held that issues of fact must be tried by a jury regardless of the equitable nature of the action. *Erickson v. Starling*, 235 N.C. 643, 654, 71 S.E. 2d 384, 392 (1952). Therefore, plaintiff in this case has the right to a jury trial under the law of this State.

Moreover, the validity of federal decisions finding no right to trial by jury in actions under 29 U.S.C. § 1132(a)(1)(B) may be questioned in light of the Supreme Court's decision in *Firestone Tire and Rubber Co. v. Bruch, supra.* Assuming for purposes of argument that those decisions remain good precedent, we hold that they are not controlling in an ERISA action brought in a court of this State. ERISA pre-empts state laws "insofar as they may now or hereafter relate" to plans covered by the statute. 29 U.S.C. § 1144(a). This pre-emption prohibits state laws from varying or supplementing the substantive rights, obligations, and remedies provided by ERISA. *See Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. at 56-57, 107 S.Ct. at 1557-58, 95 L.Ed. 2d at 53-54.

It is now clear that the right to a jury trial in federal court is governed by federal law even where the action arises under substantive state law. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2303 (1971). Similarly, state rules governing jury trials generally control actions under federal law brought in state courts. *See Minneapolis & St. Louis R.R. v. Bombolis,* 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916). Federal law must control, however, where the right to a jury trial is a substantial part of the rights accorded by a federal statute. *Dice v. Akron, Canton & Youngstown R.R.,* 342 U.S. 359, 363, 72 S.Ct. 312, 315, 96 L.Ed. 398, 404 (1952) (state law cannot deny the right to a jury trial in actions under the Federal Employers' Liability Act).

In the present case, the right to a jury trial under the law of this State does not conflict with any of the substantive provisions of ERISA. The application of State law in this situation does not abridge any of the rights granted by the Act, nor does it provide a remedy which would otherwise be unavailable under the Act. The right to a jury trial granted by our Constitution is not a right which "relates to" employee benefit plans. Therefore, we hold that State law controls and plaintiff is entitled to have the factual controversy in this action submitted to a jury.

V.

[7] Because we are reversing the trial court's entry of summary judgment for plaintiff, we also vacate and remand the court's award of attorney's fees to plaintiff for reconsideration following a final adjudication of plaintiff's claim. The trial court must also reconsider its denial of defendant's claim for fees. Once again, however, we must clarify the correct law to be applied by the trial court.

Under ERISA, the trial court has discretion to award attorney's fees and costs to either party. 29 U.S.C. § 1132(g)(1). The federal circuit courts almost without exception have adopted a five-factor test, first set out in *Eaves v. Penn*, 587 F. 2d 453, 465 (10th Cir. 1978), to determine the parties' entitlement to costs and fees. *See Gray v. New England Tel., and Tel. Co.*, 792 F. 2d 251, 257-59 (1st Cir. 1986). *But see Bittner v. Sadoff & Rudoy Indus.*, 728 F. 2d 820 (7th Cir. 1984) (rejecting the five-factor test as applied to a defendant). In view of its almost unanimous acceptance by the federal courts, we adopt the five-factor test for ERISA actions brought in the courts of this State. The five factors to be considered by the trial court are (i) the degree of the parties' culpability or bad faith; (ii) the ability of the parties to satisfy an award of attorney's fees; (iii) whether an award of fees would deter similar conduct in the future; (iv) whether the party seeking fees sought to benefit all plan beneficiaries or resolve a significant legal question regarding ERISA; and (v) the relative merits of the parties' positions. *Iron Workers Local No. 272 v. Bowen*, 624 F. 2d 1255, 1266 (5th Cir. 1980). Every factor will not be relevant in all cases, no single factor is determinative, and the list is not exclusive. *Id.* Nevertheless, the trial court must support any award of fees in this case with findings showing that the award is based upon the above guidelines or similar considerations. We also note that, under ERISA, the prevailing party is not automatically entitled to an award of fees, *McKnight v. Southern Life and Health Ins. Co.*, 758 F. 2d 1566, 1572 (11th Cir. 1985), and the court may award fees to the unsuccessful party in an appropriate case. *Sokol v. Bernstein*, 812 F. 2d 559 (9th Cir. 1987).

As in all cases where statutes provide for an award of a reasonable fee, the trial court must make findings to support the amount of the award. *See Owensby v. Owensby*, 312 N.C. 473, 476-77, 322 S.E. 2d 772, 774-75 (1984); *Epps v. Ewers*, 90 N.C. App. 597, 600, 369 S.E. 2d 104, 105 (1988). *Accord Ursic v. Bethlehem Mines*, 719 F. 2d 670 (3d Cir. 1983). Both the decision to award fees under 29 U.S.C. § 1132(g)(1) and the amount of the award are matters within the trial court's discretion and, if supported by proper findings, an award will not be disturbed absent an abuse of discretion.

VI.

[8] We next consider whether the trial court erred in awarding plaintiff $500.00 in attorney's fees as a sanction pursuant to Rule

11 of the N.C. Rules of Civil Procedure. The trial court awarded the fees for plaintiff's expenses in defending against defendant's post-trial motion for attorney's fees under ERISA and Rule 11. In its motion, defendant contended that it was entitled to recover the fees it expended in defending against plaintiff's claims under ERISA for extra-contractual and punitive damages because those claims were baseless and made for improper purposes. Plaintiff voluntarily dismissed the claims after the trial court awarded plaintiff attorney's fees in connection with his claim for benefits.

Rule 11 permits the court to impose appropriate sanctions, including an order to pay attorney's fees to the opposing party, if a pleading or motion has no basis in law or fact or is interposed for an improper purpose such as harassment or delay. If the trial court finds that grounds for imposing sanctions exist, Rule 11 requires the court to impose sanctions. *Turner v. Duke University*, 91 N.C. App. 446, 449, 372 S.E. 2d 320, 323, *disc. rev. allowed*, 323 N.C. 628, 374 S.E. 2d 601 (1988) (quoting *Westmoreland v. CBS, Inc.*, 770 F. 2d 1168 (D.C. Cir. 1985)). The trial court in this case did not specify the grounds for imposition of sanctions. Plaintiff contends that defendant's post-trial motion was baseless and improper because (i) the trial court had already denied defendant's claim for attorney's fees pursuant to 29 U.S.C. § 1132(g)(1); (ii) the action was terminated when plaintiff voluntarily dismissed the remaining claims; and (iii) defendant had filed a notice of appeal from the earlier order concerning attorney's fees, thereby divesting the trial court of jurisdiction to consider the matter.

We first consider whether the trial court had jurisdiction to rule on defendant's motion. The termination of the action and defendant's filing of notice of appeal did not automatically deprive the court of jurisdiction to impose sanctions pursuant to Rule 11. *See Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F. 2d 1327 (4th Cir.), *cert. denied*, --- U.S. ---, 108 S.Ct. 99, 98 L.Ed. 2d 60 (1987); *Orange Production Credit Assoc. v. Frontline Ventures Ltd.*, 792 F. 2d 797, 801 (9th Cir. 1986). Under G.S. 1-294, an appeal does not bar the trial court from proceeding "upon any other matter included in the action and not affected by the judgment appealed from."

In this case, however, defendant had appealed from the earlier denial of its claim for attorney's fees under ERISA. Although defendant's post-trial motion also sought fees under Rule 11, the

motion was based upon the ERISA action and, therefore, any award of attorney's fees would be governed by 29 U.S.C. § 1132(g). Courts should not impose sanctions under Rule 11 when relief is available under another provision which more specifically addresses the situation. *See Zaldivar v. City of Los Angeles*, 780 F. 2d 823, 830 (9th Cir. 1986). Since the substantive basis of defendant's motion had been adjudicated in the earlier order, defendant's appeal therefrom divested the trial court of its jurisdiction to entertain the post-trial motion.

Nevertheless, we do not find that defendant's motion warranted sanctions under Rule 11. Although we do not consider the merits of plaintiff's dismissed claims, extra-contractual damages are generally not available in an action under ERISA. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed. 2d 96 (1985); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F. 2d 821, 825 (1st Cir.), *cert. denied*, --- U.S. ---, 109 S.Ct. 261, 102 L.Ed. 2d 249 (1988). Moreover, we also note that plaintiff's claims for extra-contractual damages should have been dismissed for lack of subject-matter jurisdiction. Under ERISA, the only civil action over which a state court may exercise jurisdiction is an action to recover benefits or enforce rights under a plan. 29 U.S.C. § 1132(e)(1), (a)(1)(B). Extra-contractual damages are clearly unavailable in a state court action to recover benefits. Thus, defendant's contention that plaintiff's claims were baseless was not without merit.

Although defendant's motion was not substantively baseless, it was, however, procedurally improper in that it sought relief which the trial court had previously denied. Rule 11 sanctions may be appropriate when a party files a motion which is virtually identical to a previously denied motion. *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 611 F. Supp. 281, 285 (S.D.N.Y. 1985). The transcript of the hearing on the original motions for attorney's fees in this case shows, however, that the trial court ruled on the motions before plaintiff dismissed his remaining claims. Defendant's counsel indicated at the hearing that he believed that the remaining claims were to be tried and he was unprepared to litigate the issue of attorney's fees. In addition, counsel noted an objection to the trial court's consideration of attorney's fees before adjudicating plaintiff's remaining claims. Plaintiff did not dismiss his remaining claims until after the trial court awarded him fees. Defendant filed its post-trial motion because it felt that

it did not obtain a fair hearing on the issue of attorney's fees. Thus, although defendant's proper remedy was by way of appeal, we do not find its motion to be baseless or interposed for an improper purpose so as to justify sanctions under Rule 11.

VII.

For the foregoing reasons, we reverse the trial court's entry of summary judgment for plaintiff on his claim for benefits and remand the case for a jury trial on that claim. The trial court's award of attorney's fees to plaintiff is vacated and remanded for reconsideration in accordance with this opinion. The trial court's award of Rule 11 sanctions to plaintiff is reversed.

Judgment entered 19 April 1988 reversed and remanded.

Order entered 24 May 1988 vacated and remanded.

Order entered 15 August 1988 reversed.

Judges PHILLIPS and COZORT concur.

NEW BERN POOL & SUPPLY COMPANY v. ELI GRAUBART D/B/A AIR MACHINES, INC.

No. 883SC998

(Filed 18 July 1989)

1. **Process § 14.30— fraud in sale of aircraft—defendant's contacts with North Carolina—sufficiency to allow exercise of personal jurisdiction**

In an action to recover for fraud in the sale of an aircraft, defendant had sufficient minimum contacts with the State of North Carolina so as to allow the trial court to exert personal jurisdiction over him and the maintenance of this action in North Carolina did not offend traditional notions of fair play and substantial justice where the trial court found that plaintiff had shown that defendant had advertised the sale of the airplane in a trade magazine which was mailed to the offices of plaintiff in Craven County, North Carolina; defendant initiated

and placed numerous telephone calls to plaintiff in Craven County, North Carolina; defendant mailed brochures, information, specifications, and photographs of the aircraft to plaintiff at plaintiff's offices in Craven County, North Carolina, in an attempt to solicit plaintiff to purchase the aircraft; in response to the solicitations by defendant and at the request of defendant, plaintiff forwarded funds drawn on a North Carolina bank to defendant; at defendant's request, plaintiff shipped an aircraft owned by plaintiff to New York and took a check in the amount of $22,000 drawn on plaintiff's account with a North Carolina bank to defendant in New York; defendant made repeated promises to ship aircraft parts to Craven County and promised to pay for repairs to be made in North Carolina; repairs to the aircraft were performed in North Carolina; and witnesses as to those repairs and to the associated expenses were residents of North Carolina, as were FAA personnel who were anticipated to be witnesses in the case.

2. Fraud § 12— fraud in sale of aircraft—sufficiency of evidence

The trial court did not err in denying defendant's motion for a directed verdict on plaintiff's claim of fraud in the sale of an aircraft where plaintiff's evidence tended to show that defendant represented that the airplane was in excellent condition; in reliance upon that representation, plaintiff bought the plane from defendant; plaintiff subsequently discovered that the plane was not in the condition it was represented to be; and plaintiff incurred expenses in repairing the plane.

Judge EAGLES dissenting.

APPEAL by defendant from *Reid, David E., Jr., Judge*. Judgment entered 25 March 1988 in CRAVEN County Superior Court. Heard in the Court of Appeals 12 April 1989.

Plaintiff is a North Carolina corporation with its principal place of business in Craven County, North Carolina. Defendant is an individual who is a resident of the State of New Jersey.

On 4 September 1985, plaintiff filed a complaint alleging fraud on the part of defendant Graubart, breach of implied and express warranties, and unfair and deceptive trade practices. Plaintiff sought to recover compensatory, punitive and statutory treble damages, and attorney's fees from defendant.

In November 1984, plaintiff's president, Jack C. Trabucco, received a trade magazine, "Trade-a-Plane," by mail delivered to him in Craven County, North Carolina. Trabucco read about a Beechcraft Baron (Baron) aircraft offered for sale by defendant in an advertisement placed in the magazine. Trabucco called the telephone number indicated in the trade magazine and received a call back from defendant Graubart the same day regarding the Baron aircraft. Subsequent to the original conversation between defendant and Trabucco, defendant forwarded a photograph of the airplane and the statistics on the airplane to Trabucco. On 11 December 1984, plaintiff, through Trabucco, forwarded to defendant Graubart a check in the amount of $5,000 to hold the aircraft off the market until Trabucco had an opportunity to travel to New York to examine and inspect the aircraft. Prior to flying to New York, Trabucco and defendant negotiated the general terms of the deal in the event Trabucco decided to purchase the aircraft. The terms were that Trabucco would pay to defendant $22,000 and trade his Piper aircraft.

On 14 December 1984 Trabucco flew with his son in the Piper Arrow owned by plaintiff company to Poughkeepsie, New York to inspect and examine the Baron and complete the terms of the deal. On 15 December 1984 the sale of the Baron was closed by Trabucco giving to defendant a check in the amount of $22,000 and the keys to the Piper Arrow owned by plaintiff, New Bern Pool and Supply Company.

Prior to closing the deal, Trabucco had an opportunity to observe the aircraft. Trabucco had further opportunity to examine the aircraft on 15 December and he taxied the aircraft across the airport and had the opportunity to check the operation of some of the instruments on the aircraft. At lunch on 15 December, Trabucco requested the log books on the aircraft. Trabucco repeated this request at dinner on 15 December and again on the morning of 16 December. The log books for the aircraft were given to Trabucco on 16 December just prior to his departure for North Carolina. Trabucco flew the aircraft back to North Carolina. During the flight home, Trabucco discovered that some of the navigation aids aboard the aircraft did not work properly. Trabucco later determined that the propellers on the aircraft did not have a current inspection, the original inspection having expired approximately four months prior to the sale of the aircraft.

Defendant was served with process on 26 November 1985. On 21 January 1986 plaintiff requested an entry of default which was made on that date. On 19 February 1986, defendant made a special appearance and filed a motion to dismiss for lack of personal and subject matter jurisdiction and requesting, in the alternative, that the court set aside the entry of default and allow defendant to contest jurisdiction and to file an answer. Plaintiff filed a written response to defendant's motions and on 29 April 1986 the court entered an order granting defendant Graubart's motion to set aside the default entry and allowing defendant Graubart to file responsive pleadings. The court found that a basis for personal and subject matter jurisdiction existed and denied defendant's motion to dismiss for lack of jurisdiction. Defendant filed an answer on 23 May 1986 raising as defenses the lack of personal and subject matter jurisdiction, failure of plaintiff to state a claim upon which relief could be granted, and generally denying the allegations of plaintiff's complaint.

On 7 January 1987 defendant filed a motion for summary judgment on the issue of personal and subject matter jurisdiction. On 13 February 1987 the matter was heard and defendant's motion was denied by the trial court on the grounds that the earlier order finding personal and subject matter jurisdiction prohibited a ruling on those issues.

The case was called for trial in Craven County Superior Court on 24 March 1988. Prior to the beginning of trial, defendant moved for a continuance based upon the medical condition of defendant Graubart. The court denied the motion and the trial proceeded. Defendant did not appear at trial. Prior to trial defendant also made a motion to dismiss the action based on the lack of subject matter and personal jurisdiction. The court declined to rule on this motion as the matter had already been ruled upon by another judge.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict. Defendant's motion was granted with respect to the unfair and deceptive trade practice claim but denied with respect to the claims of fraud and breach of warranty. Defendant presented no evidence but renewed his motion for a directed verdict, which was denied. Six issues concerning the theories of fraud, breach of warranty, and compensatory and punitive damages were submitted to the jury.

The jury returned a verdict in favor of plaintiff on the fraud issue and awarded plaintiff $16,000 in compensatory damages and $53,000 in punitive damages. The jury did not respond to the breach of warranty issues or to the corresponding damages issue. Judgment for plaintiff was entered on the verdict. Defendant filed a motion for judgment notwithstanding the verdict and, in the alternative, to set aside the verdict and for a new trial. These motions were denied. Defendant appeals from the judgment entered in the case.

Ward and Smith, P.A., by John A. J. Ward and Donalt J. Eglinton, for plaintiff-appellee.

Barker, Dunn & Mills, by Donald J. Dunn, for defendant-appellant.

WELLS, Judge.

[1] Defendant assigns error to the trial court's failure to dismiss plaintiff's action on the grounds that the courts of North Carolina lacked personal and subject matter jurisdiction. Defendant contends that defendant Eli Graubart is a citizen and resident of the State of New Jersey who has no business in this State and has conducted no business transactions in North Carolina. Defendant further contends that he owns no property in North Carolina and that he never has owned property in this state. Defendant also contends that the transaction at issue in the present case was transacted by telephone between defendant and plaintiff's president, Jack Trabucco. Trabucco flew to the State of New York to inspect and examine the Baron aircraft and the sale of the aircraft was consummated in New York. Defendant contends that these facts indicate that North Carolina courts do not have personal jurisdiction over him and that plaintiff's action should have been dismissed. Defendant further contends that the transaction at issue took place entirely in New York and therefore North Carolina courts lack subject matter jurisdiction.

In regard to *in personam* jurisdiction we have stated:

> To determine if foreign defendants may be subjected to *in personam* jurisdiction in this state, we apply a two-pronged test. First, we determine whether North Carolina jurisdictional statutes allow our courts to entertain the action. Second, we

determine whether our courts can constitutionally exercise such jurisdiction consistent with due process of law.

Marion v. Long, 72 N.C. App. 585, 325 S.E. 2d 300, *appeal dismissed and disc. rev. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985). In his brief defendant has conceded that a statutory basis for jurisdiction exists. In order for North Carolina courts to have *in personam* jurisdiction over defendant, defendant must be shown to have sufficient "minimum contacts" under the test established in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). As we stated in *Marion*:

> The existence of minimum contacts cannot be ascertained by mechanical rules, but rather by consideration of the facts of each case in light of traditional notions of fair play and justice. . . . The factors to be considered are (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.

Marion, supra, at 587, 325 S.E. 2d at 302. (Citations omitted.)

In *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E. 2d 91 (1985), we stated:

> Minimum contacts do not arise *ipso facto* from actions of a defendant having an effect in the forum state. . . . There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business there, . . . such that he or she should reasonably anticipate being haled into court there. (Citations omitted.)

In the present case, defendant initially filed a motion to dismiss for lack of personal jurisdiction on 19 February 1986. On 11 April 1986, Jack Trabucco, President and Chief Executive Officer of plaintiff company filed an affidavit outlining defendant's contacts and activities with plaintiff, through Trabucco, in regard to the transaction at issue in the present case. This affidavit was filed in opposition to defendant's motion to dismiss. Defendant filed no affidavit in contravention of plaintiff's affidavit. On 27 April 1986, the trial court (Judge John B. Lewis, Jr.) entered an order denying defendant's motion to dismiss for lack of jurisdiction. The trial court in making this order found that plaintiff had shown that: defendant had advertised the sale of the airplane in a trade magazine which was mailed to the offices of plaintiff in Craven County, North

Carolina; defendant initiated and placed numerous telephone calls to plaintiff in Craven County, North Carolina; defendant mailed brochures, information, specifications, and photographs of the aircraft to plaintiff at plaintiff's offices in Craven County, North Carolina in an attempt to solicit plaintiff to purchase the aircraft; in response to the solicitations by defendant and at the request of defendant, plaintiff forwarded funds drawn on a North Carolina bank to defendant. The trial court further found that plaintiff, at defendant's request, had shipped a 1973 Piper Arrow aircraft, owned by plaintiff, to New York and took a check in the amount of $22,000 drawn on plaintiff's account with a North Carolina bank to defendant in New York.

The trial court also found that plaintiff further showed that defendant made repeated promises to ship aircraft parts to Craven County, and promised to pay for repairs to be made in North Carolina. The trial court also noted that repairs to the aircraft were performed in North Carolina, that witnesses, as to those repairs and to the associated expenses, were residents of North Carolina and that FAA personnel who were anticipated to be witnesses in the case were residents of North Carolina, the FAA inspection of the plane having been made in Craven County, North Carolina. Defendant did not except to these findings. The trial court concluded that "Defendant has sufficient minimum contacts with North Carolina and that maintenance of the suit . . . would not offend traditional notions of fair play and substantial justice." This order was excepted to by defendant. The ruling formed the basis for the denial of defendant's subsequent motions to dismiss at trial for lack of personal jurisdiction.

We now apply the above principles to the evidence of defendant's contacts in the present case as related by plaintiff's affidavit and found by the trial court. Defendant has made numerous telephone calls and mailings to plaintiff in North Carolina as well as the initial solicitation in the trade magazine. Plaintiff was further directed by defendant to forward funds drawn on a North Carolina bank to New York. The contacts were substantial in form and content with the intention of effecting a sale. Defendant's contacts with plaintiff in North Carolina gave rise to the transaction, the sale of the Baron aircraft. The interest of the State of North Carolina in providing consumer protection for its citizens and corporate entities and a forum for the adjudication of controversies involving them is substantial. In terms of convenience to the parties, it is

noted that repairs to the aircraft in question were performed in North Carolina. Persons who are witnesses to these repairs and the expenses incurred are residents of North Carolina and FAA personnel, who were potential witnesses as a result of having inspected the plane in North Carolina, were also residents of North Carolina.

Defendant's intentional acts in this case are such that defendant can be said to have purposely availed himself of the privilege of doing business in the State of North Carolina to the extent that defendant should have reasonably anticipated being haled into court in this State. We conclude that defendant had sufficient minimum contacts with the State of North Carolina so as to allow the trial court to exert personal jurisdiction over him and that the maintenance of this action in North Carolina does not offend traditional notions of fair play and substantial justice. We hold that the trial court had proper *in personam* jurisdiction over defendant in the present case. Defendant's assignments of error are overruled.

Defendant has cited no law to support his argument concerning the trial court's failure to dismiss for lack of subject matter jurisdiction upon motion by defendant. We have examined these assignments of error and found them to be without merit. Accordingly, the assignments of error are overruled.

[2] Defendant also assigns error to the trial court's failure to grant defendant's motion for directed verdict at the close of plaintiff's evidence on the grounds that plaintiff failed to prove by sufficient evidence that defendant fraudulently represented to plaintiff the condition of the Baron aircraft and that plaintiff reasonably relied on the statements of defendant. "The question of sufficiency of the evidence to send a case to the jury is a question of law." *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). "The question presented to the appellate court in reviewing the decision of the trial court 'is the identical question which was presented to the trial court by defendant's motion . . ., namely, whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury.' " *Id.* at 644, 272 S.E. 2d at 360 (*quoting Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971)). As we stated in *Hunt*:

> The trial court should deny motions for directed verdict and for judgment notwithstanding the verdict when, viewing the

> evidence in the light most favorable to the plaintiff and giving the plaintiff the benefit of all reasonable inferences, it finds 'any evidence more than a scintilla' to support plaintiff's prima facie case in all its constituent elements.

Hunt at 644, 272 S.E. 2d at 360. (Citations omitted.) Concerning the establishment of a *prima facie* case of fraud our Supreme Court has stated:

> 'While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'

Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E. 2d 385 (1988), *rehearing denied*, 324 N.C. 117, 377 S.E. 2d 235 (1989) (*quoting Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974)). (Emphasis omitted.)

In the present case plaintiff's evidence tended to show that defendant indicated to plaintiff that the Baron aircraft was "a Number 1 airplane; what we call a cream puff" and defendant indicated to plaintiff that based on a 1 to 10 scale, the plane was "a Number 10." Plaintiff's evidence further indicated that this representation had a certain meaning within the aviation industry, namely, that the aircraft in question was in "peak condition," that everything on the aircraft was in working order. Upon flying the plane back to North Carolina, plaintiff discovered that several items on the plane including navigational aids did not work properly and later discovered that the propellers were out of inspection and in a defective condition. Prior to taking off, plaintiff had requested on several occasions to have the airplane's log books delivered to him by defendant for examination. Defendant indicated that he had forgotten the log books but that he would deliver them to plaintiff. Defendant finally delivered the log books just prior to plaintiff's take-off for the flight to North Carolina. A log book was defined by plaintiff as "a personal history of an airplane kept in a book on paper," which contains information such as that pertaining to inspections. These log books, according to plaintiff, can only be properly interpreted and understood by a trained airplane

mechanic. Plaintiff received these log books after the sale was completed and too late to have them examined before taking off.

Viewing the evidence in a light most favorable to plaintiff and giving plaintiff the benefit of all reasonable inferences, we conclude that the evidence was sufficient to allow a jury to find that defendant made a representation as to a material fact, namely, the good condition of the airplane, and that this representation was false; and additionally, that defendant concealed material facts, as to the defective condition of the airplane. The reasonable inference could be drawn that these representations and concealments were reasonably calculated to deceive, were made with intent to deceive, and that plaintiff was in fact deceived. Plaintiff suffered injury when the plane was subsequently discovered not to be in the condition defendant represented it to be, and additionally in a condition concealed from plaintiff by defendant, causing plaintiff to incur expenses in repairing the plane. Plaintiff has presented sufficient evidence to establish all of the constituent elements for a *prima facie* case of fraud. Therefore, we hold that the trial court did not err in denying defendant's motion for a directed verdict. The assignments of error are overruled.

Defendant also assigns error to the trial court's denial of defendant's motion for a new trial. Defendant argues as grounds for its motion that the award of punitive damages was excessive and appeared to be given under the influence of passion or prejudice. Defendant's motion for a new trial was made pursuant to G.S. § 1A-1, Rule 59(a)(6) of the North Carolina Rules of Civil Procedure and was addressed to the trial court's discretion. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). The trial court's decision will not be disturbed on appeal in the absence of a showing of manifest abuse of that discretion. *Id.* Defendant has made no showing of such abuse of discretion by the trial court. Accordingly, the assignment of error is overruled.

Defendant assigns error to the trial court's failure to continue the trial in the present case. Defendant argues that the trial court abused its discretion in failing to grant this continuance because of defendant's health problems and resultant inability to travel from New Jersey to North Carolina. "The granting of a continuance is within the discretion of the trial court and absent a manifest abuse of discretion its ruling is not reviewable on appeal." *Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins.*

Co., 70 N.C. App. 742, 321 S.E. 2d 10 (1984). The record in this case discloses no such abuse of discretion. This assignment of error is overruled.

Defendant's other assignments of error concern issues which were not answered by the jury. Therefore, we decline to reach these assignments of error.

No error.

Chief Judge HEDRICK concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I dissent because I believe there is insufficient basis to support a finding of *in personam* jurisdiction.

Minimum contacts necessary to satisfy due process requirements and acquire *in personam* jurisdiction are not ascertainable by application of mechanical rules but involve a weighing of the facts of each case. *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E. 2d 300, 302, *appeal dismissed and disc. rev. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985). In making the evaluation here the majority has erred in two respects. First, it has, in marshaling the facts to show minimum contacts, included contacts with North Carolina that are not related to the conduct giving rise to this action but relate primarily to plaintiff's remedy and to the proof of plaintiff's damages. Second, even if we consider all the facts including those relating to remedy and damages, I believe they are insufficient in the aggregate to satisfy due process.

From the record it is clear that the defendant solicited prospective purchasers by advertising in a national trade magazine which was directed into North Carolina, among other places. Defendant also responded from New York to plaintiff's telephone and mail inquiries made from North Carolina. Defendant was never in North Carolina but in New York accepted and negotiated a deposit or earnest money check drawn in North Carolina on a North Carolina bank delivered by United States mail from North Carolina. There are no other contacts with North Carolina in this case. In my judgment these contacts are not sufficient to pass constitutional muster.

All the critical representations, inspections of the aircraft, final negotiations of sale, final payment and delivery of the airplane took place outside of North Carolina. While defendant's alleged conduct was reprehensible and potentially dangerous to plaintiff and his young son, almost all of that alleged misconduct occurred elsewhere—outside of North Carolina.

Unless we are prepared to say that placing an advertisement in a national trade magazine which comes into North Carolina and responding to inquiries from North Carolina generated by the advertisement constitute sufficient minimum contacts to satisfy due process, the judgment should be reversed and the case remanded for entry of dismissal for lack of *in personam* jurisdiction. We have said that advertisement in a national magazine is not sufficient contact to comply with due process. *Hankins v. Somers*, 39 N.C. App. 617, 621, 251 S.E. 2d 640, 643, *disc. rev. denied*, 297 N.C. 300, 254 S.E. 2d 920 (1979). We have also said that advertisement plus a visit by the defendant to close the contract in North Carolina do not constitute sufficient contacts with the State to exercise personal jurisdiction over the defendant. *Marion, supra*, 72 N.C. App. at 589, 325 S.E. 2d at 303.

I would vote to reverse and remand for entry of an order dismissing the case.

STATE OF NORTH CAROLINA v. WALTER COPPAGE

No. 8826SC795

(Filed 18 July 1989)

1. **Criminal Law § 112.6— request for instructions on involuntary commitment—withdrawal not coerced by mistaken ruling of trial court**

Defendant's withdrawal of his request for instructions on involuntary commitment was voluntary and not improperly coerced by a mistaken ruling of the trial court where the trial court initially agreed to give defendant's requested instructions; the court also indicated that the district attorney could argue that involuntary commitment would continue subject to periodic review until, after a full evidentiary hearing,

the Chief of Medical Services determined that defendant was not in need of hospitalization; the trial court stated that he would allow the district attorney to argue that defendant's doctor had testified that any condition from which defendant was suffering at the time of the crimes was in remission and he was no longer a sick man; and these arguments which the court was prepared to allow were consistent with the proposed instructions, the procedures of the involuntary commitment statutes, and earlier holdings of the courts.

2. Criminal Law § 5.1— insanity—issue properly submitted to jury

There was no merit to defendant's argument that there was uncontradicted evidence of his insanity and the trial court was therefore required to dismiss the charges, since the State offered evidence that defendant ran from the scene of the crime once he was discovered by police; this was some evidence that defendant possessed the presence of mind to flee; and this evidence, coupled with the presumption of sanity and defendant's burden of proof, made the issue of insanity one which the court was justified in submitting to the jury.

3. Criminal Law § 102.6— psychiatrist's opinion of defendant's sanity—questions raised in prosecutor's jury argument

The district attorney's argument which raised questions about the opinions of a psychiatrist as to defendant's sanity was not grossly improper or clearly calculated to prejudice the jury in its deliberations, and the trial court therefore was not required to intervene *ex mero motu*.

4. Criminal Law § 112.6— instructions on insanity—burden of proof on elements of offense not shifted to defendant

There was no merit to defendant's contention in a rape case that the trial court left the impression with the jury that it did not "need to put the State to the proof on the elements [of the crime] if it rejected the insanity defense," and that this had the effect of shifting the burden of proof as to the elements of the offense from the State to the defendant, since the trial court instructed the jury that the State was required to prove each of the elements of the offense beyond a reasonable doubt and that if the jury found the defendant committed each element of the offense beyond a reasonable doubt, it would then determine if the defendant was insane at the time the offense was committed.

APPEAL by defendant from *Kirby (Robert W.), Judge.* Judgment entered 19 January 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 February 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lemuel W. Hinton, for the State.

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

GREENE, Judge.

Defendant appeals from the imposition of consecutive life sentences imposed by the trial court after the jury returned a verdict of guilty to first-degree rape and first-degree sexual offense.

The State's evidence tended to show defendant attacked the victim and had vaginal and anal intercourse with her. As a result of the assault, the victim received bruises to the face, blackened eyes, bruised eyeballs, scalp lacerations and injuries to her ears. During the assault a police car drove by the scene and defendant ran and was later apprehended underneath a house. At the time of his arrest, defendant appeared to the police officers to be "high" on drugs and his eyes were bloodshot and dilated. The defendant in statements to police denied the assault.

The defendant did not testify but offered evidence through his mother and Dr. John M. Billinsky, Jr. (hereinafter referred to as "Billinsky"). The mother testified that the defendant had had a problem with drugs and alcohol for the last eight years. Billinsky, an expert in forensic psychiatry, examined defendant on several occasions prior to the trial and after the assault. He was of the opinion that defendant, at the time of the assault, was mentally ill: suffering from "cocaine delusional syndrome," "cocaine dependence," "alcohol abuse," "marijuana abuse" and "adjustment disorder with depressed mood." Billinsky opined that defendant's mental disorders impaired "his ability to understand the nature and quality of what he was doing" and "his ability to know right from wrong in the specific act." Finally, Billinsky testified that the various disorders defendant had at the time of the assault still exist "though in a state of remission."

The trial court submitted two verdict sheets to the jury, one on sexual offense and one on rape. Both verdict sheets con-

tained the following special issue: "Did you find the defendant not guilty because you were satisfied he was insane?"

Defendant's appeal presents the following issues: I) whether defendant's withdrawal of his request for instructions on involuntary commitment proceedings was voluntary; II) whether the trial court erred in denying the defendant's motion to dismiss; III) whether the district attorney made improper jury arguments; and IV) whether the instructions of the trial court erroneously placed the burden of proof as to the elements of the offense on the defendant.

I

[1] During the charge conference, defendant requested the trial court give as part of the instructions on the insanity defense the following instruction:

> When a defendant charged with a crime is found not guilty by reason of insanity, the trial court, upon such additional hearing as it determines to be necessary, shall direct that there be civil proceedings to determine whether the person should be involuntarily committed. If the trial judge finds that there are reasonable grounds to believe that the defendant is mentally ill and is imminently dangerous to himself or others, and he determines upon appropriate finding of fact that it is appropriate to hold such involuntary commitment proceeding, he may order the defendant held in appropriate restraint pending those proceedings. If it is determined in those proceedings that the defendant is [mentally ill] [mentally retarded], and is dangerous to himself or others, the court will order him to be confined and treated as an inpatient at a state mental health facility. This involuntary commitment will continue, subject to periodic review, until the chief of medical services of that facility, and the court, after a full evidentiary hearing, determine that he is not in need of continued hospitalization.

After the trial court stated it would give the requested instructions, the district attorney questioned the trial court as to whether he could rebut in his jury argument any implication that the involuntary commitment proceedings would result in continuous hospitalization of the defendant. The trial court responded that the district attorney should be able to argue to the jury that the involuntary commitment proceedings:

> . . . are for the purpose of determining if he is now mentally ill, and he is imminently dangerous to himself or others, and, if the Court determines that he is not, then there's no justification for involuntary commitment . . . . If he is those things, the Court will order him to be confined and treated as an in-patient at the State Mental Health Facility. Involuntary commitment will continue subject to periodic review until the Chief of Medical Services, after a full evidentiary hearing, determines he's not in need of continued hospitalization.

Additionally, the trial court stated that he would permit the district attorney to argue:

> . . . that the doctor, himself, Dr. Billinsky, has already testified that if whatever condition he was suffering from on that occasion is now in remission at this point and he is no longer a sick man.

After some further dialogue between the district attorney, the defendant's attorney and the trial court, the defendant withdrew his request for the jury instructions related to the involuntary commitment procedure. Defendant now argues his withdrawal of the instruction was not voluntary and was only made after the trial court erroneously indicated the district attorney would be permitted, if the requested instructions were given, to argue to the jury as suggested by the trial court.

When a defendant interposes a defense of insanity and requests an instruction setting out the provisions for involuntary commitment, the trial court must instruct "on the consequences of a verdict of not guilty by reason of insanity." *State v. Hammonds*, 290 N.C. 1, 15, 224 S.E. 2d 595, 604 (1976). Specifically, the trial court must set out "*in substance* the commitment procedures outlined in [N.C.G.S. Sec. 122C-261 through 277 (1986)] applicable to acquittal by reason of mental illness." *Id.* (emphasis added); *see* N.C.G.S. Sec. 15A-1321 (1988) (when defendant found not guilty by reason of insanity, the judge initially determines whether "there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment"). Failure of the trial court to instruct the jury on the consequences of a "not guilty by reason of insanity" verdict would result in speculation on the part of the jurors as to "the fate of an accused if found insane at the time of the crime" and this only "heightens the possibility that the jurors will fall prey to their emotions and thereby return a verdict of guilty which

[would] insure that defendant [would] be incarcerated for his own safety and the safety of the community at large." *Hammonds*, 290 N.C. at 15, 224 S.E. 2d at 603-604.

Our Supreme Court has not set forth a *precise instruction* that must be given on the question of involuntary commitment where the defendant makes a request for such a charge and an issue is being submitted to the jury of "not guilty by reason of insanity." *See State v. Harris*, 306 N.C. 724, 726, 295 S.E. 2d 391, 393 (1982). However, in *Harris* the Supreme Court did approve the following instruction given to the jury by the trial court:

> [If you answer this issue "yes" and I then thereafter direct a verdict of not guilty because of that answer in each of these cases, I will order the defendant held in custody until such time as a hearing can be held to see whether or not he will be confined to a state hospital, at first for a period of not more than ninety days and then another hearing will be held in reference thereafter to see whether or not he will continue to be held in the State Hospital as involuntary committed mental patient from time to time.]

Harris, 306 N.C. at 726, 295 S.E. 2d at 392.

The instructions the trial court was prepared to give in the present case are consistent with the instructions approved in *Harris* and set out the substance of the commitment procedures of N.C.G.S. Sec. 122C-261 *et seq.* Furthermore, the argument the trial court was prepared to allow the district attorney to make to the jury was entirely consistent with the proposed instructions, the procedures of the involuntary commitment statutes and earlier holdings of this court. The involuntary commitment procedures permit commitment against the will of the defendant *only as long as* the defendant remains "mentally ill and dangerous to himself or others." N.C.G.S. Sec. 122C-268(j) (1986). Furthermore, the indication of the trial court that he would allow the district attorney to argue that Billinsky had testified that defendant's mental condition was "in remission" is consistent with the holding of *State v. Flowers*, 47 N.C. App. 457, 460-61, 267 S.E. 2d 405, 408, *disc. rev. denied*, 301 N.C. 99 (1980). In *Flowers*, where the issue of "not guilty by reason of insanity" was submitted to the jury, this court approved a district attorney's argument to the jury that the examining doctor, who testified in the trial, released the defendant from confinement before trial because defendant was not

dangerous to himself or others. *Id.* The court noted that "[n]either the district attorney nor the court said the defendant would be released if he were found not guilty" by reason of insanity. *Id.* at 461, 267 S.E. 2d at 408.

Therefore, we conclude the defendant was not forced by any erroneous ruling of the trial court to withdraw his request for instructions. *See State v. Spicer*, 285 N.C. 274, 285, 204 S.E. 2d 641, 648 (1974) ("because of his mistaken view of the law [the trial judge] exercised too much pressure to make the withdrawal of the request voluntary on the part of the defendant and his counsel"). Accordingly, the defendant's withdrawal of his request for instructions on involuntary commitment was voluntary and not improperly coerced by a mistaken ruling of the trial court. The trial court therefore committed no error in refusing to give the requested instructions.

II

[2] The defendant next argues the trial court erred in denying his motion to dismiss all the criminal charges. Defendant's motion was based on his argument that on the issue of sanity there was uncontradicted evidence that the defendant was insane and that the trial court was therefore required to dismiss the charges. We disagree.

"The test of insanity as a defense to a criminal charge in this State is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation." *State v. Mize*, 315 N.C. 285, 289, 337 S.E. 2d 562, 565 (1985). In North Carolina, there exists a presumption of sanity and the defendant has the burden of proving to the satisfaction of the jury "that he was insane during the commission of the crime." *Id.*

The defendant argues that when a defendant offers evidence of his insanity as he did in this case, the state is not entitled to rely on the presumption of sanity, but must instead offer some evidence of defendant's sanity in order to overcome defendant's motion for directed verdict. Our Supreme Court has held that the presumption of sanity when supported by other evidence of sanity is "sufficient to rebut defendant's evidence of insanity on a motion . . . for a directed verdict." *Mize*, 315 N.C. at 290, 337 S.E. 2d at 565-67. In so holding, the *Mize* Court did not reject the express language of an earlier Supreme Court opinion:

> . . . And where the defendant offers evidence of his insanity, the state may seek to rebut it or to establish the defendant's sanity *by the presumption of law, or by the testimony of witnesses, or by both.* . . . Even if the evidence of insanity presented by the defendant is uncontradicted by the state, it is the defendant's burden to satisfy the jury of the existence of the defense. The credibility of the defense witnesses in the case was a proper matter for the jury. A diagnosis of mental illness by an expert is not in and of itself conclusive on the issue of insanity.

State v. Leonard, 300 N.C. 223, 235, 266 S.E. 2d 631, 638, *cert. denied*, 449 U.S. 960, 101 S.Ct. 372, 66 L.Ed. 2d 227 (1980) (quoting *State v. Leonard*, 296 N.C. 58, 64-65, 248 S.E. 2d 853, 856-57 (1978)) (emphasis in original).

Arguably, there exists some conflict in the Supreme Court opinions, but in any event, it is abundantly clear that when the State presents evidence of sanity, a motion for a directed verdict is correctly denied when considered in addition to the presumption of sanity. The State offered evidence that defendant ran from the scene of the crime once he was discovered by the police in the commission of the crime. This evidence, which is some evidence defendant possessed a "presence of mind to flee," when "coupled with the presumption of sanity and the defendant's burden of proof, make the issue of insanity one which the court was clearly justified in submitting to the jury." *Leonard*, 296 N.C. at 65, 248 S.E. 2d at 857. Accordingly, the trial court did not err in denying the defendant's motion for a directed verdict.

III

[3] The district attorney made the following statement to the jury in his final jury argument:

> Now, this psychiatrist can put this label up on the board, you ever hear of this? I've been practicing law for fifteen years, I never heard of this. Right there. Never heard of it. He wants me to apologize for the facts of this case, and he comes in here with this stuff?

The defendant contends this argument allowed the district attorney to place before the jury incompetent and prejudicial matters and that he injected into his argument "facts of his own knowledge

or other facts not included in the evidence" (quoting *State v. Monk*, 286 N.C. 509, 515, 212 S.E. 2d 125, 131 (1975)).

As the defendant failed to object to the district attorney's remarks during the trial, the trial judge was required to intervene *ex mero motu* only if the argument was "grossly improper." *State v. Mason*, 315 N.C. 724, 734, 340 S.E. 2d 430, 437 (1986). A district attorney "may not place before the jury incompetent and prejudicial matters not admissible in evidence or include in his argument facts not included in the evidence." *State v. Taylor*, 289 N.C. 223, 226, 221 S.E. 2d 359, 362 (1976). Arguments before the jury "are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts." *Id.* Ordinarily, appellate courts "do 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." *Id.* at 227, 221 S.E. 2d at 362.

Applying these principles to the present case, we do not find the jury argument of the district attorney to be "grossly improper" or "clearly calculated to prejudice the jury in its deliberations." *Id.* The district attorney expressed no personal views or opinions and only raised questions about the opinions of the psychiatrist. Therefore, the trial court did not err by failing to intervene *ex mero motu.*

IV

[4] The defendant finally argues the trial court committed plain error in its jury instructions. After instructing the jury that in order to find the defendant guilty of first-degree rape, the court instructed that it was necessary for the State to prove beyond a reasonable doubt the four different elements of the offense. The trial judge proceeded to discuss the different elements of the offense and then instructed:

> Then, members of the jury, there is evidence which tends to show that the defendant was legally insane at the time of the alleged offense. You will consider that evidence only if you find that the State has proved beyond a reasonable doubt each of the things about which I have already instructed you. Even if the State does not prove each of these things

> beyond a reasonable doubt, the defendant would be, nevertheless, *not* guilty if he was legally insane at the time of the alleged offense.

(emphasis added). The trial court then proceeded to instruct on insanity and as a part of those instructions stated:

> If you are not satisfied as to the insanity of the defendant, the defendant is presumed to be sane, and *you would find the defendant guilty.*

(emphasis added).

The defendant specifically argues that the instructions of the trial court left the impression with the jury that it did not "need to put the State to the proof on the elements [of the crime] if it rejected the insanity defense." The defendant contends that this had the effect of shifting the burden of proof as to the elements of the offense from the State to the defendant. We disagree.

The trial court instructed the jury that the State was required to prove each of the elements of the offense beyond a reasonable doubt and that if the jury found the defendant committed each element of the offense beyond a reasonable doubt, it would then determine if the defendant was insane at the time the offense was committed. The trial court summarized its instructions:

> So, members of the jury, I charge if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in vaginal intercourse with the victim, and that he did so by force, or threat of force, and that this is sufficient to overcome any resistance which the victim might have made, and that the victim did not consent, it was against her will, and that the defendant inflicted serious personal injury upon the victim, it will be your duty to return a verdict of guilty of first degree rape, unless you are satisfied that the defendant was insane at that time.

When the instructions are viewed in the entirety, they did not unconstitutionally shift the burden of proof from the State to the defendant. *See State v. Wade*, 49 N.C. App. 257, 262, 271 S.E. 2d 77, 80 (1980), *cert. denied*, 315 N.C. 596, 341 S.E. 2d 37 (1986) (in reviewing charge of trial court, this court must read and consider the charge as a whole). Accordingly, we find no reversible error in the jury instructions as given.

No error.

Judges EAGLES and COZORT concur.

LINDA M. HOGAN, ADMINISTRATRIX OF THE ESTATE OF JAMES C. HOGAN, DECEASED, EMPLOYEE PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8810IC810

(Filed 18 July 1989)

Master and Servant § 94.3— workers' compensation—refusal of Commission to set aside judgment—error

The Industrial Commission erred by not setting aside its former judgment dismissing plaintiff's action for workers' compensation with prejudice where plaintiff was last exposed to cotton dust in 1959; plaintiff filed a claim for workers' compensation benefits for byssinosis in 1976; the Deputy Commissioner wrote a letter advising plaintiff's counsel that plaintiff would not be entitled to benefits if, as it appeared from the file, plaintiff's last exposure may have occurred before 1 July 1963; defendants filed a motion to dismiss in December 1976; after discussing the matter with the Deputy Commissioner, plaintiff's counsel and plaintiff came to a mutual agreement that there was no point in pursuing the matter at that time; plaintiff indicated that he was willing to allow the dismissal of the case so long as it did not prejudice his right to initiate a new action should he so desire; the Deputy Commissioner granted defendants' motion and dismissed plaintiff's claim; plaintiff did not appeal the order; plaintiff received a notice from the Industrial Commission in 1980 inviting him to refile his claim as a result of legislative changes; plaintiff refiled in 1980; the Industrial Commission determined that its earlier order was not res judicata; defendants appealed to the Court of Appeals, which held in a divided opinion that plaintiff's claim was time barred, res judicata, and that plaintiff could not have the 1977 judgment set aside; the Supreme Court held that the Commission had the power to set aside its own judgments and found that there were sufficient grounds on which the Commission could do so; the original plaintiff having

died, his administratrix filed a motion to set aside the 1977 order on the grounds of mistake or other extraordinary circumstances; and the Commission denied benefits on the basis that no grounds existed to set aside the 1977 order of dismissal. Because the Commission's power to set aside one of its judgments is for all intents and purposes the same as that possessed by a court ruling on a motion under N.C.G.S. § 1A-1, Rule 60(b), the same standard of review should be employed. In light of the heavy equities weighing in plaintiff's favor, especially the Commission's written invitation to plaintiff to refile his action, the Commission's order finding no grounds to set aside its 1977 order of dismissal amounted to a substantial miscarriage of justice and should therefore be set aside.

Judge ARNOLD dissenting.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award filed 8 March 1988. Heard in the Court of Appeals 14 March 1989.

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

Smith Helms Mulliss & Moore, by J. Donald Cowan, Jr. and W. Alexander Audilet, for defendant-appellees.

JOHNSON, Judge.

The original plaintiff (now deceased), James C. Hogan, was born in 1916. He completed sixth grade and could read and write. From 1932 to 1959 he worked in defendant's cotton plant, in the card or slashing room, both of which were dusty. He was continuously exposed to cotton dust. In 1959, plaintiff followed his doctor's advice and left the cotton plant due to breathing problems.

Plaintiff pursued alternate employment until 1976 when he was diagnosed as totally and completely disabled as a result of byssinosis (brown lung). On 21 September 1976 plaintiff filed a claim with the Industrial Commission claiming Workers' Compensation benefits for byssinosis. By letter dated 8 December 1976, Deputy Commissioner Conely, the designated hearing officer, advised plaintiff's counsel as follows:

> From a review of the file it appears that plaintiff's last exposure to the hazards of byssinosis may have occurred before July 1, 1963. If such be the case, plaintiff would not be entitled to compensation for byssinosis or chronic obstructive lung disease.

Attached to the letter was an earlier opinion by the Deputy Commissioner in which compensation was denied because the claimant's last exposure was before 1 July 1963.

On 13 December 1976 defendants filed a motion to dismiss plaintiff's claim because "even if the employee does have byssinosis, such condition was not compensable on the date it is alleged the injury occurred." By letter dated 28 December 1976, plaintiff's counsel informed the Commission that plaintiff's last exposure to byssinosis hazards was prior to 1963. Counsel for plaintiff also made the following statements:

> I have discussed your letter and the accompanying portion of an opinion and award which you forwarded to me along with your letter of December 8, 1976, with Mr. Hogan, and in doing so, have informed him that the opinion forwarded seemed to control in regard to his case and would appear to terminate any claim he might have regarding this matter . . . .
>
> I have not as yet had the opportunity to argue a case before the Industrial Commission and therefore, since it appears that there is no valid claim on the part of Mr. Hogan because of the relevant portion of the opinion and award forwarded to me by your office, I am not certain as to whether it will still be necessary to make an appearance in Court. Therefore, I would appreciate your notifying me as to what procedural steps are at this point necessary and if, in fact, it will be necessary to make an appearance at the January 19, 1977 hearing. If so, of course, I will be happy to do so even though I do not believe there is any valid response, on the part of Mr. Hogan, to the motion propounded by [defendants].

On 3 January 1977, plaintiff's counsel had a phone conversation with Deputy Commissioner Conely to clarify the contents of the 28 December 1976 letter. Regarding that conversation, counsel stated at his 1987 deposition that plaintiff and he "came to a mutual agreement that there was no further point in pursuing this at that time." By order dated 4 January 1977, in response to defendants' motion and based on the letter and phone call with plaintiff's counsel, Deputy Commissioner Conely granted defendants' motion and dismissed plaintiff's claim:

> By letter dated January 28, 1976, counsel for plaintiff advised the Commission that plaintiff's last injurious exposure to the hazards of byssinosis was prior to 1963 and that there appears to be no valid response to the motion propounded by the defendants. Counsel further advised the Commission by telephone on January 3, 1977, that plaintiff does not intend to pursue this claim further and does not object to the Commission's entering an order dismissing this claim.

The order also set out the Deputy Commissioner's legal rationale for denying the claim. This rationale was later disapproved in *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979).

On 4 January 1977, plaintiff's counsel drafted a letter to Commissioner Conely stating that he was authorized "to notify you that [plaintiff] is willing to allow the dismissal of this case without prejudice to his initiating a new action within the proper time as allowed by the Industrial Commission . . . ." On 6 January 1977, plaintiff met with counsel and refused to sign the letter. A new letter was drafted, which plaintiff did sign which stated:

> Mr. Hogan asked me to re-emphasize to you that he is willing to allow the dismissal of this case so long as it does not prejudice his right to initiate a new action should he so desire.

Plaintiff did not appeal the order as allowed by G.S. sec. 97-85.

In July 1980, as a result of legislative changes in the statutory definition of compensable occupational diseases, plaintiff received a notice from the Industrial Commission inviting him to refile his claim. On 19 August 1980, with the advice of present counsel, plaintiff refiled. In its opinion and award dated 12 May 1981, the Commission recognized plaintiff's claim under the newly enacted Chapter 1305 of the 1979 Session Laws which provided that byssinosis claims are compensable without regard to the employee's date of last injurious exposure to cotton dust. The Commission determined that the earlier order of dismissal was "not a determination of the merits of plaintiff's claim as filed in 1980, and therefore is not *res judicata*."

Defendants appealed to this Court. A divided panel reversed and held that plaintiff's claim was time barred, *res judicata*, and that plaintiff could not have the 1977 judgment against him set aside under G.S. sec. 1A-1, Rule 60(b)(6). *Hogan v. Cone Mills Corp.*, 63 N.C. App. 439, 305 S.E. 2d 213 (1983), vacated by *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E. 2d 477 (1985).

In its opinion which vacated the decision by this Court, the Supreme Court held that the Commission had the power to set aside its own judgments, and found that there were "sufficient grounds on which the Commission may rely to set aside its former judgment. . . ." *Hogan*, 315 N.C. at 141, 337 S.E. 2d at 485.

The original plaintiff James C. Hogan died on 2 September 1987. On 19 November 1987 Linda Hogan, administratrix, filed a motion to set aside the order dated 4 January 1977 on the grounds of mistake or other extraordinary circumstances. In its opinion and award dated 8 March 1988, the Commission denied plaintiff benefits on the basis that no grounds existed to set aside the order of dismissal dated 4 January 1977. From this order, plaintiff appeals.

On appeal from this Court, the Supreme Court first elaborated on the equities weighing in Hogan's favor which encouraged the Court to reach the conclusion that

> [t]he Commission could find that Hogan's determined attempts to keep his case alive are all that a lay person, not schooled in the intricacies of *res judicata*, reasonably should be expected to do.

Hogan v. Cone Mills Corp., 315 N.C. 127, 142, 337 S.E. 2d 477, 485-86 (1985). However, the Court went on to say:

> We express no opinion as to whether the Commission should set aside its former judgment against Hogan. While we have mentioned certain equities which weigh in Hogan's favor, we have done so only for the purpose of justifying our remand of this case for the Commission's consideration. The decision whether to set aside the judgment rests, in the first instance, within the judgment of the Commission. If the Commission refuses to set aside the former judgment, Hogan's claim will be barred by *res judicata*. If, on the other hand, the Commission does set aside the former judgment, no final judgment on the merits will exist to bar this action under N.C.G.S. § 97-53(13).

Id. at 142, 337 S.E. 2d at 486.

By inserting the clause "in the first instance" the Court made it clear that the Commission's judgment is subject to appellate review. The opinion is less than clear as to what standard of review is appropriate.

G.S. sec. 1A-1, Rule 60(b)(6) allows that:

> the court may relieve a party . . . from a final judgment, order . . . for the following reasons:
>
> * * * *
>
> (6) Any other reason justifying relief from the operation of the judgment.

In its discussion of whether Hogan could have asked the Commission to set aside its judgment under G.S. sec. 1A-1, Rule 60(b)(6) the Court states:

> The Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act . . . and we find no counterpart to Rule 60(b)(6) in the Act or the Rules of the Industrial Commission. We believe the Industrial Commission, nevertheless, has inherent power to set aside one of its former judgments. . . . This power inheres in the judicial power conferred on the Commission by the legislature and is necessary to enable the Commission to supervise its own judgments.

Hogan at 137, 337 S.E. 2d at 483.

If Rule 60(b) were strictly applicable to judgments of the Industrial Commission, the correct standard to review the Commission's refusal to set aside a judgment would be as follows:

> General Statute 1A-1, Rule 60(b)(6) 'is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought.' . . . Our Supreme Court has indicated that this Court cannot substitute 'what it consider[s] to be its own better judgment' for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it 'probably amounted to a substantial miscarriage of justice.' . . . Further, '[a] judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.'

Huggins v. Hallmark Enterprises, Inc., 84 N.C. App. 15, 25, 351 S.E. 2d 779, 785 (1987). (Citations omitted.) Defendant, rightly or wrongly, assumes that abuse of discretion is the correct standard of review.

Generally, on review, awards entered in Workers' Compensation cases "shall be conclusive and binding as to all questions of fact. . . ." Appeal to this Court shall concern only "questions of law." G.S. sec. 97-86.

> When the assignments of error bring up for review the findings of fact of the Commission, we review the evidence to determine as a matter of law whether there is any competent evidence tending to support the findings; if so, the findings of fact are conclusive. . . .
>
> If a finding of fact is a mixed question of fact and law, it is conclusive also . . . if there is sufficient evidence to sustain the facts involved. If a question of law alone, we review.

Lewter v. Enterprises, Inc., 240 N.C. 399, 402-03, 82 S.E. 2d 410, 413 (1954). (Citations omitted.)

Plaintiff has suggested a hybrid standard which combines the rules of review for Workers' Compensation cases with the abuse of discretion standard. Plaintiff contends that the North Carolina Industrial Commission abused its discretion in failing to set aside its former judgment because the Commission's conclusions of law that no grounds exist to set aside the order of dismissal are based on erroneous findings of fact that are not supported by any competent evidence.

Our Supreme Court has analogized the procedure by which a claimant may request the Industrial Commission to set aside one of its judgments on the grounds of mutual mistake, misrepresentation, fraud, newly discovered evidence, *et al.*, to a G.S. sec. 1A-1, Rule 60(b) motion. *Hogan* at 137, 337 S.E. 2d at 483. In reaching the conclusion that the legislature impliedly vested the Commission with the power to set aside a former judgment, the Court stated the following policy consideration:

> The power to provide relief against the operation of a former judgment is an integral part of the judicial power. Such power is a remedy fashioned by courts to relieve hardships which from time to time arise from a fast and hard adherence to the usual rule that judgments should not be disturbed once entered. The remedy has been characterized by a flexibility which enables it to be applied in new situations to avoid the particular injustices inherent in them.

Id. at 139-140, 337 S.E. 2d at 484.

Because this power is for all intents and purposes the same as that possessed by a court ruling on a Rule 60(b) motion, we believe that the same standard of review should be employed. As the Court states in *Huggins* at 25, 351 S.E. 2d at 785, a discretionary ruling of this nature should not be disturbed unless it "probably amounted to a substantial miscarriage of justice," or where the ruling is "manifestly unsupported by reason." In our opinion, the Commission's decision in the case *sub judice* meets both tests.

Although we are mindful of the equities noted by the Supreme Court which weigh heavily in plaintiff's favor, especially "Hogan's determined attempts to keep his case alive," *Hogan* at 142, 337 S.E. 2d at 485, we are more convinced that the Commission's ruling was erroneous because of its written invitation to plaintiff to refile his action. It is because the Commission communicated with plaintiff by letter in July 1980 to notify him that his claim had become viable due to legislative changes, that we are especially sensitive to plaintiff's plight. As of January 1977, when the Commission ruled that plaintiff's claim was barred because his last exposure to byssinosis hazards occurred prior to 1963, plaintiff's legal battle had ceased. He refiled his action because he was encouraged to do so by the Commission.

While we are aware that the Commission had no authority over this Court's ruling on appeal that plaintiff's action was time-barred, and also *res judicata*, after the Commission had entered an order in plaintiff's favor, *Hogan v. Cone Mills*, 63 N.C. App. 439, 305 S.E. 2d 213 (1983), nor over the Supreme Court's ruling vacating our decision, 315 N.C. 127, 337 S.E. 2d 477 (1985), it was empowered to evaluate and determine whether sufficient grounds existed to set aside its former judgment. In light of the heavy equities weighing in plaintiff's favor, *see Hogan* at 315 N.C. 141-42, 337 S.E. 2d at 485-86, we are convinced that the Commission's order finding no grounds to set aside its 4 January 1977 order of dismissal, "amounted to a substantial miscarriage of justice" *Huggins, supra,* and should therefore be reversed.

We are mindful of the caution to avoid substituting our judgment for that of the Commission; however, from a study of the entire facts and circumstances of this case we believe that only one decision could possibly have been correctly reached by the

Commission, to set aside its former judgment dismissing plaintiff's action with prejudice.

Reversed.

Judge PHILLIPS concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

The majority cites the following statement made by our Supreme Court after its careful review of the record in this case:

> We express no opinion as to whether the Commission should set aside its former judgment against Hogan. While we have mentioned certain equities which weigh in Hogan's favor, we have done so only for the purpose of justifying our remand of this case for the Commission's consideration. The decision whether to set aside the judgment rests, in the first instance, within the judgment of the Commission. If the Commission refuses to set aside the former judgment, Hogan's claim will be barred by *res judicata*. If, on the other hand, the Commission does set aside the former judgment, no final judgment on the merits will exist to bar this action under N.C.G.S. § 97-53(13).

Hogan v. Cone Mills Corp., 315 N.C. 127, 142, 337 S.E. 2d 477, 486 (1985).

The Supreme Court clearly directs the Commission to make a discretionary ruling whether to set aside judgment in this case. The majority ably discusses the parameters for appellate review when a lower tribunal has refused, in its discretion, to set aside judgment. It then proceeds to substitute its own judgment for that of the Commission. Given the heavy burden demanded under either an abuse of discretion test, or a test which would require a finding that there is no competent evidence to support the findings of the Commission, I dissent.

These are the pertinent findings of fact of the Commission from its order dated 4 January 1977:

> 4. . . . Mr. Hogan did not object to the Commission's entry of the order of dismissal and did not appeal from same.
>
> * * * *

7. The decision not to appeal the order of dismissal of January 4, 1977 was a mutual decision, reached by Hogan and his attorney at the time . . . .

Based on these and other findings of fact the Commission concluded that:

1. No grounds exist in the judgment or discretion of the Commission to set aside the order of dismissal of January 4, 1977.

2. Plaintiff's claim is barred by *res judicata.*

In its opinion the Supreme Court stated:

It appears to us the reason plaintiff did not contest defendants' motion to dismiss is because he decided he did not have a viable claim under the law then in effect. That plaintiff determined for whatever reason not to oppose defendants' motion does not transform what is otherwise a dismissal on the merits into a voluntary dismissal.

Hogan at 136, 337 S.E. 2d at 482. The record and the 1987 deposition of Hogan's former counsel could support an interpretation that Hogan did not contest dismissal because he agreed with his attorney that there was no viable claim at that time. The fact that the record also makes clear that Hogan did not understand that by agreeing not to contest, he agreed to a dismissal with prejudice is not enough ammunition for this Court to overturn a finding of fact which is based on any competent evidence. Further, when the Commission makes a discretionary ruling this Court cannot substitute its own judgment for that of the Commission. *See Worthington v. Bynum*, 305 N.C. 478, 485-86, 290 S.E. 2d 599, 604 (1982).

Had it been this Court's place to rule on plaintiff's motion "in the first instance," I would agree with the majority that the equities weigh in favor of granting plaintiff's motion. That is not our function as an appellate court. I would affirm.

PAUL E. BOLICK, AND MARY J. BOLICK, PLAINTIFFS v. TOWNSEND COMPANY, A SUBSIDIARY OF MERRILL LYNCH REALTY ASSOCIATES, INC., JAMES L. BUNN, AND GAILE T. BUNN, DEFENDANTS

No. 8826SC932

(Filed 18 July 1989)

Fraud § 12; Vendor and Purchaser § 6— representation that land was suitable for residential purposes—sufficiency of evidence of fraud

In an action to recover for breach of contract and fraud in a sale of land, the trial court erred in entering summary judgment for defendant realtor where plaintiffs purchased from the sellers a parcel of land for residential use upon the representation of defendant realtor that the parcel had been approved for the installation of a septic system and could therefore be used for residential purposes; there was evidence through testimony of an employee of the county health department that the representation was false and that defendant knew it to be false or made the statement without regard to its truth or falsity; defendant intended for plaintiffs to rely on that representation because it was the contingency upon which their conditional contract with the sellers was based; plaintiffs in fact relied upon the representation and purchased the parcel which they could not use for its intended purpose; and defendant made a specific and definite representation reasonably calculated to induce plaintiffs to forego an independent investigation.

APPEAL by plaintiffs from *Snepp, Frank W., Judge.* Order entered 22 April 1988 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 March 1989.

Plaintiffs appeal from an order dismissing their cause of action against defendant Townsend Company for breach of contract, fraud and unfair and deceptive trade practices, upon defendant Townsend Company's motion for summary judgment. In their complaint, plaintiffs alleged that defendants Bunn had sold them a parcel of land and that defendant Townsend Company represented to them that it was suitable for a residence to be built upon it. When plaintiffs attempted to later convey the parcel to a third party, they discovered that the lot was unsuitable for residential use and the third party

refused to purchase the parcel. Plaintiffs then sued defendants for damages.

Charles G. Monnett, III for plaintiff-appellants.

Hamel, Helms, Cannon & Hamel, P.A., and DeArmon & Burris, by Christian R. Troy and Elizabeth T. Hodges, for defendant-appellees.

JOHNSON, Judge.

On or about 20 November 1983, plaintiffs and defendants James L. and Gaile T. Bunn entered into a written contract for the purchase of a parcel of land designated as Lot #7, Ludell Lane, Charlotte, North Carolina. Defendant Townsend Company was employed by the Bunns as the real estate company to sell their property. The plaintiffs intended to purchase the property for residential use.

On 21 November 1983, one day after the contract was signed, plaintiffs received a letter from the Townsend Company stating that a home could be built upon the lot in question because the property was suitable for the installation of a modified septic system. The letter was delivered by Hubert Holmes, the Bunns' listing agent who was employed by defendant Townsend Company. The letter also stated that the Environmental Health Department had confirmed the recommendation.

In April 1986 plaintiffs agreed to sell this same lot to a Raymond Woods. Mr. Woods, who also intended to use the lot for residential purposes, attempted to obtain approval for the installation of a septic system on the lot from the Mecklenburg County Environmental Health Department. The Environmental Health Department declined two applications submitted for approval, and Mr. Woods then refused to purchase the lot.

Plaintiffs then instituted this action against the Townsend Company and the Bunns on 19 March 1987, and the trial court dismissed it on 22 April 1988 pursuant to defendant Townsend Company's motion for summary judgment. Defendants James L. and Gaile T. Bunn filed no motion for summary judgment and the dismissal had no effect on the action which had been instituted against them.

On appeal plaintiffs bring forth one question for review. They contend that the trial court erred by concluding that the record failed to disclose a genuine issue of material fact and by consequent-

ly granting defendant Townsend Company's motion for summary judgment. We agree.

A motion for summary judgment tests the legal sufficiency of a claim for submission to a jury. If the pleadings, depositions, interrogatories, and admissions on file, along with any affidavits, demonstrate that there is no genuine issue of any material fact and only questions of law exist, then summary judgment is proper. *Rose v. Guilford County*, 60 N.C. App. 170, 298 S.E. 2d 200 (1982). Summary judgment is generally inappropriate in an action alleging fraud, *Bank v. Belk*, 41 N.C. App. 328, 255 S.E. 2d 430, *disc. rev. denied*, 298 N.C. 293, 259 S.E. 2d 299 (1979), as the existence of fraud must include fraudulent intent which is usually proven by circumstantial evidence.

In order to establish a prima facie case of fraud plaintiff must show

> (a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false *or made it recklessly without any knowledge of its truth and as a positive assertion*; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Myers and Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E. 2d 385 (1988), *quoting Odom v. Little Rock and I-85 Corp.*, 299 N.C. 86, 261 S.E. 2d 99 (1980). (Emphasis in original.) We believe that plaintiffs have presented sufficient evidence in the case *sub judice* to withstand defendant's motion for summary judgment.

The uncontroverted evidence we have before us indicates that plaintiffs and defendants Bunn entered into a written conditional agreement on 20 November 1983 for the purchase of a parcel of land. The agreement was contingent upon a positive perk test being issued by the Mecklenburg County Health Department. A positive test would permit the installation of a modified septic tank system. On 21 November 1983, one day after the conditional agreement was entered, defendant Townsend, by its agent Hubert Holmes, submitted a letter to plaintiffs which stated that "a home can be built on Lot 7, Ludell Lane, Charlotte, N.C. using an en-

larged system with a diversion value and a separate wash line. This is further confirmed by a conversation with the Environmental Health Department (Mr. Hardister) dated 11-21-83." Plaintiffs then purchased the lot on 14 December 1983 pursuant to the representation made by defendant Townsend, through its agent, and later discovered that the property was unsuitable for residential use.

In opposition to defendants' motion for summary judgment, plaintiffs submitted the deposition of Mr. Bill Hardister, the Mecklenburg County Environmental Health Department employee with whom Mr. Holmes had allegedly spoken. Mr. Hardister testified in his deposition as follows:

> Q. Do you recall whether or not you spoke to a Hubert Holmes of Merrill Lynch Realty back in November of 1983?
>
> A. The name is familiar and I may have talked with him.
>
> Q. Does your department give permits for septic systems over the phone?
>
> A. No, we do not.
>
> Q. Do you give opinions on septic systems over the phone?
>
> A. No, we do not. We—we will give information such as options which may be suitable. We would not indicate to anyone that a particular system would be acceptable over the phone.
>
> Q. What is your department procedure in regards to telephone approvals or opinions?
>
> A. Basically, as far as alternate systems, they would be only—only the section supervisor would do that and as—my practice was to indicate to people that our only approval is issuance of an improvement permit. Without an improvement permit we have not said that a system is acceptable for a particular lot.
>
> . . .
>
> Q. I'll show that we've marked as Plaintiffs' Exhibit 1, which is a letter—well, I'd ask you if you can—if you know what it is or if you can identify it.
>
> (WHEREUPON, Mr. Monnett handed the referenced document to the witness for his review.)

A. Well, it's a letter stating that a septic tank system can be installed or a home can be built on Lot 7 on Ludell Lane.

Q. What is an enlarged system?

A. I would think that that would be—well, what they're talking about, an enlarged system with a diversion valve, would be a system which would be probably one and one-half times the size of a regular system with a diversion valve that would allow the effluent to be diverted from one part of the system to another.

Q. What is a separate wash line?

A. It would be an additional nitrification line that would serve the washing machine only.

Q. Do you recall speaking with anyone concerning this lot on 11/21/83?

A. Not on this particular lot. I've talked to a lot of people about a lot of different lots; I can't recall specific lots necessarily.

Q. You don't recall any conversations with Mr. Holmes?

A. No; I said the name is familiar and I may well have talked with him, but I don't recall any specifics.

(WHEREUPON, the witness continued reviewing the referenced document.)

A. Reading further, this says that this was—that he did talk with me and I would not have told someone that yes, a lot is suitable. We would have issued an improvement permit had that been the case.

Q. Now, when you say that you would not have, how do you know that you wouldn't have?

A. *Well, it was always my policy in on-premises waste, as well as the department's, that we do not give verbal confirmations; we either issue a permit or we do not.*

Q. Do you ever have requests for verbal confirmations?

A. We have people who come in who want to talk about a particular lot who say, "Well, can I do this?" or "Can I do that?" We would request that they submit a plan and we would review that plan.

Q. Do you recall whether any plan was submitted to the department in 1983?

A. No[,] we don't have a record of one.

(Emphasis added.)

We are convinced that this deposition evidence raises a genuine issue of material fact as to defendant's intent in representing to plaintiffs that the parcel had been approved for residential use. Defendant does not deny that he represented to plaintiffs that the parcel had been approved for residential use. Defendant's representation that the parcel had been approved for the installation of a septic system was material because it was the contingency upon which the conditional contract was based.

There is evidence from which a jury could conclude that the representation was in fact false. The deposition evidence introduced by plaintiffs that the Health Department does not have a practice of issuing telephone approvals; that it does not give opinions concerning such matters over the phone; that without an improvement permit a system is not deemed acceptable; and that no plan was submitted to the department in 1983 on the lot in question, leads us to conclude that a jury could determine that defendant either knew of the falsity of the statement or recklessly made the statement without knowledge of its truth or falsity. Because defendant knew that this representation would remove the contract's contingency, we believe that a jury could also determine that defendant intended for plaintiff to rely upon the representation and to act upon it and purchase the property. Plaintiffs in fact relied upon the representation and purchased the parcel which they could not use for its intended purpose, a purpose of which defendant was well aware. Prior to the representation, plaintiffs' obligation to purchase the property was only conditional.

We believe that plaintiffs have established an actionable case of fraud against defendant Townsend Company and have raised genuine issues of material fact. Therefore, the trial court erred by granting defendant Townsend Company's motion for summary judgment.

In response to defendant's argument that even assuming that his statement was false, plaintiffs had the duty to make an independent inquiry as to the condition and character of the lot, we answer that our cases do not place such a duty upon plaintiff

in this instance. Defendant relies upon *Harding v. Southern Loan & Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940), and contends that plaintiffs had a full opportunity to investigate the property's value and its condition or adaptability to a particular use, and that therefore their claim for fraud must fail. The subsequent portion of the *Harding* rule, however, allows a plaintiff purchaser to maintain an action where the seller, through fraud, engages in an artifice "reasonably calculated to induce the purchaser to forego investigation," *id.* at 135, 10 S.E. 2d at 602, or to "forebear inquiries which he would otherwise have made." *Id.* at 134, 10 S.E. 2d at 602; *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E. 2d 578, *disc. rev. denied*, 320 N.C. 639, 360 S.E. 2d 92 (1987).

We have before us such a situation. In the case *sub judice* defendant made a specific and definite representation, rather than some general or vague statement about the property's condition. *See Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974); and *New Bern v. White*, 251 N.C. 65, 110 S.E. 2d 446 (1959). The inducement employed to prevent plaintiffs' inquiry was a representation that an employee of the County's Environmental Health Department had specifically approved the installation of a septic tank system upon the property. Defendant gave the employee's name as well as the date the contact was made. The named individual was in fact an employee of the Environmental Health Department. We believe that this is the type of artifice contemplated in *Harding, supra*, which is employed to induce a prospective purchaser to forego inquiry about real property. *See also Miller v. Mateer*, 172 N.C. 401, 90 S.E. 435 (1916) and *May v. Loomis*, 140 N.C. 350, 52 S.E. 728 (1905) where our Supreme Court found that the buyers had been induced through fraud to forego inquiry. (Although we have relied upon *Mateer, supra*, we specifically disavow its outmoded reasoning.)

It is for the aforementioned reasons that we hold that the trial court erroneously granted defendant Townsend Company's motion for summary judgment. We therefore reverse the trial court's order and remand the case for trial.

Reversed and remanded.

Judges BECTON and ORR concur.

HOOKS v. MAYO

[94 N.C. App. 657 (1989)]

NONA MAYO HOOKS AND HUSBAND, CURTIS W. HOOKS; ETHEL MAYO SHIREY AND HUSBAND, LYNWOOD SHIREY; LEONARD MAYO AND WIFE, JULIA R. MAYO; ORA MAE FOWLER (WIDOW); FRED B. MAYO AND WIFE, LOUISE D. MAYO; JANET MAYO PEARSALL (WIDOW); AND MARJORIE MAYO CARROLL AND HUSBAND, WOODROW W. CARROLL, SR. v. DAVID WHITLEY MAYO (SINGLE); GEORGE E. MAYO, III AND WIFE, REBECCA COLE MAYO; AND GRETCHEN MAYO JORDAN AND HUSBAND, BEN JORDAN

No. 888SC1326

(Filed 18 July 1989)

Wills § 35.4— devise of farm—life tenant—vesting of remainder interest

The trial judge erred in an action for a declaratory judgment to construe a will by ruling that the will devised a vested remainder to nieces and nephews who were living at the time of his death and should have granted summary judgment for plaintiffs where the testator left all of his property to his wife, except the farm he inherited from his father, which he gave to his wife for her lifetime and ". . . at her death, said farm shall be divided between my living nieces and nephews"; the testator died in 1940 survived by his wife, one brother, and eleven nieces and nephews; the wife died in 1987, survived by seven nieces and nephews; the seven surviving nieces and nephews are the plaintiffs in this action; and the defendants are four heirs of the dead nieces and nephews. The Court of Appeals concludes from the will's language that the testator used "living" to express his intent to take care of any nieces and nephews living at the time of the eventual distribution of the estate, the death of his wife, and in so doing treats the phrase "my living nieces and nephews" as our courts have treated other phrases of survivorship, giving the nieces and nephews the estate contingent upon their survival of the life tenant.

Judge LEWIS dissenting.

APPEAL by plaintiff from *Herbert O. Phillips, Judge*. Judgment entered 7 November 1988 in Superior Court, WAYNE County (out of session and out of district, by consent of the parties, at Kinston, North Carolina). Heard in the Court of Appeals 7 June 1989.

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

Warren, Kerr, Walston & Hollowell, by John H. Kerr, III, for defendant-appellees.

BECTON, Judge.

Plaintiffs sought a declaratory judgment to construe the Last Will and Testament of Jake G. Mayo. The trial judge ruled that Mr. Mayo's will devised a vested remainder in his farm to such of his nieces and nephews who were living at the time of his death. Plaintiffs appeal, contending that the testator intended that only the nieces and nephews who survived the life tenant should have an interest in the farm. We reverse and remand with instructions that the trial judge enter summary judgment for plaintiffs.

I

Jake G. Mayo died testate on 31 May 1940. He was survived by his wife, Sophia Jarman Mayo, one brother, George E. Mayo, and eleven nieces and nephews, all of whom were born prior to the time the testator executed his will on 20 December 1939. Jake G. Mayo left all of his property to his wife, ". . . except the farm I inherited from my father. This farm, I give to my wife . . . for her life time and at her death, said farm shall be divided between my living n[ie]ces and nephews."

Sophia Jarman Mayo died on 28 January 1987. Between the time of her death and the death of the testator, Jake's brother and four of Jake's nieces and nephews died. The seven surviving nieces and nephews are the plaintiffs. Four heirs of the dead nieces and nephews are the defendants.

II

Plaintiffs contend that the testator intended only those nieces and nephews who survived the life tenant should have an interest in the farm and that the nieces and nephews living at the time of the testator's death took only a contingent remainder interest. The defendants contend, as the lower court held, that because the language of the will is ambiguous, all the nieces and nephews living at the testator's death took a vested interest in the farm.

It is true that the law favors early vesting of estates and that an estate will be held to vest at the death of the testator,

unless it is clear from the language that the testator intended to postpone vesting to some other time. *Chas. W. Priddy & Co. v. Sanderford*, 221 N.C. 422, 425, 20 S.E. 2d 341, 343 (1942). A court's primary objective when construing a will is to effectuate the intent of the testator, as long as that intent does not conflict with the state's public policy or laws. *Kale v. Forrest*, 278 N.C. 1, 5, 178 S.E. 2d 622, 625 (1971). All other rules of construction must yield to this objective. *Id.* at 14, 178 S.E. 2d at 625.

The testator's intention must be gathered, if possible, from the language of the will itself. *Clark v. Conner*, 253 N.C. 515, 520, 117 S.E. 2d 465, 468 (1960). Every word must be examined for meaning and purpose. *Id.* at 521, 117 S.E. 2d at 468. In this case, we are called upon to give meaning and purpose to the phrase "my living nieces and nephews."

States differ on the interpretation of words of survivorship. Some states hold that terms such as "surviving" refer to the death of the testator. *See, e.g., Gay v. Graham*, 218 Ga. 745, 130 S.E. 2d 591 (1963). North Carolina, however, is among the majority of states which presume that words of survivorship refer to the death of the holder of the intervening estate, unless an intention to the contrary is indicated. *Vass v. Freeman*, 56 N.C. 221 (1857). The reasoning behind this presumption is that it is assumed that the testator expected to be survived by those mentioned in the will and that it would be unnecessary to use words such as "surviving" or "living" if the testator intended that all those living at the time of his death should take. *See id.* at 226; *Miller v. Rogers*, 246 S.C. 438, 444, 144 S.E. 2d 485, 488 (1965).

North Carolina courts have held "surviving" to refer to the death of the holder of the intervening estate, as long as the entire will would sustain such a construction. For example, in *Kale v. Forrest*, 278 N.C. 1, 178 S.E. 2d 622 (1971), our Supreme Court held that the phrase "[a]t his death the balance should be given to my surviving heirs" referred to the "persons who would be living or surviving at the death of [the holder of the life estate]." *Id.* at 17, 178 S.E. 2d at 632.

Defendants rely heavily on *Taylor v. Taylor*, 174 N.C. 537, 94 S.E. 7 (1917), in which our Supreme Court held that the phrase "my living children" referred to all the children living at the death of the testator. However, the Court noted that

> when the devise is to survivors after a life estate, the time usually adopted for determining who comes within the class is the death of the life tenant, and not the death of the testator . . . but these are not principles of substantive law, but rules of interpretation, which should be resorted to to ascertain the intention of the testator, and not to defeat it.

Id. at 539, 94 S.E. at 8 (citation omitted). The Court found evidence of the testator's intent for vesting to occur at his death because 1) he had used "living" to exclude his deceased child and that child's heirs for personal reasons, and 2) by other language in the will, the testator had said what he meant by "living." *Id.*

North Carolina courts have held "living," when qualifying the takers after a life estate, to refer to those living at the death of the life tenant. In *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867 (1963), the Court held the expression "that is living" in the executory devise meant those living at the death of the life tenant. *Id.* at 376, 128 S.E. 2d at 872. In *Gill v. Weaver*, 21 N.C. 41 (1834), the Court recognized the survivorship quality of "youngest living child," despite its disinheriting effect, noting that the testator had "forgotten to provide for the death of a child leaving issue . . . [and] [a]ny other reading would strike the word 'living' out of the will altogether." *Id.* at 45.

Language nearly identical to that found in Jake Mayo's will has been interpreted by the South Carolina Supreme Court in *Slice v. Metze*, 294 S.C. 12, 362 S.E. 2d 178 (1987). The court held the devise to the testator's wife for her life and at her death "to my living children to be equal [sic] divided between them" to vest the remainder at the death of the life tenant. *Slice* was based on an earlier case, *Miller*, in which the court found the words "my living children" to mean the same thing as "my surviving children," words which had been previously held to reflect an intent on the part of the testator to postpone vesting until the death of the life tenant. The court based its decision on the view that the word "living" must be given effect, for "[i]f [the testator] intended his children living at the date of his death to take a vested interest immediately, he did not need to use the modifying word 'living' and would have accomplished that result by the use of the word 'children,' without any modifying adjective." *Miller*, 246 S.C. at 444, 144 S.E. 2d at 488. We agree with the reasoning in *Miller*.

Other language in Jake Mayo's will reinforces the construction we have given to the remainder interest. We recognize that words such as "after," "at," or "upon," by themselves, do not postpone vesting. *See Sanderford*, 221 N.C. at 425, 20 S.E. 2d at 343. However, the phrase "at her death" combined with the phrase "living nieces and nephews" reflects to us a clear intention on the part of the testator to postpone vesting. As the Supreme Court of Pennsylvania stated in construing "at his death to be divided among his living children as follows: $500 to M., . . .":

> The words, "at his death," refer to the death of [the life tenant], and not to the death of the testator, and fix the time for division. The words "living children" and "other children" are descriptive of the persons who are then to take. Until the time for distribution is reached, the persons entitled to shares cannot be ascertained.

Day v. Thompson, 233 Pa. 550, 82 A. 935 (1912).

We must assume that Jake Mayo had a purpose in using "living" to qualify "nieces and nephews." None of the nieces and nephews had predeceased him, so he did not use the word to exclude a specific niece or nephew. Yet, his words serve as a limitation of the class which is to take the remainder interest. Therefore, we conclude from the will's language that Jake Mayo used "living" to express his intent to take care of any nieces and nephews living at the time of the eventual distribution of the estate, the death of his wife. In so doing, we treat the phrase "my living nieces and nephews" as our courts have treated other phrases of survivorship, giving the nieces and nephews the estate contingent upon their survival of the life tenant.

III

For the reasons we have stated above, the order granting summary judgment for the defendants is reversed, and the case is remanded with instructions that the trial judge enter summary judgment for the plaintiffs.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I dissent. The court's construction of the language of a will must be guided by the intent of the testator. *White v. Alexander*, 290 N.C. 75, 224 S.E. 2d 617 (1976). The testator's intent is to be gathered from the four corners of the will. *Vick v. Vick*, 297 N.C. 280, 254 S.E. 2d 576 (1979). The construction of particular words is to be guided by an examination of the instrument in its entirety. *Lambeth v. Fowler*, 33 N.C. App. 596, 235 S.E. 2d 914 (1977). In its entirety, the will states:

> I give to my wife, Sophia Jarman Mayo, all my Personal Property, Real Estate, Money, Bonds, Etc., except the farm I inherited from my father. This farm I give to my wife, Sophia Jarman Mayo, her life time and at her death, said farm shall be divided between my living neices (sic) and nephews.

The majority concludes that the word "living" signifies an express condition that nieces and nephews survive the life tenant before they take a vested remainder. They hold that the word "living" comes after the phrase "at her death" and thus suggests that the remaindermen must be living at the death of the life tenant for the remainder to vest in them. However, the meaning of particular words in a will is to be determined in accordance with the testator's overall intention. *Schaeffer v. Haseltine*, 228 N.C. 484, 46 S.E. 2d 463 (1947).

Looking at the four corners of the will I gather that the overall intent of the devise was to guarantee that the farm Jake G. Mayo inherited from his father remained in the possession of lineal descendants of his father. All eleven of the nieces and nephews were on the Mayo side, the children of the testator's brothers. The structure of the will suggests it was written to exclude the farm from all other property taken by Sophia Mayo in fee simple. This farm was a Mayo family place and Jake G. Mayo singled it out to belong to his brother's children, as he had none of his own.

The language of a will is to be construed in light of the circumstances of the testator's family and estate known to the testator at the time. *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973). Had Jake G. Mayo not written the will and excluded the Mayo farm from the balance of his estate, his father's land would have passed to his wife. Given that she, at age 40, had not borne children, it was possible that the farm would then pass to someone other

than his father's lineal descendants. Particular language of the will must therefore be read in light of Jake G. Mayo's intention to keep his father's farm in the Mayo family.

In applying this overall intent to the word "living," I see no reason why Jake G. Mayo would have wanted to disenfranchise those nieces and nephews who died during the life tenancy. There is a presumption against disinheritance among heirs of the same class. *Palmer v. Ketner*, 29 N.C. App. 187, 223 S.E. 2d 913 (1978). This presumption is overcome only by clear expression of intent. *Id.* I believe that Jake G. Mayo employed the word "living" because he sought to devise the farm to those nieces and nephews who would themselves perpetuate the paternal line. Where the word "living" can be so explained, there is no evidence outweighing the presumption against disinheritance.

Furthermore, the law favors early vesting of estates. *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E. 2d 341 (1942). An estate will be held to vest at the death of the testator unless it is clear from the language of the will that the testator intends to postpone vesting. *Id.* Where the word "living" does not unambiguously indicate such postponement, the presumption for early vesting prevails. I believe the remainder in the farm vested in those nephews and nieces who survived the testator.

For these reasons, I would affirm the order of the trial judge.

IN THE MATTER OF: CONCHITA P. SMITH, PETITIONER-APPELLANT v. KINDER CARE LEARNING CENTERS, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. 8810SC1354

(Filed 18 July 1989)

1. Master and Servant § 108.2— unemployment compensation— day-care teacher's use of physical punishment—violation of employer's rule—misconduct disqualifying employee from receiving benefits

The Employment Security Commission did not err in finding that petitioner willfully and without good cause violated her employer's rule against physical punishment and in con-

cluding that her actions amounted to misconduct connected with her work so as to disqualify her from receiving unemployment benefits pursuant to N.C.G.S. § 96-14(2) where the evidence tended to show that petitioner was a driver and teacher in a day-care center; while pregnant, she was hit in the stomach by a student who was swinging her book bag; petitioner's immediate reaction was to hit the student on the shoulder to keep her from further hitting petitioner with the book bag; and petitioner knew that corporal punishment was not allowed and knew that failure to comply with her employer's discipline policy was a reason for immediate termination.

2. **Master and Servant § 108.1 — denial of unemployment compensation — single violation of employer's rule sufficient basis**

The Employment Security Commission did not err in basing its decision to deny unemployment compensation upon petitioner's single violation of her employer's rule against use of corporal punishment where petitioner violated a significant rule based on State law. N.C.G.S. §§ 96-14(2); 110-85; 110-91(10).

Judge EAGLES dissenting.

APPEAL by petitioner from *Allen (J. B., Jr.), Judge.* Judgment entered 11 July 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 8 June 1989.

Petitioner worked at a day-care facility as a teacher and van driver. Petitioner's employer discharged her for violating the employer's rule against physical punishment of children. The Employment Security Commission denied petitioner's claim for unemployment benefits on the grounds that her employer discharged her for misconduct connected with her work. Petitioner appeals from the trial court's judgment affirming the decision of the Commission.

East Central Community Legal Services, by William D. Rowe, for petitioner-appellant.

Maupin, Taylor, Ellis & Adams, P.A., by Margie T. Case and Rodney O. Lohman, for respondent-appellee Kinder Care Learning Centers, Inc.

Chief Counsel T. S. Whitaker for respondent-appellee Employment Security Commission of North Carolina.

PARKER, Judge.

[1] In reviewing a decision of the Employment Security Commission, the court must (i) determine whether the Commission's findings of fact are supported by competent evidence and (ii) decide whether the findings of fact support the Commission's conclusions of law and its final decision. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E. 2d 357, 359 (1982). The burden is on the employer to show that a discharged employee is disqualified from receiving benefits. *Id.* In the present case, petitioner contends that the Commission erred in finding that she willfully and without good cause violated her employer's rule against physical punishment and in concluding that her actions amounted to misconduct connected with her work so as to disqualify her from receiving unemployment benefits pursuant to G.S. 96-14(2).

The incident leading to petitioner's discharge occurred on 20 November 1987 while petitioner was organizing a group of children whom she had driven to the day-care facility. The Commission made the following findings of fact regarding the incident:

> 6. The claimant was pregnant at the time of the final incident that caused her termination.
>
> 7. The young student (approximately nine (9) years of age) was horsing around. The student was swinging her book bag and struck the claimant with it. The claimant's immediate raction [sic] was to hit the student on the shoulder to keep her from further hitting the claimant with the book bag.
>
> 8. The claimant then grabbed the student by the sleeve and was attempting to take the student to the end of the line for the bus. The student tripped and fell.
>
> 9. The incident was reported by both the claimant and a parent who observed the situation.
>
> 10. Claimant was or should have been aware of [the rule against physical punishment] because it is a well known and established rule of which the claimant was very much aware.

Petitioner did not except to findings of fact 6 through 10 and, therefore, those findings are binding on appeal. *In re Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 364, 291 S.E. 2d 308, 309 (1982). Petitioner has excepted only to the Commission's findings that she violated her employer's rule and that the violation was willful

and without good cause. These findings are conclusive if supported by competent evidence. *Intercraft Industries Corp. v. Morrison*, 305 N.C. at 377, 289 S.E. 2d at 360.

We find no merit in petitioner's contention that she did not violate the rule. The rule is embodied in a document entitled "Discipline Policies and Procedures" which provides in pertinent part: "*No* corporal/physical punishment shall be used!" Petitioner signed a copy of the document which contained a statement that she understood that failure to comply with discipline policy is a reason for immediate termination. Petitioner argues that she did not violate the rule because her striking the child was a reflexive action and she did not intend it to be a disciplinary measure. This argument is based upon an overly narrow reading of the rule. The clear intent behind the rule is that employees should never use physical violence for any purpose in their dealings with children. Therefore, petitioner's reason for striking the child is irrelevant.

Similarly, we find no error in the Commission's finding that petitioner "willfully" violated the rule. The word "willful" may have different meanings in different contexts. *See* Black's Law Dictionary 1434 (5th ed. 1979). In this case, the undisputed evidence shows that the act constituting the violation was intentional as opposed to accidental or negligent; therefore, it was a willful violation.

We also find no error in the Commission's finding that petitioner violated the rule without good cause. Violation of a work rule does not constitute misconduct under G.S. 96-14(2) if the employee acted reasonably and with good cause. *Intercraft Industries Corp. v. Morrison*, 305 N.C. at 375, 289 S.E. 2d at 359. Our courts have defined good cause as "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work," *id.* at 376, 289 S.E. 2d at 359, and as "justifiable or reasonable under the circumstances." *In re Cantrell*, 44 N.C. App. 718, 722, 263 S.E. 2d 1, 3 (1980) (quoting *McLean v. Board of Review*, 476 Pa. 617, 620, 383 A. 2d 533, 535 (1978)). The existence of good cause is a question of fact. *Intercraft Industries Corp. v. Morrison*, 305 N.C. at 377, 289 S.E. 2d at 360.

Petitioner contends that she acted reasonably and with good cause because she was pregnant and the child hit her in the stomach with a book bag. We disagree. One who assumes responsibility for young children must be prepared to deal with unruly behavior in the proper manner. The findings and evidence show that pe-

titioner's immediate reaction to the child's act was to respond with her own violent act. The evidence does not show that the blow from the book bag caused petitioner any harm or pain, nor does it show that petitioner had to resort to physical force to prevent another blow. The Commission may properly refuse to find good cause for the violation of an employer's rule where more prudent alternatives were available to the employee. *See In re Cantrell*, 44 N.C. App. at 723, 263 S.E. 2d at 4. Respondent employer had provided training in alternative methods for dealing with disruptive and unruly children, and petitioner concedes in her brief that "other alternative reactions were possible." Therefore, the Commission's finding that petitioner violated her employer's rule without good cause is supported by competent evidence.

Petitioner next contends that her violation of the rule did not constitute misconduct within the meaning of G.S. 96-14(2). The statute provides in pertinent part:

> Misconduct connected with the work is defined 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.

Every violation of an employer's rule does not necessarily amount to misconduct. *In re Kahl v. Smith Plumbing Co.*, 68 N.C. App. 287, 289, 314 S.E. 2d 574, 576 (1984). Petitioner contends that her violation did not constitute misconduct because it was a single instance of poor judgment and she did not act with the intent to harm the interests of her employer.

We agree with petitioner that there is no evidence to show that she intended to act in a manner adverse to her employer's interests. Although G.S. 96-14(2) requires a showing of more than simple negligence such that an employee's intent is a relevant consideration, *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 456, 349 S.E. 2d 842, 851 (1986), the statute does not require a finding of a specific intent to harm the employer in all cases. Misconduct may be found based upon a showing of "deliberate violations or disregard" of the employer's standards of behavior.

In the present case, the act constituting the violation was intentional and, therefore, it cannot be classified as negligence. *See Jenkins v. Department of Motor Vehicles*, 244 N.C. 560, 563, 94 S.E. 2d 577, 580 (1956); *Lail v. Woods*, 36 N.C. App. 590, 244 S.E. 2d 500, *disc. rev. denied*, 295 N.C. 550, 248 S.E. 2d 727 (1978). Because petitioner was charged with knowledge of the rule against physical punishment, her actions amounted to a deliberate violation of the rule. Therefore, we find little merit in petitioner's argument that her conduct was merely an instance of "poor judgment." Cases from other jurisdictions upon which petitioner relies are not pertinent to this case because they involve physical altercations between adult employees. *See, e.g., Anderson v. Florida Unemployment Appeals Comm'n*, 517 So. 2d 754 (Fla. Dist. Ct. App. 1987).

[2] Petitioner also contends that the Commission erred in basing its decision upon a single violation of the rule. Although the frequency of an employee's improper conduct is relevant under G.S. 96-14(2), the seriousness of a particular rule violation is also a relevant factor in determining whether an employee is guilty of misconduct. In this case, petitioner violated a clearly stated rule after she had been informed that such a violation was grounds for termination. The General Assembly has declared its intent to protect children who are placed in day-care facilities through regulation of the facilities. G.S. 110-85. Facilities are required by statute to have written policies on discipline which must be given to parents of enrolled children. G.S. 110-91(10). Regulations governing day-care facilities expressly prohibit any form of corporal punishment. 10 N.C. Admin. Code 3U.1801.

Thus, petitioner violated a significant rule based on State law. In *Douglas v. J. C. Penney Co.*, 67 N.C. App. 344, 313 S.E. 2d 176 (1984), this Court upheld a finding of misconduct where a security officer was discharged for one instance of discussing confidential information with other employees. We noted that "[c]onfidentiality is an integral part of a store's security." *Id.* at 346, 313 S.E. 2d at 178. In this case, the important policy underlying the rule which petitioner violated justifies the Commission's finding of misconduct based upon a single violation.

For the foregoing reasons, the judgment affirming the decision of the Employment Security Commission is affirmed.

Affirmed.

Judge ORR concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. I would reverse the decision below because the facts found here do not support the conclusion that petitioner was guilty of misconduct so as to disqualify her from unemployment benefits.

The findings of fact here show that petitioner violated her employer's rule against inappropriate discipline (any corporal or physical punishment). A student hit petitioner in the stomach with a book bag. Petitioner was pregnant at the time. Petitioner's "immediate raction [sic] was to hit the student in the shoulder to keep her from further hitting the [petitioner] with the book bag." The hearing officer also found that petitioner was aware of the rule against corporal punishment and promptly informed her supervisor of the incident. I do not agree that these facts support the conclusion that petitioner's actions constitute misconduct under G.S. 96-14(2). Misconduct means

> conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior . . ., 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. . . .

G.S. 96-14(2).

Deliberate means "[w]illful rather than merely intentional." Black's Law Dictionary 384 (5th ed. 1979). Deliberate actions are those taken after weighing the consequences. *Id.* The facts here do not show petitioner acted deliberately. Her actions were more a reflex. Additionally, I do not believe petitioner's actions show an "intentional and substantial disregard of the employer's interests or of the employee's duties and obligations." Although petitioner's actions may have shown poor judgment on her part and properly subjected her to termination by her employer, they do not constitute the type of conduct that should disqualify her from unemployment benefits.

JEAN SELLARS RAWLS v. GEORGE WHITFIELD RAWLS

No. 885DC1366

(Filed 18 July 1989)

1. **Divorce and Alimony § 24.9— child support—sums expended on home—findings sufficient**

The evidence was sufficient in an action for child support and equitable distribution to support the trial court's finding regarding the child's total reasonable expenses, including sums expended on the home.

2. **Divorce and Alimony § 24.9— child support—findings regarding father's monthly expenses—sufficient**

The trial court in a child support and equitable distribution action made sufficient findings and the findings were supported by the evidence presented at the hearing where defendant was the non-custodial parent, the court found that defendant's expenses were $52.00 per month, that any expenses in excess of that amount were provided by his mother and brother, and defendant's evidence did not contradict that finding.

3. **Divorce and Alimony § 24.1— child support—amount—no abuse of discretion**

The trial court did not abuse its discretion in an action for child support and equitable distribution by requiring defendant to pay an excessive amount of child support where, although the order required defendant to expend a rather large percentage of his stated weekly income for the support and maintenance of his son, the trial court found that defendant had been paying $100.00 per week voluntarily for several months prior to the hearing and had testified that he would continue to do so. Moreover, the court made extensive findings regarding the child's needs and his parents' estates and earnings, including defendant's job skills and improving educational qualifications, and the resulting order for current child support does not require that defendant exhaust his savings.

4. **Divorce and Alimony § 24.1— child support—reimbursement for past support—no error**

The trial court did not err in an action for child support and equitable distribution by allowing plaintiff to recover $15,100.00 from defendant in reimbursement of past child sup-

port where the court specifically found that, prior to filing this action, plaintiff had expended at least $400.00 per month for the support of the parties' child and that defendant had the capacity to pay one-half of this amount toward the child's support during this time.

5. Divorce and Alimony § 30— equitable distribution—marital debt—insufficient findings

An equitable distribution action was remanded for further factual findings where the parties had incurred a debt jointly and it was impossible from the court's findings to determine whether the debt was a marital debt. N.C.G.S. § 50-20(e) (1987).

6. Divorce and Alimony § 25.12— child custody—determination of visitation—order to consult psychologist

The trial court did not abuse its discretion in an action for child support by ordering defendant to consult a psychologist or psychiatrist before the award of specific visitation rights where the court found that defendant's contact with his minor child had been minimal and, although defendant was fit and proper to have visitation rights, consultation by plaintiff and defendant with a third-party professional could benefit the court in awarding specific visitation rights. N.C.G.S. § 50-13.2(b) (1987).

APPEAL by defendant from *Morris-Goodson, Jacqueline, Judge.* Order entered 11 July 1988 in NEW HANOVER County District Court. Heard in the Court of Appeals 17 May 1989.

This appeal arises from an order of child support and equitable distribution. The trial court found that plaintiff and defendant were married on or about 21 July 1979 and separated on or about 1 August 1981. Plaintiff was awarded an absolute divorce from defendant on 3 April 1987. The parties had one child, who was born 12 November 1980.

The court further found that plaintiff and defendant secured a loan from Cooperative Savings & Loan Association to provide money for defendant's separate property, a farm supply store and farming operation. Plaintiff pledged her own residence, which she had owned for approximately nine years prior to her marriage to defendant and which the court determined was separate property, as collateral to secure the loan. The parties' child was born

shortly after they secured this loan, and they separated less than a year thereafter.

Following the separation defendant made all payments due under the note until June 1983, but made payments sporadically during 1984 and made no payments after March 1985. The court found that in order to prevent foreclosure on her primary residence, plaintiff made approximately thirty-seven payments on the note as of the time of the hearing. Since March 1985 she had paid approximately $23,000.00 on the note but its balance at the time of the hearing was $48,738.04.

The court also found that plaintiff paid at least $400.00 per month prior to filing this action for the support and maintenance of the parties' child, and that this sum was reasonable. It further found that defendant had the estate and earning capacity at the time to pay at least one-half of those costs. In 1986 plaintiff received from defendant $50.00 for the support of their child; in 1987 she received $900.00, and from January 1988 until the date of the hearing she received $750.00.

Regarding the child's current expenses, the court found that total reasonable monthly expenses on his behalf were $785.00 per month. Plaintiff's gross income prior to withdrawing from her employment in 1987 was approximately $26,000.00 per year, but she was diagnosed with Hodgkins Disease in April 1987 and was subsequently unable to work. At the time of the hearing she received $917.00 per month in benefits. Defendant was a vice-president at Production Credit Association for some years and was skillful in accounting, the court found, but he currently attended school and worked for his brother driving a truck, earning approximately $132.00 per week. He lived with his mother at the time of the hearing and incurred living expenses of $52.00 per month. Prior to the hearing he was sending plaintiff $100.00 per week in child support, and he stated that he could currently pay that amount. The court found that he had interest in properties, education, training, and background sufficient to permit him to contribute to his child's support and maintenance.

The trial court ordered that defendant pay $100.00 per week in current child support, and $15,100.00 in reimbursement for past child support. It further ordered that defendant pay $43,812.21 to plaintiff as compensation for the depletion of her separate property for the benefit of his separate property. It awarded custody

of the child to plaintiff and ordered the parties to consult with a psychologist or a psychiatrist prior to its determining defendant's specific visitation rights.

James L. Nelson for plaintiff-appellee.

Larrick & Mason, by James K. Larrick, for defendant-appellant.

WELLS, Judge.

I. CHILD SUPPORT

Defendant first assigns error to the trial court's order that he pay $100.00 per week in child support. In determining the amount of support necessary for a minor child the trial court must consider specific factors and circumstances; child support payments shall be sufficient "to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c) (1987).

The trial court's findings on these issues must be sufficiently detailed to support its conclusions of law. This specificity enables appellate tribunals to examine the court's findings to determine whether they support its order; appellate courts do not make factual findings but rather review the trial court's conclusions of law to decide whether they are amply supported by the facts as found. *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985); *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E. 2d 581 (1986).

> With respect to an order for child support, the factual findings must be sufficiently specific to enable the appellate court to determine that the trial court "took 'due regard' of the particular 'estates, earnings, conditions [and], accustomed standard of living' of both the child and the parents" in determining "(1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount."

Boyd, supra (*quoting Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980)).

[1] Defendant contends that the trial court erred in its findings of fact with respect to the child's support needs by including

sums expended on behalf of plaintiff's home as a whole. We do not believe that the evidence supports this assertion. During plaintiff's testimony regarding her computation of the child's living expenses the following discussions took place:

> THE COURT: Are those expenses for your child alone?
>
> A. Yes.
>
> THE COURT: It's not including yours for anything, just the child, you need $290.
>
> A. Right. For instance, for food, that was just his food, not total food there.
>
> . . .
>
> CROSS EXAMINATION (By Mr. Larrick)
>
> Q. Mrs. Rawls, the figures you just went through starting $150 for electricity, $36 for phone, $10 for trash. And you talked about insurance on the house and you said that was part of the utility bill. What do you mean by that? Do you understand what I am asking you about? What you just testified to.
>
> A. Actually I cut myself out $200. It should be $400.

We believe that this evidence supports the trial court's finding regarding the child's total reasonable expenses.

[2] Defendant also contends that the trial court failed to make sufficient factual findings regarding his monthly expenses. In determining the proper amount of child support payments the trial court must make findings regarding the non-custodial parent's living expenses. *Plott, supra.* The court found that defendant's expenses are $52.00 per month, and that any expenses in excess of this amount are provided for by his mother and brother. Defendant's evidence did not contradict this finding. We hold that the trial court made the required findings and that they were supported by the evidence presented at the hearing.

[3] Defendant next contends that the trial court abused its discretion by requiring him to pay an excessive amount of child support. Although the order requires him to expend a rather large percentage of his stated weekly income for the support and maintenance of his son, we note that the trial court found that defendant

had been paying $100.00 per week voluntarily for several months prior to the hearing and testified that he would continue to do so. This finding is supported by the evidence and is relevant to the trial court's inquiry, as a fact "of the particular case." N.C. Gen. Stat. § 50-13.4(c) (1987). We emphasize, however, that the primary inquiry is always the child's reasonable needs rather than the parties' abilities to pay. *Warner v. Latimer*, 68 N.C. App. 170, 314 S.E. 2d 789 (1984). The court made extensive findings regarding the child's needs and his parents' estates and earnings, including its findings regarding defendant's job skills and improving educational qualifications. Its resulting order for current child support does not require that defendant exhaust his savings, but appears to be fair and reasonable as to all parties. *See Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). We overrule this assignment of error.

[4] Defendant next assigns error to the trial court's order that plaintiff recover $15,100.00 from him in reimbursement of past child support. This sum reflects credits awarded to defendant for the amounts previously contributed to plaintiff for the child's support. Retroactive child support payments are recoverable for amounts actually expended on the child's behalf; *"[t]he measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represented the defendant's share of support. . . ." Warner, supra* (emphasis retained) (*quoting Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E. 2d 307 (1977)).

The trial court specifically found that prior to filing this action plaintiff expended at least $400.00 per month for the support of the parties' child. It also found that defendant had the capacity to pay one-half of this amount toward the child's support during this time. *See Buff v. Carter*, 76 N.C. App. 145, 331 S.E. 2d 705 (1985) (trial court must consider defendant's ability to pay during the time for which reimbursement for child support is sought). In light of these findings, which are supported by the evidence and thus are binding on appeal, we hold that the trial court correctly awarded plaintiff reimbursement for past child support. We overrule this assignment of error.

II. EQUITABLE DISTRIBUTION

[5] Defendant next assigns error to the trial court for ordering that plaintiff recover $43,812.21 "in equity" for the depletion of her separate estate for the benefit of defendant's separate estate.

The court found that the parties had acquired no marital property, and therefore concluded that there was no "estate to be adjusted pursuant to [N.C. Gen. Stat. §] 50-20(c) [1987]." In reaching this conclusion the trial court neglected, however, to consider the debts incurred by the parties during their marriage.

"Debt, as well as assets, must be classified as marital or separate property." *Byrd v. Owens*, 86 N.C. App. 418, 358 S.E. 2d 102 (1987). In effectuating an equitable distribution the trial court must consider the parties' debts. *Geer v. Geer*, 84 N.C. App. 471, 353 S.E. 2d 427 (1987); N.C. Gen. Stat. § 50-20(c)(1) (1987). If it finds that a particular debt is marital, that is, "a debt incurred during the marriage for the joint benefit of the parties," it possesses discretion to equitably apportion or distribute the debt between the parties. *Geer, supra.*

The parties in this case incurred the debt jointly. In its limited factual findings on this issue, the trial court found that "the savings and loan made [a loan] to defendant for the purpose of enhancing and/or maintaining the defendant's separate property . . . ." It made few findings, however, concerning the actual use of the loan proceeds: the court discussing defendant's use of only $5,000.00 out of the total amount borrowed of $50,400.00. It is impossible from these incomplete findings to determine whether the debt was a marital debt, *i.e.*, one incurred for the joint benefit of the parties. Because of the trial court's failure to make the findings necessary to properly establish the classification of the debt, in accordance with the authorities cited above, we reverse and remand the cause for further factual findings on this issue and for an appropriate order based on such findings. Such order may include a requirement that defendant reimburse plaintiff for such portion of the marital debt as the court finds equitable. *See* N.C. Gen. Stat. § 50-20(e) (1987).

III. CUSTODY AND VISITATION

[6] In his final assignment of error defendant challenges the trial court's authority to order him to consult with a psychologist or psychiatrist before awarding specific visitation rights. Visitation rights orders, along with other matters related to child custody, are governed by the standard of "promot[ing] the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(b) (1987). The trial court had wide discretion to protect the child's best interests and welfare. *Craig v. Kelley*, 89 N.C. App. 458, 366 S.E. 2d 249 (1988).

The trial court found that defendant's contact with his minor child had been minimal, and although he was fit and proper to have visitation rights, consultation with plaintiff and defendant by a third-party professional could benefit the court in awarding specific visitation rights. The court's factual findings support its order, and we perceive no abuse of discretion. We overrule this assignment of error.

Affirmed in part, reversed in part and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

DOUGLAS L. RAWLS v. CULA R. EARLY AND J. GUY REVELLE, JR. AND ELMA WILLIAMS, CAROLYN O. HOLLOWELL, DAVID LEE HOLLOWELL, ELEANOR O. LEMMOND, THOMAS ALLAN LEMMOND, SHIRLEY O. BRYANT, JOE ROGERS BRYANT, ADOLPH ODOM, MOLLIE WHITE ODOM, GEORGE ODOM, DARNELL HEDGEPETH ODOM, E. J. HARRELL, JAMIE JO ODOM, AND AMANDA JO EVANS

No. 886SC867

(Filed 18 July 1989)

1. **Wills § 34.1— contingent remainder interest of ascertained remainderman—conditions to which interest was subject**

The contingent remainder interest of an ascertained remainderman in this case was subject to the condition precedent of the life tenant not being survived by children, but her interest was not also subject to an implied condition of the remainderman surviving the life tenant.

2. **Wills §§ 34.1, 35.4— contingent remaindermen—survival requirement—class treated different from ascertained individuals**

Lawson v. Lawson, 267 N.C. 643, and other cases which imply a survival requirement on members of a class who are contingent remaindermen do not apply to devises in which the contingent remainder is to ascertained individuals.

APPEAL by petitioner from *Watts (Thomas S.), Judge*. Judgment entered 28 April 1988 in Superior Court, HERTFORD County. Heard in the Court of Appeals 15 March 1989.

Joseph J. Flythe for petitioner-appellant.

Revelle, Burleson, Lee & Revelle, by L. Frank Burleson, Jr., for respondent-appellee J. Guy Revelle, Jr.

Leahy & Moore, by Charles A. Moore, Guardian Ad Litem for respondent-appellee Jamie Jo Odom.

James D. Riddick, III, Guardian Ad Litem for respondent-appellee Amanda Jo Evans.

GREENE, Judge.

Petitioner, Douglas L. Rawls, filed an action against respondent, Cula R. Early, seeking to partition a certain tract of land located in Hertford County on the ground that petitioner and respondent own the land jointly. Respondent filed an answer requesting the partitioning be denied. A motion to intervene filed by the administrator of the Norman Ray Odom estate was granted by the court. The heirs at law of Norman Ray Odom were then joined as additional respondents. The intervenor respondent prayed that the court enter a judgment declaring the respective rights, status, and other legal relations of all the parties under the will of Telie M. Odom.

Telie M. Odom died testate on 22 January 1963. In the third paragraph of her Last Will and Testament, executed 1 May 1956, testator devised all her land to her only child, Norman Ray Odom for life:

> THIRD, I give and devise to my beloved son Norman Ray Odom all real estate which I may own at the time of my death for the term of his natural life, and if he has children then to his said children in fee simple, and if the said Norman Ray Odom shall die and does not leave children living at the time of his death, then I give and devise my said real estate to Izetta Rawls, my niece, in fee simple.

Norman Ray Odom went into possession of the disputed land after the death of his mother and remained in possession until his death on 15 January 1985. He died without children. Izetta Rawls died on 21 September 1978 without having conveyed the interest she owned in the disputed land. She was survived by Ethel Rawls and Cula R. Early as her only heirs at law. Telie M. Odom's will contained no residuary clause.

On or about 19 November 1986, Ethel Rawls executed a deed purporting to convey to Douglas L. Rawls, the petitioner, a one-half undivided interest in the land. This deed was recorded in the office of the Register of Deeds for Hertford County on 19 November 1986. Based upon this deed, petitioner filed this partition action.

The case was tried without a jury in Hertford County. At trial, the final pre-trial conference order, the deed conveying the property in question to Telie M. Odom, testator, the will of Telie M. Odom, a copy of the deed purporting to convey a one-half undivided interest in the property from Ethel Rawls to petitioner Douglas L. Rawls, and the admissions of the pleadings were admitted into evidence. On the foregoing evidence, the trial court made the following Conclusions of Law:

> 1. The interest of Izetta Rawls under the will of Telie M. Odom was contingent.
>
> 2. That contingent interest did not vest because Izetta Rawls died before Norman Ray Odom.
>
> 3. The real estate . . . did not descend to Ethel Rawls and Cula R. Early upon the death of Izetta Rawls before the death of Norman Ray Odom.
>
> 4. The . . . [deed] recorded . . . in the office of the Register of Deeds for Hertford County did not convey to Douglas L. Rawls any interest in the real estate . . . because Izetta Rawls and her heirs had no interest in the property after her death on September 21, 1978.
>
> 5. The heirs at law of Norman Ray Odom own the real estate . . . to the exclusion of Douglas L. Rawls and Cula R. Early . . . .

The trial court entered an order consistent with the Conclusions of Law. Petitioner Douglas L. Rawls appeals.

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[1] The following issue is presented for review: whether in addition to being subject to the condition precedent of the life tenant not being survived by children, the contingent remainder interest of an ascertained remainderman is also subject to an implied condition of the remainderman surviving the life tenant.

Petitioner argues on appeal that the trial court erred in concluding the remainder created in Izetta Rawls was contingent. Petitioner contends Izetta Rawls' remainder was vested and therefore she was not required to survive Norman Ray Odom in order for her interest to vest. Accordingly, he asserts he has a valid one-half undivided interest in the land as Izetta Rawls' heir, Ethel Rawls, conveyed the land to him by deed. While we disagree with petitioner and hold that Izetta Rawls' remainder interest was contingent, for reasons discussed below, we agree that petitioner has a valid one-half undivided interest in the land. Accordingly, the judgment is reversed.

A remainder is "an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument." 2 N. Wiggins, *Wills and Administration of Estates in North Carolina* Sec. 280 at 124 (2d ed. 1983) (citations omitted). A contingent remainder is a remainder which is "*either* subject to a condition precedent (in addition to the natural expiration of prior estates), *or* owned by unascertainable persons, *or both*." T. Bergin & P. Haskell, *Preface to Estate in Land and Future Interests* at 73 (1984) (emphasis in original). In this case, Norman Ray Odom had a life estate. The future interest created in his children was a contingent remainder because it was subject to the condition precedent of the children being born and was therefore owned by unascertainable persons. *See Davis v. Davis*, 3 N.C. App. 536, 165 S.E. 2d 553 (1969) (example analogous to case at bar which holds the remainders are contingent). The future interest created in Izetta Rawls is likewise a contingent remainder because it is subject to the condition precedent of Norman Ray Odom not being survived by any children. In this situation, Izetta Rawls is said to have an *alternative* contingent remainder. T. Bergin & P. Haskell, *supra*, at 73.

This case is governed by this court's holding in *Davis*, 3 N.C. App. 536, 165 S.E. 2d 553. In *Davis*, the devise was similar to the one involved in the present case. *Id.* The testator in that case devised his property to his daughter "Lizzie . . . for life . . . and if she should die leaving no child or issue of such, then to my two daughters, Christian . . . and Melissa . . . ." *Id.* at 536, 165 S.E. 2d at 554. Christian conveyed her interest in the land to Lizzie, the life tenant, and then predeceased Lizzie. *Id.* at 536-37, 165 S.E. 2d at 554. The court held that the conveyance to Lizzie was valid and the heirs of Christian had no interest in the land.

Id. at 541, 165 S.E. 2d at 557. The court based its decision on our Supreme Court's holdings in other cases that "a contingent remainder may be assigned *where the ultimate taker is ascertained*" and ". . . when the holders of a contingent estate are specified and known, they may assign and convey it . . . ." *Id.* at 541, 165 S.E. 2d at 557 (emphasis added); *see Hobgood v. Hobgood*, 169 N.C. 485, 86 S.E. 189 (1915); *Malloy v. Acheson*, 179 N.C. 90, 101 S.E. 606 (1919); *Seawell v. Cheshire*, 241 N.C. 629, 86 S.E. 2d 256 (1955). In that case, Christian's remainder was contingent, "not because of the uncertainty of the person who was to take, but because of the uncertainty of the event." *Id.* In the present case, as the ultimate taker, Izetta Rawls, is ascertained, her alternative contingent remainder interest is validly conveyed to the petitioner.

The respondents argue that in order for Izetta Rawls to have an interest to convey she must survive the life tenant. The respondents base their argument on *Lawson v. Lawson*, 267 N.C. 643, 148 S.E. 2d 546 (1966). In *Lawson*, the devise was "to [my Daughter for] her natural life, and at her death to her children, if any, in fee simple; if none, to the whole brothers and sisters of my daughter, . . . in fee simple." *Lawson*, 267 N.C. at 643, 148 S.E. 2d at 547. The Court in *Lawson* implied a survival requirement on the alternative contingent remaindermen and held only those who can " 'answer the roll immediately upon the happening of the [stated] event acquire any estate in the properties granted.' " *Lawson*, 267 N.C. at 645, 148 S.E. 2d at 548 (quoting *Strickland v. Jackson*, 259 N.C. 81, 84, 130 S.E. 2d 22, 25 (1963)). Accordingly, the *Lawson* Court held that only the "whole brothers and sisters" alive at the death of the life tenant acquired any interest and the heirs of any predeceased brother or sister acquired nothing. *Id.*

[2] The *Lawson* case is distinguishable from the present case and from *Davis* in that *Lawson* involved an alternative contingent remainder to a class. North Carolina courts have seemed to apply different rules of survivorship according to whether the contingent remainder interest was a class gift or a gift to ascertained individuals. Professor Roberts notes that "[i]n cases in which the donees have been named individually, courts are not as inclined to imply a survival requirement." Roberts, *Class Gifts in North Carolina—When Do We "Call the Roll?,"* Wake Forest L. Rev. Vol. 21, No. 1, p. 13 (1985). Therefore, we conclude *Lawson* and other cases which imply a survival requirement on members of

a class who are contingent remaindermen do not apply to devises in which the contingent remainder is to ascertained individuals. *See* L. Simes, *Handbook of the Law of Future Interests* Sec. 96, p. 195 (2d ed. 1966) (no implied condition of survivorship in order for the named individual holder of an alternative contingent remainder to take).

Accordingly, we reverse the order of the trial court and hold the petitioner has a valid one-half interest in the land as Ethel Rawls inherited the property from Izetta Rawls, an ascertained contingent remainderman, and then made a valid conveyance of her one-half interest to the petitioner.

Reversed.

Judges EAGLES and COZORT concur.

CORNELIA ELLINWOOD v. EVERETT H. ELLINWOOD, JR.

No. 8814DC1018

(Filed 18 July 1989)

1. **Divorce and Alimony § 8.2— constructive abandonment—sufficiency of evidence to support findings**

Plaintiff's testimony was sufficient to support the trial court's findings of fact that defendant was a busy professional who became so completely immersed in his work that, over a twenty-year period, he basically left plaintiff to her own devices to maintain a family and rear the parties' children, and these findings of fact were sufficient to support the trial court's conclusion that defendant constructively abandoned his wife and children.

2. **Divorce and Alimony § 16.8— conclusions as to supporting spouse and dependent spouse—sufficiency of evidence**

Evidence was sufficient to support the trial court's conclusion that plaintiff was a dependent spouse and defendant was a supporting spouse where the court found that plaintiff's budget of $2,800 per month was "both reasonable and commensurate with the standard of living which the couple maintained prior

to the date of the separation"; the court further found that plaintiff had no income producing assets, but earned a net income of $1,353 per month; and the court also found that defendant's gross income was nearly four times that of plaintiff.

3. **Divorce and Alimony § 16.6— no findings as to parties' estates and accustomed standard of living—award of alimony improper**

The trial court erred in making an award of alimony without making findings as to the parties' estates and accustomed standard of living.

4. **Divorce and Alimony § 18.16— alimony action—award of attorney's fees proper**

The trial court's findings of fact were sufficient to support its award of attorney's fees where the court made specific findings as to the services rendered by plaintiff's attorney, the time expended, the quality of services rendered, and the attorney's expertise.

5. **Appeal and Error § 63— case remanded—parties not allowed further hearing—no error**

The trial court did not err in not allowing the parties a further hearing upon remand of the case after the first appeal where the opinion in the first appeal ordered the trial court to reconsider plaintiff's allegations as to constructive abandonment based only on evidence which preceded the date of the separation; the order did not direct the trial court to take more evidence; the trial court determined it was not necessary to take more evidence or hear additional argument; and the court in so doing did not abuse its discretion.

APPEAL by defendant from *Titus, Judge*. Judgment entered 25 April 1988 in District Court, DURHAM County. Heard in the Court of Appeals 17 April 1989.

This is the second appeal in this matter. This action began on 25 May 1984 when plaintiff-wife filed a complaint seeking, *inter alia*, divorce from bed and board, alimony, and attorney's fees. The trial court granted the parties an absolute divorce and about a year later entered an equitable distribution order dividing the marital property. The parties did not appeal either of these orders and those issues are not before us. After a hearing on plaintiff's claims for alimony and attorney's fees, the trial court found that de-

fendant had constructively abandoned his wife and, accordingly, granted her claims. Defendant appealed the trial court's judgment.

In *Ellinwood v. Ellinwood*, 88 N.C. App. 119, 123, 362 S.E. 2d 584, 587 (1987), we noted that the trial court's findings of fact included post-separation events which could not be used in proving constructive abandonment. We remanded with instructions to "reconsider the plaintiff's allegations based only on evidence which precedes the date of the separation." *Id.* On 26 April 1988, pursuant to our opinion, the trial court filed an amended judgment. Defendant appeals.

Maxwell, Martin, Freeman & Beason, by James B. Maxwell, for plaintiff-appellee.

Moore & Van Allen, by Edward L. Embree, III and Georgia B. Vrionis, for defendant-appellant.

EAGLES, Judge.

Defendant presents five assignments of error for review. He argues that the evidence and findings of fact fail to support: the trial court's conclusion of constructive abandonment; the conclusion that defendant is a supporting spouse and plaintiff is a dependent spouse; the award of $48,600 in alimony; and an award of $2,500 in attorney's fees. Additionally, defendant contends the trial court erred in failing to provide the parties with another opportunity to be heard when the case was remanded following the first appeal. We hold that the trial court's findings of fact are insufficient to support its award of alimony and, accordingly, we must remand the case for additional findings of fact. As to defendant's remaining assignments of error, we affirm.

[1] Defendant first argues that the trial court's findings of fact do not support its conclusion that he constructively abandoned his wife. We disagree. As we stated in the first appeal,

> If proven, plaintiff's allegations would support a finding of constructive abandonment notwithstanding the absence of evidence of physical cruelty or wilful failure to provide economic support. The permissible bases are more broad and encompass cruelty by other than mere physical cruelty and, as pointed out in *Panhorst [v. Panhorst*, 277 N.C. 664, 178 S.E. 2d 387 (1971),] wilful failure to fulfill spousal or parental responsibilities beyond merely providing adequate economic support. There

> remains, as a basis for a finding of constructive abandonment, a level of wilful spousal misconduct which rises above the normal and sometimes commonplace problems associated with marriages involving busy professionals.

Ellinwood at 122, 362 S.E. 2d at 586.

The record here shows defendant as a busy professional who became so completely immersed in his work that, by his conduct, he effectively abandoned his wife and children. These findings of fact point to a pattern of behavior by defendant over a twenty year period where plaintiff was left to her own devices without defendant's assistance in maintaining a family and rearing their children. The court noted that at least ten years earlier Mrs. Ellinwood had told defendant that she needed more of his time and attention. The situation improved somewhat thereafter, but only for a short time.

Defendant claims that he testified about his involvement and concern for his family, but that the trial court failed to make any findings in this regard. However, the trial court is not required to make findings as to every evidentiary fact; it need find the ultimate facts only. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). The trial court's findings are conclusive if supported by any competent evidence, even when the record contains evidence to the contrary. *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E. 2d 636 (1984). Plaintiff's testimony supports each finding of fact made by the trial court. We overrule this assignment of error.

[2] We next address defendant's third assignment of error. Defendant contends that the evidence and findings of fact do not support the trial court's conclusion that plaintiff is a dependent spouse and that defendant is a supporting spouse. In part, G.S. 50-16.1(3) defines dependent spouse as one "who is actually substantially dependent upon the other spouse for his or her maintenance and support." A supporting spouse is the spouse a dependent spouse looks to for maintenance and support. G.S. 50-16.1(4). A spouse is a "dependent spouse" if he or she is "without means of providing for his or her accustomed standard of living." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E. 2d 849, 854 (1980).

The trial court found that plaintiff's budget of $2,800 per month was "both reasonable and commensurate with the standard of living which the couple maintained prior to the date of the separation."

The court further found that plaintiff had no income producing assets, but earned a net income of $1,353 per month. In addition, the court found that defendant's gross income was nearly four times that of plaintiff. These findings support the trial court's determination that plaintiff is a dependent spouse and that defendant is a supporting spouse.

[3] In defendant's second assignment of error defendant does not argue with the amount of the alimony award, but rather he maintains that the findings of fact did not support the trial court's award. More particularly defendant contends that the trial court erred in failing to make findings about the parties' expenses, the parties' estates, and the parties' standard of living. In accordance with our Supreme Court's decision in *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982), we agree.

While the amount of alimony awarded by the trial court is within the trial court's discretion and will not be reversed absent an abuse of discretion, *Phillips v. Phillips*, 83 N.C. App. 228, 349 S.E. 2d 397 (1986), an alimony award must "be based upon factual findings sufficiently specific to indicate that the trial judge properly considered the six statutory factors enumerated [in G.S. 50-16.5]." *Quick* at 454, 290 S.E. 2d at 659. The statutory factors include the parties' estates and their accustomed standard of living. G.S. 50-16.5.

We note that the trial court referred to its previous order in the equitable distribution proceeding. This reference to the equitable distribution order shows that there is evidence in the record from which findings could be made. However, "[t]he trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-713, 268 S.E. 2d 185, 189 (1980). Because the trial court failed to make findings about the parties' estates and accustomed standard of living, we must remand for additional findings of fact.

[4] In defendant's fourth assignment of error he argues that the trial court's findings of fact fail to support its award of attorney's fees. Attorney's fees may be awarded to a dependent spouse in an action for alimony if the trial court finds that the dependent spouse is without the necessary means to defray expenses which

would allow him or her to meet their spouse on substantially even terms. *Owensby v. Owensby*, 312 N.C. 473, 322 S.E. 2d 772 (1984). However, the trial court must make findings "as to the nature and scope of legal services rendered, [and] the skill and the time required upon which a determination of reasonableness of the fees can be based." *Id.* at 476, 322 S.E. 2d at 774. The trial court's finding of fact number 21 states, in part,

> According to the Affidavit submitted on behalf of the firm of Maxwell, Freeman & Beason, P.A., no less than 29.3 hours of the 94 hours total had been expended in matters related solely to this hearing of Ms. Ellinwood's entitlement to alimony, amount and duration thereof, issues involved with evidence of and testimony about constructive abandonment and concerns relating to the family unit as a whole, including the children. The Court has reviewed the Affidavit, considered the nature of the work done, the quality of the services rendered, the necessity of the services rendered, and the experience and expertise of Mr. Maxwell and finds that 30 hours was a reasonable time expended by Mr. Maxwell in connection with his representation of Ms. Ellinwood and her claim for alimony based on constructive abandonment. It was necessary that he have conferences with Ms. Ellinwood to develop a factual basis on which to determine whether grounds for alimony existed; he has prepared a Complaint and seen that it was filed; he has conducted discovery, which had benefits for both alimony and equitable distribution, but were particularly relevant on the alimony question in regard to the dependency issues and the relative incomes and expenses of both parties; he has prepared for the alimony trial, been present in Court for a full day in conduct of that trial, and prepared the first draft of this Order in connection therewith by November 18, 1986. Based upon these services rendered for the alimony action only, the Court finds that Two Thousand Five Hundred Dollars ($2,500) is a reasonable fee and consistent with rates in Durham for attorneys with Mr. Maxwell's experience and expertise in family law matters.

We hold this finding sufficient to support the trial court's award of attorney's fees. We overrule this assignment of error.

[5] Defendant's final assignment of error contends that the trial court erred in not allowing the parties a further hearing upon re-

mand of the case after the initial appeal. We disagree. The opinion in the first appeal ordered the trial court to "reconsider the plaintiff's allegations based only on evidence which precedes the date of the separation." *Ellinwood* at 123, 362 S.E. 2d at 587. The order did not direct the trial court to take more evidence but merely limited the evidence to be considered to events preceding separation. The trial court, in its discretion, determined it was not necessary to either take more evidence or hear additional argument. We find no abuse of discretion. *See Patton v. Patton*, 88 N.C. App. 715, 364 S.E. 2d 700 (1988). This assignment of error is without merit.

For the foregoing reasons the trial court's amended judgment is affirmed in part and remanded for further proceedings consistent with this opinion.

Affirmed in part, remanded in part.

Chief Judge HEDRICK and Judge WELLS concur.

PICKARD ROOFING CO., INC., PLAINTIFF-APPELLEE v. STEWART G. BARBOUR, DEFENDANT-APPELLANT

No. 8814DC963

(Filed 18 July 1989)

1. **Trial § 3.2— continuance to obtain new counsel—counsel relieved of duties night before trial—denial of motion proper**

The trial court committed no abuse of discretion by refusing to grant defendant's continuance motion to obtain new counsel, since defendant relieved his counsel of his duties the night before trial was to begin.

2. **Interest § 2— breach of contract—award of prejudgment interest proper**

The trial court did not err in awarding prejudgment interest from 31 December 1985, the date of defendant's breach of a roofing contract as determined by the trial court, and there was no merit to defendant's contention that the amended version of N.C.G.S. § 24-5 was inapplicable to his case because the contract between the parties was entered into prior to

the 1 October 1985 effective date of the amendment which allowed the recovery of prejudgment interest on a contract action from the date of the breach, since the date for determining whether the 1985 amendment applies to any action is the date the action is commenced, not the date the contract was entered, and this action was instituted almost a year after the amendment became effective.

3. Contracts § 21.1— breach of roofing contract—findings of trial court sitting without jury supported by evidence

In an action to recover on a contract for roofing services, the court on appeal was bound by the findings of the trial court, sitting without a jury, where there was some evidence that the parties entered into a contract, plaintiff provided the roofing work called for and submitted a bill, and plaintiff's demands for payment went unheeded.

APPEAL by defendant from *Hudson, Orlando B., Judge.* Judgment entered 19 April 1988 in District Court, DURHAM County. Heard in the Court of Appeals 11 April 1989.

Plaintiff instituted this action to collect a sum due for roofing work completed on defendant's real property. Following entry of judgment in plaintiff's favor, defendant gave notice of appeal.

King, Walker, Lambe & Crabtree, by Daniel Snipes Johnson, for plaintiff-appellee.

Loflin & Loflin, by Thomas F. Loflin III and Ann F. Loflin, for defendant-appellant.

JOHNSON, Judge.

On 2 July 1985 defendant signed a contract submitted by plaintiff Pickard Roofing Company (Pickard) for roofing work to be done on defendant's home. The contract was submitted pursuant to a conversation between the parties and a letter written to defendant outlining plaintiff's service and prices.

According to the contract, plaintiff contracted to do the following for a sum of $5,000.00:

Remove existing roofing and haul away all debris from premises.

> Install multiple layers of insulation so as to add a fall of approximately 1/8" per foot to the existing roof deck.
>
> Over the installation, install a 4 Ply built-up roof using fiber glass felts and having a slag surface imbedded in hot asphalt.
>
> Install new gravel stops of 26 gauge galvanized iron around perimeter of roof.
>
> Install cants and built up base flashings around chimneys and at connecting point of flat roof to existing house.
>
> Install metal counter flashings around chimneys.
>
> Flash all penetrations through roof with new metal flashings.

Plaintiff completed the work on defendant's roof on or about 31 December 1985. The Company's demands for payment went unheeded and plaintiff instituted this action on 21 August 1986 to recover the sum of $5,446.05.

Defendant's first retained counsel, who represented him in the earliest pretrial matters, ceased to represent him for reasons the record does not disclose. Defendant then retained subsequent counsel who represented him on all remaining pretrial matters, including successfully opposing plaintiff's motion for summary judgment. On Sunday 17 April 1988, one day before the trial was scheduled to commence, defendant relieved his counsel of his duties. He informed him by letter that based upon their discussion of the previous Friday, he would "be more comfortable with a different attorney on this particular case." Defendant further stated in his letter that he

> would therefore appreciate it if we could part company in an amicable manner tonight, and will ask that you stop by court tomorrow and arrange for your release as my attorney and a reasonable delay of 60 days or more, but not over 90, for me to prepare for a new trial.

Defendant's attorney then promptly filed a motion to withdraw as counsel on the following day in accordance with defendant's request. The court entered a brief order on 18 April 1988 permitting defendant's attorney to withdraw. Defendant's attorney also attempted to obtain a continuance for defendant as per his request. His motion was denied.

When the matter was called for trial on 19 April 1988, defendant appeared in his own behalf and made an oral motion to continue. In a written order filed 21 April 1988 the court denied the motion and made the following findings of fact:

> 8. Defendant has not acted with diligence in ascertaining any claimed need for a continuance and should have made a decision with respect to representation by counsel prior to the eve of trial.
>
> 9. No circumstances beyond the control of the defendant have prevented him from appearing in court with an attorney of his choice.
>
> 10. Plaintiff is ready and willing to proceed with this action and objects to the granting of any continuance.
>
> 11. The Defendant has not used due diligence and good faith in his request for continuance.

Defendant then proceeded to trial *pro se*, and waived a jury. At the conclusion of all the evidence, the court entered judgment for the plaintiff, specifically finding that plaintiff had fully performed its obligations under the contract. Defendant was then ordered to pay $5,446.05 plus interest at the legal rate from 31 December 1985, which the court determined to be the date the contract was breached. From this order, defendant appealed.

By this appeal, defendant brings forth five questions for review, one which involves the trial court's denial of his motion for a continuance, another concerning the award of prejudgment interest, and three which question the sufficiency of the evidence to support a judgment in plaintiff's favor and which shall be considered lastly and collectively.

[1] Defendant first contends that the key issue of his appeal may be whether his motion for a continuance was erroneously denied. Because we have previously stated the circumstances surrounding the request, we find no need to repeat them here.

G.S. sec. 1A-1, Rule 40(b) provides that "[n]o continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." A motion for a continuance is addressed to the sound discretion of the trial court, *Spence v. Jones*, 83 N.C. App. 8, 348 S.E. 2d 819 (1986), and is generally not favored, *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380

(1976). A court's ruling on a motion for a continuance is not reviewable absent a clear abuse of discretion. *Spence, supra.* The burden of showing sufficient grounds for a continuance rests with the party seeking it. *Shankle* at 482, 223 S.E. 2d at 386.

Defendant in the case *sub judice* overemphasizes the fact that his attorney was allowed to withdraw the day before the trial was scheduled to commence. He simultaneously de-emphasizes the reason why the attorney withdrew, because defendant terminated his employment. It is well established that an attorney's withdrawal from a case on the eve of trial is not *ipso facto* grounds for a continuance. *Shankle, supra; Brown v. Rowe Chevrolet-Buick,* 86 N.C. App. 222, 357 S.E. 2d 181 (1987). The cases which defendant advances to support his position can clearly be distinguished from the case *sub judice.* None of them involve a situation where counsel's withdrawal was necessitated by the party's decision to terminate his employment one day before the day on which the party knew his case was scheduled to be tried.

In *Smith v. Bryant,* 264 N.C. 208, 141 S.E. 2d 303 (1965), for instance, upon which defendant relies, our Supreme Court determined that the trial court erred by refusing to grant plaintiff's continuance where her attorney withdrew as counsel on the day set for trial without giving his client notice of his intent to do so because he had not been paid. *See also Underwood v. Williams,* 69 N.C. App. 171, 316 S.E. 2d 342 (1984) and *Roberson v. Roberson,* 65 N.C. App. 404, 309 S.E. 2d 520 (1983).

The facts in the case *sub judice* are much more analogous to those of *Fungaroli v. Fungaroli,* 40 N.C. App. 397, 252 S.E. 2d 849 (1979), where this Court affirmed the trial court's denial of plaintiff's request for a continuance because plaintiff, who had notice of the pending hearing, relieved his attorney of his duties three days before the hearing was scheduled, and retained substitute counsel only thirty minutes before the hearing began. *See also Rowe Chevrolet, supra.*

We therefore conclude that the trial court committed no abuse of discretion by refusing to grant defendant's continuance motion. Defendant's first Assignment of Error is overruled.

[2] By his fourth question for review defendant argues that the trial court's award of prejudgment interest from 31 December 1985, the date of the breach as determined by the trial court, was

erroneous. In support of his argument he contends that the amended version of G.S. sec. 24-5 (1986) is inapplicable to his case because the contract between the parties was entered into on 2 July 1985, prior to the 1 October 1985 effective date of the amendment which allows for the recovery of prejudgment interest on a contract action from the date of the breach.

We meet defendant's argument with three principles. First, the important date for determining whether the 1985 amendment applies to any action is the date the action is commenced and not the date the contract was entered. *See Harwood v. Harrelson Ford, Inc.*, 78 N.C. App. 445, 337 S.E. 2d 158 (1985). Therefore, the amendment, effective 1 October 1985, and applicable to all claims except claims pending on that date, clearly applied to this action which was instituted 21 August 1986, almost a year after the amendment became effective.

G.S. sec. 24-5 (1986) provides that "[i]n an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach." Plaintiff completed the work on 31 December 1985. The company was not paid at this time, the due date. Defendant's failure to pay the amount owed when due constitutes breach of contract. *See Miller v. Ensley*, 88 N.C. App. 686, 365 S.E. 2d 11 (1988). It therefore follows that the due date or the date payment is demanded and the demand refused is the date of the breach. We can find no error.

[3] Assignments of Error two, three, and five question the sufficiency of the evidence to support judgment in plaintiff's favor.

Where a court sits without a jury a reviewing court is bound by the findings of fact entered where there is some record evidence to support them, although evidence may exist which supports findings to the contrary. *Lyerly v. Malpass*, 82 N.C. App. 224, 346 S.E. 2d 254 (1986). The trial judge solely weighs the evidence, the witnesses' credibilities, and the weight to be accorded their testimony. *Id.*

We have carefully reviewed the trial court's findings in this matter and find that we are bound by them. Therefore, defendant's Assignments of Error two, three, and five are overruled.

Affirmed.

Judges BECTON and ORR concur.

THE NORTH CAROLINA PRESS ASSOCIATION, INC., AND THE NEWS AND OBSERVER PUBLISHING COMPANY, D/B/A THE NEWS AND OBSERVER AND THE RALEIGH TIMES, PETITIONERS v. C. D. SPANGLER, JR., PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA AND ARTHUR PADILLA, ASSOCIATE VICE PRESIDENT FOR ACADEMIC AFFAIRS OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENTS

No. 8810SC1004

(Filed 18 July 1989)

1. **Attorneys at Law § 7.5— award of attorney's fees to prevailing party—stay of trial court order pending appeal—prevailing party status unaffected**

Where petitioners sought to compel the disclosure of written reports containing recommendations about intercollegiate athletics prepared by the chancellors of the various UNC campuses in response to the president's request, and petitioners obtained an order from the trial court directing respondents to release the records for inspection, examination, and copying, petitioners were the prevailing party in their action within the meaning of N.C.G.S. § 6-19.2, and that fact was not altered by respondents obtaining a stay of the trial court's order pending appeal. Furthermore, even if the documents were released as a consequence of a decision made prior to the lawsuit and not as a consequence of the lawsuit itself, petitioners' prevailing party status was not affected.

2. **Attorneys at Law § 7.5— action to compel disclosure of documents—award of attorney's fees—substantial justification for withholding documents—bad faith not standard**

Bad faith is not the standard to be used by the trial court in determining whether the withholding of public records was without substantial justification within the meaning of N.C.G.S. § 6-19.2.

3. **Attorneys at Law § 7.5— action to compel disclosure of documents—failure to show substantial justification for withholding document—award of attorney's fees**

Respondents failed to show substantial justification for withholding reports containing recommendations about intercollegiate athletics prepared by the chancellors of the various UNC campuses on the basis that there should be an exception to the Public Records Act for preliminary, interoffice communi-

cations and, if there was such an exception, these documents would be covered by it.

4. Attorneys at Law § 7.5— action to compel disclosure of documents—no special circumstances making award of attorney's fees unjust

There was no merit to respondents' argument that the trial court erred in finding that there were no "special circumstances" to make an award of attorney's fees unjust where respondents asserted that the special circumstances here were that "it was apparent to all involved here that these documents would be disclosed in a matter of days" and "[t]he lawsuit was not necessary to compel the disclosure of the reports," but the fact that a governmental agency chooses to chart its own course regarding the timing of the requested release of public documents does not make an award of attorney's fees against it "unjust," and the Public Records Act does not give a governmental agency the discretionary authority to decline to comply with an order for release of records to the public until a time when the agency has determined that release would be prudent or timely.

APPEAL by respondents from *Bailey, Judge*. Order entered 10 August 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 12 April 1989.

This appeal involves an award of attorney's fees under G.S. 6-19.2. Petitioners sought to compel the disclosure of written reports containing recommendations about intercollegiate athletics prepared by the chancellors of the various University of North Carolina campuses. These reports had been requested by respondent, president of the university. The trial court ordered respondents to disclose the reports under Chapter 132 of the General Statutes, "Public Records." Respondents appealed, petitioned for a writ of supersedeas and a stay of the trial court's order. This court granted the stay. Thereafter, during the pendency of the stay, the university disclosed the reports but continued to pursue their original appeal. Our court found the action was moot and dismissed respondents' appeal. *See North Carolina Press Ass'n v. Spangler*, 87 N.C. App. 169, 360 S.E. 2d 138 (1987). Petitioners then filed a motion for attorney's fees under G.S. 6-19.2 which the trial court granted. Respondents appeal.

Attorney General Thornburg, by Chief Deputy Attorney General Andrew A. Vanore, Jr., Special Deputy Attorney General Edwin M. Speas, Jr. and Assistant Attorney General Laura E. Crumpler, for the respondent-appellants.

Tharrington, Smith and Hargrove, by Wade H. Hargrove and Randall M. Roden, for petitioner-appellees.

EAGLES, Judge.

Respondents bring forward five assignments of error that question three findings of the trial court. Respondents contend that the court erred in finding petitioners were the prevailing party in the action to compel disclosure of the reports, in finding no special circumstances which would make the award of fees unjust, and in finding that the records were withheld without substantial justification. We disagree with respondents' argument and affirm the award.

G.S. 6-19.2 provides that

> [i]n any civil action in which a party successfully compels the disclosure of public records pursuant to G.S. 132-9 . . ., the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in denying access to the public records; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.
>
> . . .

As the plain language of the statute states, an award of attorney's fees under G.S. 6-19.2 is in the trial court's discretion if the court finds the agency acted without substantial justification and there are no special circumstances which make an award unjust.

[1] Respondents assert in their brief that petitioners are not a "prevailing party" because petitioners have not shown that their action "successfully compelled, or was the catalyst for, the ultimate disclosure by Respondents of these disputed documents." Respondents cite several federal cases for the proposition that petitioners have the burden of showing that their lawsuit caused

the agency to release the documents. Respondents argue that at all times they planned to release the documents but their release was going to be after President Spangler had the opportunity to "absorb and consider their contents." Respondents claim the documents were released as a consequence of a decision made prior to the lawsuit, not as a consequence of the lawsuit. Therefore, respondents argue, petitioners cannot be a prevailing party. The cases that respondents cite interpret the Federal Freedom of Information Act which contains language substantially different from our Public Records Act. The cases are not persuasive here.

To strike the trial court's award of attorney's fees simply because respondents claim the records were released pursuant to a decision made prior to suit would condone and reward their withholding of requested public records. Which party has prevailed is determined by an examination of the trial court's order. The fact that the respondent, after entry of the order, elects to make the disclosure ordered does not affect the issue of who prevailed in the proceeding to compel disclosure. To rule otherwise would defeat the purpose and spirit of the Public Records Act, and more specifically G.S. 6-19.2. Here petitioners obtained an Order from the trial court directing respondents to release the records for inspection, examination and copying. That respondents were able to obtain a stay of the trial court's order pending appeal does not alter the fact that petitioners were the prevailing party in their action.

[2] Respondents' second argument is that the trial court erred in finding that the withholding of the documents in question was without substantial justification. Respondents assert that the withholding of the documents was in good faith because they are "preliminary working papers" and "intergovernmental communications" that should be an exception to the Public Records Act. Respondents contend that in order for a refusal to disclose documents to be without substantial justification, the refusal must have been made in bad faith, frivolously or without any reasonable or colorable basis in law. Respondents assert there is no evidence that their actions were in bad faith and therefore no basis for finding that they acted without substantial justification. We disagree and do not accept respondents' contention that bad faith is the standard to be used by the trial court in determining whether the withholding of public records was without substantial justification.

The phrase, "without substantial justification," as it is used in G.S. 6-19.2 has not been judicially defined in North Carolina. We note that the General Assembly has used the phrase "substantially justified" in G.S. 1A-1, Rule 37(d) when providing for attorney's fees for failure to comply with discovery requests. Our court has interpreted Rule 37(d) as requiring the non-complying party to carry the burden of showing justification for non-compliance. *Hayes v. Browne*, 76 N.C. App. 98, 101, 331 S.E. 2d 763, 764-65 (1985), *cert denied*, 315 N.C. 587, 341 S.E. 2d 25 (1986). Likewise, respondents here have the burden of showing justification for nondisclosure.

[3] In this case one justification given by respondents for nondisclosure was a fear that, if the information was revealed "prematurely, the contextual relevance of such component materials frequently would not be apparent or could not be ascertained." This argument has no merit. Another basis urged for refusing to release the reports was that there should be an exception to the Public Records Act for preliminary, interoffice communications and if there were such an exception, these documents would be covered by it. Respondents assert that this was a good faith argument for a reasonable judicial extension of existing law and therefore the withholding of the documents was substantially justified. We agree that assertions of their good faith and arguments urging reasonable extensions of existing law are factors to be considered by the trial court in reaching its decision on the issue of substantial justification. Here respondents' arguments were presented to the trial court. On this record we cannot say that the trial court abused its discretion in finding that the respondents acted without substantial justification.

[4] Respondents' final argument is that the trial court erred in finding that there were no "special circumstances" to make an award of attorney's fees unjust. Respondents assert that the special circumstances here are that "it was apparent to all involved here that these documents would be disclosed in a matter of days" and "[t]he lawsuit was not necessary to compel the disclosure of the reports." Respondents' arguments are without merit. The fact that a governmental agency chooses to chart its own course regarding the timing of the requested release of public documents does not make an award of attorney's fees against it "unjust." Additionally, the Public Records Act does not give a governmental agency the discretionary authority to decline to comply with an order

for release of records to the public until a time when the agency has determined that release would be prudent or timely. That authority would fly in the face of the Public Records Act and effectively nullify the attorney's fees provision in G.S. 6-19.2.

For the reasons stated, the order awarding attorney's fees under G.S. 6-19.2 is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

ERNESTINE W. JAMIN, AND HUSBAND, CHARLES F. JAMIN; MARY VERNE W. POWELL, WIDOW; MARILYN ROSE DUNCAN; GLADYS W. BAICY, SINGLE; JOYCE W. McDIARMID, WIDOW; JAMES WILLIAMSON, AND WIFE, JEANETTE WILLIAMSON; MARIE W. WARNER, AND HUSBAND, JIMMY WARNER; MARGUERITE W. NORRIS, WIDOW; BEATRICE W. STEWART, AND HUSBAND, SAM ELMO STEWART; BERNICE L. WILLIAMSON, SR., AND WIFE, ROSA A. WILLIAMSON; HUGH L. WILLIAMSON, AND WIFE, JOYCE H. WILLIAMSON; OLIVER WAYNE WILLIAMSON, AND WIFE, BETTY L. WILLIAMSON; ARROVEIVE W. HILL, WIDOW; RINTOUL E. MITCHELL, SINGLE; LYNN C. GOODWIN, AND WIFE, DEBORAH GOODWIN; LOUISE W. DYE, SINGLE; ANDREW GREY WILLIAMSON, AND WIFE, ANN M. WILLIAMSON; BETTY H. WILLIAMSON, WIDOW; JANE OLIVER SWAIN, AND HUSBAND, JOHN EDWARDS SWAIN, III; SUSAN C. WILLIAMSON, SINGLE; KATHRYN R. WILLIAMSON BOWSWELL; PRISCILLA C. MILLER, AND HUSBAND, STEVE MILLER; KAREN D. SEIFFERT, AND HUSBAND, THOMAS W. SEIFFERT; SANDRA GALLOWAY WORKMAN, AND HUSBAND, HAROLD S. WORKMAN, JR. v. JOSEPH M. WILLIAMSON, III AND WARNER BROWN DANIELS, JR.

No. 8816SC1337

(Filed 18 July 1989)

Deeds § 12— life estate with remainder to life tenant's children—reversion to other children and grandchildren—per stirpes distribution intended

A deed which conveyed land to the grantor's son for life with remainder to the son's children and provided that if the son should die without issue, the land "is to revert to any child or children that I have living at that time, and to the representative of any of my children who may be dead" required a per stirpes distribution among the grantor's grand-

children and great-grandchildren upon the death of the son without issue after all of the grantor's other children had died. The reversion clause did not provide for a per stirpes distribution only if at least one other child of the grantor survived the life tenant, and the land thus did not revert to the grantor and pass to his heirs by intestate succession.

APPEAL by petitioners from *Carlton E. Fellers, Judge.* Order entered 5 July 1988 in Superior Court, ROBESON County. Heard in the Court of Appeals 7 June 1989.

Wyrick, Robbins, Yates & Ponton, by Robert A. Ponton, Jr. and L. Diane Tindall, for Sandra Galloway Workman and Harold S. Workman, Jr., petitioner-appellants.

Price & McIntyre, P.A., by D. Carmichael McIntyre II, for Hugh L. Williamson and Joyce H. Williamson, petitioner-appellants.

No brief for respondents.

BECTON, Judge.

This case involves the distribution of proceeds received from the sale of real property. The trial judge ordered that $134,000 received in the sale of the "Homeplace Property" be disbursed among the grandchildren and great-grandchildren of S. G. Williamson on a per capita basis at each generation. We vacate the order and remand with instructions that the court order a per stirpes distribution.

I

On 13 December 1934, S. G. Williamson, a father of ten children, conveyed a life estate in the "Homeplace Property" to his son Charlie, with the remainder to Charlie's children. In the event that Charlie died without issue, the deed provided that

> . . . the said land . . . is to revert to any child or children that I have living at that time, and to the representatives of any of my children who may be dead, it being the intention of this conveyance that said land is conveyed to the said Charlie B. Williamson during the term of his natural life, and at his death, to his children, and if he should die without children, then and in that event, said land is to revert to my children or to my grandchildren as the case may be . . . .

All of Charlie Williamson's siblings predeceased him. Charlie died in 1985 and left no children. At his death, sixteen grandchildren and ten great-grandchildren of S. G. Williamson were alive.

After the sale of the Homeplace Property, the commissioners asked the Superior Court for directions on distributing the proceeds. Following a hearing, the judge ordered the commissioners to make a disbursement among the grandchildren and great-grandchildren on a per capita basis at each generation. The judge's decree left the grandchildren with sixteen-twentieths of the $134,000 (or a one-twentieth undivided interest per grandchild) and left the great-grandchildren with four-twentieths of the total (or a one fiftieth undivided interest per great-grandchild).

Appellant Hugh Williamson is a grandchild of S. G. Williamson and the surviving child of S. G. Williamson's son L. C. Williamson. Appellant Sandra Galloway Workman is the great-grandchild of S. G. Williamson and is the surviving grandchild of S. G. Williamson's daughter Bertha Williamson Galloway. Under a per stirpes distribution, each of these appellants would receive a one-ninth share of the proceeds of the sale.

II

Appellants press several different points in their respective briefs. The contention common to them both, however, is the single issue we address in this appeal. Appellants argue that the judge erred by construing the deed as directing a per capita distribution among the heirs of S. G. Williamson, and we agree.

As with the provisions in a will, a court's duty when construing a deed is to ascertain the intent of the grantor by looking to the language of the instrument. *See Hardy v. Edwards*, 22 N.C. App. 276, 278, 206 S.E. 2d 316, 318, *cert. denied*, 285 N.C. 659, 207 S.E. 2d 753 (1974). In will cases, our courts have acknowledged an especial difficulty in determining whether a testator intended a per capita or per stirpes distribution scheme. *See, e.g., Wachovia Bank and Trust Co. v. Bryant*, 258 N.C. 482, 484, 128 S.E. 2d 758, 760 (1963). As a consequence, "certain rules have devolved to help solve this perplexity." *Id.* (citation omitted). Among these is the rule that when a person takes as the *representative* of an ancestor, she or he takes per stirpes. *E.g., Coppedge v. Coppedge*, 234 N.C. 173, 177, 66 S.E. 2d 777, 780, *reh'g denied*, 234 N.C. 747, 67 S.E. 2d 463 (1951); *Wooten v. Outland*, 226 N.C. 245,

248, 37 S.E. 2d 682, 684 (1946); *see also* Annotation, *Taking Per Stirpes or Per Capita Under Will*, 13 A.L.R. 2d 1023 (1950).

The critical clause in S. G. Williamson's deed provides that, in the event Charlie Williamson died without issue, "the said land . . . is to revert to any child or children that I have living at [Charlie's death], and to the representatives of any of my children who may be dead. . . ." The use of the word "representatives" signals a per stirpes distribution plan. *E.g.*, *Wooten*, 226 N.C. at 248, 37 S.E. 2d at 684. Apparently, however, the trial judge interpreted the reversionary clause to provide for a per stirpes taking *only if* at least one child of S. G. Williamson survived Charlie. Because all the other children predeceased Charlie, the judge concluded that the property reverted to S. G. Williamson and then passed to his heirs by intestate succession. The per capita distribution at each generation ordered by the judge is the scheme called for under the Intestate Succession Act. *See* N.C. Gen. Stat. Secs. 29-16(a)(1) and 29-16(a)(2) (1984).

Although the inference drawn by the judge may be fairly derived from the deed's language, construing the document in that way compels a conclusion that S. G. Williamson did not provide for the possibility that Charlie would be his last-surviving child. Traditionally, however, deeds are interpreted, if possible, in such a way as to give them effect, rather than in a manner that renders them inoperative. *See* 23 Am. Jur. 2d *Deeds* Sec. 228 (1983); *see also Hardy*, 22 N.C. App. at 278, 206 S.E. 2d at 318. For example, in North Carolina, "the terms and phraseology of [the] description" of the conveyed land will be construed in order to uphold the deed "if this can reasonably be done." *Edwards v. Bowden*, 99 N.C. 80, 80-81, 5 S.E. 283, 284 (1888). In our view, if a reasonable interpretation of the deed can identify the grantees in a reversionary clause, upholding the deed by such a construction is preferable to one that causes the conveyed property to pass via intestacy. *Cf. Quickel v. Quickel*, 261 N.C. 696, 700, 136 S.E. 2d 52, 55 (1964) (presumption, when construing a will, that testator did not intend to die intestate as to part of property).

Most important, the language of this deed is more reasonably read as directing a per stirpes distribution. The use of the word "representatives" indicates that S. G. Williamson did not intend that his grandchildren would take per capita. Additionally, the clause "if [Charlie] should die without children, then . . . [the]

land is to revert to my children *or* to my grandchildren *as the case may be*" (emphasis added) is consistent with a per stirpes scheme. The use of the conjunction "or" and the phrase "as the case may be" emphasizes the notion of the grandchildren as standing in the place of their deceased parents, i.e., *representing* them. Finally, the deed speaks of *any child or children* being dead; we think it reasonable that the words *any children* can be read as including *all* the siblings of Charlie, thus providing for the contingency that Charlie would be the last-surviving child.

III

The language of the deed, under a reasonable construction, indicates that S. G. Williamson intended a per stirpes and not a per capita distribution scheme. Explicitly, he directed that his grandchildren would *represent* any parent who died prior to Charlie, and the deed can be read as contemplating the possibility that all of Charlie's siblings would predecease him. Our reading of the deed gives effect to the document, while the trial judge's construction requires use of intestate succession statutes.

The order of the trial court ordering a per capita distribution at each generation is vacated, and the case is remanded with directions that the judge order a per stirpes distribution.

Reversed and remanded.

Judges PHILLIPS and LEWIS concur.

DR. BRENDA D. RIVENBARK v. PENDER COUNTY BOARD OF EDUCATION

No. 885SC1097

(Filed 18 July 1989)

Schools § 4.1— extension or renewal of superintendent's contract— authority of "lame duck" board

Pursuant to legislative action taken on 15 June 1989, N.C.G.S. § 115C-271 provides that a county board of education may "extend or renew the term of the superintendent's contract *at any time during the final 12 months of the contract*; provided, however, when new members are to be elected or

appointed and sworn in *during the final 12 months of the contract* the board may not act until after the new members have been sworn in"; therefore, it was unnecessary to determine whether "fiscal year" or "calendar year" was the intended meaning of the word "year" in the statute as originally enacted. 1989 N.C. Sess. Laws ch. 339, sec. 3.

APPEAL by defendant from *David E. Reid, Jr., Judge.* Judgment entered 16 June 1988 in Superior Court, PENDER County. Heard in the Court of Appeals 6 June 1989.

Terry B. Richardson for plaintiff-appellee.

Tharrington, Smith & Hargrove, by Richard A. Schwartz, Douglas A. Ruley, and Daniel W. Clark, for defendant-appellant.

BECTON, Judge.

In this suit by a school board member against the Pender County Board of Education ("Board"), the question presented is whether the Board could renew the county superintendent's contract in the last *fiscal* year of the contract, which overlapped with a *calendar* year in which new board members were slated to take office. To answer this question, the parties ask us to determine whether "fiscal year" or "calendar year" was the intended meaning of the word "year" in N.C. Gen. Stat. Sec. 115C-271's prohibition of contract renewal "until after new members have been sworn in" during "any year when new members are to be elected. . . ." For the reasons that follow, we reverse the order granting summary judgment for the plaintiff.

I

This dispute concerns Dr. Haywood Davis' contract as superintendent of the Pender County school system which ran from 1 July 1984 to 30 June 1988. On 22 February 1988, the then current five member Board voted, three to two, to renew Dr. Davis' contract for another four year term, to begin 1 July 1988 and end 30 June 1992. Two Board members who voted for renewal had terms in office which were to expire in December 1988, at which time two newly-elected Board members were to be sworn in.

The plaintiff brought the present action, seeking declaratory and injunctive relief on the ground that the vote was taken in violation of Section 115C-271. The trial judge granted summary

judgment in her favor, ruling that the Board's renewal of Dr. Davis' contract violated Section 115C-271, which provided, in relevant part:

> . . . The county board of education may, with the written consent of the current superintendent, extend or renew the term of superintendent's contract *at any time during the final year of his term.* Provided, however, *in any year when new members are to be elected* or appointed, the board may not act until after the new members have been sworn in. . . .

N.C. Gen. Stat. Sec. 115C-271 (1987) (emphasis added). The trial judge declared Dr. Davis' contract "null and void ab initio and of no force and effect."

The Board appeals, contending that because a school superintendent's term of office is measured in *fiscal* years, from 1 July to 30 June, the trial judge's ruling, construing Section 115C-271 to prohibit board renewal of a superintendent's contract during any *calendar* year in which board members will be elected, thwarts the legislative purpose behind the statute and imposes absurd time limits on reelection of superintendents. The Board argues that the term "year" in both of the disputed sentences in Section 115C-271 must be read to refer to the final *fiscal* year of the superintendent's contract.

If the word "year" is interpreted to mean "calendar year," the Board contends, a school board would be prohibited from acting until after the superintendent's contract had already expired, thereby incurring the risk of not attracting or retaining the most qualified candidate for the position, who, in the competitive market for superintendents, would surely prefer a settled contract to the uncertainty of delayed board action. As a result, the Board argues, the operation of the school system could be disrupted, in turn adversely affecting the education of the county's schoolchildren. Moreover, the Board asserts, if this court adopts the plaintiff's position, a duly elected, currently sitting board—ostensibly empowered to oversee the operation of all aspects of the county school system—would be powerless from January to December of any election year to employ a superintendent to run the county's schools. The Board contends that such a result would be absurd and would conflict with the legislature's visible expansion in recent years of school board discretion to choose a superintendent.

The plaintiff, on the other hand, argues that the legislature intended in Section 115C-271 to prohibit a "lame duck" board from imposing an unwanted superintendent upon an incoming board. To effectuate that intent, she argues, "year" must be read in accord with its ordinary meaning, that is, "calendar year," measured from 1 January to 31 December. She points out that a county school system would not necessarily face being without a superintendent during the period between the expiration of the superintendent's contract and the swearing-in of new board members because Section 115C-271 permits a superintendent to remain in office "until his successor is elected and qualified."

II

We need not address the merits of the parties' contentions because the question before us has been resolved by the legislature's recent clarification of Section 115C-271. On 15 June 1989, the General Assembly ratified H.B. 1072, entitled "An Act to Clarify Legislative Intent Regarding Renewal of Superintendent's Contracts." The two disputed sentences were amended to read as follows:

> The county board of education may, with the written consent of the current superintendent, extend or renew the term of the superintendent's contract *at any time during the final 12 months of the contract*; provided, however, when new members are to be elected or appointed and sworn in *during the final 12 months of the contract* the board may not act until after the new members have been sworn in.

1989 N.C. Sess. Laws ch. 339, sec. 3 (emphasis added). The bill further provides: "This act is effective upon ratification and shall apply to all superintendent contracts extended or renewed by local boards of education since July 1, 1985." *Id.*

Thus, it is clear that the Board was free to renew its superintendent's contract at any time during the final 12 months of the contract since no new members were to take office during that period. Accordingly, we hold that the Board's renewal of Dr. Davis' contract was valid, and the order granting summary judgment in favor of the plaintiff is

Reversed.

Judges PHILLIPS and LEWIS concur.

STATE OF NORTH CAROLINA v. ROBERTA MALONE EALY

No. 8817SC1024

(Filed 18 July 1989)

Automobiles and Other Vehicles § 113.1 — misdemeanor death by vehicle — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for misdemeanor death by vehicle where all of the evidence tended to show that defendant's tractor trailer was across the center line of the highway at the time the accident occurred. Defendant's testimony that she lost control of her vehicle and skidded into the other lane after she applied her brakes to avoid a collision with the victim's car which was approaching in her lane of travel merely presented a question for the jury.

APPEAL by defendant from *John, Joseph R., Judge.* Judgment entered 13 April 1988 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 11 April 1989.

Defendant was tried and convicted on a charge of misdemeanor death by vehicle. From the imposition of a two-year suspended sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William B. Ray, for the State.

Walker, Melvin & Berger, by Philip E. Berger, for defendant appellant.

JOHNSON, Judge.

The charge against defendant, Roberta Malone Ealy, of misdemeanor death by vehicle arose out of a vehicle accident which occurred on 20 April 1987 at approximately 11:00 a.m. on U.S. 220 approximately one mile north of Stoneville, North Carolina. U.S. 220 is a two lane highway, one lane for northbound traffic and one for southbound traffic. Each lane is approximately 13' wide. At the time in question, Margaret J. Olaki was a passenger riding in the front seat of a 1987 Oldsmobile driven by her husband in the northbound lane of U.S. 220. Defendant was operating an International Harvester tractor trailer truck in the southbound

lane of U.S. 220. The weather was clear, dry and sunny. Mrs. Olaki testified that as she and her husband were proceeding north, the defendant's truck, when it was approximately 25 to 30 feet from their car, crossed the center line into their lane of travel and collided with their car. Mr. Olaki was killed as a result of the collision. All of the debris was located in the northbound lane. An examination of defendant's tractor trailer truck's braking and steering systems after the collision revealed no defects in either.

The defendant, testifying in her own behalf, stated that on the date and at the time in question she was operating a tractor trailer in the southbound lane of U.S. 220. She first saw the Olaki's vehicle when it was approximately two hundred feet away from her tractor trailer and was proceeding north in the southbound lane; that upon seeing the Olaki's vehicle in her lane of travel, she slammed on her brakes, lost control of the tractor trailer, skidded one hundred feet in the southbound lane, then skidded across the center line into the northbound lane striking the Olaki's car which had partially crossed back over into the northbound lane.

At the close of all the evidence, defendant's motion for a directed verdict was denied.

By her sole assignment of error, defendant contends that the trial court erred in denying her motion for a directed verdict. We disagree.

A motion for a directed verdict by a defendant tests the legal sufficiency of the evidence to go to the jury. *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E. 2d 427 (1985). In considering a motion for directed verdict, plaintiff's evidence must be taken as true, along with all reasonable inferences therefrom, resolving all conflicts and inconsistencies in plaintiff's favor, and disregarding defendant's evidence unless favorable to plaintiff or tending to clarify plaintiff's case. *Forsyth County v. Shelton*, 74 N.C. App. 674, 329 S.E. 2d 730, *cert. denied and appeal dismissed*, 314 N.C. 328, 333 S.E. 2d 484 (1985). Accordingly, the court should grant a motion for directed verdict only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Cates v. Wilson*, 83 N.C. App. 448, 350 S.E. 2d 898 (1986), *modified*, 321 N.C. 1, 361 S.E. 2d 734 (1987). If, however, there is more than a scintilla of evidence supporting each element of plaintiff's case, the motion for directed verdict should be denied. *Broyhill v. Coppage*, 79 N.C. App. 221, 339 S.E. 2d 32 (1986).

Defendant was charged, tried and convicted under G.S. sec. 20-141.4(a2) which provides:

> Misdemeanor Death by Vehicle.—A person commits the offense of misdemeanor death by vehicle if he unintentionally causes the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. sec. 20-138.1, and commission of that violation is the proximate cause of the death.

The elements of the offense of misdemeanor death by vehicle are (1) an unintentionally caused, (2) death of another person, (3) while a defendant engaged in the violation of any state law or local ordinance other than impaired driving, and (4) death proximately resulting from this violation. *Id.*

The specific traffic violation defendant was alleged to have violated when the collision occurred is driving her vehicle to the left of the center of the highway. G.S. sec. 20-146(a).

Defendant argues that there was insufficient evidence to carry the case to the jury because (1) the evidence did not show a violation of state law or local ordinance and (2) the evidence failed to show that her negligence was the proximate cause of the collision and her negligence could not, therefore, be the proximate cause of Mr. Olaki's death.

All of the evidence tended to show that the collision occurred in the northbound lane when defendant was driving to the left of the center of the highway. This evidence, therefore, made out a prima facie case of actionable negligence. *See Anderson v. Webb*, 267 N.C. 745, 148 S.E. 2d 846 (1966); *Sessoms v. Roberson*, 47 N.C. App. 573, 268 S.E. 2d 24 (1980). Evidence favorable to the defendant tending to show that she was in the northbound lane from a cause other than her own negligence (loss of control of her tractor trailer and skidding into the northbound lane after defendant applied the brakes to avoid a collision with the Olaki's vehicle which was at that time traveling north in the southbound lane) tended to rebut the presumption of actionable negligence arising from plaintiff's prima facie case. Thus, a genuine issue of fact was presented for the jury to decide. The trial court properly denied defendant's motion for a directed verdict. *See Insurance Co. v. Chantos*, 298 N.C. 246, 258 S.E. 2d 334 (1979).

For the reasons stated above, we find

No error.

Judges BECTON and ORR concur.

STATE OF NORTH CAROLINA v. VELMA ANN ROBINSON AGUBATA

No. 8810SC1041

(Filed 18 July 1989)

1. **Narcotics § 4— trafficking in heroin—possession of stated amount required—mixture containing heroin sufficient for conviction**

Defendant was not entitled to have a charge of trafficking in heroin dismissed and to have the lesser offense of felonious possession of heroin submitted to the jury on the basis that the heroin in her possession, apart from the various substances it was mixed with, weighed less than four grams, since pursuant to N.C.G.S. § 90-95(h)(4) the offense of trafficking in heroin consists of possessing stated amounts of any mixture containing heroin, and the evidence indicated that defendant had in her possession several heroin containing mixtures which weighed more than twenty-two grams altogether.

2. **Criminal Law § 92.5— severance requested—antagonistic defenses not shown—denial proper**

There was no merit to defendant's contention that the trial court erred in refusing to sever her trial from that of her codefendant where defendant alleged that she married the codefendant four days before the trial began and they had antagonistic defenses, but no such conflict was alluded to in her brief or revealed by the record.

3. **Criminal Law § 80.1— letters placing blame on another—authenticity not shown—exclusion proper**

In a prosecution of defendant for trafficking in heroin, the trial court did not err in excluding letters allegedly written by the owner of controlled substances found in the house shared by defendant, codefendant, and this third person when the trial

court found that the letters were not trustworthy for the reason that the only evidence as to the existence of the writer and his presence in the house with the codefendants was that given by the codefendant, and the police who arrested the codefendants found nothing in the house to indicate that the alleged writer lived or had been there.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 14 January 1988 in Superior Court, WAKE County. Heard in the Court of Appeals 12 April 1989.

Attorney General Thornburg, by Associate Attorney General D. Sigsbee Miller, for the State.

Purser, Cheshire, Parker, Hughes & Manning, by Thomas C. Manning and Joseph B. Cheshire, V, for defendant appellant.

PHILLIPS, Judge.

[1] In a joint trial with Patrick Agubata, who became her husband four days earlier, defendant was convicted of trafficking in heroin by possessing more than fourteen grams but less than twenty-eight grams of heroin in violation of G.S. 90-95(h)(4)(b). Because the evidence shows that the heroin in her possession, *apart from the various substances it was mixed with*, weighed less than four grams she contends that she was entitled to have the trafficking charge dismissed and the jury instructed on the lesser included offense of felonious possession of heroin, as her motions requested. The contentions have no merit. Under the provisions of G.S. 90-95(h)(4) the offense of trafficking in heroin or any of the other substances referred to therein does not consist of just possessing the stated amount of the listed drugs; it also consists of possessing "any mixture containing such substance," *State v. Dorsey*, 71 N.C. App. 435, 322 S.E. 2d 405 (1984), *State v. Willis*, 61 N.C. App. 23, 300 S.E. 2d 420, *modified and affirmed*, 309 N.C. 451, 306 S.E. 2d 779 (1983), and the evidence indicates that defendant had in her possession several heroin containing mixtures that weighed more than twenty-two grams altogether. This being the only evidence as to the weight of the forbidden mixtures possessed by defendant, it raised no issue as to the lesser included offense and the court did not have to charge on it. *State v. Thompson*, 306 N.C. 526, 294 S.E. 2d 314 (1982).

[2] Defendant next contends that the court erred in refusing to sever her trial from that of her codefendant, Patrick Agubata. The initial joinder order, consented to by the codefendants, was entered two months before trial and is not attacked. The claimed basis for the motion to sever, made the day trial began, is that she married the codefendant four days earlier and they had antagonistic defenses. But since no such conflict is alluded to in her brief or revealed by the record the contention is overruled.

[3] Defendant finally contends that the trial court prejudicially erred by refusing to admit into evidence two handwritten letters postmarked Houston, Texas that Patrick Agubata received through the mail after his arrest. The letters were signed "Pat" and contained statements indicating that the drugs he and defendant were charged with possessing belonged to the writer and that he was sorry for the trouble caused them. In a *voir dire* hearing concerning the proffered evidence, Patrick Agubata testified in substance that the letters were written by one Patrick Babatundi who, he said, resided with him and defendant in the house where the controlled substances were seized, and that a subpoena issued for Babatundi's attendance in court was returned unserved because the sheriff could not locate him. Defendant contends that these letters should have been admitted pursuant to either Rule 804(b)(3), Rule 803(24), or Rule 804(b)(5) of the N.C. Rules of Evidence. It is unnecessary to determine whether the various other requirements of any of these rules were met by the letters and the evidence about them; for before the statements could be received into evidence under either rule relied upon the trial court had to determine, *inter alia*, that the surrounding circumstances indicated that the statements were trustworthy, *State v. Wilson*, 322 N.C. 117, 134, 367 S.E. 2d 589, 599 (1988); *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985), and the court did not so determine. Instead, it permissibly found that the statements were not trustworthy for the sensible reason that the only evidence as to Patrick Babatundi's existence and presence in the house with the codefendants was that given by Patrick Agubata; and that the police who arrested them found nothing in the house to indicate that Babatundi lived or had been there.

No error.

Judges PARKER and COZORT concur.

STATE OF MICHIGAN, COUNTY OF SHIAWASSEE, ON BEHALF OF JANICE PRUITT v. HAROLD PRUITT

No. 8827DC1081

(Filed 18 July 1989)

1. **Divorce and Alimony § 24— child support order—ten-year statute of limitations applicable**

A child support order is a judgment directing payment of a sum of money and as such falls within the ten-year statute of limitations provided in N.C.G.S. § 1-47. The statute of limitations begins to run against each support payment as it becomes overdue, not from the date the decree ordering support was entered, and accordingly there is no bar to recovery of unpaid child support payments which have come due during the ten years immediately prior to the filing of a claim for past due support.

2. **Divorce and Alimony § 24.10— child support—obligation terminated by children's adoption—pre-adoption obligation not affected**

A father's obligation to provide support for his children was a continuing one which ceased only when the children were adopted by their stepfather, and in the absence of evidence that the mother waived her right to the past due payments, nothing about the subsequent adoption affected the father's pre-adoption obligation to provide support for his children, and nothing about the subsequent adoption affected the applicable statute of limitations.

APPEAL by defendant from *George W. Hamrick, Judge.* Order entered 4 August 1988 in District Court, CLEVELAND County. Heard in the Court of Appeals 9 May 1989.

No appellee brief.

Lackey & Lackey, by N. Dixon Lackey, Jr., for defendant-appellant.

BECTON, Judge.

The question presented by this appeal is whether an action against a father for past due child support, brought eight years after the children were adopted by the mother's new husband, was

barred by the statute of limitations. We hold that the applicable statute of limitations was ten years, and, accordingly, we affirm the order of the trial court commanding the father to pay past due child support for the period from June 1978 to February 1980.

I

Harold Pruitt ("the father") and Janice Pruitt (Now Gray) ("the mother") obtained a divorce in Michigan in 1974. Custody of their two minor children was awarded to the mother, and the father was ordered to pay $20.25 per week in child support. The father, now a North Carolina resident, never paid child support as ordered by the Michigan court. On 4 February 1980, the children were legally adopted by the mother's present husband, Robert Gene Gray.

On 27 June 1988, the State of Michigan filed this action in Cleveland County District Court on behalf of the mother, seeking $10,943.50, the amount of child support in arrears since March 1974. The trial judge ruled that the ten-year statute of limitations barred all support payments past due as of June 1978, and further ruled that the father's support obligation ceased when the children were adopted in February 1980. The judge ordered the father to pay the past due support for the period from 26 June 1978 (ten years before this action was instituted) to 4 February 1980 (when the children were adopted).

The father appeals, contending that the three-year statute of limitations found in N.C. Gen. Stat. Sec. 1-52(5), applicable to "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated," applies to this case, and therefore, that any claim for amounts due between June 1978 and February 1980 was barred after 3 February 1983, three years after the children were adopted. In the alternative, the father urges us to hold that an action for past due child support should be commenced "within a reasonable time after the continuing obligation to pay child support ceased," and that this action was barred because eight years after the obligation ended was an unreasonable length of time for the mother to wait before asserting her claim. We decline to embrace the father's view.

II

[1] A child support order is a judgment directing payment of a sum of money, and, as such, falls within the ten-year statute of limitations provided in N.C. Gen. Stat. Sec. 1-47 (1983). *See,*

e.g., Adkins v. Adkins, 82 N.C. App. 289, 291, 346 S.E. 2d 220, 221 (1986); *Lindsey v. Lindsey*, 34 N.C. App. 201, 203, 237 S.E. 2d 561, 563 (1977). The statute of limitations begins to run against each support payment as it becomes overdue, not from the date the decree ordering support was entered. *Arrington v. Arrington*, 127 N.C. 190, 197-98, 37 S.E. 212, 214 (1900). Accordingly, there is no bar to recovery of unpaid child support payments which came due during the ten years immediately prior to the filing of a claim for past due support. *See Stephens v. Hamrick*, 86 N.C. App. 556, 559, 358 S.E. 2d 547, 549 (1987).

[2] The father's obligation to provide support for his children was a continuing one which ceased only when the children were adopted by their stepfather. *See Streeter v. Streeter*, 33 N.C. App. 679, 682, 236 S.E. 2d 185, 187 (1977) (" 'obligation of the husband to furnish support to his . . . minor children is a continuing one' ") (citation omitted); N.C. Gen. Stat. Sec. 48-23(2) (1984) ("biological parents . . . [are] relieved of all legal duties and obligations due from them to the person adopted" following entry of a final order of adoption). In our view, entitlement to each installment of child support ordered by the Michigan court became fixed and vested at the moment it was due and unpaid. In the absence of evidence that the mother waived her right to the past due payments, nothing about the subsequent adoption affected the father's pre-adoption obligation to provide support for his children, and nothing about the subsequent adoption affected the applicable statute of limitations. *Accord Sample v. Poteralski*, 169 Ga. App. 448, 313 S.E. 2d 145 (1984); *Sheffield v. Strickland*, 268 Ark. 1148, 599 S.W. 2d 422 (1980); *Bolden v. Davies*, 87 Cal. App. 2d 238, 196 P. 2d 588 (1948).

For the reasons stated, the order of the trial court is

Affirmed.

Judges PHILLIPS and LEWIS concur.

HELMS INSURANCE AGENCY, INC., PLAINTIFF v. REDSHAW, INC., DEFENDANT

No. 8820DC1189

(Filed 18 July 1989)

Appeal and Error § 24— failure to comply with Rules of Appellate Procedure—appeal dismissed

Defendant's appeal is dismissed for failure to comply with the Rules of Appellate Procedure.

APPEAL by defendant from *Honeycutt, Judge*. Order entered 3 June 1988 in District Court, UNION County. Heard in the Court of Appeals 11 May 1989.

Joe P. McCollum, Jr. for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Scott C. Lovejoy, for defendant appellant.

PHILLIPS, Judge.

In appealing from the denial of its motions to dismiss plaintiff's action and to compel arbitration, defendant failed to comply with our Rules of Appellate Procedure in several respects and the appeal is dismissed. *Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E. 2d 566 (1984). *Inter alia*, none of defendant's assignments of error is accompanied by a list of the exceptions upon which it is based and the pages of the record or transcript where they can be found as Rule 10(c) requires; no exceptions follow the judicial actions complained of as Rule 10(b)(1) requires, or appear in any other place in the record for that matter.

Appeal dismissed.

Judges BECTON and LEWIS concur.

ELVERA A. COFFEY v. MICHAEL COFFEY

No. 8822SC968

(Filed 1 August 1989)

1. Parent and Child § 2— automobile accident—mother's suit against son—dismissed

The trial court did not err in dismissing plaintiff parent's action against her defendant son for injuries sustained from defendant's operation of an automobile. The general rule is that an unemancipated minor child cannot maintain a tort action against his parent for personal injuries; as the child's immunity is considered the reciprocal of the parents' immunity, a parent likewise cannot sue an unemancipated minor child for a personal tort. The right to sue must exist at the time of the injury and the subsequent emancipation or majority of the minor is of no consequence.

2. Rules of Civil Procedure § 15.1— auto accident—mother's action against son—amendment to add father as defendant

The trial court erred in an action by plaintiff mother against her son arising from an automobile accident by denying plaintiff's request to amend the complaint to add the father as a defendant under the family purpose doctrine. The amendment was permissible under N.C.G.S. § 1A-1, Rule 20(a) because plaintiff was seeking recovery against both her son and the son's father for injuries sustained in an automobile accident, so that the injuries arose from the same transaction and consequently common questions of law and fact arise; plaintiff complied with the notice requirement of N.C.G.S. § 1A-1, Rule 21; as defendant had filed an answer, plaintiff was allowed under N.C.G.S. § 1A-1, Rule 15(a) to amend her pleadings only by leave of the court; as the trial court failed to declare or state any reason for refusing to sign the order of amendment, the appellate court may examine any apparent reasons for such denial; defendant has shown no apparent justification for denying the amendment; the action by the mother against the father under the family purpose doctrine based on the son's negligence is not futile; and the fact that additional discovery may be required or that additional counsel may be required to represent the new defendant does not amount to prejudice or make the delay undue.

Judge LEWIS dissents in part.

APPEAL by plaintiff from *Collier (Robert A.), Judge*. Judgment entered 12 July 1988 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 23 March 1989.

Joel C. Harbinson for plaintiff-appellant.

James T. Patrick for defendant-appellee.

GREENE, Judge.

On 27 January 1988, plaintiff filed a complaint against her son (hereinafter "defendant") alleging that she sustained injuries as a result of defendant's negligent operation of an automobile on 17 August 1985 in which plaintiff was a passenger. On 19 May 1988, the plaintiff moved to amend her complaint to join Clayton Coffey, the father of the defendant, as an additional party defendant. The proposed amended complaint alleged that the father was liable under the family purpose doctrine, as the son was a member of the father's household and the father provided the automobile in which the plaintiff was a passenger for the pleasure and general use of the family. The trial court on 1 June 1988, without assigning any reasons, denied the plaintiff's motion to amend. On 12 July 1988, the trial court in response to defendant's Rule 12(b)(6) motion and after receiving a stipulation from the parties that the defendant was on 17 August 1985 the unemancipated minor son of the plaintiff, entered summary judgment for the defendant and dismissed "with prejudice" plaintiff's complaint. Plaintiff appeals the denial of her motion to amend the complaint and the granting of defendant's motion for summary judgment. The parties stipulated that at the time of the accident the defendant was living with the plaintiff and was sixteen years old, having been born on 11 November 1968. On the date the complaint was filed, 27 January 1988, the defendant was nineteen years old.

The issues presented are: I) whether the defendant who had reached the age of majority at the time of the lawsuit is immune from suit by his parent, the plaintiff, for negligent conduct occurring when the defendant was an unemancipated minor; and II) whether the trial court erred in denying plaintiff's motion to amend her complaint to add as a party defendant the defendant's father.

I

[1] The general rule in North Carolina is that "an unemancipated minor child cannot maintain a tort action against his parent for personal injuries." *Gillikin v. Burbage*, 263 N.C. 317, 321, 139 S.E. 2d 753, 757 (1965). As the child's immunity is considered the reciprocal of the parents' immunity, a parent likewise cannot sue an unemancipated minor child for a personal tort. *Id.* The parent-child immunity doctrine "does not apply to actions by an unemancipated minor with respect to contract and property rights, actions by an unemancipated minor involving willful and malicious acts, or actions by an emancipated child for torts committed after emancipation." *Lee v. Mowett Sales Co.*, 316 N.C. 489, 492, 342 S.E. 2d 882, 884 (1986). However, our General Assembly created an exception to the general rule which permits a minor child to sue a parent for "personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent." N.C.G.S. Sec. 1-539.21 (1983). This exception, however, is limited and did not abolish the unemancipated minor's immunity from suits by his parents. *Allen v. Allen*, 76 N.C. App. 504, 506, 333 S.E. 2d 530, 532, *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 855 (1985); *Ledwell v. Berry*, 39 N.C. App. 224, 226, 249 S.E. 2d 862, 864 (1978), *cert. denied*, 296 N.C. 585, 254 S.E. 2d 35 (1979); *Camp v. Camp*, 89 N.C. App. 347, 348, 365 S.E. 2d 675, 676 (1988).

The plaintiff nonetheless contends that since defendant was an adult on the date the complaint was filed, the unemancipated minor's immunity does not bar the parent's action against the adult child. Specifically, plaintiff argues that the rule prohibiting the parent's action against the child should not apply since one of the bases of the rule, maintenance of the family relationship, vanishes when the child reaches majority or is emancipated. *See Lee*, 316 N.C. at 492, 342 S.E. 2d at 884 (listing five policy reasons supporting parent-child immunity doctrine). We disagree.

The right to sue must exist at the time of the injury and the subsequent emancipation or majority of the minor is of no consequence. *See* 67A C.J.S. *Parent and Child* Sec. 128 at 505 (1978). Similarly, an emancipated minor or a person obtaining their majority cannot maintain a personal tort action against their parents for a tort " 'committed before emancipation if at the time of the wrong the action was not maintainable.' " *Lee v. Comer*, 159 W.Va. 585, 587-88, 224 S.E. 2d 721, 722 (1976) (quoting from 59 Am. Jur.

2d *Parent and Child* Sec. 145 at 277); *see also Foster v. Foster*, 264 N.C. 694, 697, 142 S.E. 2d 638, 640 (1965) (action cannot be maintained against mother for personal injuries inflicted by mother during minority "even after [child] has attained her majority"); 3 R. Lee, *North Carolina Family Law* Sec. 248 at 304 (4th ed. 1981); Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases* 6 A.L.R. 4th, Sec. 5 at 1092 ("notwithstanding that the child was either emancipated or had attained his majority at the time of commencement of the action," parental tort immunity doctrine constitutes bar to action by child against parent). The effect of a holding such as the one plaintiff advocates would be to allow a parent to sue her child if the filing of the complaint could be delayed until the unemancipated minor either becomes emancipated or attains majority. Such a purposeful delay would itself contravene domestic tranquility, one of the policy reasons supporting immunity. *See Lee*, 316 N.C. at 492, 342 S.E. 2d at 884 (listing five policy reasons supporting parent-child immunity). "The family relationship would be disturbed during the time the parent waited for the child to become of age." *Nahas v. Noble*, 77 N.M. 139, 142, 420 P. 2d 127, 129 (1966). Finally, the facts and holding in *Allen* are entirely consistent with our holding. 76 N.C. App. 504, 333 S.E. 2d 530. In *Allen*, the parent-plaintiff sued her son for his alleged negligent conduct. *Id.* at 505, 333 S.E. 2d at 531. At the time of the alleged negligent conduct, the defendant-son was sixteen years old and at the time the complaint was filed the defendant was at least eighteen years old. *Id.* The *Allen* court while not specifically addressing the fact that the defendant had attained majority at the time the lawsuit had been filed held the defendant was immune from suit by his mother for conduct occurring when he was an unemancipated minor. *Id.* at 507, 333 S.E. 2d at 533. Accordingly, the trial court committed no error in dismissing the plaintiff-parent's action against her defendant-son for injuries she sustained arising from defendant's operation of the automobile.

We note that the general rule of parent-child immunity has been criticized and authors have suggested that the immunity "should not bar an action by a child or parent when such action does not arise out of the exercise of parental authority or discretion and, alternatively, where there is available liability insurance coverage for the personal injuries sustained." Wyatt, *The Last Pangs of Parent-Child Immunity in North Carolina: Lee v. Mowett*

Sales Co. and Allen v. Allen, 22 Wake Forest L. Rev. 607, 628 (1987). However, our Supreme Court has determined that if the doctrine is to be abolished, "it should be done by legislation and not by the Court." *Lee*, 316 N.C. at 494, 342 S.E. 2d at 885.

II

[2] The plaintiff next argues the trial court erred in denying her request to add the defendant's father as a party defendant under the family purpose doctrine. We agree.

Where the essence of a Rule 15(a) motion to amend a pleading is to add a party to the lawsuit, consideration of North Carolina Rules of Civil Procedure 20 and 21 is required. N.C.G.S. Sec. 1A-1, Rule 15(a) (1983); N.C.G.S. Sec. 1A-1, Rule 20 (1983); N.C.G.S. Sec. 1A-1, Rule 21 (1983); *see* 3 J. Moore, Moore's Federal Practice Sec. 15.08[5] at 15-84, 15-85 (2d ed. 1989); 3A J. Moore, Moore's Federal Practice Sec. 21.05[1] at 21-26 (2d ed. 1989); *Pask v. Corbitt*, 28 N.C. App. 100, 102, 220 S.E. 2d 378, 380 (1975). Rule 20(a) allows permissive joinder of defendants "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action." N.C.G.S. Sec. 1A-1, Rule 20(a). As the plaintiff was seeking recovery against both her son and the son's father for injuries she sustained in an automobile accident occurring on 17 August 1985, plaintiff was seeking the liability of both defendants for injuries "arising out of the same transaction" and consequently common questions of law and fact arise in the action. N.C.G.S. Sec. 1A-1, Rule 20(a); *see Shuping v. Barber*, 89 N.C. App. 242, 249, 365 S.E. 2d 712, 716 (1988) ("Although defendants may not be held jointly liable, plaintiff is not precluded from pursuing his claims against both defendants in the same civil action"). Accordingly, the amendment joining the defendant's father as a party defendant was permissible under Rule 20.

Under Rule 21, which concerns the procedure upon nonjoinder of parties, by order of the court and on "such terms as are just parties may be dropped or added." N.C.G.S. Sec. 1A-1, Rule 21. Furthermore, a requirement of notice to the existing parties "has been read into Rule 21" and such notice is a condition precedent to entry of an order adding or dropping a party. *Pask*, 28 N.C. App. at 102-3, 220 S.E. 2d at 381. Plaintiff complied with the notice requirement of Rule 21. She served a notice of hearing on defend-

ant Michael Coffey along with a copy of the proposed amendment notifying defendant that she would appear in court on a certain day to request an order allowing the amendment.

Under Rule 15(a), as the defendant had filed an answer, the plaintiff was allowed to amend her pleadings "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.G.S. Sec. 1A-1, Rule 15(a). While the grant or denial of an opportunity to amend pleadings is within the discretion of the trial court, *Kinnard v. Mecklenburg Fair*, 46 N.C. App. 725, 727, 266 S.E. 2d 14, 16, *aff'd*, 301 N.C. 522, 271 S.E. 2d 909 (1980), the "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed. 2d 222, 226 (1962). It is "an abuse of discretion to deny leave to amend if the denial is not based on a valid ground." 3 J. Moore, Moore's Federal Practice Sec. 15.08[4] at 15-65, 15-66.

"Absent any declared reason for denial of leave to amend, the appellate court may examine any apparent reasons for such denial." *Banner v. Banner*, 86 N.C. App. 397, 400, 358 S.E. 2d 110, 111, *disc. rev. denied*, 320 N.C. 790, 361 S.E. 2d 70 (1987). The trial court failed to "declare" or state any reason for refusing to sign the order of amendment tendered by the plaintiff. The defendant, who had the burden of establishing prejudice, *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E. 2d 591, 596 (1977), has shown no "apparent" justification for denying the amendment. "Apparent" or "declared" reasons approved by our courts include: undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment. *See Foman*, 371 U.S. at 182, 83 S.Ct. at 230, 9 L.Ed. 2d at 226.

The action by the mother against the father under the family purpose doctrine based on the son's negligence is not futile. Arguably, the son's immunity from a suit against him by his mother would be extended to the father to protect the father from the mother's cause of action based on the son's negligence. However, our Supreme Court has rejected such transference of immunity from the son to the father and has specifically held that one parent is entitled to maintain a suit against another parent under the family purpose doctrine for the negligence of their son. *Cox v. Shaw*, 263 N.C. 361, 367, 139 S.E. 2d 676, 680 (1965); N.C.G.S. Sec. 52-5 (1984)

(common law immunity from suits between husband and wife abolished). Furthermore, we reject defendant's argument that the amendment would prejudice him or cause undue delay. The fact that additional discovery may be required or that additional counsel may be required to represent the new defendant does not amount to prejudice or make the delay "undue."

Accordingly, the trial court erred in not allowing the plaintiff to amend her complaint to add the defendant-father as a party defendant and the cause is remanded.

Affirmed in part, reversed in part and remanded.

Judge ARNOLD concurs.

Judge LEWIS dissents in part.

Judge LEWIS dissenting in part.

I would affirm the trial judge in all respects, therefore I dissent as to reversing the denial of the motion to amend the complaint.

Our Rules of Evidence do not require the trial judge to declare or state reasons for denying a motion to amend. Some cases seem to say there should be "apparent" or "declared" reasons. Here, we are substituting the discretion of the appellate court to determine what is "apparent," what constitutes an "undue" delay, what is "dilatory" and what constitutes "undue prejudice."

There is no doubt the complaint was filed 27 January 1988; the existence of the father and his position as well as all other aspects of the case were then well known. Undoubtedly there was a delay from then till 19 May 1988. The majority opinion will put us in the position of legislating how much time constitutes undue delay. The trial judge is in the better position to exercise discretion in this matter. Otherwise, the statute will be judicially changed to mean "amendments must be allowed unless the trial judge declares adequate reasons why not."

WILLIAM L. GRAY v. WALLACE NEIL HOOVER

No. 8821SC874

(Filed 1 August 1989)

1. **Husband and Wife § 25— alienation of affections—sufficiency of evidence**

The trial court erred in granting defendant's motion for directed verdict on plaintiff's claim for alienation of affections where defendant offered as evidence of his happy marriage and mutual love and affection toward his wife testimony that he thought they "had a wonderful marriage" and testimony that they had built a new home and were doing some part-time farming; plaintiff offered evidence that the love and affection he and his wife had for each other was alienated and destroyed where he testified that, after defendant started working with his wife, his wife began to turn cold toward plaintiff and their sex life started deteriorating; his wife turned down a trip to Europe and told plaintiff she did not want to go anywhere with him; she also told plaintiff she did not love him anymore and loved defendant; plaintiff presented evidence that the wrongful and malicious acts of defendant produced the alienation of affections where plaintiff testified that defendant told plaintiff's wife that "anytime she got tired of [plaintiff], why didn't she just take her part of what [she and plaintiff] owned and run"; defendant sent plaintiff's wife gifts and notes and often talked to plaintiff's wife on the telephone at night; when plaintiff found defendant in his trailer hanging onto plaintiff's wife, plaintiff told defendant to stay away from his wife; and a couple of weeks later plaintiff again found defendant at the lake hanging onto plaintiff's wife.

2. **Husband and Wife § 28— criminal conversation—sufficiency of evidence**

There was more than a scintilla of evidence that defendant and plaintiff's wife had sexual intercourse during plaintiff's marriage so that the trial court erred in granting defendant's motion for judgment n.o.v. on the issue of criminal conversation where there was evidence that plaintiff twice caught defendant in plaintiff's trailer at the lake with defendant hanging onto plaintiff's wife's arm; plaintiff testified without objection that plaintiff's wife and defendant were living together in a

condominium in Florida while plaintiff and his wife were still married; defendant admitted to plaintiff in a phone conversation that he was having sex with plaintiff's wife; and defendant did not object to plaintiff's testimony, nor did defendant or plaintiff's wife testify at trial.

3. Husband and Wife § 29— criminal conversation—compensatory damages—sufficiency of evidence

Evidence of plaintiff's loss of consortium, mental anguish, and humiliation was sufficient to support an award of compensatory damages in plaintiff's action for criminal conversation where the evidence tended to show that after one incident of finding defendant in plaintiff's trailer with plaintiff's wife, plaintiff's wife told plaintiff she no longer loved him but loved defendant; plaintiff's sex life with his wife began deteriorating; plaintiff observed defendant and plaintiff's wife drinking out of the same cup with a straw, sharing the same hamburger, and taking turns eating bites; defendant called and told him he was having sex with plaintiff's wife; defendant and plaintiff's wife lived together in Florida; and defendant and plaintiff's wife intentionally kissed in plaintiff's presence.

4. Husband and Wife § 29— criminal conversation—punitive damages—sufficiency of evidence

Evidence was sufficient to support an award of punitive damages in an action for criminal conversation where defendant made phone calls to plaintiff and told plaintiff he was having sex with plaintiff's wife and was going to take plaintiff's business, and defendant drove up in front of plaintiff's business, blew the horn, and then in the presence of plaintiff kissed plaintiff's wife, then unbuttoned her blouse and put his hand inside.

APPEAL by plaintiff from *Seay (Thomas W.), Judge*. Judgment entered 25 March 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 February 1989.

Thomas J. Keith for plaintiff-appellant.

Thomas A. Fagerli for defendant-appellee.

GREENE, Judge.

Plaintiff, William L. Gray, brought this action against defendant, Wallace Neil Hoover, seeking compensatory and punitive damages for alienation of affections and criminal conversation. Plaintiff was the only witness to testify at trial. At the close of plaintiff's evidence, the trial court granted defendant's motion for a directed verdict as to the alienation of affections claim. The criminal conversation issue was submitted to the jury and the jury returned a verdict in favor of the plaintiff for $30,000 in compensatory damages and $10,000 in punitive damages. The trial court granted defendant's motion for judgment notwithstanding the verdict and ordered the verdict and judgment for plaintiff set aside and judgment entered for defendant. Plaintiff appeals.

The two issues presented for review are: I) whether there was more than a scintilla of evidence presented on each element of plaintiff's alienation of affections claim so as to render it error for the trial court to have granted defendant's motion for directed verdict; II) whether there was more than a scintilla of evidence presented on each element of plaintiff's criminal conversation claim so as to render it error for the trial court to have granted defendant's motion for judgment notwithstanding the verdict.

I

We note initially that plaintiff has failed to comply with Rule 10(c) of the North Carolina Rules of Appellate Procedure which requires that each assignment of error contained in the record on appeal "state plainly and concisely and without argumentation the basis upon which error is assigned." App. R. 10(c); *see generally Kimmel v. Brett*, 92 N.C. App. 331, 374 S.E. 2d 435 (1988). Plaintiff's exceptions upon which his assignments of error are based are therefore deemed abandoned. App. R. 10(c) (exceptions upon which assignments of error are based are deemed abandoned if assignments of error do not state the basis upon which the error is assigned). Nevertheless, we exercise our discretion under Appellate Rule 2, suspend the rules and decide the case on the merits. App. R. 2.

The standard for appellate review of a trial court's decision on a motion for a directed verdict is whether the evidence, when taken in the light most favorable to the non-movant, is sufficient as a matter of law to support a verdict in favor of the non-movant.

Broyhill v. Coppage, 79 N.C. App. 221, 226, 339 S.E. 2d 32, 36 (1986); *see Harvey v. Norfolk Southern Ry. Co., Inc.*, 60 N.C. App. 554, 556, 299 S.E. 2d 664, 666 (1983). The evidence is sufficient to withstand the motion if there is more than a scintilla of evidence to support each element of the non-movant's case. *Id.*

[1] Plaintiff argues the trial court erred in granting the defendant's motion for directed verdict on plaintiff's claim for alienation of affections because there was more than a scintilla of evidence to support each element of plaintiff's claim. We agree.

"In order to withstand defendant's motions for directed verdict, plaintiff must have presented evidence to show that: (1) plaintiff and his wife were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of defendant produced the alienation of affections." *Chappell v. Redding*, 67 N.C. App. 397, 399, 313 S.E. 2d 239, 241, *disc. rev. denied*, 311 N.C. 399, 319 S.E. 2d 268 (1984). The term "malicious acts" has been interpreted by this court to mean " 'unjustifiable conduct causing the injury complained of.' " *Id.* at 400, 313 S.E. 2d at 241 (quoting *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E. 2d 434, 436 (1980)). Plaintiff offered the following testimony at trial as evidence that he and his wife were "happily married and a genuine love and affection existed between them": "Well, I thought we had a wonderful marriage." Plaintiff expounded on this statement by telling how he and his wife had built a new home, were doing some part-time farming and had at one time thirty head of cattle and three registered quarter horses. Although this evidence is at best marginal, we conclude that when taken in the light most favorable to the plaintiff, it is more than the scintilla of evidence required in order to survive a directed verdict motion.

We also conclude plaintiff presented more than a scintilla of evidence that the love and affection that existed between plaintiff and his wife was alienated and destroyed. Plaintiff testified that after defendant started working with his wife, his wife began turning cold towards the plaintiff and their sex life started deteriorating. Plaintiff also testified that his wife turned down a trip to Europe and told plaintiff she did not want to go anywhere with him. Plaintiff's wife also told plaintiff she did not love him anymore and loved defendant.

There was likewise more than a scintilla of evidence that the "wrongful and malicious acts of defendant produced the alienation of affections." Defendant told plaintiff's wife that "anytime she got tired of [plaintiff], why didn't she just take her part of what [she and plaintiff] owned and run." Defendant also sent plaintiff's wife gifts and notes and often talked to plaintiff's wife on the telephone at night. When plaintiff found defendant in his trailer hanging onto plaintiff's wife, plaintiff told defendant to stay away from his wife. A couple of weeks later, plaintiff again found defendant at the lake hanging onto plaintiff's wife. These actions by the defendant are evidence of "unjustifiable conduct" causing the alienation of affections.

When taken in the light most favorable to the plaintiff, there was more than a scintilla of evidence on each essential element of the tort of alienation of affections. Accordingly, we reverse the order of the trial court granting a directed verdict on this issue and remand the issue for trial.

II

[2] Plaintiff also assigns as error the trial court's order granting judgment notwithstanding the verdict on the issue of criminal conversation. The same rules used to test the sufficiency of the evidence upon a motion for directed verdict apply to the determination of a motion for judgment notwithstanding the verdict. *Allen v. Pullen*, 82 N.C. App. 61, 64, 345 S.E. 2d 469, 472 (1986), *disc. rev. denied*, 318 N.C. 691, 351 S.E. 2d 738 (1987). The evidence is sufficient to withstand the motion if there is more than a scintilla of evidence, when taken in the light most favorable to the party who won the verdict, to support each element of the winning party's case. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E. 2d 579, 580-81 (1983).

Criminal conversation is an action for damages. 2 Lee, *North Carolina Family Law* Sec. 208 at 567 (4th ed. 1980). The elements of this cause of action are: "(1) marriage between the spouses and (2) sexual intercourse between defendant and plaintiff's spouse during the marriage." *Chappell*, 67 N.C. App. at 401, 313 S.E. 2d at 241; *see* 2 Lee, *North Carolina Family Law* Sec. 208 at 567. The parties stipulated there was a "marriage between the spouses" satisfying the first element of the cause of action. *Id.* The question we are left to decide is whether there was more than a scintilla of evidence that the defendant and plaintiff's wife had sexual in-

tercourse during plaintiff's marriage. We conclude there was sufficient evidence.

In an action for criminal conversation, it is not necessary to show the sexual intercourse by direct proof. 2 Lee, *North Carolina Family Law* Sec. 208 at 571. "[I]t may be shown by circumstantial evidence from which the guilt of the parties can be reasonably inferred." *Id.* Here, there was evidence that the plaintiff twice caught the defendant in plaintiff's trailer at the lake with defendant hanging onto plaintiff's wife's arm. Plaintiff also testified, without objection, that plaintiff's wife and defendant were living together in a condominium in Florida while plaintiff and his wife were still married. Plaintiff and a private investigator went to Florida and observed defendant and plaintiff's wife arriving arm in arm in the late evening at the condominium, the lights going out inside the condominium and observed that the two did not exit the condominium until daytime. The cars of defendant and plaintiff's wife were parked outside the condominium all night and were not moved. Plaintiff also testified without objection that the defendant admitted to plaintiff in a phone conversation that he was having sex with plaintiff's wife. It is significant that defendant did not object to plaintiff's testimony nor did defendant or plaintiff's wife testify at trial. In *Warner v. Torrence*, 2 N.C. App. 384, 163 S.E. 2d 90 (1968), this court stated the following in regard to a defendant not testifying in a criminal conversation case:

> Plaintiff's charge against defendant was adultery; if the evidence of so serious a charge was not true, the defendant had the opportunity to refute it. Whether the charge was true or not, the falsity of it was peculiarly within defendant's knowledge. The fact that [he] did not refute the damaging charge made by plaintiff, it may be that this was a silent admission of the charge made against [him].

Id. at 387, 163 S.E. 2d at 92 (*quoting Walker v. Walker*, 201 N.C. 183, 184, 159 S.E. 363, 364 (1931)). We hold that the evidence when taken in the light most favorable to the plaintiff was sufficient as a matter of law to support a verdict in favor of the plaintiff on the issue of criminal conversation.

[3] The defendant argues in brief and argued to the court below that plaintiff failed to introduce evidence of damages sufficient to support the verdict reached by the jury. We disagree.

In *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E. 2d 104 (1969), this court addressed the issue of damages in a cause of action for criminal conversation: "[T]he measure of damages is incapable of precise measurement; however, it has been held, and we think properly so, that the jury in awarding damages may consider the loss of consortium, mental anguish, humiliation, injury to health, and loss of support . . . ." *Id.* at 220, 170 S.E. 2d at 115-16. "Consortium" is defined as:

> Conjugal fellowship of husband and wife, and *the right of each* to the company, co-operation, affection, and aid of the other in every conjugal relation.

Id. at 219-20, 170 S.E. 2d at 115 (quoting Black's Law Dictionary, 4th ed.) (emphasis added). Although there was no evidence presented of loss of support or injury to health, there was sufficient evidence of plaintiff's loss of consortium, mental anguish, and humiliation to support the award of compensatory damages. Plaintiff's testimony showed that after one incident of finding defendant in plaintiff's trailer with plaintiff's wife, plaintiff's wife told plaintiff she no longer loved him but loved the defendant. Plaintiff's sex life with his wife began deteriorating. Plaintiff observed defendant and plaintiff's wife drinking out of the same cup with a straw, sharing the same hamburger taking turns eating bites. Additionally, defendant's phone calls to plaintiff telling him he was having sex with plaintiff's wife, the fact that defendant and plaintiff's wife were living together in Florida, and the incident described below in which defendant and plaintiff's wife intentionally kissed in plaintiff's presence, is evidence from which a jury could find plaintiff suffered mental anguish and loss of consortium. Accordingly, we conclude there was sufficient evidence to support the award of compensatory damages.

[4] We likewise conclude there was sufficient evidence to support the award of punitive damages. Punitive damages may be awarded "where the conduct of the defendant was willful, aggravated, malicious, or of a wanton character." *Sebastian*, 6 N.C. App. at 220, 170 S.E. 2d at 116. Here, defendant's phone calls in which defendant told plaintiff he was having sex with plaintiff's wife and was going to take plaintiff's business is some evidence in support of the punitive damages award. Additionally, the defendant's act of driving up in front of plaintiff's business, blowing the horn, and then in the presence of plaintiff kissing plaintiff's wife, unbut-

toning her blouse and then putting his hand inside certainly amounts to evidence sufficient for a jury to determine defendant's conduct was "willful, aggravated, malicious, or of a wanton character." *Id.*

Accordingly, we reverse the trial court's order granting a judgment notwithstanding the verdict on the issue of criminal conversation and reinstate the verdict of the jury. The order of the trial court granting a directed verdict on the alienation of affections claim is reversed and the issue remanded for trial. Because the elements of damages for criminal conversation and alienation of affections "are so connected and intertwined," in a subsequent trial of the alienation of affections claim any damages awarded for alienation of affections should be reduced by the amount of damages awarded on the issue of criminal conversation. The compensatory damages awarded should be reduced by $30,000 and any punitive damages awarded should be reduced by $10,000. *Sebastian*, 6 N.C. App. at 220, 170 S.E. 2d at 116; *see* D. Dobbs, *Remedies* Sec. 7.3 at 532 (1973) (where plaintiff has already secured property settlement agreement with disaffected spouse, a credit seems proper in awarding compensatory damages on alienation of affections claim).

Reversed and remanded.

Judges EAGLES and COZORT concur.

FRANKLIN ROAD PROPERTIES v. CITY OF RALEIGH, NORTH CAROLINA, AVERY C. UPCHURCH, MAYOR OF THE CITY OF RALEIGH, NORTH CAROLINA, EDWARD A. WALTERS, WALTER M. KELLER, MIRIAM P. BLOCK, ARTHUR J. CALLOWAY, SANDRA P. BABB, O. MARTIN CONGLETON AND MARY C. CATES, MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA

No. 8810SC849

(Filed 1 August 1989)

1. **Municipal Corporations § 8.1— variance from ordinance granted plaintiff—benefits accepted—no standing to challenge validity of ordinance**

Where plaintiff had clearly requested, obtained, and accepted the benefits of a variance from § 20-2063(b) of the City Code of Raleigh allowing plaintiff to have parking and driveways

in the fifty-foot unusable yard area, plaintiff was thereafter precluded from attacking the validity of this zoning ordinance through its complaint seeking declaratory judgment.

2. Constitutional Law § 23.1— building permit dependent upon widening and paving road—exaction—evidence and findings required under rational nexus test

Where the Inspection Department of the City of Raleigh refused, based on § 10-2063(b) of the City Code, to allow plaintiff to proceed with its building project unless it dedicated its land to widen a road and agreed to pave a portion of the road, the ordinance as applied by defendant constituted an exaction, and the trial court erred in entering summary judgment for defendant and in failing to receive evidence and make findings under the rational nexus test of *Batch v. Town of Chapel Hill*, 92 N.C. App. 601.

APPEAL by plaintiff from *Phillips, Herbert O., III, Judge.* Judgment entered 11 March 1988 in WAKE County Superior Court. Heard in the Court of Appeals 22 February 1989.

Plaintiff is a North Carolina general partnership which has its principal office and place of business in Wake County, North Carolina. Defendant City of Raleigh is a municipal corporation chartered by the General Assembly of North Carolina and located in Wake County. Defendant Upchurch is the mayor of the City of Raleigh; the other individual defendants are members of the City Council of the City of Raleigh, North Carolina.

Plaintiff owned a tract of land on Jones Franklin Road, a public highway, which was at one time outside the City of Raleigh (the City) but within its extra-territorial planning jurisdiction. In March 1983 plaintiff asked the City to approve the construction of a three-building office condominium project and that plaintiff be allowed to measure the fifty-foot setback line under O and I-III zoning from the existing property line rather than the future right-of-way line of the highway. Plaintiff also requested a variance under § 10-2063(b) of the ordinances of the City to permit parking and driveways in the fifty-foot O and I-III unusable yard area, measured from the existing right-of-way line. On 17 May 1983 the City Council approved the site plan and granted plaintiff's requests. Plaintiff subsequently applied to the Inspection Department of the City for the necessary permits to proceed with its project. The Inspec-

tion Department refused to allow plaintiff to proceed unless it dedicated its land to widen and agreed to pave a portion of Jones Franklin Road.

On 5 April 1985 plaintiff filed a complaint seeking a declaratory judgment as to the rights, duties and liabilities of the parties with regard to the validity and enforceability of § 10-2063 and § 10-3018 of the Code of Ordinances for the City of Raleigh (the City Code). Plaintiff requested the trial court to find: (1) that plaintiff was entitled to proceed to develop its property pursuant to the site plan previously approved by the City; (2) that § 10-2063 and § 10-3018 were invalid as exceeding the authority granted by statute to the City to regulate development if the sections were interpreted to require plaintiff to dedicate its property as part of a right-of-way of a proposed road and to open and pave the road at plaintiff's expense, a condition precedent to development; and (3) that if such required action of plaintiff were permitted by statute, the ordinance sections were invalid as being in violation of Article I, Section 19 of the North Carolina Constitution and Amendment XIV of the Constitution of the United States. Plaintiff also sought damages for the unlawful taking of its property without the payment of just compensation as required by law.

On 16 September 1985, defendants answered generally denying the material allegations of the complaint and raising as defenses plaintiff's failure to state a claim upon which relief could be granted, lack of personal and subject matter jurisdiction, barring of the action by the statute of limitations, and lack of a genuine case or controversy which would allow the imposition of remedies provided by declaratory judgment.

On 12 September 1986, defendants filed a motion for summary judgment. The matter came on for hearing before the trial court at the 27 July 1987 Civil Session of Wake County Superior Court. After considering the pleadings, affidavits, testimony, documents and exhibits accepted as evidence, pertinent sections of the City Code, the North Carolina General Statutes and arguments of counsel, the trial court made findings of fact, conclusions of law and entered an order granting defendants' motion for summary judgment. Plaintiff appealed from this order.

Hunter & Wharton, by John V. Hunter III, for appellant.

Elizabeth C. Murphy, Associate City Attorney, for defendant-appellee City of Raleigh.

WELLS, Judge.

Plaintiff assigns error to the trial court's granting of summary judgment to defendants. Plaintiff commenced the present action by filing a complaint seeking declaratory judgment of its rights, duties and liabilities, and those of defendant City, under various sections of the City Code. Plaintiff specifically attacked the validity of § 10-2063 and § 10-3018 of the City Code if these ordinances were interpreted to require plaintiff to dedicate and pave a portion of its property as part of the right-of-way of Jones Franklin Road. Plaintiff also sought monetary damages for damage caused by defendants' actions to the economic value and utility of plaintiff's land. The action of defendants which brought about the commencement of the present case was the refusal of defendant City's Inspection Department to issue building permits to plaintiff. The Inspection Department refused to grant the permits to plaintiff because plaintiff had failed to make necessary improvements as required by the subdivision ordinance—§ 10-3018—of the City Code. Code § 10-2063 is part of Chapter 2 entitled "*Zoning*" and Article D entitled "*Supplementary Regulations.*" We shall discuss plaintiff's contentions concerning these ordinances and the trial court's granting of summary judgment to defendants in turn.

The Zoning Ordinance

As noted above § 10-2063 is a zoning ordinance included in the City Code. Plaintiffs originally submitted to the City a request for approval of the construction of a three-building office condominium project in March 1983. At that time plaintiff requested that it be allowed to measure the fifty-foot setback line under O & I-III zoning from the existing property line rather than the future right-of-way line of Jones Franklin Road. Plaintiff also requested a variance under § 10-2063(b) to permit parking and driveways in the fifty-foot O & I-III unusable yard area as measured from the existing right-of-way line. Plaintiff's site plan was approved by the city council. The variance requests were also granted.

[1] Plaintiff subsequently filed its complaint in the present case attacking the validity of § 10-2063 through a request for declaratory judgment pursuant to N.C. Gen. Stat. § 1-253, *et seq.* We note that "[a] suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment." *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); G.S. § 1-254 (1983). However, as we stated in *Goforth Properties, Inc. v. Town of*

Chapel Hill, 71 N.C. App. 771, 323 S.E. 2d 427 (1984), "It is well established that the acceptance of benefits under a statute or ordinance precludes an attack upon it." We stated further in *Goforth Properties, Inc.* that "A party may, by his or her conduct, be estopped to assert both statutory and constitutional rights." *Id.* at 773, 323 S.E. 2d at 429. In the present case plaintiff has clearly requested, obtained and accepted the benefits of a variance from § 10-2063(b) of the City Code, allowing plaintiff to have parking and driveways in the fifty-foot unusable yard area. Plaintiff is therefore precluded from attacking the validity of this zoning ordinance—§ 10-2063—through its complaint seeking declaratory judgment.

The Subdivision Ordinance

[2] Section 10-3018 of the City Code reads as follows:

> Whenever a tract of land included within any proposed subdivision or site plan embraces any part of a freeway, expressway, collector street, major access corridor as defined in section 10-2002, major or minor thoroughfare so designated on the current city comprehensive plan or thoroughfare plan after such plan or part of it has been adopted by the proper authority, such part of such proposed public way shall be platted and dedicated in the location and the width indicated on the city plan but no tract shall be required to plat more than one hundred and ten (110) feet of right-of-way, excluding slope easements.

This case presents a question similar to the one considered by us in *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 376 S.E. 2d 22 (1989). In *Batch*, we reviewed the trial court's granting of summary judgment in favor of plaintiff subdivision developer against defendant town on various claims challenging the constitutionality of defendant's denial of plaintiff's subdivision application based on certain subdivision requirements. Defendant had denied plaintiff's subdivision application based in part on plaintiff's failure to indicate on her subdivision plat an intent to dedicate a portion of her land as a right-of-way for Lystra Road and to improve that road "by adding . . . twelve (12) feet of pavement width as well as curb and gutter along the property's . . . frontage on that road." *Id.* at 609, 376 S.E. 2d at 27. Plaintiff sought review of defendant's action in superior court via certiorari and filed a complaint seeking declaratory and injunctive relief, compensation and damages. Upon

a motion by plaintiff for summary judgment the trial court found that the town's requirements concerning Lystra Road were "unsupported by state statute, violated due process, and constituted a temporary taking for which compensation [was] due." *Batch* at 625, 376 S.E. 2d at 36.

In another portion of our opinion in *Batch* we concluded that the town's requirement that plaintiff dedicate a portion of her property as a right-of-way for the proposed Laurel Hill Parkway was an "exaction." In defining "exaction" we stated:

> [A]n exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid in lieu of compliance with dedication or improvement provisions; and (4) requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area.

Id. at 613, 376 S.E. 2d at 30 (*quoting* Ducker, *"Taking" Found for Beach Access Dedication Requirement*, 30 Local Gov't Law Bulletin 2, Institute of Government (1987)). We further stated that "Not all exactions are constitutional takings." *Id.* at 614, 376 S.E. 2d at 30. To aid a trial court in determining whether an exaction is an unconstitutional taking, we adopted the following rational nexus test:

> To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; *and* (5) whether the condition imposed is proportionally related to the impact of the development.

Batch at 621, 376 S.E. 2d at 34 (emphasis in original). We concluded that the trial court's conclusion regarding the Lystra Road require-

ments should be reversed so as "to allow the lower court to hear evidence and make findings in light of our discussion of [*inter alia*], . . . the rational nexus test . . . ." *Id.* at 625, 376 S.E. 2d at 36.

The subdivision ordinance at issue in the present case presents substantially the same requirements as those imposed by the Lystra Road condition in *Batch*. We conclude that this ordinance as applied by defendant in this case constitutes an exaction and that summary judgment for defendant was inappropriate as to this aspect of the case. A review of this ordinance by the trial court must be made by applying the rational nexus test adopted in *Batch* and set out above to the facts presented.

> When a trial court fails to make findings or conclusions when they are required, the appellate court may order a new trial or allow additional evidence to be heard by the trial court or leave it to the trial court to decide whether further findings should be on the basis of the existing record or on the record as supplemented.

Harris v. N.C. Farm Bureau Mutual Ins. Co., 91 N.C. App. 147, 370 S.E. 2d 700 (1988) (citations omitted). A review of the trial court's judgment in the present case reveals that further evidence should be taken and findings made under the rational nexus test as applied to defendant's subdivision ordinance.

In making this determination we reiterate that, "Summary judgment should be entered only where there is no genuine issue as to any material fact. If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper." *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975).

Affirmed in part, reversed in part and remanded.

Chief Judge HEDRICK and Judge LEWIS concur.

CHARLES P. SCHON, PLAINTIFF v. MARVIN BOYD BEEKER, DEFENDANT

No. 8815DC1241

(Filed 1 August 1989)

1. **Automobiles and Other Vehicles § 6.5— sale of automobile—false odometer reading—12(b)(6) dismissal denied**

The trial court did not err by denying defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action to recover monetary damages suffered in the purchase of an automobile due to an allegedly falsified odometer reading. Plaintiff alleged essentially that he suffered damages because defendant intentionally falsified the odometer reading, but recovery pursuant to N.C.G.S. § 20-347 and N.C.G.S. § 20-348 imposes no requirement of alleging each element of fraud. Plaintiff alleged sufficient facts in his complaint to give notice of the circumstances upon which his claim was based so that defendant could recognize the event and prepare for trial and plaintiff alleged sufficient facts to establish an intent to defraud by defendant.

2. **Automobiles and Other Vehicles § 6.5— sale of automobile—false odometer reading—instructions**

In an action to recover monetary damages due to an allegedly falsified odometer reading, the trial court did not err by instructing on recovery pursuant to N.C.G.S. § 20-347 and N.C.G.S. § 20-348 even though those statutes were not specifically alleged where defendant did not object to the court's charge and plaintiff's allegations sufficiently established a cause of action based upon those statutes; it is not absolutely necessary for plaintiff to include in his complaint the statutory number upon which he bases his claim.

3. **Automobiles and Other Vehicles § 6.5— sale of automobile—false odometer reading—instructions**

The trial court did not err in its instructions on fraudulent intent in an action for monetary damages in the purchase of an automobile based on an allegedly falsified odometer statement.

APPEAL by defendant from *Washburn, J. Kent, Judge.* Judgment entered 24 March 1988 in District Court, ALAMANCE County. Heard in the Court of Appeals 16 May 1989.

Plaintiff instituted this action to recover monetary damages he suffered in the purchase of an automobile, due to defendant's failure to comply with G.S. sec. 20-347. Defendant failed to disclose the true odometer reading or to issue a statement that the vehicle's mileage was unknown to him as required by statute.

Moseley & Whited, P.A., by W. Phillip Moseley, for plaintiff-appellee.

William C. Ray for defendant-appellant.

JOHNSON, Judge.

On or about 11 March 1987, defendant, as a private individual, advertised for sale a 1969 Cadillac having low mileage. The vehicle's odometer showed 55,000 miles although the actual mileage was much greater. The odometer was unable to accommodate in excess of five digits. Plaintiff later discovered during his investigation after purchasing the vehicle, that the vehicle had 58,114 miles when *defendant* purchased the vehicle on or about 9 May 1979, nearly eight years earlier.

When the parties were negotiating the purchase and sale of the vehicle, defendant informed plaintiff that the odometer showed 55,000 miles. When the parties were having the certificate of title notarized, defendant asked plaintiff whether he wanted 155,000 or 55,000 miles placed on the title. Plaintiff responded as follows: "Well, 55,000 miles; that is what it is, isn't it?" Defendant then wrote 55,000 as the correct mileage.

After purchasing the vehicle, plaintiff expended $585.00 in order to meet State inspection standards. The automobile then experienced several other mechanical difficulties including an electrical short, emergency brake system failure, muffler failure, and right window motor failure. Plaintiff then commenced an investigation of title and discovered the vehicle's true mileage. He then filed suit against defendant.

At trial, the jury determined that defendant violated a requirement imposed by the Vehicle Mileage Act and awarded plaintiff $1,500.00 in damages, the purchase price. The trial court then considered defendant's motion for remittitur and reduced the award to $700.00. Defendant argued in his motion that because the vehicle's maximum value was $800.00 when plaintiff purchased it, and not $1,500.00, the sale price, due to the difference between the

actual mileage and the mileage stated on the certificate of title, the jury's award should be reduced.

Plaintiff did not oppose defendant's motion and consented to the remittitur. As mandated by G.S. sec. 20-348, the court trebled the $700.00 award and awarded a reasonable attorney's fee to plaintiff. From this judgment defendant appeals.

In the interest of clarity, we have grouped defendant's six questions for review into two categories. We find questions two, three, and four, which comprise category one, meritless and without need for discussion.

[1] By category two, defendant's questions one, five and six, defendant first argues that the court erred in failing to allow his motion to dismiss pursuant to G.S. sec. 1A-1, Rule 12(b)(6) because plaintiff failed to adequately allege the elements of fraud. He then argues in questions five and six that the court erred in its instructions on fraudulent intent and also erred by failing to define each element of fraud. We find no error.

We note at the outset a similarity in all substantial respects between the facts in the case *sub judice* and those in *Washburn v. Vandiver*, 93 N.C. App. 657, --- S.E. 2d --- (1989). Plaintiffs instituted that cause of 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. Defendant represented to plaintiffs that the vehicle's mileage was 83,446 miles when the truck's actual mileage was 133,000.

Plaintiff's complaint in the case *sub judice* alleges a cause of action based upon a violation of G.S. sec. 20-347 which states the following, in pertinent part:

> (a) In connection with the transfer of a motor vehicle, the transferor shall deliver to the transferee, prior to execution of any transfer of ownership document, a single written statement which contains the following:
>
> (1) The odometer reading at the time of the transfer;
>
> (2) The date of the transfer;
>
> (3) The transferor's name and current address;
>
> (4) The identity of the vehicle, including its make, model, body type, its vehicle identification number, and the license plate number most recently used on the vehicle;

(5) A statement that the mileage is unknown if the transferor knows the odometer reading differs from the number of miles the vehicle has actually traveled, and that the difference is greater than that caused by odometer calibration error;

(6) A statement describing each known alteration of the odometer reading, including date, person making the alteration, and approximate number of miles removed by the alteration; and

(7) Disclosure of excess mileage when vehicle is known to have exceeded 100,000 miles and the odometer records only five whole-mile digits.

The private right of action for the violation of this disclosure requirement statute is authorized by G.S. sec. 20-348(a) which states:

(a) Any person who, with intent to defraud, violates any requirement imposed under this Article shall be liable in an amount equal to the sum of:

(1) Three times the amount of actual damages sustained or one thousand five hundred dollars ($1,500), whichever is the greater; and

(2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

In his complaint, plaintiff essentially alleged that because defendant intentionally falsified the odometer reading on the vehicle which he purchased, he suffered damages as a result. We have examined the complaint in its entirety and find that the allegations were sufficient to state a claim based upon a violation of G.S. sec. 20-347 and G.S. sec. 20-348.

Plaintiff alleged sufficient facts in his complaint to (1) give notice of the circumstances upon which his claim was based to enable the defendant to recognize the event and prepare for trial and (2) to establish the substantive elements of a recognized legal claim. *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983).

Defendant's argument that plaintiff's claim should fail because he did not adequately allege each element of fraud is meritless. Recovery pursuant to G.S. secs. 20-347 and 348 imposes no such re-

quirement. Plaintiff must show that defendant's failure to comply with the disclosure requirements was more than a technical failure. The noncompliance must have been induced by an intent to defraud. *Washburn, supra; McCracken v. Anderson Chevrolet-Olds, Inc.*, 82 N.C. App. 521, 346 S.E. 2d 683 (1986); *American Imports, Inc. v. Credit Union*, 37 N.C. App. 121, 245 S.E. 2d 798 (1978).

In the case *sub judice* plaintiff alleged sufficient facts in his complaint to establish an intent to defraud by defendant as follows:

> That said warranties of the Defendant were patently false, as follows:
>
> a. The vehicle had four previous owners prior to the Defendant Beeker.
>
> b. The vehicle had 58,114 miles on the odometer when the Defendant purchased said vehicle from Grace Dudleck Shepherd on or about May 9, 1979.
>
> c. The vehicle was in very poor running condition and in fact had numerous latent defects which were well known to the Defendant but hidden from the Plaintiff.
>
> 5.
>
> The intentional falsification of the odometer reading by the Defendant justifies the Plaintiff in recovering treble damages from the Defendant.

The trial court therefore properly denied defendant's motion to dismiss pursuant to G.S. sec. 1A-1, Rule 12(b)(6).

[2] Defendant next argues that the court committed error by instructing on a theory not alleged in the complaint, recovery pursuant to G.S. secs. 20-347 and 348. He also argues that even assuming the court was correct in instructing on the theory of the aforementioned statutes, the charge taken as a whole left the jury with the incorrect impression that they could infer an intent to defraud based upon mere inadvertence by the defendant. We disagree on both counts.

First, we note that defendant entered no objection to the court's charge based upon the failure of the instructions to conform to the pleadings. Where one fails to object to the court's instructions on an issue, it is presumed that the instructions conform to the issues submitted and are without legal error. *Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 331 S.E. 2d 148 (1985).

Second, we are convinced that plaintiff's allegations sufficiently establish a cause of action based upon G.S. secs. 20-347 and 348. It is not absolutely necessary for plaintiff to include in his complaint the statute number upon which he bases his claim. *Thorpe v. Brewer*, 7 N.C. App. 432, 172 S.E. 2d 919 (1970).

[3] Insofar as this argument concerns the court's instructions on fraudulent intent, we again find no error. The jury was instructed as follows:

> If you have found that the defendant had actual knowledge of odometer error which he failed to disclose at the time of the sale, then you may reasonably infer that the violation was committed with the intent to defraud the plaintiff . . . [If] the plaintiff has not satisfied you that the defendant had actual knowledge that the odometer was wrong, then you can infer an intent of the defendant to defraud the plaintiff only if you find the defendant's lack of knowledge was due to reckless disregard for the truth or to willfully shutting his eyes on the facts or to gross negligence in his failure to learn the actual mileage.

These instructions comport in all substantial respects with those given in *Washburn* and *McCracken, supra.*

In *McCracken*, the Court states the following:

> [The] courts of this State do not require *actual* knowledge to prove 'intent to defraud.' (Citation omitted.) . . . The plaintiff need only present evidence that the transferor's actions toward determining true mileage were grossly negligent or that the transferor recklessly disregarded indications that the odometer was inaccurate.

McCracken at 526, 346 S.E. 2d at 687.

The reasonableness instruction given in the case *sub judice* applies to the evidence of constructive knowledge which indicates recklessness or gross negligence rather than ordinary negligence, which would not support the cause of action in question. *Id.* We therefore find no error in the trial court's instruction.

It is for the aforementioned reasons that in the trial of defendant's case we find

No error.

Judges COZORT and GREENE concur.

IN THE MATTER OF THE ESTATE OF VIDA P. FRANCIS, DECEASED

No. 8917SC159

(Filed 1 August 1989)

1. **Wills § 61— dissent by spouse—value of net estate—real property**

The Clerk of Court erred in a spousal dissent from a will by including in the value of the net estate the entire value of the real property. Upon the death of the first to die, the survivor becomes the sole owner of the real property, and no interest passes to the estate of the deceased spouse, so that the value of the real estate owned by the couple as tenants by the entirety should not be included in the testatrix's net estate for purposes of the dissent statute. N.C.G.S. § 29-2(5).

2. **Wills § 61— dissent from will—value of estate—bank accounts**

The Clerk of Court correctly included in the net estate for purposes of spousal dissent certain bank accounts held by the testatrix and the dissenting spouse as joint tenants with right of survivorship where the testatrix had retained complete control over the assets until the moment of her death.

3. **Wills § 61— dissent from will—value of property passing to surviving spouse—real property**

The entire value of real property owned as tenants by the entirety should be included in the value of property passing to the surviving spouse outside the will in a spousal dissent, absent evidence of contribution to the purchase price by the surviving spouse. N.C.G.S. § 30-1(b)(4).

4. **Rules of Civil Procedure § 52.1— spousal dissent—conclusions and findings—adequate**

The trial court did not err in a spousal dissent by adopting the Clerk of Court's very specific findings and making its con-

clusions in a single paragraph. N.C.G.S. § 1A-1, Rule 52(a)(1) requires only that the trial court's findings of fact be distinguishable from its conclusions of law.

APPEAL by respondent from *Mills (F. Fetzer), Judge.* Order entered 2 November 1988 in Superior Court, SURRY County. Heard in the Court of Appeals 11 July 1989.

The testatrix, Vida P. Francis, died on 13 September 1987 survived by no lineal descendant or parent. Following the filing of a 90 day inventory, the surviving spouse, C. A. Francis, dissented from the will pursuant to G.S. 30-1 to 30-3. On 18 July 1988, the Clerk of Superior Court made findings of fact and conclusions of law and ordered that Mr. Francis was entitled to dissent from the will. The Clerk found Mr. Francis was entitled to a monetary award equal to one-half the net estate value. Iva P. Marshall, executrix of the estate and a beneficiary under the will, appealed to the Superior Court. On 2 November 1988, the Superior Court affirmed the Clerk's order. Iva Marshall, as executrix and individually, appeals.

Johnson, Bell & Francisco, by George Francisco, for petitioner-appellee C. A. Francis.

V. Talmage Hiatt for respondent-appellant Iva P. Marshall.

LEWIS, Judge.

On 12 April 1967, the testatrix executed a will directing that all funds in savings accounts with three Mount Airy banks be divided equally among certain named relatives, including Iva P. Marshall, the testatrix's sister and the appellant in this case. This will left the remainder of her estate to Mr. Francis and named Mr. Francis executor. A codicil named her brother-in-law, Durard Marshall, and appellant as executors. Letters testamentary were issued to appellant following the testatrix's death on 13 September 1987. Appellant filed a 90 day inventory on 6 January 1988 listing the following assets: one-half the value of four joint bank accounts for a total of $46,274.48; cash on hand at death, $45.38; household and kitchen furnishings estimated value, $1,023.50; medicare check, $5.20; refund of Blue Cross and Blue Shield of North Carolina premium, $29.10; one-half the value of real property held as tenants by entirety, $14,399.00. The joint bank accounts with right of survivorship were held with appellant.

Mr. Francis, the surviving spouse, dissented from the will. The clerk found the testatrix's net estate included the following assets:

Joint bank accounts with the right of survivorship payable to Iva P. Marshall	$92,548.96
Cash on hand at death	45.38
Medicare check	5.20
Blue Cross Blue Shield of North Carolina refund of premium	29.10
Personal property of Vida P. Francis located in the house as appraised by Dick Lawson	2,055.00
Value of real property owned as tenants by the entirety	28,798.00

The clerk determined Mr. Francis was entitled to dissent from his wife's will under the provisions of G.S. 30-1(a)(2). Upon appeal by appellant, the Superior Court adopted the clerk's findings of fact and concluded that

> the public policy favoring protection of a surviving spouse against disinheritance, which has been adopted and expressed by our legislature, should prevail. *Moore v. Jones*, 44 N.C. App. 578, 261 S.E. 2d 289 (1980). The testatrix, Vida P. Francis, deposited all of the funds in the joint bank accounts with the right of survivorship. She retained complete control and authority to make withdrawals thereby in effect retaining complete control of the assets up until the time of her death. *Myers v. Myers*, 68 N.C. App. 177, 314 S.E. 2d 809 (1984).

From the Superior Court's affirmance of the Clerk's order allowing dissent, appellant, as executrix and individually, appeals.

Appellant brings forward ten assignments of error grouped as three arguments. First, she assigns error to the trial court's adopting as its own the clerk's findings of fact regarding the value of the property passing to Mr. Francis under and outside the will. Second, she contends the trial court erred in concluding the joint bank accounts with right of survivorship in appellant should be included in the net estate for purposes of determining Mr. Francis' right to dissent. Finally, she contends the court erred in not separately stating its conclusions of law. We have reviewed the assignments of error and find them to be without merit.

The testatrix was not survived by any child, lineal descendant of a child or parent. Therefore, Mr. Francis may dissent from her will if the total value of property he received under and outside the will is less than one-half his wife's net estate. G.S. 30-1(a)(2). In this case, "[t]o determine whether a surviving spouse has the right to dissent from the deceased spouse's will it is necessary to ascertain and compare two figures. The first is the aggregate value of the property passing to the surviving spouse under the will and outside the will." *Phillips v. Phillips*, 296 N.C. 590, 597, 252 S.E. 2d 761, 766 (1979). The second is the value of one-half of the deceased spouse's net estate. Appellant brings forward assignments of error relating to both figures.

[1] First, we address the assignments of error relating to the value of the net estate. Appellant contends the court erred in finding "[t]he value of the decedent's net estate is at least $123,285.64, less family allowances, costs of administration and all lawful claims against the estate." Net estate is defined in G.S. 29-2(5) as "the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate." Appellant contends the value is erroneous because it includes the entire $28,798.00 value of the real property. We agree.

The real property was owned by the testatrix and Mr. Francis as tenants by the entirety.

> This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. The estate rests upon the doctrine of the unity of person, and, upon the death of one, the whole belongs to the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee. These two individuals, by virtue of their marital relationship, acquire the entire estate, and each is deemed to be seized of the whole, and not of a moiety or any undivided portion thereof. They are seized of the whole, because at common law they were considered but one person; and the estate thus created has never been destroyed or changed by statute in North Carolina.

Davis v. Bass, 188 N.C. 200, 203, 124 S.E. 566, 567-68 (1924) (citations omitted). Upon the death of the first to die, the survivor becomes the sole owner of the real property, and no interest passes to the

estate of the deceased spouse. *Underwood v. Ward*, 239 N.C. 513, 80 S.E. 2d 267 (1954); *Davis v. Bass, supra.* The value of the real property owned by the couple as tenants by the entirety should not be included in the testatrix's net estate for purposes of the dissent statute.

[2] Appellant also contends it was error to include in the net estate certain bank accounts held by the testatrix and appellant as joint tenants with right of survivorship. She contends that upon the testatrix's death the bank accounts with right of survivorship were owned solely by appellant and are not part of the net estate for purposes of the dissent statute. We disagree.

In *Moore v. Jones*, 44 N.C. App. 578, 261 S.E. 2d 289 (1980), this Court addressed whether a net estate included the value of an *inter vivos* trust in which the husband retained the right during his lifetime to withdraw trust assets, change beneficiaries and change the trust terms. The Court acknowledged that the trust met all requirements for a valid trust under state law. The Court also determined that the statutory right to dissent expressed the public policy of this state. The question presented was "whether that public policy or the *inter vivos* trust created by [the] husband which circumvents that public policy should prevail." *Id.* at 582, 261 S.E. 2d at 291. The Court held "that the public policy favoring protection of a surviving spouse against disinheritance, which has been adopted and expressed by our legislature by enactment of Article 1 of G.S. Ch. 30, should prevail." *Id.* at 583, 261 S.E. 2d at 292. Finding that the testatrix had retained until the moment of death the same powers over the trust assets that he had before creating the trust, the Court determined those assets should be considered a part of his net estate in determining the spouse's right to dissent. *Id.* In this case, the testatrix retained complete control over the assets of the bank account until the moment of her death. We believe the public policy expressed in the dissent statutes will be served by including in the net estate for purposes of the dissent statute the value of the bank accounts with right of survivorship in appellant.

[3] Next we address the assignment of error relating to the value of the property passing to Mr. Francis. Appellant contends the trial court erred by adopting the clerk's finding that "the value of the properties passing to the surviving spouse outside the Will and in accordance with the provisions of the Will does not exceed

$14,399.00." At the testator's death, Mr. Francis received $45.38 cash on hand at death, a $5.20 Medicare check, a $29.10 insurance premium refund and personal property located in the home. Thus, it appears the finding is incorrect in that the value of the property passing to Mr. Francis does exceed $14,399.00. However, this finding does not accurately reflect the value of Mr. Francis' share. Appellant contends that one-half the value of the real property owned as tenants by the entirety should be included in the value of property passing to Mr. Francis under and outside the will. As stated above, upon the death of the first to die, the survivor owns the property "not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each [spouse]." *Davis v. Bass*, 188 N.C. at 203, 124 S.E. at 567. G.S. 30-1(b)(4) requires inclusion of property passing to the surviving spouse outside the will. Subsection (4) includes, by way of illustration, the value of real property owned by decedent and the surviving spouse as tenants by the entirety "*except that* no property or interest in property shall be so included to the extent that the *surviving* spouse . . . contributed to its purchase price." (Emphasis added.) There is no evidence that the surviving spouse contributed to the purchase price. Absent any evidence of contribution on the part of the surviving spouse, the general proposition stated in subsection four controls and the entire value of the real property is included in the value of property passing to him outside the will.

[4] Appellant also contends the trial court erred in not separately stating its conclusions of law. G.S. 1A-1, Rule 52(a)(1) does require a trial court sitting without a jury to "find the facts specially and state separately its conclusions of law thereon." In this case, the trial court adopted the clerk's very specific findings of fact and made the conclusions set forth above in a single paragraph. "Rule 52(a)(1) requires only that the trial court's findings of fact be distinguishable from its conclusions of law." *Mitchell v. Lowery*, 90 N.C. App. 177, 184, 368 S.E. 2d 7, 11, *disc. rev. denied*, 323 N.C. 365, 373 S.E. 2d 547 (1988). This assignment of error is without merit.

The case is remanded to the Clerk of Superior Court for disposition in accordance with this opinion.

Remanded.

Judges PHILLIPS and COZORT concur.

TED H. MARTIN, JR. AND ANITA C. MARTIN, PLAINTIFFS v. LISA BOGER MONDIE; DWAYNE REX FLINCHUM; AND THE TOWN OF MOUNT AIRY, DEFENDANTS

No. 8817SC1182

(Filed 1 August 1989)

Municipal Corporations § 9.1— failure to serve arrest warrants— subsequent accident involving defendant—no special duty of town toward plaintiff—no negligence of town

In plaintiff's action to recover damages from defendant town on the theory that the town's police department was negligent in not promptly serving three outstanding arrest warrants on defendant driver and that this negligence was a proximate cause of plaintiff's injuries in an automobile accident with defendant, the trial court properly entered summary judgment for defendant, since there was no allegation by plaintiffs and no forecast of evidence that defendant town through its police officers created a "special duty" toward plaintiffs by promising them protection which was then not given, nor that plaintiff's injury resulted from reliance on such a promise, and any duty created by the issuance of arrest warrants was to the public at large rather than to plaintiff specifically.

APPEAL by plaintiffs from *Brown, Franklin R., Judge.* Judgment entered 11 May 1988 in SURRY County Superior Court. Heard in the Court of Appeals 10 May 1989.

Plaintiffs are citizens and residents of Surry County, North Carolina. Defendants Mondie and Flinchum are also citizens and residents of Surry County, North Carolina. Defendant Town of Mount Airy (the Town), located in Surry County, is a municipal corporation organized and existing under the laws of the State of North Carolina.

On 6 September 1986, plaintiff Ted H. Martin, Jr. (hereinafter plaintiff) was involved in an accident with defendants Mondie and Flinchum when an automobile driven by Mondie crossed over the center line of the road and collided head-on with the motorcycle which was operated by plaintiff. Defendant Flinchum was a passenger and owner of the vehicle driven by Mondie. At the time of the accident defendant Mondie was driving without a license and under the influence of intoxicating beverages but with the permission of defendant Flinchum. As a result of the collision plaintiff was

seriously injured. After the collision Mondie fled the scene of the accident without attempting to aid plaintiff.

On 30 September 1987, plaintiffs filed a complaint seeking recovery for damages arising from the automobile accident. In their complaint plaintiffs asserted negligence claims against defendants Mondie, Flinchum and the Town and sought monetary damages for personal injury, loss of consortium, punitive damages and costs, including attorney's fees. Plaintiffs' claim against the Town arose out of the existence of three warrants outstanding against defendant Mondie at the time of the accident. The three warrants were: (1) driving while license revoked, issued 14 May 1986; (2) driving while impaired and improper equipment, issued 22 May 1986; and (3) improper registration, issued 22 May 1986. These warrants were not served on defendant Mondie until she was taken into custody following the accident in September. In their complaint, plaintiffs allege that the Mount Airy Police Department failed to exercise reasonable care to locate and arrest defendant Mondie between 14 May 1986 and the accident on 6 September 1986. Plaintiffs alleged that the police department's negligence in failing to perform its duty to serve the warrants was a proximate cause of the injuries suffered by plaintiff and that plaintiffs were therefore entitled to recover damages from the Town. The Town filed a motion to dismiss plaintiffs' claims for failure to state a claim for relief. This motion was denied. The Town subsequently filed a motion for summary judgment and offered supporting affidavits. Plaintiffs filed affidavits in opposition to the motion, filed an objection to the Town's affidavits, and requested the court to enter an order striking the affidavits. The matter was heard on 9 May 1988 and the trial court granted summary judgment in favor of defendant Town on 11 May 1988. On 20 July 1988, a consent judgment was entered against defendants Mondie and Flinchum. Plaintiffs appealed from the entry of summary judgment.

Petree Stockton & Robinson, by W. Thompson Comerford, Jr., Jane C. Jackson and Barbara E. Brady, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and James R. Morgan, Jr., for defendant-appellees.

WELLS, Judge.

Plaintiffs assign error to the trial court's entry of summary judgment in favor of defendant Town. Plaintiffs contend that the

failure of the Town's police department to serve three outstanding arrest warrants on defendant Mondie over a period of approximately four months constituted negligent conduct on the part of the Town which was a proximate cause of plaintiff's injury. Plaintiffs contend that the issuance of the warrants created a duty on the part of the Town, through its police force, to promptly arrest defendant Mondie, and that its failure to do so constituted negligence or, at a minimum, presented a question for the jury on the issue of negligence, making an entry of summary judgment in favor of defendant Town improper.

"Summary judgment is appropriate only 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." *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 341 S.E. 2d 61 (1986). "Summary judgment is rarely appropriate in negligence cases." *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E. 2d 203 (1988).

"Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent man would exercise under similar conditions and which proximately causes injury or damage to another." *Williams v. Trust Co.*, 292 N.C. 416, 233 S.E. 2d 589 (1977). It "presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law." *Vickery v. Construction Co.*, 47 N.C. App. 98, 266 S.E. 2d 711, *disc. rev. denied*, 301 N.C. 106 (1980).

In the present case plaintiffs seek to recover damages from defendant Town on the theory that the Town's police department was negligent in not promptly serving the three outstanding warrants on defendant Mondie and that this negligence was a proximate cause of plaintiff's injuries. In *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), we stated that "ordinarily, a municipality providing police services is engaged in a governmental function for which there is no liability." We went on to state that: "In furnishing police protection, a municipality ordinarily acts for the benefit of the public at large and not for a specific individual. . . . As the duty is to the general public rather than to a specific individual, no liability exists for the failure to furnish police protection." *Id.* at 193, 366 S.E. 2d at 6. (Citations omitted.) We noted in *Coleman*,

however, that there were two exceptions to the general rule set out above (1) "when there is a special relationship between the injured party and the police"; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Id.* at 193-194, 366 S.E. 2d at 6. *See also Lynch v. North Carolina Department of Justice*, 93 N.C. App. 57, 376 S.E. 2d 247 (1989); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ---, 109 S.Ct. 998, 103 L.Ed. 2d 249 (1989) (dictum).

In the present case there is no allegation by plaintiffs and no forecast of evidence that defendant Town, through its police officers, created a "special duty" toward plaintiffs by promising them protection which was then not given, nor that plaintiff's injury resulted from reliance on such a promise. There is also no forecast of evidence of the existence of any "special relationship" between plaintiffs and defendant Town's police department of the kind discussed in *Coleman.* Plaintiffs contend instead that the existence of the arrest warrants created a statutory duty to serve the warrants by arresting defendant Mondie, a duty which was owed to plaintiffs, among others, by defendant Town. Plaintiffs further contend that defendant breached this statutory duty by failing to promptly serve the warrants and defendant should be liable for the resulting injury to plaintiffs on the theory of negligence. This argument is untenable. The duty created by the issuance of arrest warrants is to the *public at large* rather than specific individuals. An individual cannot base a claim of negligence on a breach of this statutory duty when law enforcement officials owe no duty to the specific individual, but owe it instead to the public at large.

"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). In the present case, defendant Town's forecast of evidence has shown that plaintiffs cannot establish an essential element of actionable negligence—a duty owed by defendant Town to plaintiffs which defendant Town has breached. Consequently, plaintiffs' cause of action must fail.

We hold that the trial court did not err in granting summary judgment for defendant Town. The assignment of error is overruled.

Plaintiffs also assign error to the trial court's reliance on affidavits offered in support of defendant Town's motion for summary judgment. Plaintiffs contend that the affidavits "contained hearsay, improper legal conclusions and statements otherwise inadmissible"; and that the trial court's reliance on these affidavits was improper. "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 (1986), *disc. rev. denied*, 319 N.C. 402, 354 S.E. 2d 711 (1987). While some of the materials before the trial court may have contained inadmissible evidence, the materials properly before the trial court established as a matter of law that plaintiffs cannot maintain their negligence claim against the Town. Summary judgment in favor of defendant Town was properly entered. The assignment of error is overruled.

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

CALEY EUGENE ALBERTI AND LINDA HAGGINS ALBERTI v. MANUFACTURED HOMES, INC., D/B/A AAA MOBILE HOMES, AND BRIGADIER HOMES, INC.

No. 885SC1134

(Filed 1 August 1989)

1. Uniform Commercial Code § 23— mobile home—revocation of acceptance—no contractual relationship with manufacturer

The trial court erred in an action for damages arising from the purchase of a mobile home by denying defendant manufacturer's motions for a directed verdict and judgment n.o.v. Plaintiffs had revoked their acceptance of the mobile home, but revocation of acceptance under the Uniform Commercial Code is available only against a seller unless a contractual relationship exists between the manufacturer and the ultimate consumer. Statements made by the manufacturer's

agent solely to the seller's agent cannot be construed to have created a contractual relationship between the manufacturer and the plaintiffs; the evidence that defendant sent its service representative to the home cannot be held to create a contract between it and plaintiffs; and plaintiffs did not allege in their complaint that they purchased the home because of the warranty flowing from defendant to them. N.C.G.S. § 25-2-608.

2. **Sales § 8— mobile home sale—privity of contract—breach of warranty not submitted to jury**

Although plaintiffs in an action to recover damages arising from the sale of a mobile home cited *Kinlaw v. Long Mfg.*, 298 N.C. 494, for the proposition that privity of contract is not required in actions for breach of express warranty in the sale of goods by a purchaser against a manufacturer, no issue of breach of warranty between plaintiffs and defendant manufacturer was submitted to the jury, plaintiffs did not cross-assign error to the trial court's failure to do so, and the breach of warranty issue does not apply.

3. **Appeal and Error § 45.1— notice of appeal—no appellant's brief—questions not preserved**

Plaintiffs failed to preserve any question for appellate review where they gave notice of appeal to an order amending judgment and to entry of the judgment itself, did not file an appellants' brief, and attempted in their appellees' brief to challenge certain aspects of the judgment. N.C. Rules of Appellate Procedure, Rule 10(d), Rule 28(a), Rule 28(b).

APPEAL by defendant Brigadier Homes, Inc. and plaintiffs from *Barefoot, Napoleon B., Judge*. Judgments entered 3 March 1988 and 9 June 1988 in NEW HANOVER County Superior Court. Heard in the Court of Appeals 16 May 1989.

This is a civil case wherein defendant seeks reversal of the trial court's judgment allowing plaintiffs to revoke their acceptance of a mobile home. The evidence presented at trial tended to show that in August 1984 plaintiffs purchased a mobile home manufactured by defendant Brigadier Homes from AAA Mobile Homes. Lowell Bockert, who was branch manager of AAA Mobile Homes at that time, testified that he sold plaintiffs the double wide Brigadier Caprice model. Plaintiffs had emphasized to him their desire to purchase a home containing plywood flooring, as they had experi-

enced problems with particle board flooring in the past. Bockert assured them that the flooring in the Brigadier Caprice was not constructed with particle board, but with a new material called "Novadeck."

Prior to his interactions with plaintiffs Bockert had received a presentation from Donald Phillips, Brigadier Homes' sales representative. The purpose of this meeting was to enable retail mobile home sellers to illustrate advantages of a particular manufacturer's merchandise to prospective customers. Bockert testified that during the presentation Phillips told him that the home eventually sold to plaintiffs contained Novadeck flooring, which was waterproof, stronger, and thicker than particle board, and that he relied upon this information in his dealings with plaintiffs.

Donald Phillips testified that he met with Bockert at AAA Mobile Homes to discuss the Brigadier Caprice model, but denied having represented that its flooring was Novadeck. He also denied having told Bockert that the flooring was waterproof or that it was stronger or thicker than ordinary particle board.

Plaintiffs purchased the home on 20 August 1984 and received a 365-day manufacturer's limited warranty covering defects in material and workmanship. Shortly thereafter it developed a leak, which damaged the floor. A Brigadier Homes' service representative visited the home in response to plaintiffs' complaints and told them that their flooring was ordinary particle board. Plaintiffs sent notice of revocation of their acceptance of the home to AAA Mobile Homes and Brigadier Homes on 25 April 1985.

Plaintiffs subsequently negotiated a settlement with AAA Mobile Homes. At trial, defendant Brigadier Homes moved for directed verdict at the close of all of the evidence, and the trial court denied the motion. The jury found that defendant represented that the mobile home contained Novadeck flooring. It also found that plaintiffs gave defendant proper notice of revocation of acceptance.

On the jury's verdict, the trial court entered the following judgment:

> This cause coming on to be heard at the February 22, 1988 session of the Superior Court of New Hanover County. A jury having been impaneled and both parties having presented

their evidence, the following issues were submitted to the jury and answered as indicated.

1. Did the defendant, Brigadier Homes, Inc., represent that the mobile home contained Nova deck flooring?

ANSWER: Yes

2. Did the plaintiffs give proper notice of revocation of acceptance of the mobile home to the defendant, Brigadier Homes, Inc.?

ANSWER: Yes

Pursuant to the jury verdict set forth above and the stipulations entered into between the parties and the instructions of the judge presiding with regard to the meaning of the two factual issues submitted to the jury:

It is hereby ADJUDGED, ORDERED and DECREED that the plaintiff have and recover of the defendant, Brigadier Homes, Inc., the sum of $12,184.00 (Twelve Thousand One Hundred Eighty-Four Dollars and No/100) as restitution and that the plaintiff's [sic] were entitled to revoke and did revoke the mobile home purchase contract.

It is further ADJUDGED, ORDERED and DECREED that the plaintiff have and recover of the defendant, Brigadier Homes, Inc., the sum of $1,500.00 (One Thousand Five Hundred Dollars and No/100) as an award of treble damages for a violation by the defendant, Brigadier Homes, Inc., of N.C.G.S. 75-1.1, in that the defendant falsely represented the flooring in the mobile home sold to the plaintiffs which misrepresentation resulted in damages to plaintiffs in the amount of $500.00 (Five Hundred Dollars and No/100).

It is further ADJUDGED, ORDERED and DECREED that the plaintiffs have and recover of the defendant, Brigadier Homes, Inc., interest at the rate of 8% (eight percent) from September 1, 1984, the date Plaintiff's [sic] first learned of the breach, until the judgment herein provided is paid.

. . .

The trial court denied defendant's motion for judgment notwithstanding the verdict. It granted in part defendant's motion to amend the judgment by order entered 9 June 1988, by awarding interest

only from the date of the judgment, 24 February 1988. It further ordered that plaintiffs deliver the mobile home to Brigadier Homes upon payment of restitution.

Poisson, Barnhill & Britt, by James R. Sugg, Jr., for plaintiff appellee-appellants.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick, for defendant appellant-appellee Brigadier Homes, Inc.

WELLS, Judge.

[1] Defendant assigns error to the trial court's denial of its motions for directed verdict and for judgment notwithstanding the verdict. Motions for directed verdict or judgment notwithstanding the verdict are properly granted only if the evidence is insufficient to support a verdict for the nonmovant as a matter of law. *West v. Slick*, 313 N.C. 33, 326 S.E. 2d 601 (1985).

Revocation of acceptance, a remedy afforded to buyers of goods pursuant to the Uniform Commercial Code, is generally considered to be available only against a seller. *See* N.C. Gen. Stat. § 25-2-608 (1986). It is available against a manufacturer only if a contractual relationship exists between the manufacturer and the ultimate consumer. *Wright v. O'Neal Motors*, 57 N.C. App. 49, 291 S.E. 2d 165, *disc. rev. denied*, 306 N.C. 393, 294 S.E. 2d 221 (1982).

Plaintiffs contend that the evidence presented at trial demonstrated the existence of such a relationship; they assert that statements made by the manufacturer's sales representative to the retail salesman, which were related to them and upon which they relied, as well as direct contact between plaintiffs and defendant's service representative, created a contractual relationship between plaintiffs and defendant manufacturer. We disagree. These statements, which were made by the manufacturer's agent solely to the seller's agent, cannot be construed to have created a contractual relationship between the defendant manufacturer and plaintiffs. Nor could the evidence that defendant sent its service representative to the home be held to create a contract between it and the plaintiffs. Furthermore, plaintiffs did not allege in their complaint that they purchased the home because of the 365-day warranty flowing from defendant to them. *See Wright, supra.* Because of the absence of a contractual relationship between the parties, we hold that revocation of acceptance is not available to plaintiffs, as a matter of law. The trial court erred in denying

defendant's motions for directed verdict and judgment notwithstanding the verdict.

[2] In the alternative, plaintiffs argue that privity of contract is not required because defendant breached an express warranty. They cite *Kinlaw v. Long Mfg. N.C.*, 298 N.C. 494, 259 S.E. 2d 552 (1979), for the proposition that privity of contract is not required in actions for breach of express warranty in the sale of goods by a purchaser against a manufacturer. Although this statement of the holding in *Kinlaw* is correct, that case does not apply to these facts.

Kinlaw held that "the absence of contractual privity no longer bars a direct claim by an ultimate purchaser against the manufacturer for breach of the manufacturer's express warranty which is directed to the purchaser." *Williams v. Hyatt Chrysler-Plymouth*, 48 N.C. App. 308, 269 S.E. 2d 184, *disc. rev. denied*, 301 N.C. 406, 273 S.E. 2d 451 (1980). In the case now before us, no issue of breach of warranty between plaintiffs and defendant manufacturer was submitted to the jury, and plaintiffs have not cross-assigned error to the trial court's failure to do so. The breach of warranty remedy, upon which plaintiffs now rely to support the judgments, simply does not apply in this case.

Because of our disposition of this appeal we do not consider defendant's other assignment of error.

[3] Plaintiffs gave notice of appeal as to the order amending the judgment and as to the entry of the judgment itself. Plaintiffs did not file an appellants' brief, but have attempted in their appellees' brief to challenge certain aspects of the judgment. Thus, they have failed to preserve any question for our review. *See* Rule 10(d) and Rule 28(a) and (b) of the North Carolina Rules of Appellate Procedure.

That portion of the trial court's judgment awarding plaintiffs damages "as restitution" is

Reversed.

In all other respects, the trial court's judgment is affirmed.

The amendment to the judgment is vacated.

Chief Judge HEDRICK and Judge ARNOLD concur.

HOWARD STANCIL v. BRUCE STANCIL AND BRUCE STANCIL REFRIGERATION, INC.

No. 887SC1037

(Filed 1 August 1989)

Appeal and Error § 6.9— pretrial order requiring posting of bond— appeal interlocutory

Defendant's appeal from a pretrial order requiring him to post a $150,000 bond pending the outcome of litigation between the parties is dismissed as interlocutory, since the order did not determine the issues in the action, but simply preserved the status quo in a hotly contested action between two brothers, each of whom accused the other of converting corporate assets to his own use, and the amount of the bond each brother was ordered to post reasonably approximated the value of corporate assets allegedly in his possession.

APPEAL by defendant from *Thomas S. Watts, Judge.* Order entered 21 June 1988 in Superior Court, WILSON County. Heard in the Court of Appeals 13 April 1989.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford, for plaintiff-appellee.

Lee, Reece & Weaver, by Cyrus F. Lee and W. Earl Taylor, Jr., for defendant-appellant.

BECTON, Judge.

The individual defendant, Bruce Stancil, appeals from a pretrial order requiring him to post a $150,000 bond pending the outcome of the litigation between the parties. We dismiss the appeal as interlocutory.

I

The parties are before us a second time in one of the four lawsuits they have filed against each other. *See Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 344 S.E. 2d 789, *disc. rev. denied*, 318 N.C. 418, 349 S.E. 2d 601 (1986) (holding that election of board of directors was valid). The plaintiff, Howard Stancil, is the brother of the individual defendant, Bruce Stancil. The brothers are arguing over the operation of the corporate de-

fendant, Bruce Stancil Refrigeration, Inc. ("BSRI"), a close corporation originally owned by Bruce. In September 1980, Howard purchased 12,500 shares of stock in BSRI, acquiring a 50% ownership interest in the corporation. Bruce retained the remaining 50% ownership interest.

At some point, a dispute arose between the brothers, and Howard allegedly "was assaulted and run away from the corporation's office" by Bruce. Since that time, Bruce allegedly has, among other things, refused to accept the validity of the election of Howard and his wife to the three-member board of directors, denied Howard access to the corporate books and premises, and converted substantial corporate assets to his own use or to the use of his recently formed and wholly-owned sole proprietorship, Bruce Stancil Refrigeration Sales & Service.

Howard filed the present action in January 1985, seeking, *inter alia*, dissolution of BSRI and liquidation of its assets pursuant to N.C. Gen. Stat. Sec. 55-125. Bruce and BSRI asserted counterclaims against Howard, seeking recovery of BSRI property allegedly converted by Howard and the payment of outstanding debts.

In June 1988, Howard filed a motion in the cause praying for a mandatory injunction commanding Bruce to return to BSRI all assets transferred to himself or to his sole proprietorship, and seeking appointment of a receiver to preserve BSRI assets pending the outcome of the litigation. In the alternative, Howard requested the court, pursuant to its discretionary power authorized by N.C. Gen. Stat. Sec. 55-125.1, to order Bruce to post a $200,000 bond to secure payment of any sum that might be awarded to Howard in this litigation.

To support the motion, Howard submitted his own affidavit and the affidavits of two certified public accountants who had examined BSRI books and records. The affiants stated that over a period of months Bruce withdrew more than $106,000 from BSRI accounts and withdrew BSRI inventory valued at more than $35,000. In addition, three vehicles formerly titled to BSRI allegedly were transferred to Bruce's name, Bruce's weekly salary was increased from $500 to $800 a week, and BSRI's rent, payable to Bruce as owner of the building in which the corporation was located, was increased from $250 to $900 per month.

In response to the motion, Bruce submitted his own affidavit and the affidavits of his bookkeeper and a certified public account-

ant. The affiants stated that Howard misappropriated, among other things, $7,800 in cash and a BSRI pickup truck worth $10,500, and that Howard had not repaid loans made by the corporation.

The trial judge found that the brothers were equal shareholders in BSRI, that the board of directors was deadlocked in the management of the corporation, and that BSRI business could no longer be conducted to the advantage of both of the shareholders. The judge ordered the brothers to preserve all BSRI assets presently in their possession, and, in lieu of appointing a receiver or dissolving the corporation, ordered each of them to post a secured bond to ensure compliance with any judgment rendered. Bruce was ordered to post a $150,000 bond "to secure the payment of any sums which hereafter might be awarded to Howard Stancil . . . in this action." Howard was likewise ordered to post a $23,000 bond "to secure the payment of any sums which hereafter might be awarded to Bruce Stancil in this action." The order provided that in the event no sum was awarded, the condition of each respective bond would be satisfied.

Bruce appeals, primarily contending that the trial judge exceeded his authority in ordering him to post the $150,000 secured bond and that the judge's finding that the directors of the corporation were deadlocked was erroneous. Howard asserts that the judge's order was authorized by Sections 55-125(a)(4) and 55-125.1(a). Howard also contends that the order appealed from is interlocutory, and has filed a motion to dismiss the appeal on that ground.

II

In *Meiselman v. Meiselman*, this court stated that "the confluence of G.S. 55-125.1 and G.S. 55-125(a)(4) gives the trial court plenary power to frame whatever order it [deems] fit to protect the rights of a complaining shareholder." 58 N.C. App. 758, 765, 295 S.E. 2d 249, 254 (1982), *modified & aff'd*, 309 N.C. 279, 307 S.E. 2d 551 (1983). Section 55-125.1 provides in relevant part:

> (a) In any action filed by a shareholder to dissolve the corporation under G.S. 55-125(a), *the court may make such order or grant such relief*, other than dissolution, *as in its discretion it deems appropriate*, including without limitation, an order:
>
> . . .

(3) *Directing* or prohibiting *any act* of the corporation, or *of shareholders, directors, officers or other persons party to the action.* . . .

N.C. Gen. Stat. Sec. 55-125.1(a) (1982) (emphasis added).

Ordering a party to post a bond pending the outcome of litigation has been recognized as a valid means to protect the status quo in many contexts, *see, e.g., In re Winborne*, 231 N.C. 463, 57 S.E. 2d 795 (1950); *Narron v. Union Camp Corp.*, 81 N.C. App. 263, 344 S.E. 2d 64 (1986); *Keith v. Day*, 60 N.C. App. 559, 299 S.E. 2d 296 (1983), and, in particular, has been held to be a valid alternative to appointment of a receiver. *See, e.g., Durant v. Crowell*, 97 N.C. 367 (1887). It would seem to follow from the cases cited and from the plain language of Section 55-125.1, then, that the trial judge was empowered in the case before us to order the brothers to post a secured bond to prevent dissipation or conversion of corporate assets. However, we are not required to decide this question at this time since the order appealed from is interlocutory and does not impair any of Bruce's "substantial rights."

An order is interlocutory if it does not determine the issues in an action, but instead merely directs some further proceeding preliminary to the final decree. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E. 2d 338, 343 (1978). An appeal from an interlocutory order should be dismissed as fragmentary and premature unless the order deprives the appellant of some substantial right which he would lose unless the order is reviewed before final judgment. *Id.*; N.C. Gen. Stat. Sec. 1-277(a) (1983); N.C. Gen. Stat. Sec. 7A-27(d) (1986). The substantial right Bruce claims the order denies him is the right to defend himself in this action without facing "substantial economic detriments" in order to do so.

While the "substantial right" test for appealability of interlocutory orders is more easily stated than applied, it generally depends upon the particular facts of the case and the procedural context in which the order appealed from was entered. *Waters*, 294 N.C. at 208, 240 S.E. 2d at 343. Here, the order was entered prior to trial, leaving the parties' substantive claims pending and unlitigated. The obvious purpose of the pretrial order was to preserve the status quo in a hotly contested action between two brothers, each of whom accuses the other of converting corporate assets

to his own use. The amount of the bond each brother was ordered to post reasonably approximates the value of BSRI assets allegedly in his possession, and, should the opposing sibling be unsuccessful in obtaining judgment in his favor, the bond will be cancelled. Under these circumstances, "no substantial right . . . can possibly be affected to the slightest extent if the validity of the order is not determined until after a final judgment is entered in the case." *Rivenbark v. Southmark Corp.*, 77 N.C. App. 225, 227, 334 S.E. 2d 451, 452 (1985), *disc. rev. denied*, 315 N.C. 391, 338 S.E. 2d 880 (1986).

In our view, the present vexatious attempt at piecemeal adjudication serves only "to delay and frustrate the effective administration of justice." *Dixon v. Dixon*, 62 N.C. App. 744, 745, 303 S.E. 2d 606, 607 (1983). Accordingly, the interlocutory appeal is dismissed.

Appeal dismissed.

Judges JOHNSON and ORR concur.

FRANK W. PETERSILIE, II AND FRANK W. PETERSILIE, II, PERSONAL REPRESENTATIVE FOR THE ESTATE OF BRUCE V. L. SHELTON v. TOWN OF BOONE BOARD OF ADJUSTMENT

No. 8824SC1132

(Filed 1 August 1989)

Municipal Corporations § 30.6— special use permit—denial—evidence sufficient

There was sufficient evidence to support the Board of Adjustment's denial of petitioner's application for a special use permit to build multi-family residential units where property owners who opposed the application presented evidence that construction of the multi-family units would compound already existing problems of noise, traffic, congestion, and crime which had been brought about by the construction of multi-family dwellings during the ten years preceding petitioners' applications; testimony was also received that adjoining apartment buildings were occupied by college students who had

vandalized some homes and had loud parties well into the night; another complaint concerned property owners' inability to receive a fair offer for property they attempted to sell in the area; and those persons who testified were property owners and senior citizens who had lived in that area for up to thirty-five years.

APPEAL by petitioners from *Allen, C. Walter, Judge.* Judgment entered 1 June 1988 in Superior Court, WATAUGA County. Heard in the Court of Appeals 9 May 1989.

Petitioners appeal from the superior court's decision which upheld a decision by the Town of Boone denying their application for a special use permit to construct twenty multi-family residential units. Petitioners contend that the respondent's decision was arbitrary and capricious.

Miller and Moseley, by Paul E. Miller, Jr., for petitioner-appellants.

Paletta, Hedrick & Berndt, by David R. Paletta, for respondent-appellee.

JOHNSON, Judge.

On or about 14 July 1987 petitioner filed with respondent an application for a special use permit to construct a twenty unit apartment building on a vacant lot adjacent to single family homes. A public hearing on the application was held on 6 August 1987 in accordance with the town's zoning ordinance. After the hearing, respondent determined that petitioners' application should be denied. Petitioners appealed this decision to the Watauga County Superior Court which remanded the decision to the Board of Adjustment for a hearing de novo because of its failure to make findings of fact and its failure to compile a complete record of the proceedings.

A second public hearing was held on 4 February 1988 and on 3 March 1988. Petitioners' application was again denied in a unanimous vote by the Board of Adjustment. Petitioners appealed this decision to the Superior Court of Watauga County. The court concluded that the respondent's findings were supported by competent evidence and that its decision was neither arbitrary nor capricious and contained no errors of law.

From this judgment, petitioners appeal.

On appeal petitioners contend that the trial court erred by concluding that respondent's decision to deny their application for a special use permit contained no errors of law and that the decision was not arbitrary or capricious. We disagree and affirm the trial court's judgment in all respects.

The applicable principles of judicial review when considering a municipality's decision on a special use permit application are distinctly set forth in *In re Application of Goforth Properties*, 76 N.C. App. 231, 332 S.E. 2d 503 (1985). The question to be considered "is not whether the evidence before the superior court supported that court's order but whether the evidence before the town board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board." *Id.* at 233, 332 S.E. 2d at 504, *quoting Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E. 2d 379, 383 (1980).

Petitioners correctly argue that an applicant who produces competent, material and substantial evidence tending to meet ordinance requirements for the issuance of a special use permit is *prima facie* entitled to it. *Goforth, supra.* However, a municipality may deny the permit if it makes contrary findings which are also supported by competent, material and substantial evidence. *Id.; Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974).

In the case *sub judice* petitioners contend that they met the requirements of section 12.3 of the Town of Boone's Zoning Ordinance, which provides the following:

> No Special Use Permit shall be recommended by the Planner or Planning Commission for approval and no Special Use Permit shall be approved by the Board of Adjustment unless each of the following findings is made concerning the proposed special use or planned development.
>
> a. That the use or development is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;
>
> b. That the use or development complies with all required regulations and standards of this ordinance, including all applicable provisions of Articles 4, 5, 6 and the applicable

specific standards contained in Sections 12.7 and 12.8, together with all other applicable regulations;

c. That the use or development is located, designed and proposed to be operated so as to maintain or enhance the value of contiguous property, or that the use or development is a public necessity. In the event of a dispute of value, the Board of Adjustments, upon notice being given to the involved parties, may require appraisals and appraisal testimony to be submitted for its consideration;

d. The use or development conforms with the general plans for the physical development of the Town as embodied in this ordinance and in the Comprehensive Plan.

Petitioners' expert witnesses in the field of real estate appraisal testified that petitioners' proposed use would either maintain or enhance the value of contiguous property. They presented further evidence tending to show that over the past seven years the property values for ad valorem tax purposes of vacant lots and single family dwellings located in the same area as the proposed apartment building increased by fifty-one percent. During the same period, the tax valuation for the entire county had increased by forty-nine percent.

After having heard all the arguments and evidence presented at the public hearing, the Board made the following findings of fact and subsequently denied petitioners' application:

12.3(a) The proposed development is NOT located, designed, and proposed to be operated so as to maintain or promote the public health, safety and general welfare because (a) it will increase traffic congestion in an area that is already congested due to the College Place Apartments, and (b) it will further aggravate an existing problem with noise from high density use that is bothersome to the single family residences in this area. The proposed development will have a detrimental effect on the health and general welfare of a number of elderly persons living in this area because of the increase in noise likely to be generated by the new development and because of the lack of any effective buffer between the high density use and the low density use.

12.3(b) Except as set out in this motion, the proposed development satisfies Section 12.3(b) of the Boone Zoning Ordinance.

12.3(c) The proposed development is NOT located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property. This proposed development will have a detrimental effect on the value of contiguous property currently being used for single family residences because of the negative impact associated with the increased traffic congestion and increased noise that will result from this proposed development. The proposed development is NOT a public necessity.

12.3(d) The proposed development does NOT conform with the general plans for the physical development of the Town as embodied in this ordinance and in the Comprehensive Plan because it will increase the high density use to such an extent that it will make single family residences in this area so undesirable that it will effectively eliminate single family residences from a portion of this zoning district.

The superior court then reviewed the administrative record and concluded as a matter of law that the Board's findings were supported by competent evidence.

We have carefully considered petitioners' contentions, following the *Goforth* directive and hold that the evidence before the board supported its action. Several property owners who opposed the petitioners' application presented evidence at the hearing. They testified that construction of the multi-family units would compound already existing problems of noise, traffic congestion, and an increase in crime which had been brought about by the construction of multi-family dwellings during the ten years preceding petitioners' application. Testimony was also received to the effect that the adjoining apartment buildings were occupied by college students who had vandalized some of the homes and had loud parties well into the night. Another complaint concerned property owners' inability to receive a fair offer for property they attempted to sell in that area. Those persons who testified were property owners and senior citizens who have lived in this area for up to thirty-five years.

We believe that this evidence is competent to support the action taken by the Town Board denying petitioners' application. It is for this reason that we affirm the decision reached by the trial court.

Affirmed.

Judges COZORT and GREENE concur.

THORNEBURG HOSIERY CO., INC., PLAINTIFF v. G. L. WILSON BUILDING COMPANY, DEFENDANT

No. 8819SC1071

(Filed 1 August 1989)

Attorneys at Law § 7.5 — case tried by arbitration — no award of attorney's fees as part of costs

The trial court properly refused to award attorney's fees pursuant to N.C.G.S. § 6-21.5 since the case was tried before a panel of arbitrators and not in Rowan County Superior Court.

APPEAL by defendant Wilson Building Co. (Wilson) from *Beaty, James A., Jr., Judge.* Order entered 30 June 1988 in Superior Court, ROWAN County. Heard in the Court of Appeals 18 April 1989.

This civil action was originally instituted by Thorneburg Hosiery Co. (Thorneburg) so that a determination could be made as to any damages owed to it by Wilson as the result of an alleged breach of a construction contract by Wilson. For the second time, this matter is before this Court on appeal. By this appeal Wilson contests the trial court's refusal to award attorney's fees authorized by G.S. sec. 6-21.5.

Tucker, Hicks, Hodge and Cranford, P.A., by John E. Hodge, Jr., Robert B. Tucker, Jr., and Fred A. Hicks, for plaintiff-appellee.

Patton Boggs & Blow, by Eric C. Rowe and C. Allen Foster, for defendant-appellant.

JOHNSON, Judge.

On 23 May 1985, Thorneburg commenced this civil action in Rowan County Superior Court seeking a court determination of the damages it was owed as a result of Wilson's breach of the contract. A consent order was entered placing the case in inactive status upon Wilson's motion to dismiss, because the issues raised in

Thorneburg's complaint were already being determined as part of an arbitration proceeding Wilson had initiated in Iredell County in order to collect the amount it claimed it was owed by Thorneburg pursuant to the contract in question. (Note that Thorneburg is the plaintiff in the Rowan County action while Wilson is the plaintiff in the arbitration proceedings.) The arbitrators entered an award for Wilson and assessed Thorneburg with over $200,000.00 in attorney's fees. This award was confirmed by the Iredell County Superior Court. Thorneburg appealed.

On appeal by Thorneburg to this Court, we ruled that "counsel fees are not a subject of arbitration," notwithstanding the fact that the contract contained a provision authorizing an award of attorney's fees expended by the contractor for the collection of the owner's defaulted payment. *Wilson Building Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 687, 355 S.E. 2d 815, 817 (1987). This Court further held that in this jurisdiction the award of attorney's fees in this type of case, where the payment of attorney's fees is fixed by contract, G.S. sec. 6-21.2 is controlling. The amount of attorney's fees is provided by statute and, therefore, the matter is nonarbitrable. *Id.* The matter was remanded to the Iredell County Superior Court with instructions to "remand the proceedings to the arbitrators to delete from the award any counsel fees including any fees for the 'consultant to attorney' plus any interest awarded thereon." *Id.* at 689, 355 S.E. 2d at 819.

After the matter had been submitted to the arbitrators for correction consistent with the opinion of this Court, Wilson filed a motion to have judgment entered upon the corrected award for attorney's fees in accordance with G.S. sec. 6-21.2, G.S. sec. 6-21.5, and G.S. sec. 1A-1, Rule 11, and to resubmit the award to the arbitrators pursuant to G.S. sec. 1-567.10. Thorneburg filed a motion to confirm the award of the arbitrators after remand. The Iredell court concluded in an order entered 19 February 1988 that G.S. sec. 6-21.5 does not apply to arbitration proceedings; that Wilson was entitled to attorney's fees pursuant to G.S. sec. 6-21.2; that there had been no Rule 11 violation; and that Wilson's motion to have the award resubmitted for arbitration pursuant to G.S. sec. 1-567.10 should be denied. Thorneburg's motion for confirmation of the award was granted.

Wilson then filed a motion in this Rowan County action for an award of attorney's fees pursuant to G.S. sec. 6-21.5 in the Superior

Court, Rowan County. (Note that the Rowan County action had been placed in inactive status and no further action had been taken upon it.) The trial judge ruled that Wilson's motion should be denied because "there was not a complete absence of a justiciable issue of either law or fact raised by plaintiff [Thorneburg] in the complaint."

From this order, Wilson appeals.

Wilson brings forth two questions for review. We have combined them for purposes of this appeal. In short, Wilson contends that the trial court erred by refusing to admit evidence which could prove whether there was any basis for assessing attorney's fees pursuant to G.S. sec. 6-21.5, and by refusing to consider evidence of the arbitration proceedings, including evidence of the arbitrators' conclusion that Thorneburg's claims were baseless, which required the trial court to impose attorney's fees pursuant to G.S. sec. 6-21.5. We disagree.

G.S. sec. 6-21.5 provides the following:

> In any civil action or special proceeding *the court, upon motion of the prevailing party, may award a reasonable attorney'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. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

Upon review of this statute, and the facts in the case *sub judice*, two matters become readily apparent. First, although Thorneburg filed its complaint in civil court, the case had already been submitted for arbitration and was settled by the award of the arbitrators.

The attorney's fees which were expended in this matter were therefore expended as a result of arbitration and not litigation in our courts. G.S. sec. 6-21.5 does not apply to attorney's fees incurred in an arbitration hearing. The clear language of the statute provides that "the court" may make the award. G.S. sec. 6-21.5. "It allows the *trial judge* to award attorney's fees. . . . The statute also requires the *trial judge* to make findings of fact and conclusions of law to support the award." (Emphasis added.) *Bryant v. Short*, 84 N.C. App. 285, 288, 352 S.E. 2d 245, 246, 247 (1987). It necessarily follows that in order for the trial court to make such an award, the "civil action" or "special proceeding" providing the basis for the award must have been held before that tribunal or pursuant to its authority. *See also Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E. 2d 555 (1986).

Second, no order other than the order which placed the case in inactive status was entered and no action taken in the Rowan County case. The Rowan County court had no underlying claim before it from which to evaluate a motion for attorney's fees pursuant to G.S. sec. 6-21.5.

Because our statutes have provided a fixed amount of attorney's fees to be recovered in cases of this nature, *see* G.S. sec. 6-21.2, the issue of attorney's fees is adequately addressed. G.S. sec. 6-21.5 is unavailable to Wilson for the recovery of attorney's fees when the case was tried before a panel of arbitrators and not in Rowan County Superior Court.

Affirmed.

Judges BECTON and ORR concur.

DEWEY LEWIS IVEY AND WIFE, WENDY IVEY, PLAINTIFFS v. LEW ANN ROSE, DEFENDANT AND THIRD-PARTY PLAINTIFF v. JOHN ROSS BRYANT, THIRD-PARTY DEFENDANT

No. 8811SC1084

(Filed 1 August 1989)

Damages § 11.1— automobile accident—driving while impaired—sufficiency of evidence to submit punitive damages issue

Defendant's operation of a motor vehicle while impaired in violation of N.C.G.S. § 20-138.1 and failure of four sobriety tests evidenced a wilful and wanton disregard for plaintiffs' rights sufficient to warrant the submission of the issue of punitive damages to the jury in plaintiffs' action to recover for damages arising from an automobile accident.

APPEAL by plaintiffs from *Brewer, Coy E., Judge*. Judgment entered 15 January 1988 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 18 April 1989.

Plaintiffs instituted this action to recover for personal injuries, loss of consortium, and other damages which arose out of an automobile accident between plaintiff, Dewey Lewis Ivey, and defendant Lew Ann Rose.

Lucas & Bryant, P.A., by Robert W. Bryant, Jr., for plaintiff-appellants.

Spence and Spence, P.A., by Robert A. Spence, Sr., for defendant-appellee.

JOHNSON, Judge.

On 19 July 1986, two cars, one operated by John Ross Bryant and the other by Dewey Lewis Ivey, were involved in a minor collision on State Road 1168 three miles west of Benson, North Carolina. After the police had arrived, investigated the accident, and then left the scene of the accident, Dewey Ivey remained on the scene to assist the third-party defendant, John Bryant, in starting Bryant's vehicle. Ivey partially placed himself between the two vehicles so that he could jump start Bryant's battery. While he was standing in this position, defendant Lew Ann Rose approached the scene in her vehicle from a southerly direction, traveling at approximately forty-five miles per hour. She uninten-

tionally drove her vehicle into the rear of Bryant's vehicle. As a result, Bryant's vehicle rammed into Ivey's vehicle, and Dewey Ivey's legs were crushed between the bumpers of the two cars. Upon impact, he was thrown several yards and landed on his back in an adjacent field.

As a result of the collision, Ivey's right leg was fractured. After the treatment process was complete, he was assigned a fifteen percent permanent partial disability of his right leg. During the recuperation period, approximately five months, Ivey and his wife slept in separate bedrooms and did not engage in sexual intercourse.

A chemical analysis was administered on Lew Ann Rose's breath after the accident, and the lower of the two readings taken was .18. A reading of .10 constitutes legal impairment in this jurisdiction. G.S. sec. 20-138.1.

At trial, the jury determined that defendant Rose's negligence caused Ivey's injury, but that Ivey was contributorily negligent. The jury also found that defendant Rose had the last clear chance to avoid the accident and awarded Ivey $7,000.00 in compensatory damages, and $1,000.00 to his wife for loss of consortium. The court denied plaintiffs' request that the issue of punitive damages be submitted to the jury. The action against the third-party defendant John Ross Bryant was dismissed with prejudice.

The plaintiffs filed a motion for a new trial. Upon the denial of this motion, plaintiffs appealed.

By this appeal plaintiffs bring forth two questions for review which address the same issue, whether the trial court erred by refusing to submit the issue of punitive damages to the jury. Plaintiffs contend that defendant Rose's operation of a motor vehicle in violation of G.S. sec. 20-138.1, and failure of all four sobriety tests, evidenced a wilful and wanton disregard for plaintiffs' rights sufficient to warrant the submission of the issue of punitive damages to the jury. We agree with plaintiffs and therefore reverse the trial court's judgment on the issue of damages due to its refusal to submit the issue of punitive damages to the jury.

The leading case addressing this issue, *Huff v. Chrismon*, 68 N.C. App. 525, 315 S.E. 2d 711, *disc. rev. denied*, 311 N.C. 756, 321 S.E. 2d 134 (1984), presents an in-depth analysis of the status of the law in this and other jurisdictions pertaining to assessing

punitive damages against impaired drivers. In *Huff*, this Court reversed the judgment which dismissed plaintiff's claim for punitive damages. The pertinent facts of *Huff* are that while plaintiff's vehicle was stopped at an intersection in the left turn lane waiting for the light to turn green, defendant approached the intersection from the north, drove through the red light, and collided with the front of plaintiff's vehicle. At trial, plaintiff was not allowed to introduce evidence of defendant's intoxicated condition, and this Court held that this was error.

The Court, quoting *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E. 2d 393, 397 (1956), stated the following:

> Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. *Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.*

Huff at 530, 315 S.E. 2d at 713 (emphasis added).

The *Hinson* Court found that the trial court properly denied defendants' motion to strike portions of plaintiff's amended complaint stating a claim for the recovery of punitive damages. Defendant driver's act of operating a vehicle with the knowledge that his vision was defective, and defendant owner's act of allowing his vehicle to be operated by a person whose vision he knew was impaired, were held sufficient to support an allegation of wanton conduct and a claim for punitive damages.

According to the facts in the case *sub judice*, defendant had been to a six-hour music event just prior to the accident, and had consumed several beers throughout the day. She could not recall exactly how many beers she had drunk, but testified in her deposition that she had her last beer at about 7:00 p.m. that day. The accident occurred at around 8:30 or 9:00 p.m.

M. C. Whitley, the investigating officer, testified to the following concerning defendant's condition at the accident scene:

> Her face was flushed, eyes were glassy, and she had an odor of alcohol on her breath when I was talking to her, wasn't steady on her feet. I asked her was she driving. In my opinion she was impaired, so I put her in my vehicle and charged her with driving while impaired.

He also testified about the field sobriety tests he administered to her as follows:

> Well, I asked her to do the one-leg-stand test. She was unable to do that. I gave her the finger-to-nose test. That's where you touch your finger to the tip of your nose. She completely missed her nose with her left hand. She did touch it with her right, but was hesitant or slow about doing it. Sway test, stand with your head tilted back and your eyes closed. Wobbly with that. I gave her the walk-and-turn test. On the turning she had to reach out for support when she turned. On the divided attention part, she was almost falling. She had to catch herself to keep from falling.

Trooper Alton J. Renfrow testified from a police record that he administered the breathalyzer test on the defendant on the day in question, 19 July 1986. The lower reading of the chemical analysis was .18.

We believe that the evidence in this case is sufficient for plaintiffs to meet their "extremely strict burden of proof" on the issue of defendant's intoxication. *Huff* at 531, 315 S.E. 2d at 714. Unlike *Brake v. Harper*, 8 N.C. App. 327, 174 S.E. 2d 74, *cert. denied*, 276 N.C. 727 (1970), where this Court refused to submit the issue of punitive damages to the jury, primarily because no basis was given for the officer's opinion that the defendant was impaired, the evidence in the case *sub judice* to that effect is ample.

Defendant's intentional act of driving while impaired in violation of G.S. Sec. 20-138.1 is sufficiently *wanton* within the meaning of *Hinson, supra*, and *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E. 2d 345, 350 (1971) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929)) which states "[a]n act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." The act of driving while impaired is a *wanton* act. The driver's motive or intent in relation to the damages he causes as a result is wholly irrelevant.

It is for the foregoing reasons that we reverse the trial court's judgment and order a new trial on the issue of punitive damages.

New trial.

Judges BECTON and ORR concur.

BRENDA MOORE HOWARD v. MELVIN E. WHITFIELD AND ROBERT WHITFIELD, D/B/A WHITFIELD'S EXXON

No. 8815SC1187

(Filed 1 August 1989)

Negligence § 57.1— injury from falling transom/window—res ipsa loquitur—instruction not given—error

The trial court erred in a negligence action for injuries suffered when a glass frame transom fell off the top of a door and hit plaintiff on the head by not giving plaintiff's requested instruction on *res ipsa loquitur*. The evidence presented tends to show that direct proof of the cause of plaintiff's injury is not available; the instrumentality involved in the accident, the transom/window, was under the exclusive control of defendants; and the injury suffered by plaintiff is of a type that does not ordinarily occur in the absence of a negligent act or omission.

APPEAL by plaintiff from *McLelland, D. Marsh, Judge*. Judgment entered 5 May 1988 in ALAMANCE County Superior Court. Heard in the Court of Appeals 10 May 1989.

Plaintiff is a citizen and resident of Alamance County, North Carolina. Defendants are also citizens and residents of Alamance County.

In June of 1983 plaintiff, along with her husband and two children, stopped at defendants' service station in Alamance County. Plaintiff went to the restroom, and as she attempted to open the restroom door, a glass frame transom fell off of the top of the door and hit plaintiff on the head, injuring her. As a result of her injuries, plaintiff was treated by several physicians for headache pain and associated physical problems, including lapse of memory, physical tension and fright. On 10 January 1986 plaintiff filed a complaint alleging premises liability, seeking compensatory

damages, the establishment of a medical fund, attorney's fees and costs. Defendants filed separate answers, raising as defenses failure to state a claim upon which relief could be granted, that plaintiff was a licensee and defendants breached no duty owed to her as a licensee, and that defendants exercised due care, as well as generally denying the allegations of the complaint.

The case was tried before a jury at the 2 May 1988 Civil Session of Alamance County Superior Court. Three issues were submitted to the jury: (1) Was plaintiff on the premises of defendant as an invitee?; (2) Was plaintiff as an invitee injured by the negligence of defendant proprietor?; and (3) What amount of damages, if any, was the plaintiff entitled to recover for personal injuries? The jury determined on the first issue that plaintiff was an invitee. The jury found in favor of defendants on the second issue, finding that plaintiff, as an invitee, was not injured by the negligence of defendants. The jury did not answer the third issue. Judgment was entered on the verdict on 5 May 1988. Plaintiff appealed from this judgment.

Mary K. Nicholson for plaintiff-appellant.

Holt, Spencer, Longest & Wall, by James C. Spencer, Jr., for defendant-appellee.

WELLS, Judge.

Plaintiff assigns error to the trial court's failure to instruct the jury on the doctrine of *res ipsa loquitur* after being requested to do so by plaintiff. As we stated in *Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 358 S.E. 2d 566 (1987), "It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence." The failure of a trial court to declare and explain the law with respect to a substantial feature of the case is prejudicial error and entitles an adversely affected party to a new trial. *Mosely & Mosely Builders v. Landin Ltd.*, 87 N.C. App. 438, 361 S.E. 2d 608 (1987), *pet. for cert. dismissed*, 322 N.C. 607, 370 S.E. 2d 416 (1988).

In the present case plaintiff orally requested the trial court to give the jury an instruction on the doctrine of *res ipsa loquitur* along with an instruction on contentions of negligence. The trial court declined to give this instruction.

In *Sharp v. Wyse*, 317 N.C. 694, 346 S.E. 2d 485 (1986), Justice (later Chief Justice) Exum, writing for the Court, stated concerning the doctrine of *res ipsa loquitur*:

> *Res ipsa loquitur*, in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident is sufficient to carry the case to the jury on the bare question of negligence.

Id. at 697, 346 S.E. 2d at 487 (*quoting Kekelis v. Machine Works*, 273 N.C. 439, 160 S.E. 2d 320 (1968)). The Court further stated:

> The principle of *res ipsa loquitur*, as generally stated in our decisions, is this: When an instrumentality which caused an injury to plaintiff is shown to be under the control and operation of the defendant, and the accident is one which, in the ordinary course of events, does not happen if those who have the management of it use the proper care, the occurrence itself is some evidence that it arose from want of care.
>
> . . .
>
> The principle does not apply, *inter alia*, when more than one inference can be drawn from the evidence as to whose negligence caused the injury, . . . or when the instrumentality causing the injury is not under the exclusive control or management of the defendant. . . .

Sharp at 697-698, 346 S.E. 2d at 488. (Citations omitted.)

The evidence presented in the present case tends to show that direct proof of the cause of plaintiff's injury is not available; the instrumentality involved in the accident—the transom/window—was under the exclusive control of defendants; and the injury suffered by plaintiff is of a type that does not ordinarily occur in the absence of a negligent act or omission, i.e., plaintiff suffered an injury as a result of a falling transom/window. Therefore, the doctrine of *res ipsa loquitur* was a substantive issue in this case and the trial court should have given the requested instruction on this issue. Failure to do so is prejudicial error and entitles plaintiff to a new trial.

New trial.

Chief Judge HEDRICK and Judge ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 JULY 1989

FEDERAL LAND BANK v. BREWER No. 884SC1429	Duplin (87CVS150)	Affirmed
GODDARD v. BOWLIN No. 8827SC1298	Gaston (87CVS1673)	Affirmed
MENAKER v. MORKUNAS No. 881DC1320	Dare (86CVD427)	Affirmed in part, vacated & remanded in part.
MORRIS v. HANACO CORP. No. 895SC46	New Hanover (87CVS2601)	Reversed & remanded for entry of summary judgment in favor of plaintiff.
MURPHY v. MARY GRAN NURSING HOME No. 884SC986	Sampson (88CVS99)	Reversed & remanded
STATE v. GREENE No. 8822SC794	Iredell (87CRS7830) (87CRS7831)	No error; remanded for correction of clerical error.
STATE v. LOCKHART No. 8819SC1124	Randolph (88CRS437) (88CRS438) (88CRS439) (88CRS440) (88CRS441) (88CRS442) (88CRS443) (88CRS444) (88CRS445) (88CRS446) (88CRS447) (88CRS448) (88CRS705) (88CRS2809)	No Error
STATE v. MARTIN No. 886SC1131	Hertford (88CRS814)	No Error

STATE v. STALLINGS No. 8814SC869	Durham (Stallings) (87CRS8009) (87CRS8010) (87CRS11897) (Logner) (87CRS8007) (87CRS8008) (87CRS11898)	No Error
STATE v. WHITE No. 8819SC1046	Cabarrus (86CRS10429) (86CRS10430)	Affirmed. Remanded for resentencing only.

FILED 1 AUGUST 1989

DELLINGER v. CURTIS No. 8825SC908	Burke (86CVS993) (86CVS1000)	No Error
OXFORD, INC. v. DUKE POWER CO. No. 8825SC778	Caldwell (86CVS207)	No Error
SCHUBERT v. KAMPGROUND PROPERTIES No. 8930SC12	Swain (88CVS66)	Dismissed
SMITH v. CAROLINA FORD TRUCK SALES, INC. No. 8818SC928	Guilford (87CVS6335)	Vacated & Remanded
STATE v. BREWINGTON No. 882SC1367	Beaufort (88CRS2525) (88CRS2526) (88CRS2729) (88CRS2730)	As to defendant Brewington we find no error. As to defendant Bellamy we find no error.
STATE v. GATTIS No. 8915SC41	Orange (87CRS7310) (87CRS7311)	No Error
STATE v. McPHERSON No. 891SC2	Pasquotank (88CRS486)	Affirmed
STATE v. MANESS No. 8919SC56	Randolph (86CRS9454)	Affirmed
STATE v. SANDERS No. 8926SC65	Mecklenburg (88CRS35553)	No Error
STATE v. SUMLIN No. 8919SC47	Cabarrus (88CRS00453)	No Error

STATE v. THOMPSON No. 8927SC30	Cleveland (88CRS1191)	No Error
STOWERS v. FOX No. 8822SC1226	Davie (87CVS310)	Affirmed
VINSON REALTY CO. v. HONIG No. 8826SC1057	Mecklenburg (88CVS13494)	No Error
WATSON v. MANGUM, INC. No. 8810SC1095	Wake (84CVS1502)	No Error

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

ANIMALS

APPEAL AND ERROR

APPEAL AND ERROR — Continued

§ 68. Law of the Case and Subsequent Proceedings

The Supreme Court's decision in an earlier appeal that the trial court properly excluded evidence pertaining to a release executed by plaintiff constituted the law of the case on that issue. *Travis v. Knob Creek, Inc.*, 374.

ARREST AND BAIL

§ 6.2. Resisting Arrest; Sufficiency of Evidence

Evidence was sufficient to support defendant's conviction for resisting a public officer who mistakenly believed defendant to be a person for whom arrest warrants were outstanding. *S. v. Lynch*, 330.

ATTORNEYS AT LAW

§ 7. Fees Generally

There was no error in the instructions in an action by plaintiff administratrix to recover an allegedly excessive legal fee. *Williams v. Randolph*, 413.

The five-factor test for awarding attorney fees in ERISA actions is adopted for such actions brought in the courts of this state. *Overcash v. Blue Cross and Blue Shield*, 602.

§ 7.1. Validity and Construction of Fee Agreements

The trial court erred in entering judgment notwithstanding the verdict for defendant attorney in an action by plaintiff administratrix to recover excessive legal fees. *Williams v. Randolph*, 413.

§ 7.5. Allowance of Fees as Part of Costs

The trial court made inadequate findings to support the amount of attorney fees awarded in an unfair trade practices action, and the court should have awarded fees for prosecuting an appeal as well as for preparation for retrial. *Cotton v. Stanley*, 367.

Attorney fees could not be awarded to defendants under G.S. 6-21.5 or G.S. 75-16.1 after plaintiffs took a voluntary dismissal without prejudice because there was no prevailing party; nor could attorney fees be awarded to defendants under G.S. 1A-1, Rule 11(a) since plaintiffs' complaint was filed before the effective date of that statute. *Kohn v. Mug-A-Bug*, 594.

Petitioners were the prevailing parties for purposes of awarding attorney fees under G.S. 6-19.2 where they obtained an order directing respondents to release written reports containing recommendations about intercollegiate athletics prepared by the chancellors of the various UNC campuses even if the documents were released as a consequence of a decision made prior to the lawsuit. *N.C. Press Assoc., Inc. v. Spangler*, 694.

Respondents failed to show substantial justification for withholding reports containing recommendations about intercollegiate athletics prepared by the chancellors of the various UNC campuses on the basis that there should be an exception to the Public Records Act for preliminary interoffice communications. *Ibid.*

Respondents' contention that a lawsuit was not necessary to compel the disclosure of public records because it was apparent that they would be disclosed in a matter of days did not show "special circumstances" making an award of attorney fees unjust. *Ibid.*

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 129. Driving while Impaired; Instructions Generally

There was no error in the trial court's instructions concerning the credibility of the breathalyzer operator in a prosecution for driving while impaired. *S. v. Cooke*, 386.

§ 134. Driving without Consent of Owner; Unlawful Taking

Any variance between an indictment charging defendant with larceny of an automobile and the verdict finding defendant guilty of the unauthorized use of an automobile was immaterial. *S. v. Stevens*, 194.

Defendant could properly be convicted of armed robbery and unauthorized use of a vehicle where the robbery took place in a supermarket and defendant made his getaway in an employee's vehicle. *Ibid.*

BILLS AND NOTES

§ 13. Acceleration of Maturity

Plaintiff's demand for payment was insufficient to invoke an acceleration clause in an action to collect unpaid principal and interest on a note. *Vreede v. Koch*, 524.

§ 20. Actions on Notes; Sufficiency of Evidence

The trial court properly granted plaintiff's motion for directed verdict in its action to recover on a promissory note signed by defendant husband and guaranteed by defendant wife. *NCNB v. Gutridge*, 344.

BROKERS AND FACTORS

§ 1.1. Nature and Essentials of Relationship; Real Estate Brokers

An extension of a real estate listing contract was binding on defendant corporation even though it was signed by the corporation's secretary-treasurer without any indication that it was signed in her corporate capacity. *Cooper v. Marwil, Inc.*, 335.

§ 6. Right to Commission Generally

Plaintiff broker was entitled to a 6% real estate commission pursuant to an extension of an exclusive listing agreement where the parol evidence rule would prevent defendants from introducing negotiations in which plaintiff agreed to accept a $50,000 commission prior to execution of the extension. *Cooper v. Marwil, Inc.*, 335.

§ 6.2. Right to Commissions Where Contract Is Invalid

Although defendants sold their property prior to the expiration of a listing agreement giving plaintiff the exclusive right to sell the property, defendants' forecast of evidence raised a genuine issue of material fact as to plaintiff's compliance with a requirement of the agreement that plaintiff use its best efforts in good faith to secure a purchaser. *Eagan v. Guthrie*, 307.

§ 6.3. Effect of Illegality on Right to Commission

The fact that a loan broker rendered the agreed upon services to the prospective borrower did not estop the borrower from seeking to recover compensation paid to the broker under G.S. 66-111. *Wilson Heights Church of God v. Autry*, 111.

CHATTEL MORTGAGES

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW — Continued

§ 81. Punishment; Consecutive Sentences

The imposition of three consecutive life sentences for a rape and three first degree sexual offenses did not constitute cruel and unusual punishment. *S. v. Pruitt*, 261.

CONTRACTS

§ 21.1. Sufficiency of Performance; Breach Generally

The evidence supported the trial court's determination that plaintiff was entitled to collect an amount due for roofing work completed on defendant's real property. *Pickard Roofing Co. v. Barbour*, 688.

§ 21.2. Sufficiency of Performance; Breach of Building and Construction Contracts

While plaintiff heating and air conditioning contractor for a public building project had no claim for negligence against defendant general work contractor for delay damages, plaintiff did have a claim against defendant under G.S. 143-128. *Bolton Corp. v. T. A. Loving Co.*, 392.

Plaintiff heating and air conditioning contractor for a public building project may sue defendant general work contractor for breach of its contract duties as project expediter as well as for breach of its contract duties for general work not included in the other three prime contracts. *Ibid.*

Where a public building construction contract gives the architect the authority to determine responsibility for delay among the prime contractors, the architect's determination is prima facie correct. *Ibid.* The project architect could determine that an extension of time of 150 days given to the general work contractor constituted a period of "undue delay" attributable to the general work contractor. *Ibid.*

§ 21.3. Sufficiency of Performance; Anticipatory Breach

Where plaintiffs had contracted to purchase a lot in a subdivision being developed by defendants, a letter sent to defendants stating that plaintiffs had decided not to purchase the lot and asking for a refund of their earnest money did not constitute an anticipatory repudiation of the contract but constituted an offer to withdraw from the contract conditioned upon a return of plaintiffs' earnest money. *Gordon v. Howard*, 149.

§ 27. Sufficiency of Evidence Generally

The trial court properly directed a verdict for plaintiff in an action for defendant's breach of an agreement that plaintiff would obtain a loan on defendant's behalf in exchange for his promise to repay the loan. *Effler v. Pyles*, 349.

§ 29. Measure of Damages Generally

There was evidence to support the award of damages in an action for breach of contract between a school for truck drivers and mechanics and an advertising agency. *Brown v. MTA Schools, Inc.*, 218.

§ 29.3. Special Damages

Plaintiff heating and air conditioning contractor may present evidence of duration related losses resulting from undue delay caused by defendant general work contractor in the construction of a building for U.N.C., including evidence of the costs of maintaining personnel, tools and equipment at the project site. *Bolton Corp. v. T. A. Loving Co.*, 392.

CORPORATIONS — Continued

§ 18. Sale and Transfer of Stock

The trial court erred in entering summary judgment for defendant in plaintiff's action to compel defendant to reconvey his stock in a closely-held corporation to plaintiff pursuant to their alleged oral agreement. *Stancil v. Stancil*, 319.

§ 25. Contracts and Notes

Defendant corporation's bylaws could serve as a basis for plaintiff's action based on the corporation's refusal to retire a revolving fund certificate issued to plaintiff. *HAJMM Co. v. House of Raeford Farms*, 1.

COURTS

§ 20.3. ERISA Cases

The state trial court properly exercised jurisdiction over plaintiff's claim for breach of an insurance contract where the plan is subject to ERISA. *Overcash v. Blue Cross and Blue Shield*, 602.

Defendant insurer's denial of benefits under a health insurance plan within the scope of ERISA was subject to de novo review. *Ibid.*

Plaintiff was not entitled to summary judgment on a claim for benefits due under a health insurance policy on the ground that defendant's denial of benefits was based upon an allegedly erroneous interpretation of the contract. *Ibid.*

Plaintiff was entitled to a jury trial in an action to collect benefits under a health insurance plan within the scope of ERISA. *Ibid.*

CRIMINAL LAW

§ 5.1. Determination of Issue of Insanity

Evidence that defendant ran from the crime scene when discovered by police, coupled with the presumption of sanity and defendant's burden of proof, supported submission of the issue of insanity to the jury. *S. v. Coppage*, 630.

§ 7.5. Compulsion

The trial court did not err in a prosecution for driving while impaired by refusing to instruct the jury on the defense of coercion, compulsion or duress. *S. v. Cooke*, 386.

§ 34.8. Admissibility of Evidence of other Offenses to Show Common Plan, Scheme, or Design

Evidence in a prosecution for rape of a motel guest which tended to show that defendant committed another rape at the same motel two weeks prior to the charged offense was admissible to show intent, plan and design. *S. v. Moore*, 55.

Testimony by two of defendant's former lovers about defendant's past sexual conduct was admissible in a prosecution for rape and sexual offenses to prove defendant's modus operandi, plan, motive and intent. *S. v. Pruitt*, 261.

§ 51. Qualification of Experts

A pediatrician was properly permitted to testify as to the credibility of children in general who report sexual abuse. *In re Lucas*, 442.

CRIMINAL LAW — Continued

§ 96. Withdrawal of Evidence

Defendant in a narcotics prosecution was not irreparably prejudiced by testimony regarding marijuana found in a car outside his house and the display of the bags of marijuana where the trial court refused to allow the admission of the bags and their contents and instructed the jury not to consider the marijuana found outside the house. *S. v. Marshall*, 20.

§ 99. Conduct of the Court

The trial court did not err by not recusing himself in a narcotics prosecution after making an angry remark in chambers upon being told that no plea arrangement would be forthcoming. *S. v. Kamtsiklis*, 250.

§ 99.3. Court's Remarks and other Conduct in Connection with Admission of Evidence

Defendant in a narcotics prosecution was not deprived of a fair trial where, while overruling an objection, the trial court stated "it's all part of the conspiracy so it can come in." *S. v. Kamtsiklis*, 250.

§ 101.1. Statements of Prospective Jurors

The trial court did not abuse its discretion in denying defendant's motion for a mistrial in an indecent liberties case without polling each juror to determine the effect of a statement by a prospective juror that if someone did this to one of her children, they would be trying her for murder. *S. v. Holman*, 361.

§ 101.2. Jurors Exposed to Evidence not Formally Introduced

Defendant's constitutional right to confrontation was violated in an armed robbery case by the jury's exposure to extraneous evidence during deliberations when a juror removed paper from the bottom of defendant's photograph in a photographic lineup to reveal that it was taken at the Wilson Police Department on a date defendant's alibi witnesses testified he was in another state. *S. v. Lyles*, 240.

Where the evidence established that defendant's right of confrontation was violated by the jury's improper consideration of extraneous evidence, the trial judge erred by placing the burden of showing prejudice upon defendant. *Ibid.*

§ 102.6. Particular Conduct and Comments in Argument to Jury

The district attorney's argument which raised questions about the opinions of a psychiatrist as to defendant's sanity was not grossly improper. *S. v. Coppage*, 630.

§ 102.8. Prosecutor's Comment on Failure to Testify

The prosecutor's jury argument concerning defendant's failure to present evidence to support his contention that the victim consented to sexual acts with him did not constitute an improper comment on defendant's failure to testify. *S. v. Pruitt*, 261.

§ 111.1. Particular Miscellaneous Instructions

The trial court in a rape and sexual offense case did not err in presenting the charges to the jury because the court used phrases from the indictments such as "did ravish and carnally know" and "willfully and feloniously." *S. v. Pruitt*, 261.

§ 112.6. Charge on Insanity

Defendant's withdrawal of his request for instructions on involuntary commitment was voluntary and not improperly coerced by the trial court's ruling as

to what the district attorney could argue to the jury concerning involuntary commitment of defendant. *S. v. Coppage*, 630.

The trial court's instructions could not have conveyed to the jury the erroneous impression that the State was not required to prove all elements of the crime if the jury rejected the insanity defense. *Ibid.*

§ 119. Requests for Instructions

The trial court did not err in a narcotics prosecution by failing to give defendant's requested instructions clarifying that the jury could convict him based solely on the evidence of events allegedly occurring on a particular date. *S. v. Kamtsiklis*, 250.

§ 122.1. Jury's Request for Additional Instructions

Any error by the trial court in failing to exercise its discretion in denying the jury's request to have certain testimony read back to it was not prejudicial where the requested testimony would not exonerate defendant. *S. v. Hanible*, 204.

§ 126.3. Impeachment of Verdict

Jurors could testify to impeach their verdict in an armed robbery case where a juror removed paper from the bottom of defendant's photograph in a photographic lineup to reveal that it was taken at the Wilson Police Department on a date that defendant's alibi witnesses testified he was in another state. *S. v. Lyles*, 240.

The judge hearing a motion for appropriate relief properly excluded juror testimony regarding how extraneous information considered by the jury during its deliberations affected the jury's decision. *Ibid.*

§ 138.13. Fair Sentencing Act and Presumptive Sentences

The trial court did not err in a narcotics prosecution by refusing to continue the sentencing hearing in order to allow defendant time to provide the State with substantial assistance or by failing to find that the information defendant gave the State was of substantial assistance. *S. v. Kamtsiklis*, 250.

§ 138.14. Consideration of Aggravating Factors in General

The trial court did not err by sentencing defendant to two consecutive forty-year terms for trafficking in cocaine without finding any aggravating factors where the court had consolidated four trafficking counts into two judgments per sentencing. *S. v. Kamtsiklis*, 250.

The trial court erred when sentencing defendant for conspiracy to sell cocaine by sentencing defendant to a term in excess of the statutory minimum without any aggravating factors. *Ibid.*

§ 138.36. Mitigating Factor of Restitution to Victim

The trial court did not err in failing to find as a statutory mitigating factor that defendant made substantial or full restitution to the victim in a larceny case. *S. v. McDonald*, 371.

§ 138.40. Mitigating Factor of Acknowledgment of Wrongdoing

A defendant who moved to suppress a confession was not entitled to use the confession as evidence to prove the voluntary acknowledgment of wrongdoing mitigating circumstance. *S. v. Moore*, 55.

DAMAGES

§ 11.1. Circumstances Where Punitive Damages Appropriate

The refusal of defendant corporation and its president to redeem plaintiff's revolving fund certificate in violation of their fiduciary duty to plaintiff was a sufficient basis for the imposition of punitive damages. *HAJMM Co. v. House of Raeford Farms*, 1.

Evidence tending to show that defendant operated a motor vehicle while impaired in violation of G.S. 20-138.1 was sufficient to warrant submission of an issue of punitive damages to the jury in an action to recover for injuries received in an automobile accident. *Ivey v. Rose*, 773.

§ 16.3. Sufficiency of Evidence of Loss of Earnings

The trial court did not err in a wrongful death action arising from an automobile accident by admitting evidence of income lost by the decedent's parents. *Stutts v. Adair*, 227.

§ 17.1. Instructions on Cause and Extent of Injuries

The trial court's instruction on aggravation of condition was proper, and the court did not abuse its discretion in refusing to submit plaintiff's requested instruction on activation of a dormant condition. *Lusk v. Case*, 215.

DEATH

§ 7.4. Competency and Relevancy of Evidence of Damages

The trial court did not err in a wrongful death action arising from an automobile collision by allowing an expert to testify as to the amount of decedent's income lost to her parents where decedent was an adult child who had never married and who was childless. *Stutts v. Adair*, 227.

DECLARATORY JUDGMENT

§ 9. Verdict and Judgment

A district court order dismissing petitioner's supplemental proceeding to determine respondent's liability under a contract dealing with fire protection and distribution of fire taxes was remanded. *Knotville Volunteer Fire Dept. v. Wilkes County*, 377.

DEEDS

§ 12. Estates Created by Instruments Generally

A deed which conveyed land to the grantor's son for life with remainder to the son's children and provided that, if the son should die without issue, the land "is to revert to any child or children that I have living at that time, and to the representative of any of my children who may be dead" required a per stirpes distribution among the grantor's grandchildren and great-grandchildren upon the death of the son without issue after all of the grantor's other children had died. *Jamin v. Williamson*, 699.

§ 20.7. Restrictive Covenants in Subdivision; Enforcement Proceedings

The trial court improperly granted defendants' motion for dismissal of plaintiff's action against defendants for violation of subdivision protective covenants regulating construction of a swimming pool. *Midgette v. Pate*, 498.

DIVORCE AND ALIMONY

DIVORCE AND ALIMONY — Continued

§ 24.10. Termination of Child Support Obligation

A father's obligation to provide support for his children was a continuing one which ceased only when the children were adopted by their stepfather, and the adoption did not affect the father's pre-adoption obligation to support his children or the applicable statute of limitations. *State of Michigan v. Pruitt*, 713.

§ 25.9. Modification of Child Custody Order; Where Evidence of Changed Circumstances Is Sufficient

The trial court did not err in ordering a change in child custody from defendant mother to plaintiff father because psychological problems suffered by the child were attributable to the mother and were in part due to her refusals to comply with visitation orders. *Correll v. Allen*, 464.

§ 25.12. Child Custody; Visitation Privileges

The evidence supported the trial court's imposition of restrictions on defendant mother's visits with the parties' child. *Correll v. Allen*, 464.

The trial court did not abuse its discretion in an action for child support by ordering defendant to consult a psychologist or psychiatrist before the award of specific visitation rights. *Rawls v. Rawls*, 670.

§ 27. Child Support; Attorney's Fees and Costs Generally

The trial court's findings were insufficient to support its award of attorney fees to plaintiff in a child support modification action. *Cameron v. Cameron*, 168.

§ 30. Equitable Distribution

The trial court did not err in an action for divorce and equitable distribution by denying defendant's application for judgment against plaintiff for one-half of the fair rental value of the residence of the parties from the time of the separation through the date of the hearing. *Black v. Black*, 220.

The trial court did not err in an action for divorce and equitable distribution by assigning a value of $200 to a 1982 truck as of the date of separation where the truck had a value of $34,500 and was encumbered by a lien in the amount of $34,300. *Ibid.*

A property settlement agreement was not patently unfair where the husband did not affirmatively misrepresent or conceal the extent of the marital estate and the settlement terms were mostly proposed by the wife. *Hill v. Hill*, 474.

Property settlement agreements were not the result of constructive fraud where each party employed independent counsel to represent them. *Ibid.*

An equitable distribution action was remanded for further factual findings where the parties had incurred a debt jointly and it was impossible from the court's findings to determine whether the debt was a marital debt. *Rawls v. Rawls*, 670.

EJECTMENT

§ 3. Termination and Expiration of Term and Nonpayment of Rent

Evidence with regard to negotiations between the parties for plaintiff to reacquire leased property from defendant did not raise an inference that plaintiff intended to excuse defendant from making payments due under the lease or that plaintiff did not intend to declare the lease forfeited if defendant failed to pay the rent. *J. W. Cross Industries v. Warner Hardware Co.*, 184.

ELECTION OF REMEDIES

EQUITY

EVIDENCE

EXECUTORS AND ADMINISTRATORS

FIDUCIARIES

FRAUD

§ 7. Constructive or Legal Fraud

The trial court properly instructed the jury that once plaintiff established a prima facie case that defendants owed plaintiff a fiduciary duty and breached that duty, the burden of proof shifted to defendants to prove that they acted in an open, fair and honest manner. *HAJMM Co. v. House of Raeford Farms*, 1.

§ 9. Pleadings

Plaintiff's complaint was insufficient to state a claim for fraud. *Gant v. NCNB*, 198.

§ 12. Sufficiency of Evidence

Evidence that defendant general work contractor circulated an unrealistic work schedule used as a basis for bids by other prime contractors was insufficient to establish fraud since there was no evidence of intent to deceive. *Bolton Corp. v. T. A. Loving Co.*, 392.

The trial court erred in entering summary judgment for defendant realtor in an action to recover for breach of contract and fraud in a sale of land based upon misrepresentations that the land had been approved for a septic system and could be used for residential purposes. *Bolick v. Townsend Co.*, 650.

Plaintiff's evidence was sufficient for the jury in an action to recover for fraud in the sale of an aircraft. *New Bern Pool & Supply Co. v. Graubart*, 619.

FRAUDS, STATUTE OF

§ 5.1. Contracts to Answer for Debt of Another; Original Promise

Defendant's promise to plaintiff to make all the monthly payments on a mortgage note signed by plaintiff and defendant's wife constituted an original promise and was not subject to the statute of frauds set forth in G.S. 22-1. *Effler v. Pyles*, 349.

FRAUDULENT CONVEYANCES

§ 3.3. Action to Set Aside Conveyances as Fraudulent; Competency of Evidence

The trial court did not err in an action to set aside a conveyance of personal property on the ground that it was made with intent to defraud plaintiff by admitting testimony concerning indebtedness between plaintiff and defendant other than the judgment alleged in this complaint. *Dellinger Septic Tank Co. v. Sherrill*, 105.

§ 3.4. Action to Set Aside Conveyances as Fraudulent; Sufficiency of Evidence

The trial court correctly denied defendants' motions for a directed verdict and judgment n.o.v. in an action to set aside a conveyance of personal property on the ground it was made with intent to defraud. *Dellinger Septic Tank Co. v. Sherrill*, 105.

GUARANTY

§ 2. Actions to Enforce Guaranty

Plaintiff's complaint was sufficient to state a claim against defendant bank based on failure of the bank to fulfill its obligation to inform her of the financial condition of the company whose loans she guaranteed. *Gant v. NCNB*, 198.

HOMICIDE

HUSBAND AND WIFE

INDICTMENT AND WARRANT

INSURANCE

INTEREST

§ 1. Items Drawing Interest in General

The trial court erred in awarding plaintiffs interest on their earnest money deposit with defendants where the court ordered specific performance and not monetary relief. *Gordon v. Howard*, 149.

§ 2. Time and Computation

The trial court properly entered summary judgment awarding plaintiff interest at one and one-half percent per month in an action to recover under a labor and material payment bond for the lease and sale of equipment to a subcontractor. *Symons Corp. v. Insurance Co. of North America*, 541.

The trial court did not err in awarding prejudgment interest from the date of defendant's breach of a roofing contract. *Pickard Roofing Co. v. Barbour*, 688.

JUDGMENTS

§ 17.1. Attack on Void Judgments; What Constitutes a Void Judgment

The trial court erred in a divorce action by denying plaintiff's Rule 60 motion to sign a standard separation agreement where the parties had signed a memorandum of judgment/order but defendant died before the separation agreement could be signed. *Morrow v. Morrow*, 187.

§ 37.5. Preclusion or Relitigation of Judgments in Particular Proceedings; Proceedings Involving Real Property Rights

The trial court properly found that an earlier action was res judicata and denied defendant's motion in the cause in an action arising from a judgment against defendant to collect a real estate commission and an execution against defendant's real property. *H. McBride Realty, Inc. v. Myers*, 511.

JUDICIAL SALES

§ 3. Advance Bids and Resales

Neither an upset bidder's deposit with the estate attorney nor the attorney's telephone notice to the clerk amounted to an upset bid on estate property. *In re Estate of Kessinger*, 191.

LIMITATION OF ACTIONS

§ 4.4. Accrual of Cause of Action for Breach of Contract; Obligation Subject to Condition or Contingency

An action for the entire unpaid principal and interest due on a debt that defendants guaranteed was not barred under the three year statute of limitations of G.S. 1-52(3). *Vreede v. Koch*, 524.

MASTER AND SERVANT

§ 3. Distinction Between Employee and Independent Contractor

Defendant salesman was an independent contractor and not an employee of the corporate defendant. *Yelverton v. Lamm*, 536.

§ 23.1. Liability of Employer for Injuries to Employee; Degree and Standard of Care

The Commissioner of Labor was not precluded by a provision of the National Electric Code from citing defendant for a violation of the general duty clause

MORTGAGES AND DEEDS OF TRUST — Continued

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase-Money Mortgages and Deeds of Trust

Where respondents executed a promissory note secured by a deed of trust covering two tracts of land being purchased from petitioners and a third tract already owned by respondents, the anti-deficiency statute did not prohibit petitioners from foreclosing on the third tract. *In re Foreclosure of Fuller*, 207.

MUNICIPAL CORPORATIONS

§ 2.4. Remedies to Attack Annexation or Annexation Proceedings

Plaintiffs who were citizens, residents, property owners, and taxpayers in defendant town had no standing to challenge the town's annexation of noncontiguous property. *Joyner v. Town of Weaverville*, 588.

§ 4.4. Powers with Regard to Public Utilities and Services

An ordinance allowing a city to collect any deficiencies in utility payments due to underbillings for a maximum period of twelve months was valid on its face. *City of Wilson v. Carolina Builders*, 117.

A counterclaim based on negligence is not available to offset a municipality's recovery for deficient utility payments caused by the utility's underbilling of the customer. *Ibid.*

§ 8.1. Standing to Challenge Ordinance

Where plaintiff accepted the benefits of a variance from a zoning ordinance allowing plaintiff to have parking and driveways in a fifty-foot unusable yard area, plaintiff was precluded from attacking the validity of the ordinance. *Franklin Road Properties v. City of Raleigh*, 731.

§ 9.1. Rights, Powers, and Duties of Police Officers

A town police department was not negligent in failing promptly to serve three outstanding arrest warrants on a driver who was involved in a collision with plaintiff after the warrants were issued. *Martin v. Mondie*, 750.

§ 30.6. Zoning; Special Permits and Variances

The appearance of an applicant for a conditional use permit before the Board of Aldermen without notice to petitioners and his proposal to add two more conditions to his application constituted neither an improper presentation of evidence nor a denial of petitioners' right to cross-examine witnesses and present evidence at every stage of the review proceedings. *In re Application of Raynor*, 173.

There was sufficient evidence to support the Board of Adjustment's denial of petitioner's application for a special use permit to build multi-family residential units. *Petersilie v. Town of Boone*, 764.

§ 30.8. Zoning Regulations; Construction and Interpretation

The erection of a satellite dish constituted a usual domestic use of property for which a permit was not required under a 1942 city zoning ordinance. *Sunderhaus v. Bd. of Adjustment of Biltmore Forest*, 324.

§ 30.17. Zoning; Nonconforming Uses; Nature and Extent of Use or Vested Right

Plaintiffs had performed substantial work on the installation of a satellite dish by the time of enactment of a city zoning ordinance so that the ordinance did not apply to plaintiffs' satellite dish. *Sunderhaus v. Bd. of Adjustment of Biltmore Forest*, 324.

MUNICIPAL CORPORATIONS — Continued

§ 30.21. Procedure for Enactment or Amendment of Zoning Ordinances; Hearing

There was sufficient notice of a public hearing on 7 September 1982 to apprise those who might have been affected of the nature and character of the extraterritorial jurisdiction zoning proposals being considered. *In re Application of Raynor*, 91.

Sufficient public notice was given of meetings of a Town Planning Board and of the Board of Aldermen which considered proposed R-40 zoning in an extraterritorial area. *Ibid.*

§ 31. Zoning; Judicial Review

The trial court correctly granted a dismissal as to building and special use permits in plaintiff's action against town officials arising from the issuance of permits for a swimming pool and bathhouse in a subdivision. *Midgette v. Pate*, 498.

The trial court improperly granted defendants' motion for dismissal of plaintiff's action against the town for mandamus alleging that the zoning ordinance related to construction of a swimming pool. *Ibid.*

§ 31.1. Zoning; Judicial Review; Standing to Appeal or Sue

Plaintiffs, an unincorporated association of owners of businesses and real property located on a certain city street, lacked standing to seek review of a zoning board of adjustment's decision to allow a zoning permit for the renovation of an existing structure on the street to provide a shelter for the homeless. *Concerned Citizens v. Bd. of Adjustment of Asheville*, 364.

NARCOTICS

§ 4. Sufficiency of Evidence

The trial court did not err by failing to dismiss narcotics possession and trafficking charges. *S. v. Marshall*, 20.

Evidence was sufficient for the jury in a prosecution of defendant for knowingly maintaining a building used for the possession or sale of controlled substances although his girlfriend controlled the lease, utilities, and liquor license of the game room operated in the building. *S. v. Thorpe*, 270.

Defendant was not entitled to have a charge of trafficking in heroin dismissed and to have the lesser offense of felonious possession of heroin submitted to the jury on the basis that the heroin in her possession, apart from the various substances with which it was mixed, weighed less than four grams. *S. v. Agubata*, 710.

§ 4.4. Insufficiency of Evidence of Constructive Possession

Evidence was insufficient for the jury in a prosecution for possession with intent to sell and deliver Dilaudid. *S. v. Thorpe*, 270.

NEGLIGENCE

§ 1.3. Violation of Statute or Ordinance

The trial court properly dismissed defendants' counterclaim for plaintiff's alleged negligence in failing to perfect its security interest in a vehicle. *NCNB v. Gutridge*, 344.

§ 2. Negligence Arising from Performance of Contract

An alleged breach of contract by plaintiff city in underbilling defendant for electricity could not serve as a basis for defendant's counterclaim premised on negligence. *City of Wilson v. Carolina Builders*, 117.

PARTNERSHIP

PRINCIPAL AND AGENT

PRINCIPAL AND SURETY

PROCESS

RAPE AND ALLIED OFFENSES — Continued

§ 5. Sufficiency of Evidence

The evidence was sufficient to support conviction of the fourteen-year-old defendant for a first degree sexual offense committed against a three-year-old child. *In re Lucas*, 442.

The rule implying constructive force in sexual offense cases involving a parent-child relationship applied in a prosecution of defendant for the rape of the thirteen-year-old daughter of his girlfriend with whom he had been living for five years. *S. v. Morrison*, 517.

§ 6. Instructions

The trial court's instruction on employment or display of a deadly weapon as a necessary element of first degree rape and first degree sexual offense was sufficient although the instruction did not emphasize the victim's awareness of the weapon. *S. v. Pruitt*, 261.

§ 18. Assault with Intent to Commit Rape; Indictment

The trial court did not err in a prosecution for taking indecent liberties with a child by denying defendant's motion to set aside the verdict as being against the greater weight of the evidence where the evidence was that the offense occurred on a Friday in September rather than on or about 12 September as alleged in the indictment. *S. v. Fenn*, 127.

§ 19. Taking Indecent Liberties with Child

There was no abuse of discretion in a prosecution for taking indecent liberties with a child in allowing an ultrasound technician to testify concerning a matter not provided in discovery. *S. v. Fenn*, 127.

The trial court did not err in a prosecution for taking indecent liberties with a child by excluding questions defendant sought to ask the prosecutrix regarding her past sexual behavior even after the State opened the door. *Ibid.*

Assault on a child under the age of twelve years is not a lesser included offense of taking indecent liberties with a child. *S. v. Holman*, 361.

RECEIVING STOLEN GOODS

§ 5.2. Insufficiency of Evidence

The State's evidence in a prosecution for possession of a stolen vehicle was sufficient to show that defendant had possession of the stolen car but was insufficient to show that he had knowledge or should have had knowledge that the car was stolen. *S. v. Suitt*, 571.

ROBBERY

§ 1.2. Relation to other Crimes

Defendant could properly be convicted of armed robbery and unauthorized use of a vehicle where the robbery took place in a supermarket and defendant made his getaway in an employee's vehicle. *S. v. Stevens*, 194.

§ 4.3. Armed Robbery Cases where Evidence Held Sufficient

The evidence was sufficient for the jury in a prosecution for an armed robbery committed by use of a butcher knife. *S. v. Stevens*, 194.

RULES OF CIVIL PROCEDURE

§ 11. Signing and Verification of Pleadings

Attorney fees could not be awarded to defendants under G.S. 1A-1, Rule 11(a) since plaintiffs' complaint was filed before the effective date of that statute. *Kohn v. Mug-A-Bug*, 594.

§ 15. Amended Pleadings

Defendant was not prejudiced by the allowance of an amendment correcting typographical errors in the complaint after the complaint had been dismissed. *Gant v. NCNB*, 198.

The trial court erred in allowing plaintiff to amend the complaint after entry of summary judgment. *Sentry Enterprises, Inc. v. Canal Wood Corp.*, 293.

§ 15.1. Discretion of Court to Grant Amendment

The trial court erred in an action by plaintiff mother against her son arising from an automobile accident by denying plaintiff's request to amend the complaint to add the father as a defendant under the family purpose doctrine. *Coffey v. Coffey*, 717.

§ 19. Necessary Joinder of Parties

A marketing company was a necessary party to plaintiff's action to recover for advertising materials furnished for the benefit of the corporate defendant. *G & S Business Services v. Fast Fare, Inc.*, 483.

§ 21. Procedure upon Misjoinder and Nonjoinder

The trial court properly dismissed a claim without prejudice under Rule 12(b)(7) when plaintiff failed to secure a bankruptcy court's permission to join a necessary party which had declared bankruptcy. *G & S Business Services v. Fast Fare, Inc.*, 483.

§ 37. Failure to Make Discovery; Consequences

The trial court did not abuse its discretion in a conversion action arising from a repossession by dismissing defendant's counterclaim as a sanction for failure to comply with discovery. *Lincoln v. Grinstead*, 122.

§ 41.1. Voluntary Dismissal; Dismissal without Prejudice

Plaintiff's second voluntary dismissal without prejudice of the same claim operated as an adjudication on the merits even though an individual was the defendant in the first action and his corporation was named as the defendant in the second action. *City of Raleigh v. College Campus Apartments, Inc.*, 280.

Defendants' motions for summary judgment and for attorney fees were not claims for affirmative relief which prevented plaintiffs from taking a voluntary dismissal without prejudice. *Kohn v. Mug-A-Bug*, 594.

§ 52.1. Findings by Court; Particular Cases

The trial court was not required to make findings and conclusions supporting its dismissal of claims for failure to state a claim for relief or for failure to join a necessary party. *G & S Business Services v. Fast Fare, Inc.*, 483.

The trial court did not err in a spousal dissent by adopting the Clerk of Court's very specific findings and making its conclusions in a single paragraph. *In re Estate of Francis*, 744.

SALES

SCHOOLS

SEARCHES AND SEIZURES

SEARCHES AND SEIZURES — Continued

said to have told officers he was inside the house within the preceding 48 hours and saw cocaine being sold. *S. v. Marshall*, 20.

Probable cause existed for the issuance of a warrant to search defendant's residence for marijuana based on statements by three persons arrested at a break-in that defendant sold marijuana out of his residence and had hired them to steal additional marijuana for him. *S. v. Milloway*, 579.

§ 39. Execution of Search Warrant; Places Which May Be Searched

A car parked fifteen feet from the front door and in the front yard of premises named in the search warrant was within the curtilage of the house and was subject to search. *S. v. Marshall*, 20.

§ 41. Execution of Search Warrant; Conduct of Officers; Knock and Announce Requirements

The trial court in a narcotics prosecution correctly denied defendant's motion to suppress evidence based on the assertion that police used excessive force to gain admission to his house. *S. v. Marshall*, 20.

§ 43. Motions to Suppress Evidence

There was no prejudicial error in a narcotics prosecution from the denial of defendant's initial motion to suppress evidence where the motion was unverified or from the denial of the subsequent motion where the accompanying affidavit contained no supporting facts. *S. v. Langdon*, 354.

The trial court could properly summarily deny defendant's motion to suppress evidence seized from his person where defendant failed to make a motion to suppress prior to admission of the evidence. *S. v. Lynch*, 330.

§ 45. Motion to Supress Evidence; Necessity for Hearing

Defendant in a narcotics prosecution was not entitled to a second hearing on his motion to suppress based on the severance of his trial from the trials of other defendants. *S. v. Marshall*, 20.

STATE

§ 12. State Employees

The superior court had subject matter jurisdiction to hear a claim filed pursuant to G.S. § 126-37 by a county Department of Social Services employee who was dissatisfied with action taken by the county director following an advisory decision by the State Personnel Commission. *Mitchell v. Thornton*, 313.

The record supported the trial court's judgment ordering plaintiff's reinstatement as a county Department of Social Services employee because plaintiff had not been given a written statement of the reason for her dismissal and a written statement informing her of her appeal rights. *Ibid.*

TAXATION

§ 31.1. Sales and Use Taxes; Particular Transactions and Computations

The Secretary of Revenue correctly determined that a photographer must pay sales and use tax on contract and commission sales of school pictures to students. *In re Assessment Against Strawbridge Studios*, 300.

TRESPASS

§ 6. Competency and Relevancy of Evidence

The trial court did not err in a trespass action arising from the operation of a marina over plaintiff's submerged land by admitting plaintiff's testimony as to the fair rental value of the property. *Zagaroli v. Pollock*, 46.

§ 7. Sufficiency of Evidence

The trial court did not err in giving a peremptory instruction on the issue of trespass in an action in which plaintiff claimed that a marina owned and operated by defendants in Lake Hickory was located on or above his submerged property. *Zagaroli v. Pollock*, 46.

Plaintiff corporation's president had the apparent authority to bind plaintiff by an agreement for the sale of timber to defendant. *Sentry Enterprises, Inc. v. Canal Wood Corp.*, 293.

§ 11. Judgment

The trial court abused its discretion in a trespass action by failing to set aside a judgment against an individual defendant where there was no evidence of any legal responsibility for the operation of the trespassing marina other than as president of the corporation. *Zagaroli v. Pollock*, 46.

TRIAL

§ 3.2. Motions for Continuance; Particular Grounds

The trial court did not abuse its discretion in denying defendant's motion for a continuance to obtain new counsel after defendant dismissed his counsel the night before trial was to begin. *Pickard Roofing Co. v. Barbour*, 688.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence

The trial court did not abuse its discretion in an action by the administratrix of an estate to recover an allegedly unreasonable legal fee by conditionally allowing defendant a new trial. *Williams v. Randolph*, 413.

TRUSTS

§ 13.2. Creation of Resulting Trusts; Express Agreement; Parol Agreement to Purchase or Accept Title for Benefit of Another

The evidence was sufficient to establish a purchase money resulting trust on realty held in the name of the father of defendant husband. *Gragg v. Gragg*, 134.

§ 18. Actions to Establish Resulting and Constructive Trusts; Competency and Relevancy of Evidence

Evidence of consideration furnished after a deed was transferred to the grantee was admissible in an action to establish a purchase money resulting trust where it was offered to illustrate the parties' intent and to show that the promise which constituted the consideration was performed. *Gragg v. Gragg*, 134.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Plaintiff's complaint was sufficient to state a claim against a corporation and its president for an unfair trade practice in refusing to redeem a revolving fund

WATERS AND WATERCOURSES

WILLS

WITNESSES

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina